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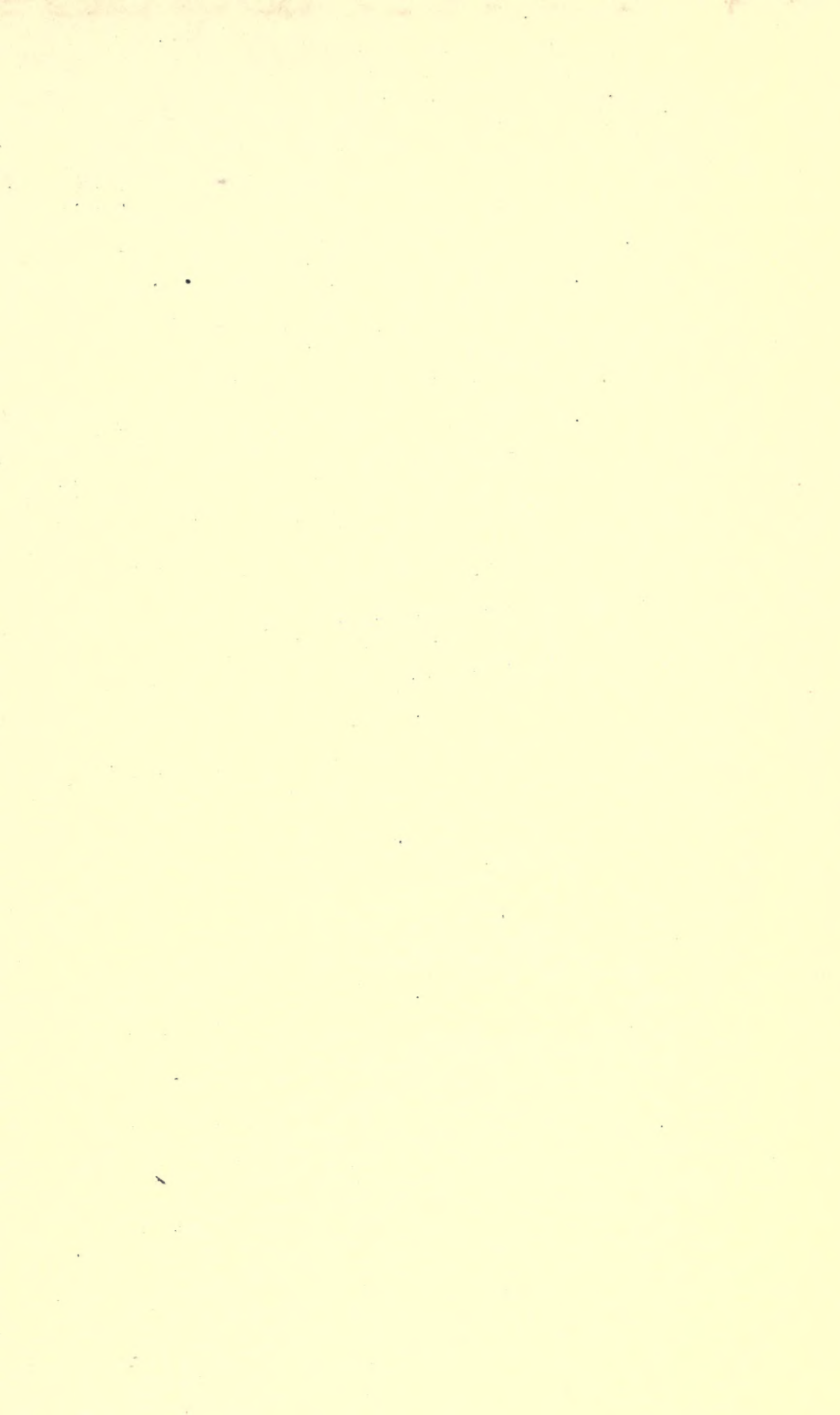
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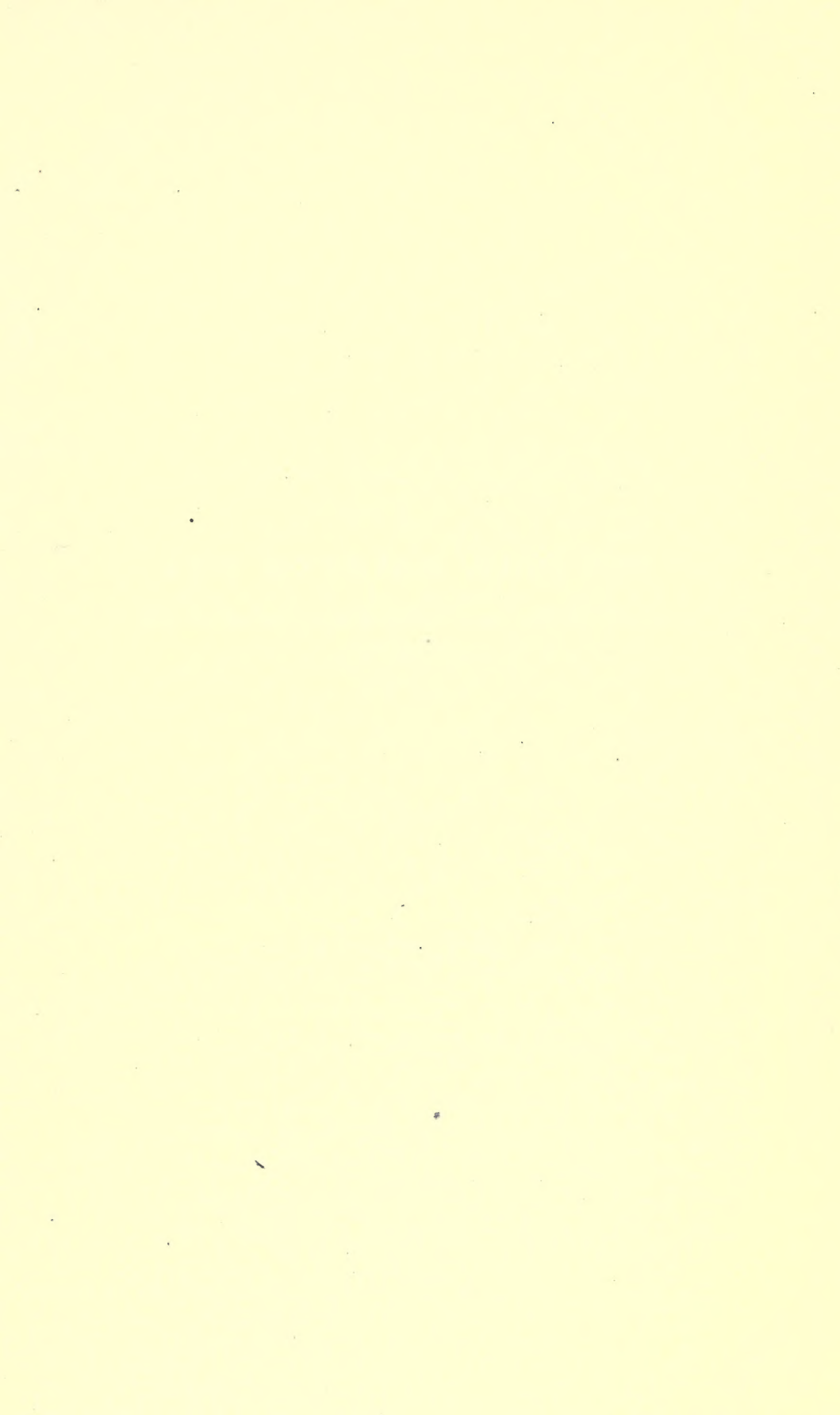
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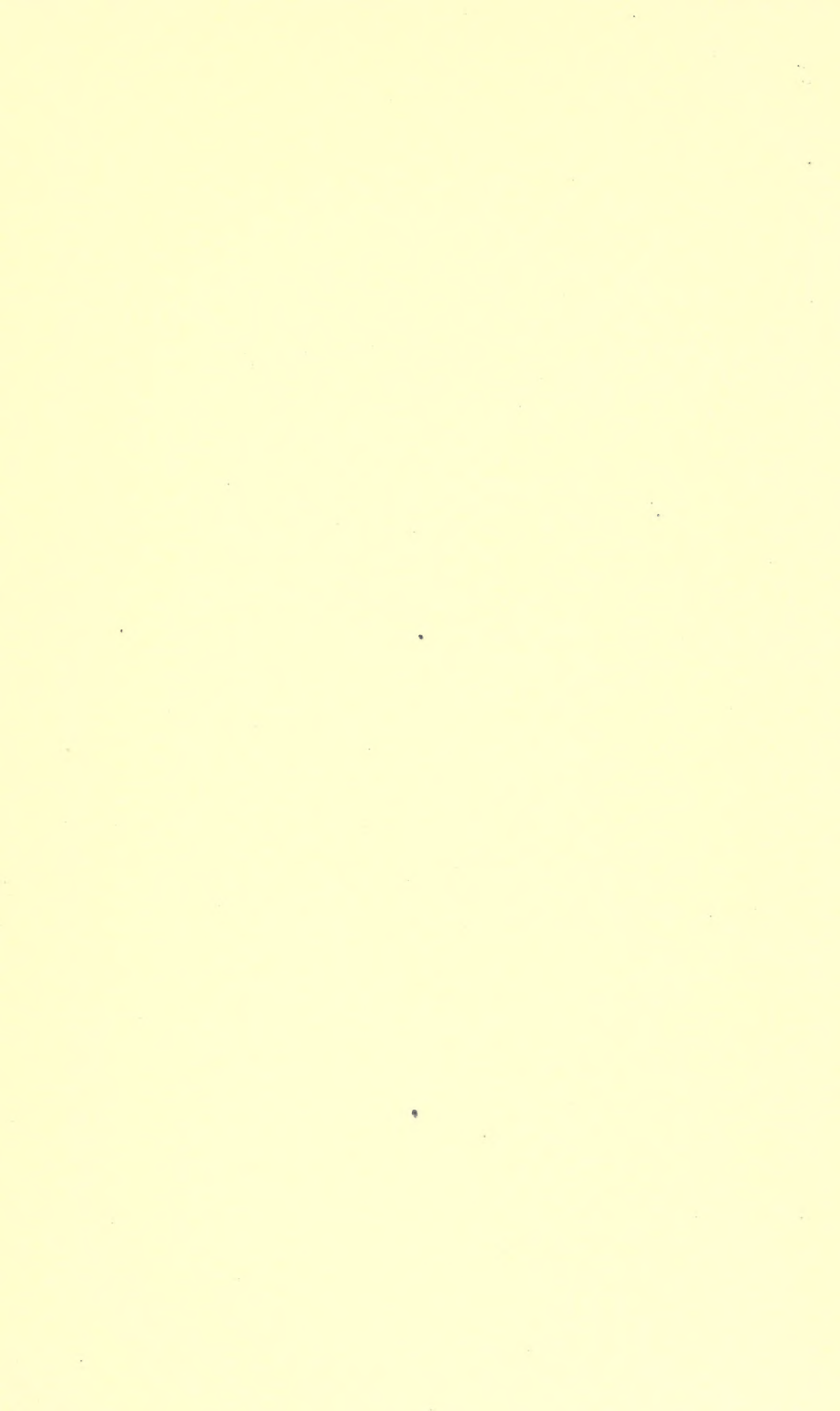
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REPORTS of CASES ARGUED and DETERMINED
in the ECCLESIASTICAL COURTS at DOCTORS' COMMONS. By W. C. CURTEIS, LL.D., Advocate. Vol. I. Containing Cases from Michaelmas Term, 1834, to Michaelmas Term, 1838. London, 1840.

[1] REPORTS OF CASES ARGUED AND DETERMINED IN THE ECCLESIASTICAL COURTS AT DOCTORS' COMMONS.

IN THE GOODS OF SIR ROBERT WILMOT, BART., Deceased. Prerogative Court, Michaelmas Term, 1st Session, Nov. 6th, 1834.—Appointment of executor, provided he proved the will within three calendar months next after the death of deceased, in computing the time, the day of the death excluded.

Sir Robert Wilmot, late of Osmaston, in the county of Derby, Baronet, died on the 23rd of July, 1834, having made his will, bearing date the 3rd of May, 1834, and thereof appointed executors as follows:—"I appoint the said Valentine Browne, Earl of Kenmare, Charles Foley Wilmot, Eardly Nicholas Wilmot, William Simpson, and John Benbow, executors of this my will," "provided always, and I do hereby declare and direct, that in case any one or more of them the said Valentine Browne, Earl of Kenmare, Charles Foley Wilmot, [2] Eardly Nicholas Wilmot, William Simpson, and John Benbow shall be absent from Great Britain at the time of my death, and shall continue absent therefrom for the space of three calendar months next after my decease, or if any one or more of them shall not prove my will within three calendar months next after my death in the Ecclesiastical Court, then, and in either of such cases, the appointment of him or them, as an executor or executors, shall become null and void, and is hereby revoked accordingly." Probate of the said will had been granted to Eardly Nicholas Wilmot and John Benbow, two of the executors, they having proved the same within three calendar months after the death of the testator, power being reserved of making the like grant to the other executors, provided they, or either of them, should apply for the same within three calendar months after the death of the said testator. On the 23rd of October Charles Foley Wilmot, who had been absent from England for some time on the affairs of the estate, applied to be joined in the probate, and was sworn as executor; but some difficulty having arisen in the registry as to whether the day of the death of the testator should be included or not in calculating the time specified, the King's advocate moved the Court to decree probate to pass to Mr. Charles Foley Wilmot, and contended that the rule of law was that the day of the death should be excluded, and cited the case of *Lester v. Garland*, 15 Vesey, 248; and the Court being of that opinion directed the probate to pass.

[3] SERGEAUNT *v.* SERGEAUNT. Consistory Court of London, Michaelmas Term, 2nd Session, Nov. 18th, 1834.—Facts collateral to the point in issue cannot be pleaded in exception to the character of a witness.

On admission of an exceptive allegation.

This was a cause of divorce by reason of adultery, brought by James Sergeaut, Esq., against Harriet Sergeaut, his wife. A countercharge of adultery against the husband was set up in an allegation brought in on the part of Mrs. Sergeaut. Publication had passed in the cause. An allegation was now offered on the part of

Mr. Sergeant, exceptive to the testimony of Elizabeth Cullen, a witness who had been examined on the 5th article of Mrs. Sergeant's allegation.

The exceptive allegation pleaded,

First. That no faith or credit is or ought to be given to Elizabeth Stephens, wife of John Stephens, a witness produced, sworn, and examined on the part and behalf of Harriet Sergeant, one of the parties in this cause, by the names and description of Elizabeth Cullen, wife of John Cullen.

Second. That the said Elizabeth Stephens, in her deposition on the fifth article of the allegation given in, and admitted on the part of Harriet Sergeant, and in answer to the last of certain interrogatories on the part of James Sergeant, Esq., had sworn and deposed that "her maiden name was Walkins; that she married a man named Stephens; that the said Stephens died, and that her real name is Cullen;" that she had therein knowingly and wilfully sworn and deposed falsely, for the truth and fact was, [4] and is, that John Stephens, her lawful husband, the person meant and intended by her in her said deposition, was and is still living, and that the same was well known to the said Elizabeth Stephens at the time of her said examination, and that the name of Cullen is not now, and was not then, her true and proper name as falsely sworn and deposed to by her.

The Court—Dr. Lushington. The present question arises on the admissibility of an allegation exceptive to the testimony of Elizabeth Cullen, a witness examined on behalf of Mrs. Sergeant. The allegation pleads in the first article that no faith or credit is to be given to Elizabeth Stephens, a witness produced, sworn, and examined as Elizabeth Cullen. And it goes on in the second article to plead that she has deposed "that her maiden name was Walkins; that she married a man named Stephens; that the said Stephens died; and that her real name is Cullen." And it alleges that she has knowingly and wilfully sworn falsely; for that John Stephens, her lawful husband, was and is still living, and that the same was well known to the witness at the time of her examination, and that Cullen is not her true and proper name.

In opposition to this allegation three objections have been stated—

First. That if this allegation were admitted, it would put in trial issues collateral to the cause; and it is contended, on behalf of Mrs. Sergeant, that that cannot be done.

Second. Because it charges the party with the commission of a crime without producing the re-[5]-cord of conviction, which is the only admissible proof in such a case.

Third. Because the allegation differs from the accustomed mode of pleading by the omission of the word corruptly.

Upon the first point it is clear that this allegation does contain averments, which, if put into a train of proof, would be foreign to the issue in the cause.

The question then for me to determine is whether a proof of collateral issues can be allowed for the purpose of discrediting a witness.

At common law there can be no doubt that if a witness be asked a question, foreign to the issue in the cause, the party asking that question must abide by the answer he receives, and cannot be admitted to produce evidence for the purpose of shewing that the witness in this respect has been guilty of perjury. This is the rule laid down in *Spencely v. De Willott* (7 East, 108), Lord Ellenborough adding, "that he had ruled the point again and again, till he was quite tired of the agitation of the question; and therefore he wished that a bill of exceptions should be tendered by any party who was dissatisfied with his judgment, that the question might be finally put at rest."

And, in the proceedings against her late Majesty, Lord Tenterden delivered the opinion of the judges, affirming the principals of the case cited.

This doctrine has been expressly recognized, as the rule governing the practice of these courts, by Sir John Nicholl, in the case of *Whish and Woollutt* against *Hesse* (3 Hagg. Ecc. 680); and it would be exceedingly inconvenient that our practice should differ from that of other courts.

[6] It has been said that in point of fact allegations objectionable on this ground have been admitted; but I am not aware that there exists any case whatsoever before these tribunals in which, after opposition and on debate, an allegation violating the principles already stated has been admitted to proof.

Then the case stands thus: the rule at common law is clear; it is sanctioned by the highest authority in ecclesiastical law—it is met by no contradictory decision.

Whatever might be my own opinion, it would be my duty, as the judge of an inferior court, to follow out in practice a doctrine so sanctioned. But I think it right to add that, so far from entertaining any doubt whatsoever of the soundness of the principle upon which the rule is founded, I am thoroughly convinced that for prevention of endless litigation, and excessive expense, as well as for the ascertainment of the truth, it is for the advantage of all the suitors that I should rigidly adhere to the rule so established; I therefore reject the allegation.

This objection being sufficient, I shall not consider the others that have been raised; but I must observe that they are also worthy of serious consideration.

LAMBERT v. LAMBERT. Consistory Court of London, Michaelmas Term, 3rd Session, Nov. 26th, 1834.—Specific facts cannot be pleaded in order to support the character of a witness' testimony, who has been impeached on the ground of general bad conduct.

On admission of an allegation.

This was a suit for restitution of conjugal rights, brought by Georgiana Charlotte Lambert against William Charles Lambert, Esq., her husband.

An allegation had been admitted on the part of [7] the husband, charging the wife with adultery; in the sixth article of which, exception, on the ground of general bad character, had been taken to the testimony of Mary Cox, a witness produced by Mrs. Lambert.

The present allegation was offered in support of the character of Mary Cox, and was opposed by Phillimore.

Addams and Nicholl were heard in support of it.

Dr. Lushington. This allegation is offered on behalf of Mrs. Lambert, in opposition to an allegation given in by Mr. Lambert, in which an article states that Mary Cox is a person of bad character.

It is clear that, in an allegation in these general terms, the examiner ought not to take down particular facts.

In answer to this general averment it is pleaded that Mary Cox is not a person of bad character, but is a person of good character; and there is no doubt that it is competent to the party to plead so far; but a question of some importance arises as to the remainder of the article: it goes on specifically to plead "that the said Mary Cox lived for twenty-five years, or thereabouts, with General Norcut; that she afterwards went to live with Mr. and Mrs. East;" it then goes on further to plead that whilst living with Mr. and Mrs. East "she was suspected and falsely accused of purloining certain articles."

The objection raised is, that supposing the Court were to admit this allegation, many issues would be introduced which are not material to the real question in the cause.

If this allegation were admitted, it would certainly be competent to the other party to contradict [8] every averment contained in it: what then would be the consequence? Not only would the Court have to inquire into each particular fact set forth—but it might be pleaded that she was not falsely accused of stealing certain articles, and the consequence would be that this Court would have to try a felony. Now, unless I found myself bound down by precedent, I should be considerably alarmed at such a result. But the allegation goes on further: "That she has attended ladies as a monthly nurse, and has constantly given satisfaction." Now, this does appear to me, in principle, not only unnecessary, but detrimental to the true course of justice.

The expenses would be increased to a considerable extent: and I do not see the necessity of this inquiry—witnesses will be produced to the general good character, and the examiner in taking the evidence on the allegation will be justified, without pleading the specific fact, in taking down from General and Mrs. Norcut the circumstance of the long residence of the witness in their family, and this not as a specific fact whereby to support her character, but as the grounds of their knowledge, and enabling them to give their evidence.

It is true that in some very particular cases such an investigation might by possibility tend to the elucidation of truth; but Courts of Justice cannot adapt their system to a few extraordinary cases; the great object to be sought for is that mode of administering the law which may produce justice in the great majority of cases, without overwhelming it by extravagant expense, or destructive delay: it is upon

these principles I apprehend that collateral issues are excluded ; and that trial of such matter as is contained in the latter part of this allegation is forbidden.

[9] *BUSSELL v. MARRIOTT*. Prerogative Court, Feb. 21st, 1835.—Evidence of hand-writing alone not sufficient to establish a testamentary paper.—A codicil propounded upon such evidence, without any facts or circumstances connecting it with the deceased, pronounced against with costs.

The King's advocate and Addams for Bussell.

Lushington and Nicholl contra.

Judgment—*Sir Herbert Jenner*. This case has been very fully and elaborately argued ; at the same time the Court has not felt any doubt or difficulty as to the result upon the principles established here it would come to.

The question arises upon the validity of a codicil to the will of the Rev. Daniel Petteward, deceased, rector of One House in the county of Suffolk, and vicar of Finborough, the adjoining parish. He died on the 14th of November, 1833, a bachelor, leaving two nieces, his only next of kin, one married to Captain Bussell, and the other to Dr. Terry.

The deceased left two testamentary papers which are undisputed—a will, dated 4th May, 1832, and a codicil of 6th June, 1833. The codicil in question bears date on the 14th May, 1833.

The will and codicil of June are formal papers, and regularly executed ; that in dispute is informal, not drawn up by a professional person ; it purports to be signed by the deceased, but is not attested ; and it makes a very different disposition of the property from that contained in the will.

The deceased's property consisted of personalty [10] of the value of about 30,000*l.*, and of real estate of about 3000*l.* By his will of May, 1832, he devised his real estate to trustees, to be sold for the benefit of the families of his two nieces ; and also gave 14,000*l.* in the same way. He then gave a variety of specific legacies to the amount of between 4000*l.* and 5000*l.* to different friends, and the residue equally between Captain Bussell and Dr. Terry ; and of this will he appointed Captain Bussell and Dr. Shillito executors. Amongst the legacies there is one of 500*l.* to his brother, Mr. Roger Petteward, and another of 1000*l.* to his nephew, Charles Eyre, both of whom predeceased him, the latter dying in the early part of the year 1833, the former on 31st July in the same year. He had also one other nephew, Mr. George Eyre, who died in the year 1832. By his will he had also left a legacy of 300*l.* to the Suffolk Hospital, which by the codicil of June, 1833, he increased to 600*l.* ; and he also bequeathed 100*l.* to the Suffolk Clerical Society ; in other respects he confirmed his will.

Shortly after his death one part of his will and codicil, for it was executed in duplicate, was found at his residence, at One House, in an envelope, on which was endorsed "a counterpart at Dyke's, Doctors' Commons," where, accordingly, the other part was found : these were the only testamentary papers known at that time to be in existence ; although it seems the deceased had executed two former wills ; one in or before the year 1824, in which he also executed a codicil to it, as appears by the evidence of Mr. Foss, and a will and codicil bearing date in 1828 and 1829 ; but the contents of neither of these are before the Court.

It further appears that Dr. Shillito, one of the [11] executors of the will of 1832, from conversations which he had had with the deceased in the month of August, 1833, was strongly impressed with the notion that there were other testamentary papers of the deceased besides the existing will and codicil ; and that they contained dispositions in favor of himself, or of his family ; accordingly he set about making inquiries of the friends of the deceased, both orally and by letter, as to the fact of the deceased having left any testamentary papers in their possession ; and, amongst others, he addressed himself to the Rev. Henry Marriott, who had been the deceased's curate ; and also to Mr. Robert Marriott, a solicitor, at Stowmarket ; the deceased having, as Dr. Shillito states in his deposition, in the conversation of the 25th August, 1833, observed to him, after alluding to his will being with Mr. Dyke, "Marriott will also have some papers," and this impression of Dr. Shillito may probably have occasioned the delay in proving the will and codicil, which has been alluded to in argument, as it was not probable that the executors, of which he was one, would take probate while this impression remained. These inquiries, however, produced no result until the 17th January, 1834,

when, as pleaded, Mr. Robert Marriott received a letter, bearing the London post mark, to the following effect:—"Inclosed is a paper left (with the strictest injunctions to secrecy) by the late Rev. D. Petteward, nearly the last time he was in London, with directions to be sent by post after he should have been dead a month at least."—London: January, 1834. Enclosed in this letter was the paper containing the codicil now propounded, and which was written upon part of a sheet of paper, on which [12] was a note purporting to have been written by deceased, and addressed to Mr. Robert Marriott, Stowmarket, requesting his acceptance of something—what does not appear. This note was dated Wednesday; but no month or year was added. The contents of the codicil are to this effect: "I give to J. G. Rust, Esq. five hundred pounds; also to Henry Marriott five hundred pounds; also to my servant twenty pounds; also I forgive Mr. Robert Marriott the debt he owes to me at my decease, and name him one of the executors of my will, and one of my residuary legatees; and I confirm my will in other respects, and desire this may be considered as a codicil thereto. Witness my hand the 14th day of May, 1833. Daniel Petteward." Now, this paper so produced purports to give considerable benefit to these persons; and to depart very materially from the disposition of the property by the will. Now, the letter was anonymous; and neither the writer of the codicil, nor the writer of the letter, with whom the codicil is said to have been deposited, have, up to this moment, thought proper to come forward. Immediately on the receipt of this letter Mr. Marriott, who must have been greatly surprised at receiving it, exerted himself in endeavouring to obtain evidence of the handwriting of the deceased; and having furnished himself with affidavits from a considerable number of persons acquainted with the deceased, he communicated the codicil, together with the evidence which he had collected in its favour, to Capt. Bussell and Dr. Shillito, in the hopes, as it should seem, that they would be satisfied with the evidence arising from these affidavits, and consent to prove it with the will and other codicil, though it could hardly be [13] expected that they would act upon evidence so obtained, considering the very extraordinary manner in which the paper came to light. The consequence of this communication was, that a decree was taken out by Captain Bussell, calling upon Mr. Marriott to propound the paper, which he has accordingly done.

Under the peculiar circumstances of the case, there being no attesting witness to the codicil, and no person discovered who was supposed to be the depositary of it, a very special allegation was given in on the part of Mr. Marriott; and twenty-three or twenty-four witnesses have been examined in support of it. A counter allegation has been given by Captain Bussell, either contradicting or explaining many parts of Mr. Marriott's plea, upon which seventeen or eighteen witnesses have been examined.

Now, the factum of the codicil depends entirely upon the evidence of handwriting, which it is admitted is not alone sufficient to enable the Court to pronounce for any testamentary paper, but there must be some circumstances adminicular to that evidence tending to connect the paper with the alleged testator, the requisite stringency of those circumstances varying according to the strength of the evidence as to handwriting; but still it is admitted that evidence of handwriting alone, however strong, is not sufficient proof of the factum of the instrument, and accordingly circumstances are pleaded, shewing the eccentricity which marked the conduct of the deceased; the state of his regard for the persons mentioned in the codicil; and, above all, the declaration which he is stated to have made to Dr. Shillito: that "Marriott would have some papers," which, it is contended, could have reference to no other paper than that propounded.

[14] As might be expected, the great stand has been made to establish the handwriting of the deceased; and it is said that stronger evidence has been produced in this than in any other case which has come before the Court, and that it is such as to amount almost to a moral certainty; and besides that there is one circumstance which distinguishes this case from all others, namely, that the note which occupies one side of the paper on which the codicil is written was originally admitted, and has not been counterpleaded, to be in the handwriting of the deceased, and, therefore, that the paper is connected with the deceased. But in my mind this goes a very little way to remove the difficulty, for it nowhere appears when this note was written; it is not admitted that it was written to Mr. Robert Marriott at all, for it is denied that the superscription is in the deceased's handwriting, even if the body of the note is, and there is therefore not much to be collected from this circumstance: the connection of

the paper with the deceased must be deduced from other circumstances. But it is again argued that the codicil bears intrinsic evidence of having been written at or about the same time with the note, and with the same pen and ink, as there are signs of failure of the ink in both instruments; but it has been objected in answer to this that they could not have been written on the same day, as the 14th May, the date of the codicil, was on a Tuesday, whilst the note is dated on Wednesday, and certainly there is no want of ink in the signature to the codicil. The paper also appears to have been opened at least once after it had been sealed, and to have been again sealed; and in its appearance it is much more dilapidated than, from the supposed time of [15] its having been written, might have been expected. No evidence is, I think, given as to the state of the paper when first it came into the possession of Mr. Marriott on the 17th January; but it is possible that its present condition may have been occasioned by the hands of the numerous persons to whom it has been produced. Passing therefore by these, which may be considered as preliminary observations, I will now proceed to the more important part of the case; namely, the evidence produced in support of the instrument. And first, as to the handwriting, which it is not the intention of the Court to enter into with any great degree of minuteness, as the circumstances of the case do not appear to require it. The parts which are pleaded to be in the handwriting of the deceased are, the names of the legatees—the subscription to the codicil—and the whole of the note, with its subscription and superscription. Now, there are certainly a great number of witnesses, respectable in station and character, and well acquainted with the deceased, who have deposed, in very strong terms, as to their belief of the parts pleaded being the genuine handwriting of the deceased: and although some of them speak with less confidence with respect to some parts than to others, it cannot be denied that a very strong body of affirmative evidence has been produced; whilst, on the other hand, it must be admitted that there are other persons of respectability also, and well acquainted with the deceased and his writing, who are of a different opinion, and whose evidence cannot be altogether laid aside in the consideration of the case, particularly under the circumstances connected with it. Now, in all cases the negative evidence to handwriting must be of [16] less weight than the affirmative, for reasons that must be obvious to every one, and which have been over and over again stated in these Courts, in those cases to which the Court may think it necessary to advert very briefly.

I will however first observe that if the Court were called upon to decide simply and abstractedly from all other circumstances upon which side the weight of evidence was, it would probably feel itself compelled to pronounce for the affirmative side of the question—but this fortunately is not the duty of the Court: it must take into its consideration all the circumstances of probability or improbability, in order to determine its judgment, for the very nature of the evidence is such as to be altogether most unsatisfactory and inconclusive, and such as it is admitted the Court cannot act upon alone.

With reference to this part of the case, it may not be unimportant to look at some of the decisions in which this question has been discussed, and to see to what extent the Court has acted upon this principle, which it is admitted to be the rule of the Court. In the case of *Machin and Tyndall against Grinden and Others* (Lee's Cases, ii. 406) Sir George Lee said, "I pronounced against the codicil, because it was not supported by any circumstance whatever; on the contrary, the circumstance (which he stated) gave suspicion of forgery." Now, the Court does not cite this case for the purpose of shewing the similarity of its circumstances to this—but for the principle which it establishes. Sir George Lee goes on to observe: "But supposing there were no suspicions [17] at all of any indirect practice, I was of opinion there was not evidence enough before the Court to establish this paper, for it stood solely upon a doubtful proof of handwriting—the most uncertain species of proof. The Court has never established a paper, not found in the deceased person's custody, nor supported by any circumstance, upon a controverted evidence of handwriting; and in this case the evidence that it was not Mr. Pickering's (the deceased) handwriting is as strong as the evidence that it was;" and accordingly the codicil was pronounced against.

The same doctrine has been held by the late learned judge of this Court. In the case of *Saph against Atkinson* (1 Add. 213) he said: "Evidence as to handwriting, either affirmative or negative, is commonly inconclusive for obvious reasons; the former, from the exactness with which handwriting may be imitated; the latter, from

the dissimilarity which is often discoverable in the handwriting of the same person, under different circumstances." And further on he observed: "The rule here rather inclines to hold that a will cannot be proved by mere evidence to the handwriting, without some concomitant circumstances as to the place of finding, or the like, to connect it with the party whose suggested will it is." Again, "All evidence of handwriting is the mere statement of an opinion formed by the witness on comparing a writing said to be by the deceased with some standard—either by having seen him write a longer or shorter time from the transaction—or by comparing the paper with the admitted writing by deceased."

[18] It was stated in the argument that comparison of handwriting was not admitted in other Courts. In these Courts such evidence has always been admitted. In the case before adverted to (*Lee's Cases*, ii. 335) Sir George Lee admitted evidence of that description, and said that "such had always been received."

In *Robson v. Rooke* (2 Add. 53) the Court observed: "That evidence to handwriting is, at best, but inconclusive—but of that species of proof I will say that the witnesses here produced have furnished as strong and as satisfactory a sample as well could be furnished." So that even when the proof was so strong the Court considered it still inconclusive, although in that case it was in support of the evidence of a witness who swore to the fact of execution. He further observed: "The rule of this Court is, that evidence to handwriting only is incapable of substantiating any disputed instrument as a will." Again, the same learned judge, in the case of *Constable v. Steibel* (1 Hagg. Ecc. 60), made these remarks: "This evidence then is, if evidence of handwriting can be, of considerable weight. But the inclination, amounting almost to a settled principle of this Court—founded perhaps on the facility with which handwriting may be imitated—has been not to pronounce for a disputed paper on proof of handwriting alone, but to require some corroborating circumstances. These are peculiarly necessary in the present case, where there is much conflicting evidence on this point: for there are a great number of witnesses also well acquainted with the handwriting of the deceased, who speak to their belief that the paper is a for-[19]-gery, being in their opinion unlike his (the testator's) ordinary character. These witnesses are not to be laid entirely out of consideration; but I never can think that evidence of dissimilitude is equally cogent and weighty with evidence of similitude." For reasons which he then assigns, arising from the particular state of the deceased at the time, and other circumstances—and he continued: "If I were bound to form an opinion whether this paper is in the handwriting of the deceased, I would say that the evidence in favor of it so far preponderates that I should be disposed to pronounce the codicil genuine."

The Court then went into the history of the finding of the paper, and was ultimately of opinion that it was entitled to probate.

But the case of *Crisp and Ryder against Walpole* (2 Hagg. Ecc. 531), which was referred to in the argument, is still more applicable in its circumstances to the present case, though the paper was not produced until after a much longer time after the death of the deceased. He died on the 12th November, 1826; and the paper propounded was not brought forward till 1828—having been, as alleged, sent to Mr. Ryder in an anonymous letter of the 19th May of that year. The Court, without hearing counsel against the codicil, observed: "This case lies within a narrow compass; for unless the principles established in these Courts, for the security of property, are broken through, I can entertain no doubt what decision ought to be given."

He then stated the particulars of the case, and proceeded: "The true question in the cause is whether there be proof that the instrument is a genuine [20] codicil—the act of the deceased (2 Hagg. Ecc. 534). To this paper there is no attesting witness; the factum depends upon evidence of handwriting alone; and there is no circumstance that connects the instrument directly with the deceased. Some general regard for the several legatees has been relied upon, as rendering the disposition probable. Now, in the first place, no person would set about the fabrication of an instrument, without endeavouring to give the disposition some colour of probability: but looking to all the circumstances in which the deceased stood, with reference to these parties at the date of this instrument, it does not appear to my mind even probable that he would have bequeathed these two legacies to Mr. Crisp and Mr. Ryder.

"It is a rule of this Court that evidence of handwriting alone is not sufficient to establish a testamentary paper, without something to connect the act with the

deceased : and this rule is founded upon the facility there is of imitating handwriting so closely as to deceive those who are best acquainted with that of the supposed testator. It is therefore required that there should be something to connect the instrument with the deceased—either that it was found in his repositories at his death, or some direct recognition of it in his lifetime ; or else some other circumstances of such strong probability that it was the genuine act of the deceased, as to leave no reasonable doubt on the moral conviction of the Court.

“In the present case the evidence of the similitude of handwriting, even produced by the parties setting up the paper, is not uniform in support [21] of it, while it is opposed by the evidence of other individuals who believe it not to be the handwriting of the deceased : so that this proof, at the best of a loose and unsatisfactory species, is in the present instance conflicting.”

The Court then proceeded to state that there were other circumstances unfavorable to the genuineness of the instrument, which he stated : “But,” said the Court, “the great difficulty of the case arises from the mysterious appearance of this instrument a year and a half after the testator’s death : nor is there any account from whom it came, or from whence it came, or where it was first discovered, or why it had lain so long concealed : no plausible conjecture can be formed in explanation ; and this circumstance raises a strong suspicion that the instrument has been a fabrication of much more recent date than the death of the testator. In addition to this, the paper is dated at the head, Denston Hall, September 2nd, 1823, which was the testator’s usual place of residence.”

But it was proved that the deceased was not at that time there resident, which the Court remarked upon as affording an additional circumstance of suspicion. “Upon the whole,” the Court said, “the judgment of the Court is, that there is a complete failure of proof of this instrument as a codicil of the deceased testator : the Court is not called upon to pronounce that it is a fabrication ; but, whether fabricated or not, I must repeat that I fully acquit Mr. Ryder of any participation in the transaction, and that I entertain no suspicion that he was concerned in, or privy to, the fabrication of the paper.” Again,

[22] “If, however, parties will set up, and undertake to establish, such a case by proof, for the chance of benefit to themselves, they must also be content to do it at their own risk of paying the costs in case of failure. I must therefore not only pronounce against the codicil, but feel bound to condemn the parties who have pronounced it in costs.”

Considering then the rule, as indeed has been fully admitted, to be clearly established ; that evidence of handwriting is not sufficient to establish a testamentary instrument, but that there must be something to connect it with the deceased ; and admitting the preponderance of the evidence as to handwriting to be in favour of the genuineness of the paper ; it would seem to be a waste of time to enter into a minute consideration of it ; the Court will therefore proceed to consider whether the circumstances which are stated to connect the paper with the deceased are sufficient to produce that result.

Now it was first contended that the will itself was not duly considered, that it was drawn up and executed in a hurry, and, therefore, that it was not improbable that the deceased would alter it ; but the Court cannot discover any marks of haste, or want of due deliberation, either in giving the instructions for it, or in its preparation.

The judge then referred to Mr. Dyke’s evidence, who deposed to the first article : “I became slightly acquainted with the deceased in this cause by his being present on a few occasions which I am unable to specify, when his nephew, George Eyre, has called on me in Doctors’ Commons. Upon the death of his nephew the deceased, as one of his executors, attended at my office and [23] proved the will ; that was in the month of March, 1832, and I saw the deceased several times on the business. In the course of it he employed me to prepare a will for him, and in the following year a codicil to it, of both of which I will more particularly depose. I never observed anything singular or eccentric about the deceased, or evincing any disposition to create surprise ; so far as I saw of the deceased I should rather have said that he was inclined to be reserved and distant. Those which I have mentioned are the only transactions of business I ever had with the deceased. In proving the will of his said nephew the deceased shewed himself very particular, and evinced every disposition to be correct,

and throughout the whole business, as well as in every thing relating to the preparation of his own will and codicil, conducted himself in a most steady and becoming manner.

To the second article: "In the years 1832 and 1833, about the time the instruments respectively bear date, I was employed by the deceased to make his last will and testament and codicil thereto mentioned, as articulate in the third and ninth articles of the allegation given in, and admitted in this cause on behalf of Robert Marriott, the other party therein. In giving instructions for both of those instruments, which he did to myself personally, the deceased was very particular and exact, and both of them were, by his particular directions, prepared and executed in duplicate. Previously to his giving instructions for his said will, the deceased when with me, on one occasion, on business respecting the affairs of his deceased nephew, George Eyre, inquired of me if I ever made wills, and also, as I have already mentioned, [24] what my charge would be for so doing, and in a day or two afterwards he called upon me and brought with him instructions in writing, and also, as I best recollect, a former will which he had made. I read over the instructions with him which, so far as I recollect, were perfectly regular, but what was afterwards done with them, or whether they are still in existence, I do not know. From these instructions, and some verbal explanations I received from the deceased, I prepared the draft of a will, being the script A. . . . In a day or two afterwards the deceased attended at my office, when the draft-will was read over with him and finally settled, and very shortly afterwards I attended with the will and duplicate at the lodgings of the deceased in Suffolk Street by appointment, and both parts were there executed by the deceased, one part he retained in his own possession, and the other by his desire I took possession of and kept. At the time the deceased first spoke to me about making a will for him he mentioned, I remember, as a reason for wishing so to do, that he had ascertained that on account of the death of their elder nephew, George Eyre, his (the deceased) brother had substituted their other nephew, Charles Eyre, as his heir, and, therefore, that he himself should provide for or take care of his nieces, or to that effect."

To the third article: "On the 6th of June in the following year, 1833, as I know from such being the date of the codicil just deposed to, the deceased called at my office, and told me that he wished to have a codicil made to the will I had made for him, or that he wished to make some alteration in his said will; he at the same time [25] produced to me the part of his said will which, as predeposed, he had retained in his own possession, and reminded me that I had the duplicate of it, which, by his desire, I produced to him. He then requested me to read it, which I did very deliberately, he at the same time looking over the duplicate which he had brought with him. In the course of my reading the will, when I came to the name of Dr. Terry, which was left in blank as to the Christian name, the deceased reminded me that William was Dr. Terry's Christian name, and thereupon I inserted that name with a pencil in the blank in that part of the will which I reading; some conversation which I do not very distinctly recollect passed between the deceased and me as to the legacy given by the will to the deceased's nephew, Charles Eyre, who as I knew was then recently dead, as to the mode in which it should be disposed of, and the name of Mrs. Charles Eyre, his widow, was mentioned, and some observations made about her which I am unable to recollect, but arising probably upon some suggestion made by myself that part of the legacy should be given to her; but, whatever the conversation was, I remember that the deceased seemed satisfied upon learning from me, on inquiry, that if the legacy were not noticed it would form part of the residue of his property, and he declined having anything mentioned in respect to that legacy; it seemed as if it were a weight off his mind that he could omit noticing it in any way. Upon my coming to the legacy of three hundred pounds given by the will to the Suffolk Hospital, the deceased said he wished it to have six hundred [26] pounds. I asked him if he wished that sum to be in addition to the former legacy, but he said no, that he wished the legacy to be six hundred pounds in all; the deceased appeared to think that the will might be altered in that respect, but I told him it might be done by a very short codicil. He then said that he wished to give a legacy of one hundred pounds to a clerical charity in Suffolk; he was in doubt how the charity was described, but after some consideration he at length fixed on 'the Suffolk Clerical Charity' as being a sufficient description of it. He then inquired how long I should

be preparing such a codicil for him, and having learned from me that it would not take long, he said he was going further and would call again in a couple of hours to execute it. The deceased then went away, leaving both parts of his will with me for the purpose of having the proposed codicil written upon each of them. He was particularly desirous, I remember, that the codicil should be written on each of the parts of his will, and that it should be executed in duplicate, that was his own proposal. I then proceeded to draw up a sketch of the proposed codicil, which was copied in my office at the end of each part of the will, and upon the return of the deceased, one part of the codicil was read over to the deceased by myself, he at the same time looking at and comparing the duplicate himself as I read. The deceased then executed each part of the codicil in the presence of myself and two of my clerks, and the two parts of the will and codicil on each were enclosed, to the best of my recollection, in the same envelopes in which they had been before enclosed, and one part was [27] taken away by the deceased, the other was left with me, and remained in my possession until after the deceased's death. Neither on the said occasion of my reading the will over to the deceased, nor upon his giving instructions for the said codicil, nor at any other time, did the deceased mention or in any way allude to any other codicil or testamentary disposition having been made by him, since the will I had, as predeposed, made for him, or intended to be made by him."

Nothing can be more natural than the disposition of the property, and nothing more proper and careful than the manner in which the instructions are given and acted upon; it is executed in duplicate; one part is taken possession of by the deceased himself, and the other left with Mr. Dyke, and an indorsement is written on the envelope, in which the part which the deceased had was kept, that the other part was at Mr. Dyke's. I cannot, therefore, agree in the observation, that it was probable that the deceased would alter this will; at all events he adheres to it for twelve months, and I think there is also quite sufficient evidence to justify the disposition in favour of the husbands of his nieces, with whom, though he did not keep up any very constant intercourse, on account of the distance at which they resided from each other yet it is admitted he entertained for them much respect and esteem, though it is said not much friendship and regard.

The next ground of probability urged is, that he had great regard and esteem for the legatees in the codicil propounded. Now when the evidence comes to be examined, to what does it amount? why, that [28] Mr. Rust was an intimate friend of the deceased, to whom it was not improbable he might have left a legacy, and that Mr. Henry Marriott had been his curate for a short time; that the deceased had a high opinion of him, and entertained a regard for him; so that it was not improbable he might have also left some legacy to him.

But great stress is laid upon the regard and esteem he is said to have felt for Mr. Robert Marriott, to whom it was contended that he lay under such infinite obligation as called upon him to make some return, he never having paid him anything for his services in his life time. Now, that the deceased was in the habit of going to Mr. Marriott's to consult him as to the execution of deeds and powers of attorney, and of availing himself of his legal knowledge in reading deeds for him, there can be no doubt; and no one would have been surprised if the deceased had left him a hundred or two, or three hundred pounds; but that these services, coupled with the connexion between their families, should have rendered it probable that the deceased should leave him between five and six thousand pounds, and make him an executor of his will, is a proposition to which the Court cannot in any manner assent. It is indeed said that the deceased was under obligation to Mr. Marriott for consenting to retain a sum of 1300*l.* which had been borrowed of him by the father of Mr. Marriott, who was desirous of paying it off; but that, at the deceased's desire, he consented to have a transfer of the debt to him, for which he paid interest. The only witness examined to this point is Mr. J. Marriott, who mentions the arrange-[29]-ment, but does not give the particulars of it; but supposing the circumstances to be precisely as are represented in the plea, they do not in my mind lay any foundation of probability for the extent of the benefit which this codicil purports to confer upon Mr. Robert Marriott.

Again, it is said that the deceased's eccentricities were such as to render his conduct with respect to this paper most probable, and, indeed, that two of the witnesses, Mrs.

Pettiward and Mrs. Garnham, depose to the impression which they entertained, the latter stating that "the act bespoke the man." But the question is not as to their impression, but what impression the evidence is calculated to produce in the mind of the Court.

Now, that the deceased's conduct was singular, and eccentric, in many particulars cannot be denied; it is spoken to by all the witnesses; but in what instance did it shew itself? in surprising his friends, by appearing in a Chinese dress; introducing a blind fidler; receiving his friends with a salute of guns, and hoisting a flag; in dropping halfpence down the backs of the children at school, or putting a bun into their hands, or amusing himself with giving them bread dipped in cream, and laughing at the cream dropping from their mouths; in short, that he was a man fond of practical jokes, and was amused with trifles; but that he ever suffered these fancies to intrude into matters of business is altogether in opposition to the whole of the evidence; for instance, see Mr. Foss's account of the manner in which he conducted himself in the preparation and execution of the codicil of 1824, and the will of 1828, and the codicil of 1829.

See also the account given by Mr. Dyke already [30] referred to; where nobody could have conducted himself with greater steadiness and propriety; and that such was his conduct in all matters of business is deposed to by Hart, Packington, and Mrs. Roberts, in answer to the second interrogatory.

So far, therefore, from the general habits of the deceased rendering it probable that he should have adopted this method of conferring a benefit on his friends, the very reverse seems to be established; for no reason can be assigned why he should act with respect to this instrument in a different manner to what he had done with respect to his will and codicil.

I consider, therefore, that this ground of probability also fails.

Then comes the main fact of all—his conversation with Dr. Shillito on the 25th August, 1833. Now, giving Dr. Shillito credit for a perfect recollection of the deceased's expression upon that occasion, and for an accurate account of it, to what does it amount? "Marriott also will have some papers." Can anything be more loose and indefinite? Is there anything to connect it with this paper? It is said, indeed, To what else could it allude? But this seems to be begging the whole question; it is assuming that the instrument is proved to be the act of the deceased himself: whereas that is the point to be proved.

Now, certainly Dr. Shillito did not suppose the deceased referred to such a paper as this; he expected one in favor of himself and his family, and all his inquiries are made under that impression; his conduct shews that he had no very definite understanding of deceased's meaning. He was entirely in the dark as to which of the Marriotts deceased [31] alluded; and it is clear that no further explanation took place in September, when Dr. Shillito was at One House: surely then it is too much to contend that this conversation must necessarily have reference to such a paper as this, to be produced under such extraordinary circumstances.

A good deal of observation has been made on an expression in one of Dr. Shillito's letters, as if he was impressed with the notion that the paper was not to be produced till some time after the deceased's death, by his direction; and it was said that this consists with the expression in the letter transmitting the codicil. Now, this letter was not written till some time after Dr. Shillito's, and it might have been suggested by that very observation, but the Court is unwilling to enter into any conjecture upon the subject; at all events it is not proved that deceased gave any instructions to the effect recited, or that he had anything to do with the writer; the coincidence therefore between Dr. Shillito's notions and the expressions in the letter can have no effect whatsoever. To what the deceased might allude the Court is not bound to conjecture: it is sufficient that there is no proof that he referred to this document, or any of a similar description.

The Court is unable, and the counsel have been unable, to suggest any probable reason for the non-appearance of the writer of the codicil, or of the letter, with whom it is said the codicil was deposited, under strong injunctions of secrecy, and not to produce it for a month after the death of the deceased. For what possible reason could this be? Was his character such as to lead the Court to suppose that he wished to involve his executors and their families in difficulties? or that he wished to [32] raise hopes and expectations for the purpose of disappointing them? The very reverse seems

to have been the case on those occasions in which he is said to have been fond of surprising his friends, his aim appearing to have been to give them pleasure; and such was the impression on the mind of Mr. Marriott, who seems to have forgotten, that in proportion to the agreeable surprise which he would feel on finding himself thus unexpectedly benefited would be the disappointment of Captain Bussell and Dr. Terry at finding so large a portion of the deceased's property conferred upon another.

Upon the whole, then, of this case, I am decidedly of opinion that there are no circumstances of probability, nor declarations, nor facts, to connect this instrument with the deceased: and although the preponderance of evidence upon the abstract question of handwriting may be in favor of the party propounding it, yet it is by no means conclusive even upon that point; and taking all the circumstances into consideration, I feel myself bound to pronounce that the parties have failed in proving this instrument to be the genuine act of the testator, and I therefore pronounce against it.

Costs have been pressed against Mr. Robert Marriott, as well upon the general principle as on account of the manner in which the suit has been conducted. On the latter ground I should be unwilling to give costs, for he was under the necessity of pleading every thing that might make in favor of the genuineness of the paper, when once he had made up his mind to propound it. But upon the general principle I feel greater difficulty, for I see no reason why Mr. Marriott should be allowed to make this experiment for his own advantage, at the expense of Captain Bussell and Dr. Terry; they have been kept out of the probate of the will for twelve months and have been put to considerable expense in defending themselves against the effect of a codicil produced under these very extraordinary circumstances, and I do not see how I can refuse to condemn Mr. Marriott in costs if they are pressed against him. But I confess it would be a relief to my mind if costs were waived, as I feel very strongly impressed with the belief, I may say conviction, that if this paper is a fabrication Mr. Marriott is entirely free from any participation in it.

The other party having pressed for costs, the Court decreed them against Mr. Marriott.

[34] THE OFFICE OF THE JUDGE PROMOTED BY CHICK *against* RAMSDALE AND CHICK, FALSELY CALLED RAMSDALE. Consistory Court of London, Feb. 20th, 1835.—Criminal suit for incest; marriage of the parties annulled, and penance enjoined.—Penance afterwards remitted.

[Referred to, *R. v. Dibdin*, [1910] P. 103.]

This was a criminal proceeding instituted by Ann Chick against Matthias Ramsdale and Joan Chick, the sister of the former wife, for incest. The citation called upon the parties to answer to a suit "touching their souls' health, &c., and more especially for their having been guilty of the foul crime of incest."

The King's advocate and Nicholl for the promoter, prayed the Court to assign the parties to perform the usual penance, and also to pronounce the marriage null and void.

Addams on behalf of the parties proceeded against, contended that it was not competent to the Court to pronounce a sentence annulling the marriage—that the parties were called upon by the citation to answer merely to a suit for incest—that nothing was said therein of annulling the marriage of the parties—that to ingraft upon such a citation a sentence of nullity of marriage, bastardizing the issue, was tantamount to permitting the party to proceed in a civil suit, without the necessary proof of interest.

April 28th, 1835.—*Judgment*—*Dr. Lushington*. In this case the office of the judge was promoted by Ann Chick against Matthias Ramsdale and Joan [35] Chick on the ground of incest, alleged to have been committed by them. The incest consisted in Ramsdale having married Joan, the sister of his former wife. The evidence as to this is so clear that it is unnecessary for me to advert to it, but I delayed giving judgment in this case, in consequence of doubts I entertained of the propriety of pronouncing a sentence annulling the marriage of the parties.

The citation called upon the parties to answer to a suit touching their souls' health, and more especially for being guilty of the crime of incest, and the sentence which I am asked to sign declares the marriage of the parties to be null and void. In

consequence of the doubts I felt upon this point, I directed a search to be made for precedents, and I am now informed that in the case of *Blackmore and Thorp* against *Bridger* (2 Phill. 359), in the Arches, on 10th of April, 1816, the citation was similar to that in the present case, and that the marriage was annulled; and that in the case of *Cleaver v. Woodbridge* (2 Phill. 362, note), Arches, 1789, the citation was the same, and the sentence, which cannot be found, would seem to have been the same also; as there is no proof that these cases were determined without sufficient consideration, although I still entertain some doubts upon this point, I must consider them as precedents binding on this Court; I therefore pronounce this marriage null and void, and direct the parties to perform the usual penance.

On a subsequent day (6th of May) Addams prayed the Court to remit the penance directed in [36] this case; he founded his application upon a certificate and affidavit of Dr. Taylor, the medical attendant of the parties, that "Matthias Ramsdale had been attacked in March last with a brain fever, and that he had been in an unsound state of mind in consequence, and that in his (Dr. Taylor's) opinion very disastrous consequences might result from his performing the prescribed penance."

"That Joan Chick has a morbid state of her uterine system, that in February last she had a premature labour (induced by the state of her mind) attended by dangerous hemorrhage, from the effects of which she is not yet recovered, and that she is now again pregnant, that any excitement will be calculated to induce miscarriage and uterine hemorrhage, and that she would be exposed to dangerous risk if the penance be carried into effect."

And he cited the case of *Burgess* against *Burgess* (1 Hagg. Con. 384, 393).

The King's advocate did not object to a suspension of the penance, but submitted that sufficient cause was not shewn for its remission.

Dr. Lushington. The Court in this case pronounced its usual sentence, that the parties should do the ordinary penance, and I did so, because it appeared to me that it was a matter of form, and that it was not competent for the Court, but upon special circumstances, to depart from the usual form.

I accede to the remarks of Lord Stowell in *Burgess* against *Burgess*.

[37] Whatever may have been the reasons for the performance of penance in former days, certainly they do not apply with equal force to the present time. The facts stated in the certificate and affidavit of Dr. Taylor render it the imperative duty of the Court not to enforce this part of its sentence, at least at the present time.

As this statement is uncontradicted, I must presume that it is an accurate representation of the circumstances of the parties, and undoubtedly if it be true it becomes the duty of the Court not to expose the parties to the hazard which Dr. Taylor says would be likely to be incurred; for this part of the sentence was not intended as anything more than a public recantation of the offence of which the parties have been guilty; I have no hesitation, therefore, in saying that the Court would not attempt to enforce the penance against either of the parties at present; but I am bound to consider whether I ought to suspend the sentence merely, or dispense with it altogether.

The learned counsel for the promoter has expressed his ready concurrence in the suspension of the penance; but in my judgment, considering the state of both parties, by allowing the threat of penance to hang over their heads for an indefinite time—for the extent of time for which the penance is to be suspended it is impossible to tell—the probable consequences would be almost as detrimental as the actual performance of it. I therefore think it right and fitting to remit the penance.

[38] TONGUE v. ALLEN. Arches Court, Easter Term, 3rd Session, May 7th, 1835.—Suit of nullity of marriage under 4 G. 4, c. 76, by reason of undue publication of banns sustained; both parties having "knowingly and wilfully intermarried after such undue publication."

[Affirmed, nomine *Tongue* v. *Tongue*, 1 Moore, P. C. 88; 12 E. R. 745 (with note).]

The King's advocate and Haggard in support of the sentence.

Addams contra.

Judgment—Sir Herbert Jenner. This is an appeal from the Consistory Court of London in a suit of nullity of marriage, by reason of undue publication of banns brought by the father of a minor, Edward Croxall Tongue, against Mary Anne Allen, widow, falsely calling herself Tongue.

The citation was returned on the 22nd of April, 1834, the libel was brought in on the 16th of May, and admitted without opposition on the first session of Trinity Term, the 29th of May, 1834. The marriage was confessed, and a negative issue was given to other parts of the libel, five witnesses were examined, no interrogatories were put to the witnesses, nor was any counterplea given in, so that the case came on to be heard on the evidence taken on the libel only, when the judge of the Consistory Court was of opinion that the proof was insufficient, and dismissed the party cited.

From this sentence an appeal was brought to this Court, and an allegation containing supple-[39]-mental matter was offered, which was opposed and rejected by the Court, so that the appeal has been heard upon the same evidence as in the Court below.

The facts of the case appear to be these. The minor (the son of Edward Tongue, who is described as a gentleman of considerable landed property, on which he resided in Staffordshire) was born on the 4th of May, 1815, and was baptized on the 15th of October following, as Edward Croxall Tongue; in 1828 or 1829 he was placed at a school kept by a gentleman of the name of Atchison, at Edgbaston near Birmingham, in Warwickshire; in 1832 Mr. Atchison removed from Edgbaston to Keynsham, in the county of Gloucester; and in January, 1833, a second son of Mr. Tongue's was sent to the same school. It further appears that Mrs. Allen, the sister of Mr. Atchison, who was about thirty-five years of age, and a widow, lived with her brother at Edgbaston and Keynsham as housekeeper, and to superintend the pupils, that the young man was always, as well at home as at school, called by the name of Croxall, the baptismal name, Edward, having become entirely dormant and disused, although it certainly does appear that he had been seen to write the name Edward, but whether with or without the name Croxall is not stated, but the general effect of the whole evidence is that he was called, addressed, and spoken of by his family, friends, and schoolfellows, and by Mrs. Allen as Croxall only: and so much had that become the name by which he was known that one witness says that if he had heard Edward Tongue mentioned he should have supposed the father was meant.

[40] In the beginning of 1833, the parties having agreed to be married, banns of marriage were published on Sunday, the 10th of February, and on the two following Sundays in the church of St. Michael, Bristol, in the names of Edward Tongue, and Mary Anne Allen, altogether omitting the name Croxall, by which, as has been already observed, the young man was generally, if not universally, known; and it is charged that this was knowingly and wilfully done, and by preconcert between the parties for the purpose of fraudulent concealment.

In pursuance of the banns so published the marriage was celebrated on the 26th of February, in the church of St. Michael.

After the marriage the parties returned to Keynsham, where the minor continued as a pupil of Mr. Atchison's until the Midsummer vacation, when he went home unaccompanied by Mrs. Allen; at the end of the vacation he returned to school, and at Christmas again went home; none of his family at such time having the least suspicion of the connexion between him and Mrs. Allen: during these holidays, however, some circumstances came to the knowledge of the father which induced him to make inquiry, when he was for the first time informed of the marriage of his son, whom he immediately sent abroad; and the parties have had no further intercourse together.

Proceedings were shortly afterwards instituted for the purpose of having the marriage declared null and void; such is the general outline of the case as collected from the history given by the witnesses, and which, as there is no dispute as to the main facts, it is not necessary to detail more minutely.

[41] The result, then, is this, that at the marriage the minor was between seventeen and eighteen years of age; the woman thirty-four or thirty-five, and a widow, or representing herself as such, and the sister of the master of the school where he was placed; that the marriage was clandestine, and continued secret and unknown to the family of the minor for nearly twelve months; that the name of baptism, by which alone he was generally known, was omitted in the publication of the banns; and that this was done for the purpose of concealment, and in fraud of the father's rights, there can be no doubt.

The question, therefore, is whether a marriage under such circumstances is good and valid according to the existing marriage law of this country; for under the original

marriage act, the 26 Geo. 2, c. 33, the marriage would have been clearly void, it having been repeatedly held that the omission of the name of general repute in the publication of banns, when for the purpose of fraud, rendered the marriage void, as in the case of *Pouget v. Tomkins* (2 Hagg. Con. 142), in which Lord Stowell observed that all parts of a baptismal name ought to be set forth, as composing altogether the name and legal description of the party, yet he would not go the length of deciding that in all cases the omission of a name would be fatal, where no fraud was intended, nor any deception practised, and where the suppression was only of a dormant name.

The present statute, the 4 Geo. 4, c. 76, equally requires the true names of both parties to be published, but in order to obviate the inconveniences, [42] and to prevent the crying injustice which arose out of the law as it formerly stood, and the cruel injuries to which innocent parties were exposed, it has provided that, in order to annul a marriage on the ground of the banns having been unduly published, "the parties must have knowingly and wilfully intermarried without due publication of banns;" the construction which has been put upon the twenty-second section of the 4 Geo. 4, c. 76, in the few cases as yet determined under it, is that both parties must be cognizant of the undue publication. This, indeed, seems to arise necessarily from the words of the act itself; the "parties" are spoken of in the plural number, and there would have been no necessity for any enactment at all upon the subject if the knowledge of one party would have been sufficient to render the marriage void, as there can hardly be a case in which one of the parties must not be cognizant of the fact.

But however this may be, the same construction has been put upon this section of the act in the courts of common law as in these courts: the cases have been referred to in the argument and the Court will notice them hereafter; at present it will be enough to say that it entirely agrees in the soundness of that construction; and it only remains to be seen whether there is sufficient proof in the present case to justify the Court in coming to the conclusion that both parties were cognizant of the undue publication of banns before the marriage was solemnized; for I also agree with the decisions before adverted to, that the knowledge must be shewn to have existed before, and not after, the marriage. The manner in which this knowledge is to be proved must vary according to the circum-[43]-stances of each case; that may be quite sufficient in one which would not suffice in another, and although it may be true that in construing the law the favourable or unfavourable nature of the transaction in question ought not to be taken into consideration, yet circumstances may give a greater or less effect to the evidence of the facts to which the law is to be applied, and may furnish a clue to guide the Court to the proper conclusion to be drawn from them. It cannot be required that in every case direct and positive proof should be adduced; if so, I am inclined to agree with the observation of Dr. Addams, that in most cases the fraud would be successful, the parties would have nothing to do but to keep their own secret. The Court must therefore take all the circumstances into consideration, and deduce its conclusion from them. It was, indeed, hardly denied that circumstantial evidence would be sufficient, but it was said it must be such as to leave no reasonable doubt on the mind of the Court. It is necessary then to consider what the circumstances are.

In all cases of this kind three questions necessarily arise—

First. Whether a marriage has been had between the parties to the suit.

Secondly. Whether there has been an undue publication of banns.

Thirdly. Whether both parties were cognizant of the undue publication before the marriage was celebrated.

Now here there can be no doubt of the fact of marriage between these parties, nor of their identity.

Secondly. There can be no doubt from what has [44] been observed that there was an undue publication of banns, it would be a waste of time to inquire further on this point; and it is equally clear that concealment was the object of both parties. The third point, whether both parties were cognizant of the undue publication, remains to be considered. Now that Mrs. Allen knew cannot be denied; she in fact, although it is otherwise pleaded in the libel, gave the instructions for the publication of the banns: it was said that the evidence as to this fact was irregularly introduced, and perhaps it was so, but if it were not true, it might have been contradicted even after publication, but no attempt of that kind was made either here or in the Court below; I must therefore take that fact as proved. There is certainly no direct proof of concert

between the parties, but there is a pretty strong presumption of it; both were living in the same house, having daily communication with each other; both must have known of the necessity for concealment, and neither could well have been ignorant of the means to be used from the very nature of the transaction; but it does not rest here, the proceedings at the time of the marriage are material; it is sworn that it is the practice in this parish to shew the banns-book to both parties, and to inquire whether they are correctly described or not, and Sarah Haynes, the sextoness, says "she is sure it was done on the present occasion." Now was the fact so or not? The witness deposes positively to the practice, and that it was observed on this occasion; if the fact were not so, it might have been counterpleaded, and the minister and clerk might have been brought to contradict the sextoness; there is no reason to believe that she deposes falsely, [45] and there can be no reason assigned why the usual practice should not have been adhered to at this marriage. Again, during the ceremony the minor must have answered to the name of Edward, and there is no evidence to shew that he evinced any surprise at being so addressed. And after the ceremony was concluded he signed that name to the entry in the register without hesitation. This latter circumstance standing alone might not perhaps have been sufficient to fix him with a knowledge of the undue publication of banns, but taken in conjunction with all the other circumstances it goes a considerable way to satisfy me of his previous knowledge of the intended fraud.

These facts then taken altogether form a strong body of evidence upon which the Court, had this been the first case arising under the statute, might and would have felt itself justified in pronouncing this marriage to be void, as having been knowingly and wilfully by both parties contracted without due publication of banns.

But cases have been referred to, which the Court must now proceed to consider, in order to see whether they at all interfere with the impression it has stated itself to entertain as to the effect of the evidence here produced.

The first, that of *Wiltshire* against *Prince*, in the Consistory Court of London (3 Hagg. Ecc. 332), was a suit brought by the father of a minor, for the purpose of setting aside the marriage of his son with a woman servant in the family; wrong names had been used in the publication of the banns, and there was clear proof that both parties knew it, and that it was for the [46] purpose of fraud: there was no doubt of the fact of both parties being cognizant of the undue publication of banns before the marriage, and the Court accordingly pronounced it void; that case therefore is important only as shewing the construction put upon the words of the Act of Parliament, by the learned judge of that Court, namely, that both parties must be cognizant of the undue publication of banns: nothing was there determined as to the nature of the proof required.

The second case cited was that of *The King* against *The Inhabitants of Wroston* (4 Barn. & Ad. 640), which was a question sent by the Quarter Sessions for the opinion of the Court of King's Bench. The facts were found by the justices, and the Court was bound by them; on what evidence the justices came to the conclusion of fact does not appear; but they stated that the woman was ignorant of the false publication, although the names used were very different from the true names.

The decision of the King's Bench on the facts found by the justices was, that as the woman did not know of the false publication of banns the marriage was good; in fact it goes no further than to adopt and confirm the construction which had been put upon the statute in the case of *Wiltshire v. Prince*. These cases, therefore, prove nothing more than that in order to render a marriage null and void, by reason of undue publication of banns, both parties must be shewn to have been cognizant of the undue publication before the celebration of the marriage.

But the case more particularly relied upon as [47] applicable to the case now before the Court was that of *Hadley v. Reynolds*, which occurred in this Court, but has not yet been reported. The circumstances of that case were extremely different from the present; there the husband, after a cohabitation for three years and a half, and the birth of a child, sought to set aside his own marriage, he himself having caused the banns to be published; it was so pleaded by him. He was a clergyman of twenty-six or twenty-seven years of age, the woman twenty-two, both were therefore at full liberty to contract marriage: no rights of third parties were invaded. The woman having no occasion to have recourse to fraudulent concealment, nor having any reason to suppose that fraud was to be resorted to; there was no evidence to shew that she was at all

acquainted with the intended use of false names; the banns were published at Birmingham, she was at Worcester; there was not any ground to presume that there was any previous knowledge on her part of the undue publication; true it is that she answered, during the ceremony, to the wrong name, and also after the marriage signed that name in the register; those were the only circumstances from which her knowledge could be inferred, and the Court, rightly holding that in such a case the strictest proof was necessary, was of opinion that those circumstances alone were not sufficient evidence of the fact.

But what is the present case? A woman, situated as I have described, persuades, for so I must presume, a boy not half so old as herself to marry her; she, knowing that he had a father who would disapprove of the marriage, gives instructions for the publication of the banns, omitting that which must be [48] considered as the only real baptismal name of the minor, and this for the purpose of fraud, the parties being in constant and daily communication with each other; they proceed to Bristol on the morning of the marriage, and return to school the same day, when they resume their usual occupations, she superintending her brother's pupils, he continuing his education; no one of his schoolfellows nor any one else suspecting that any connexion existed between them. It is precisely the case against which the legislature must have intended to provide—the maxim, *semper præsumitur pro matrimonia*, strongly applies to *Hadley's case*, but not to this, where fraud was meditated by both parties, and in which it may not unjustly be presumed that both were acquainted with the means by which that fraud was to be carried into effect.

On the whole, I cannot bring my mind to doubt that both parties knowingly and wilfully intermarried without due publication of banns, and I therefore pronounce for the appeal, retain the principal cause, and declare this marriage to be null and void.

The sentence of the Arches Court in this case was affirmed on appeal by the Judicial Committee of the Privy Council on the 21st of June, 1836.

Present—The Rt. Hon. Sir L. Shadwell, V. C.; Mr. Justice Bosanquet; Baron Parke; Thos. Erskine, C. J., of the Court of Bankruptcy.

[49] **WRIGHT v. ELWOOD, FALSELY CALLING HERSELF WRIGHT.** Consistory Court of London, Trinity Term, 3rd Session, June 23rd, 1835.—Marriage without due publication of banns not void under stat. 4 G. 4, c. 76, s. 22, where only one of the parties knew of the false publication.

[See further, p. 662, post.]

This was a cause of nullity of marriage by reason of undue publication of banns, promoted by James Dennis Wright against Amelia Elwood, heretofore calling herself Emma, otherwise Emily Wright, and pretending to be the wife of the said James Dennis Wright.

The libel pleaded:

First. That Harlow Elwood and Amelia Elwood, then Amelia Dames, were married on the 22nd of October, 1821, at a private house, in the parish of Straid, in the county of Mayo, in Ireland, by the Rev. Anthony Thomas Clerk, a minister in holy orders of the United Church of England and Ireland by virtue of a license first had, and that an entry was made of such marriage in the parish register.

Second. That by the law of Ireland a marriage by a clergyman of the United Church of England and Ireland in a private house is valid.

Third. That the register book of marriages, for Straid, for that year is lost.

Fourth. Cohabitation until in or about 1823, when Amelia Elwood separated from her said husband.

Fifth. That at the end of the year, 1825, Amelia Elwood assumed the Christian name of Emma, [50] and gave out and pretended that she was a spinster. That James Dennis Wright, bachelor, believing that the said Amelia Elwood, so assuming the name of Emma, was then a spinster and free from all matrimonial contracts and engagements, made his courtship and addresses by way of marriage to her, and that she consented to be married to him; that he caused banns of marriage between himself and the said Amelia Elwood (then the wife of the said Harlow Elwood), by the name of Emma Elwood, spinster, to be published in the parish church of St. John the Evangelist, Westminster, on Sunday, 28th of May, Sunday, 4th of June, and on Sunday, 11th of June, 1826, and that they were married on the 6th of July, 1826.

Sixth. Pleaded the entry of the marriage.

Seventh. That at the several times of publication of the banns the said Harlow Elwood, the husband of the said Amelia Elwood, was living; and that he died on the 27th of June, 1826, at Ballymore in Ireland.

Eighth. Pleaded the identity of the wife.

Ninth. That the parties cohabited together as husband and wife until September, 1828, when the said J. D. Wright having discovered that he had been imposed upon by said Amelia Elwood, inasmuch as she was the wife of the said Harlow Elwood at the time of the publication of the banns, he separated himself from her.

Addams in opposition to the libel contended: First. That there was no undue publication of banns—that the names Amelia and Emma were the same, or, at least, that there was not such a variation of names as would render the banns void, especially as it was not pleaded in the usual way [51] that Amelia was the baptismal name of the party, and her usual and proper name.

Secondly. That supposing the publication of banns was an undue publication, still that the marriage was a valid one, as by the present marriage act both parties must be consensant of the undue publication; whereas it is pleaded in this libel that the husband believed that the wife was a spinster at the time of the publication.

Phillimore and Haggard in support, contended that by the marriage law, independent of the Acts of Parliament, no marriage could be celebrated without publication of banns or dispensation.

That the party being a married woman at the time could not authorize the publication of banns, that the banns must be taken to be a nullity, and consequently the marriage also must be null and void.

Judgment—Dr. Lushington. The libel in this case pleads that Harlow and Amelia Elwood were married in a private house in Ireland, in October, 1821 (now that must be taken to be a valid marriage).

It then pleads that James Dennis Wright caused banns of marriage to be published between himself and Emma Elwood, spinster, on the 28th of May, 4th of June, and 11th of June, 1826, and it alleges that she was properly Amelia Elwood, the wife of Harlow Elwood, that he was living after the publication of banns, and that he died before the celebration of the marriage, 6th of July, 1826; and the question is whether or not such marriage can be pronounced null and void.

[52] Now the first objection to this libel is, that the variation of the names is not such as would render the publication of banns an undue publication; but assuming, at present, that the publication was such as to cause a sufficient disguise of the parties, the most essential fact is, that at the period of publication Mr. Wright supposed that Mrs. Elwood was a spinster; it, therefore, cannot be said that this was a false publication of banns had with the consent and connivance of both parties.

Under the present marriage act, 4 Geo. 4, c. 76, there is no nullity, except under the 22nd section, which enacts, "that if any person shall knowingly and wilfully intermarry in any other place than a church, or such public chapel, wherein banns may be lawfully published, unless by special licence, or shall knowingly and wilfully intermarry without due publication of banns or licence, from a person or persons having authority to grant the same, first had and obtained, or shall knowingly and willingly consent to or acquiesce in the solemnization of such marriage by any person not being in holy orders, the marriages of such persons shall be null and void to all intents and purposes whatsoever." The first consideration, then, is whether this is such a marriage as comes within any of these provisions, and I am of opinion that it is not.

The construction put upon this clause is the same in this as in other courts, although there may be a difference of opinion as to the evidence which may be required.

But it was pressed upon the Court that, independently of the statute, this is a nullity by the general marriage law of England.

[53] Now the act commences with repealing all other acts previously in force, and I must look to the provisions of this statute and nothing else.

Before the 26 Geo. 2, c. 33, the first statute on the subject, this would clearly have been a good marriage. A marriage in a church would undoubtedly have been as valid without banns or licence as with, for although they were requisites fit and proper to be complied with, yet they were not necessary to the validity of the marriage.

The only conclusion that I should come to would be that this was a valid marriage, and I therefore reject the libel.

THE OFFICE OF THE JUDGE PROMOTED BY WILLIAMS v. BROWN. Consistory Court of London, Trinity Term, 4th Session, June 30th, 1835.—The right of nominating to a chapel under the stat. 1 & 2 W. 4, c. 38, cannot be acquired unless the conditions required by the act be strictly complied with.—The conditions required are conditions precedent.

[Referred to, *MacAllister v. Bishop of Rochester*, 1880, 5 C. P. D. 205.]

Addams for Mr. Williams.

Haggard contra.

Judgment—*Dr. Lushington*. In this case the office of the judge has been promoted by the Rev. Mr. Williams, the incumbent of the parish of Hendon, against the Rev. Mr. Brown; and the object of the suit, as I understand, is to ascertain in this form whether Mr. Brown has been officiating in the parish of Hendon under a competent authority or not. Although the form of the suit is a criminal one, I apprehend that all that is sought to be determined, upon the facts [54] before the Court, is the rights of the respective parties. Undoubtedly the question to be decided is of very considerable importance, and I have deemed it my duty to give it very serious consideration, and to endeavour, if possible, on a consideration of the Act of Parliament, to find out its true construction, with reference to the facts and circumstances proved in evidence. Before I proceed minutely to consider the facts and the law, I think it right to make an observation upon the jurisdiction of the Court in this case. When the suit was originally instituted, I certainly entertained some doubt how far it was competent for this Court to exercise jurisdiction to the fullest extent to which the case might be carried. But on reference to authorities—the cases of *Bliss against Woods* (3 Hagg. Ecc. 486), of *The Duke of Portland against Bingham* (1 Hagg. Con. 157), of *Carr against Marsh* (2 Phill. 198), of *Moysey against Hilcoat* (2 Hagg. Ecc. 30), especially with reference to the first. I could entertain no doubt that this Court had jurisdiction and the power of expressing its opinion upon the question. But I will state candidly the difficulty which presented itself to my mind, which was this: In the course of the discussion it might, perhaps, incidentally happen that I should be trying the right to a perpetual curacy, and there was a doubt in my mind whether the Court was competent to come to a decision upon this point; or, at least, whether it would not have been open to either party to have applied for a prohibition, if the Court proceeded. However, the authorities which I have mentioned, of cases in these Courts, and which have not been [55] in the slightest degree impugned—no prohibition having been applied for—are sufficient to warrant me in considering the circumstances of this case.

It appears that the chapel in question was built by the late Mr. Wilberforce, and was consecrated a few days after his death, and it purports to have been built under the statute of 1 and 2 W. 4, c. 38. No doubt can be entertained as to the general principle of the law, where any clergyman attempts to officiate in a church or chapel within the limits of a parish without the permission of the incumbent. That has been laid down in the case of *Bliss against Woods* by Sir John Nicholl, precisely as was laid down by his learned predecessors and all authorities; namely, that it is not competent for any clergyman of the Church of England to enter a parish without leave of the incumbent, and to officiate in performing the duties of his vocation. The defence on the part of Mr. Brown is that this case is brought within an exception to the general principle of the law, and it is alleged that, under the provisions of the act, 1 and 2 W. 4, it was competent to Mr. Wilberforce to erect this chapel with the consent of the incumbent or patron, and after sufficient endowment and compliance with the various provisions of the statute, to obtain the right of nominating the minister, who might be duly licensed by the ordinary of the diocese; and that a license has been obtained. It is unnecessary to consider one part of the case; namely, whether there was a performance of divine service before a license was obtained; because that was not a question in the citation as originally taken out in the cause, and is not applicable to the [56] important point; namely, the various rights of the parties.

The question shortly comes to this: Have the provisions of the statute been complied with or not?

And if they have not, the next question is, What are the legal consequences to be deduced therefrom?

The provisions of the statute, to which the facts of the case have reference, are contained in the second section of the statute itself; and I must take the Act of Parliament as my guide, and endeavour, as far as it is in my power, to arrive at a just construction of it, with reference to the facts and circumstances which have been proved in the cause. If I am of opinion that the conditions of the statute have not been complied with, I shall have then further to consider whether these conditions are precedent or not; because if they are conditions precedent to the right of nomination vesting, and it appears that those conditions have not been carried into effect, the right of nomination will never have vested at all, and consequently any license which may have been granted on a supposition that such conditions had been complied with, and that the right of nomination had vested, falls to the ground. The sole ground upon which the ordinary grants a license is that the right of nomination has vested in the person who has nominated the individual who comes so to be licensed. It must not be understood that where a party has obtained the authority of the ordinary that authority is conclusive. It is not competent for the ordinary himself without consent of the incumbent to license any person to officiate within the limits of the [57] parish of that incumbent. It is not necessary to travel through the whole of the provisions of the Act of Parliament; but I shall first consider the objections, and whether they are supported by the evidence in the cause.

The objections resolve themselves into four heads:

The first objection is, that at the date of the passing of the act the chapel was not built and completed within the terms of one of the subsequent sections of the act.

The second objection is that the repairing-fund is not sufficient.

The third is, that the free-seats are not of sufficient extent according to the directions of the statute.

The fourth is, that the nomination has not been rightly exercised.

With respect to the first point, I have looked through the whole of the evidence with reference to the question whether the chapel was built and completed at the date of the passing of the act, according to the true meaning of the legislature; and after the best consideration I can give to the evidence I have come to the conclusion that the Act of Parliament has been on this point sufficiently complied with. The next question is one of the greatest difficulty in the case; and for the purpose of determining this question I must first refer to the terms of the Act of Parliament itself. The Act of Parliament directs that "where any person or persons, belonging to the Church of England, shall declare his, her, or their intention of building a church or chapel for the performance of divine service [as aforesaid], and where such per-[58]-son or persons shall declare their intention of providing a sum of one thousand pounds at the least by way of endowment for such church or chapel to be secured upon lands or money in the funds, in addition to the pew-rents and profits arising from the said church or chapel in case any such rents shall be taken, and shall also declare his, her, or their intention of providing a fund for the repairs of the said church or chapel, in manner following; namely, one sum equal in amount to five pounds upon every one hundred pounds of the original cost of erecting and fitting up, or of purchasing such chapel or building, to be secured upon lands or money in the funds as aforesaid; and also a further sum to be reserved annually out of the pew-rents of the said church or chapel, after the rate of five pounds for every one hundred pounds of the sum so to be provided, as last aforesaid." Now, after having looked through the evidence, I think it unnecessary to refer to it in detail, but I shall advert to such parts of it as bear upon the point I have to determine—whether or not a repairing-fund "equal in amount to five pounds for every one hundred pounds of the original cost of erecting and fitting up" the chapel has been set apart.

The evidence on this part of the case consists of the testimony of Mr. Ravenscroft and Mr. Philip Flood Page. I have read this evidence in order to see whether it established the sufficiency of the repair-fund, and I must say that, looking to this evidence and to the defect of it, I think it is a most unsatisfactory mode of establishing so important a fact. Nothing could have been more easy than to have produced to the Court a state-[59]-ment of the actual sum expended in the erection and fitting up of this chapel, and it would have been competent for the party defendant in this cause to have stated the component items of the account, out of which the sum of five pounds per cent. ought to be assessed. Instead of that, I have the evidence of Mr. William Ravenscroft, the solicitor, acting in the lifetime of the late Mr. Wilber-

force, who gives the following account of the transaction :—He knows nothing of his own knowledge as to the cost of erecting and fitting up the chapel : he was informed by another person the amount upon which the five per cent. was to be calculated upon. His evidence is this : he states that he applied to Mr. Samuel Flood Page, the architect, who told him that the amount was 3600l. and that he inserted that sum in the deed of endowment, and the sum of 180l. as the amount of five per cent. on that principal sum. Every part of the testimony of this witness tends to shew that in his judgment there was a perfect *bonâ fide* ; that it was intended that the act should be accurately complied with, and that all that was requisite and necessary was to be done. In his answer to the fourth interrogatory he goes on to say that he cannot swear either one way or the other ; so that no information is obtained from this witness.

The next witness is Mr. Philip Flood Page, and he is the brother of the architect who was employed on the occasion, and he knows nothing of the cost of erecting the chapel, except so far as he is enabled to speak from the papers in his office, and except so far as he considers himself competent, without reference to the actual cost and expenditure under the Act of Parliament, to make an estimate of the [60] sum. This witness was not the architect, but his brother was ; and his brother has not been called upon to give evidence. He is now in the Isle of Man, having left the business and gone into the Church, and it might be attended with some inconvenience to examine him. But if the party in the cause did not think it right or expedient to examine the brother, some better account might surely have been given of the costs and expense of building this chapel. The account which this gentleman gives appears to me singular. I presume Mr. Ravenscroft gave him some information as to the principle of the estimate required. He, however, states : “The sum I gave to Mr. Ravenscroft to insert in the deed of endowment as the cost of erecting and fitting up the chapel in question was 3600l. I gave him that as a round sum.” The Act of Parliament does not speak of a round sum at all. The Act of Parliament directs that there shall be set apart five per cent. upon “the original cost of erecting and fitting up.” This was not for the purpose of selling the chapel. The act speaks elsewhere of the purchase of such chapel ; but where the right of patronage is assigned to the builder and endower of a chapel, it is made a condition that five per cent. of the actual prime cost of erecting and fitting up shall be set apart as a repair-fund. “I gave that as a round sum, for my calculation made it amount to only 3325l. 18s. 8d. I had no communication with Mr. Wilberforce on the subject ; the application to me and my answer to it, so far as I know, were quite unknown to Mr. Wilberforce. I made my calculation in this manner : I took the sums paid to Messrs. Bowden and Mr. Cantellow, who had the contract [61] for building the chapel ; 3080l. 2s. 3d. paid to Messrs. Bowden, and 560l. 16s. 10d. paid to Mr. Cantellow, making 3640l. 19s. 1d.,” this exceeds the amount given to Mr. Ravenscroft by 40l. 19s. 1d. “Then I deducted from that the duties upon the building materials, 221l. 3s. 4d.”

Now really it is necessary to direct our attention to this item, for I am bound to see whether the Act of Parliament has been carried into full effect. I listened to the argument of counsel for Mr. Brown, to endeavour to learn on what principle this deduction was justified. I am aware that under other church-building acts duties were allowed to be remitted, but I am not aware that where a church or chapel has been built under this act, there is authority given by any Act of Parliament for a remission of any part of the duty. But I should like to know whether the duty has *de facto* been remitted. For whether it was or was not remitted, it is a matter of serious consideration for the Court, considering how the question presses on the party, whether the fact of the duty being remitted and repaid ought not to have been pleaded and proved in order to be made a fit subject for consideration : because, how is it possible for me to decide whether this sum of 221l. 3s. 4d. is a legal deduction from 3630l. 19s. 1d. if no statement is made to me of the authority under which the deduction is made, and when it is not averred that there has been any remission at all ? I apprehend I am under the necessity of coming to the conclusion that the item of 221l. 3s. 4d. forms a part of the original cost of erecting and fitting up this chapel, and that it is not fit to be deducted. This gentleman goes on, “I did not deduct the salary and expenses of [62] the clerk of the works, nor the cost of the iron railing, or of the hot-air stove, nor the fee of the architect, nor the painted window-guard, nor the advertisements ; for those items were not included in the gross

sum. I did not add them in my calculation of the gross cost of the chapel. Then I deducted, besides, the duty on the building materials, being part of the extras paid to Messrs. Bowden; 36l. 8s. 8½d. for the brickwork to the iron railing; 29l. 4s. 4½d. for the brickwork to the hot-air stove; 1l. 14s. for rough oak extra height of fence; 9l. for inclosing the chapel during the winter of 1829-30, and 17l. 10s. for an additional coat of paint rendered necessary from the chapel having been finished in 1830, and not consecrated till 1833. The sum of 39l. paid for the painted window I did not add. Of the whole sum of 3080l. 2s. 3d. paid to Messrs. Bowden, 357l. 2s. 3d. were extras, in which were included the items I have specified." Now this witness to the fourth interrogatory says, "I have no doubt that the erecting and fitting up of the chapel in question actually cost the late Mr. Wilberforce more than 3600l." Now I have looked as minutely as I can into the various items and to the principles of calculation which this gentleman proceeded on to see whether, according to any calculation I can make in conformity to the statute, I am able to reduce the amount of the actual cost of erecting and fitting up of the chapel to 3600l.; and I have done so with reference to the statement of this witness that the cost was only 3225l.

Mr. Wilberforce (and it is a fact which is mainly relied upon by Mr. Williams), in the month of [63] April, 1831, was desirous of disposing of the chapel at Mill Hill to the patron of the parish, on the principle of a simple re-imbursement to himself of the cost of the chapel and security for the same; and it appears from a letter from the secretary to the church commissioners, to the address of Mr. Williams, that a statement had been made by Mr. Wilberforce of the cost of the chapel, which statement is annexed to the letter, and is to the following effect:—"Cost of Mr. Wilberforce's chapel at Mill Hill, as nearly as can just now be ascertained. Account of Messrs. Bowden, the contractor (it is doubtful whether or not 90l. of this amount still remains to be paid), 3080l. 2s. 3d. Clerk of the works and other incidental expenses, 177l. 7s. 1d. Account of Messrs. Cantelow, plasterer, 560l. 16s. 10d. Mr. Smalley, iron railing, 80l. Hot-air stove, 56l. Architect, &c., 170l. Painted window-guard, advertisements, &c. &c., 12l. 4s. Altar window fittings (I am not clear of the particulars of this amount), 39l. 12s. 6d." The whole is 4176l. 2s. 8d. Then there are blanks for "furniture and fittings," and for "law charges." It is then added: "I am told that it is expected there are to be more payments amounting from 350l. to 400l., or even 500l. additional. It is expected there will be a repayment of the amount of duties paid on bricks to the amount perhaps of 100l.; but these particulars may be supplied hereafter, if the general negotiation proceeds." Now I have not the least information before me of a date subsequent to that of this paper, as to whether any of these anticipated payments were made, or whether or not Mr. Wilberforce calculated upon the items stated here; and I cannot but think that [64] it was incumbent on the party, whose duty it was to make it appear that 3600l. was the whole amount of the cost of erecting and fitting up this chapel, to shew that the sum actually paid by Mr. Wilberforce on account of the chapel did not exceed that sum; or at least to shew what was paid, and why some of the items should be considered as extras, and not to be included. I am also without any evidence as to what Mr. Wilberforce meant by other payments to the amount of 350l., 400l., and even 500l. more. Looking to the items in this statement, as they are before me, they amount to 4176l. Which of these items, consistently with the Act of Parliament, should I be justified in rejecting? "Clerk of the works and other incidental expenses." The words of the statute are, "The original cost of erecting and fitting up." I can only understand, unless the word "cost" has received by law some different interpretation, that its meaning is the actual cost incurred by the individual for erecting and fitting up the chapel; and I am of opinion that one of these expenses must be that of the clerk of the works. But if I entertained any doubts upon this point, what am I to say to "other incidental expenses?" What other expenses? And how are they to be excluded from the calculation? Then there is "architect, &c. 170l." I am at a loss to understand why that should be excluded, or that for the hot-air stove. The window-guard, being ornamental, might perhaps be excluded. But it appears to me that, if it be contended that any of these items are not fairly included in the calculation, the party is bound to point out what items, and on what principle they are to be excluded. I confess that the only [65] attempt which has been made to do so has been wholly unsatisfactory to my mind, although I acknowledge I have the strongest predisposition to come to an opposite conclusion if the law would allow me.

Because, when I see what has been the extent of the expenditure by Mr. Wilberforce, and the great advantage to the public which has been afforded by the erection of this chapel in the parish of Hendon, I feel disposed, to the utmost extent to which the law allowed me, to sustain the right of nomination. But I am bound to put the real construction upon the Act of Parliament, whatever may be the consequences to the party; for I am aware of nothing more injurious than to attempt to fit the limits of an Act of Parliament to the circumstances of a particular case. I am compelled, therefore, to conclude that the Act of Parliament has not been complied with, according to the terms of it.

Then what are the effects? The Act of Parliament goes on to say: "It shall be lawful for the bishop of the diocese in which such parish or extra parochial place is locally situate, if he shall see fit, and he is hereby authorized, to declare by writing under his hand and seal, that the right of nominating a minister to such church or chapel when so built or purchased, and endowed, as aforesaid, and when the conditions herein-before mentioned shall have been performed, shall for ever thereafter be in the person so building, or purchasing, and endowing the same, his, her, or their heirs and assigns." Then did the right of nomination vest, or was it forfeited? I apprehend it is as clear as words can express it that the per-[66]-formance of the conditions is a condition precedent to the vesting of the right of nomination.

In this view of the case I am compelled to come to the next step, and to conclude that the right of nomination never vested in Mr. Wilberforce; and if so, it follows that the license which was granted under a supposition that the right of nomination did so vest cannot be supported. Now the result which I have assumed leads me directly to the conclusion, according to my view of the case, that Mr. Brown is not at present legally entitled to perform the duty of a clergyman within the limits of the parish of Hendon. Two other objections remain to be disposed of; one is, that the room assigned for free seats is not sufficient. Looking to the whole of the evidence in the case, it appears to me that this objection could not be sustained. The total dimensions of the chapel are 609 feet, of which 252 feet are assigned to free seats: so that there appears to be sufficient to satisfy the requisites of the act. But an objection has been taken that part of the free seats are in the gallery, and that the gallery is appropriated to the children of the national school. Now I have looked into all the measurements of the architects, and into the different modes of estimate, and I think I may take it thus; that two children occupy the room of one grown person. I am of opinion, with reference to this mode, that sufficient room for free seats has been set apart in the chapel; and I am very clearly of opinion that it is a sufficient fulfilment of the Act of Parliament to set apart a space which shall include the accommodation for children; for I can never go the length of saying that, under this Act [67] of Parliament, the whole of the accommodation as free seats must be for adult persons. The children of the poor are as much entitled as grown up persons to have accommodation for attending divine service, and I consider this objection not supported. The Court has then only to consider the remaining objection as to the mode in which the nomination was made. I am of opinion that I am not called upon to consider that question. I think if the right of nomination had vested in Mr. Wilberforce it would not have been necessary for me to consider whether the form of the nomination had been precisely consistent with regularity or not. This is not the substantial question before the Court.

Looking at all the circumstances of the case I am compelled to come to the conclusion that, as far as I am enabled to form a judgment of the true construction of the Act of Parliament, and of the evidence, the provisions of the act have not been complied with; that a compliance with the provisions of the act is a condition precedent to the vesting of the right of nomination, and that the right not having vested, the license granted under a supposition that the right had vested cannot be supported.

I wish it to be distinctly understood that I impute no blame to any of the parties whatever, I have no doubt of the bona fides, and of the intention of all to fulfil the terms of the Act of Parliament; but I must say that it is most unfortunate that where the conditions of an Act of Parliament are so clear and explicit, and where a reference to the Act of Parliament might have enabled the individuals to have understood its directions and conditions, and to have complied with them lite-[68]-rally, instead of that, reference was made, not to the architect of the chapel, but to another individual who could give no information to the other party, who had no knowledge

of the circumstances ; and that a computation should have been made, not with reference to the actual cost of the building and fitting up of the chapel, the only criterion prescribed by the Act of Parliament. On these grounds I am under the necessity of coming to the conclusion that the articles have been proved. It is clear that this is a case in which I should not think of giving costs on either side.

[69] WYNN v. DAVIES AND WEEVER. Arches Court, Michaelmas Term, 1st Session, 1835.—Articles against a clergyman for publishing banns of marriage between persons not parishioners of, nor resident in, his parish, and for marrying such persons, admitted.

The King's advocate and Phillimore for the appellant.

Lushington and Addams contra.

Judgment—*Sir Herbert Jenner*. This is an appeal from the sentence of the chancellor of the diocese of Hereford, admitting certain articles in a cause of office promoted by Davies and Weever, the churchwardens of the parish of St. Nicholas, Hereford, against the Rev. Thomas Wynn, clerk, for publishing the banns of marriage between persons not being parishioners or resident in that parish, and for marrying such persons ; also for not distributing the alms collected at the offertory in pious and charitable uses pursuant to the rubric in the Book of Common Prayer.

The citation was dated the 2nd of August, 1834, and was returned into Court on the 7th of August.

On the same day an appearance was given for the party cited, and the articles were brought in. On the 23rd of September a prayer was made by the proctor of the promoter to amend certain of the articles, which was permitted by consent ; and on [70] the 30th of October the admissibility of the articles was debated. The Court took time to deliberate ; and on the 14th of November the proctor of the promoter prayed leave to strike out parts of other articles ; and on the 11th of December, 1834, the chancellor admitted the articles.

From this decree an appeal was prosecuted, and the case has been very fully argued. The question raised being one of very great importance, both as respects the public interest, and the parochial clergy of this country, and the individual more immediately concerned in the proceedings, and not having, as far as I am able to learn, been as yet judicially determined, the Court thought it right to take some time to consider of the judgment which it ought to deliver, as well as to look into those cases which were cited on one side and on the other ; and this, with other unavoidable causes, occurring in the earlier stages of the hearing, have postponed the decision of this case to a later period than was desirable. I have thought it right to say thus much in explanation of the delay that has taken place, that no blame might attach to the parties or the practitioners. I now proceed to the question before the Court.

The principal objection charged I have already stated to be that of publishing the banns of marriage, and of marrying persons not resident within the parish, and the objection taken to the admissibility of the articles is that the offence imputed to the appellant, if a violation of the law, is not cognizable in the Ecclesiastical Courts ; and a doubt is raised whether in fact it ever was cognizable in those Courts ; or if so, whether the jurisdiction has not been taken away by subsequent statutes.

[71] Now that the performance of religious rites and ceremonies was under the superintendence and direction of the ordinary, to whose authority the clergy were amenable, is too clear to admit of dispute, and it would be a waste of time to refer to any authorities in support of this position ; in fact, the correction of the clergy in matters relating to the performance of divine worship is, and always has been, more peculiarly the province of the ordinary.

That the canon law prohibited clandestine marriages, and inflicted punishment on the parties contracting such marriages, as well as on the minister solemnizing them, is abundantly clear ; and it is no less certain that marriages were forbidden to be solemnized by any other than the priest of the parish in which the parties resided ; unless with the license of the diocesan and of the curate of the parish. It would hardly have been necessary to cite passages from the canon law in support of this latter doctrine, but for the doubt which was suggested in the argument ; but as that doubt has been raised the Court is called upon to refer to some of the authorities in order to establish this position.

The constitution of Archbishop Reynolds is as follows: (a)—“In matrimonio quoque contrahendo semper tribus diebus dominicis vel festivis a se distantibus, (b) quasi tribus edictis, perquirant sacerdotes a populo de immunitate sponsi et sponsæ. Si quis autem sacerdos hujusmodi edicta non servaverit, pœnam nuper in concilio super hoc statutam non evadat.”

[72] And as Lyndwood observes in the gloss: “Hæc pœna est suspensionis per triennium” (Decretal, Greg. lib. 4, tit. 3, ch. 3).

Here then is suspension for three years of the minister solemnizing matrimony without publication of banns. Simon Mephram’s constitution is an authority also on this point:

“Quia ex contractibus matrimonialibus absque bannorum editione præhabitâ initis, nonnulla pericula evenerunt, et manifestum est indies provenire, omnibus et singulis suffraganeis nostris præcipimus statuendo quod decretalem cum inhibitiō (Quâ prohibetur ne qui matrimonium contrahant, bannis non præmissis in singulis ecclesiis parochialibus suæ diœcesis pluribus diebus solennibus, cum major populi affuerit multitudo), exponi faciant in vulgari, et eam firmiter observari, quibusvis sacerdotibus etiam non parochialibus, qui contractibus matrimonialibus ante solennem editionem bannorum initis præsumpserint interesse, pœnam suspensionis ab officio per triennium infligendo et hujusmodi contrahentes etiamsi nullum subsit impedimentum pœnâ debitâ percellendo” (Lyndwood, book 4, tit. 3).

Also Archbishop Stratford (ibid.): “Præsentis auctoritate concilii statuimus, quod exnunc matrimonia contrahentes, et ea inter se solennizari facientes, quæcunque impedimenta canonica in ea parte scientes, aut præsumptionem verisimilem eorundem habentes; sacerdotes quoque qui solennizationes matrimoniorum prohibitorum hujusmodi seu etiam licitorum inter alios quam suos parochianos in posterum scienter fecerint, diœce-[73]-sanorum vel curatorum ipsorum contrahentium super hoc licentiâ non obtentâ . . . majoris excommunicationis sententiam incurrant ipso facto.”

The text law then especially prohibits priests from solemnizing marriage, even though lawful, between others than their own parishioners; and Lyndwood on the same chapter observes, “Matrimonium dicitur clandestinum multis modis;” and, amongst others, says, “quia non præmittuntur publicæ denuntiationes sive banna publica.”

There is then no doubt that not only the parties contracting, but also the priest solemnizing clandestine marriages, were punishable by the ancient canon law as received and allowed here; and that a marriage, not preceded by publication of banns, or license, or between persons not parishioners, was in the meaning of that law a clandestine marriage; and this continued to be the law down to the time of the passing of the marriage act (26 Geo. 2); at least, in 1736, it was so held in the case of *Middleton v. Croft* (2 Atkyns, 650), so often referred to and so much relied on in the argument. And the case of *Mattingley v. Martyn* (W. Jones, 257) was mentioned by Lord Hardwicke in support of this part of his judgment, where it was resolved: “That if any persons marry without publication of banns, or license dispensing with it, they are citable for it in the Ecclesiastical Court;” and this even in the case of lay persons, so à fortiori in the case of the clergy.

The question then is simply reduced to this, whether the marriage act (4 Geo. 4, c. 76) by which a clergy-[74]-man knowingly and wilfully solemnizing marriage without due publication of banns, or license, is liable to be convicted as a felon, and to be transported for fourteen years, has repealed the canon law, and taken away the ancient jurisdiction of the Ecclesiastical Court in such matters; and this, undoubtedly, is a very grave and serious question, and deserves great consideration, more especially as there does not, as before observed, appear to have been any actual decision upon it; the only case which is to be found being that of *Campbell, Clerk v. Aldridge, Clerk* (2 Wilson, 79), which occurred shortly after the marriage act (26 Geo. 2); that case was to this effect, a clergyman was called upon to answer in the Ecclesiastical Court, for solemnizing marriage without banns, or license, and for performing other religious rites without the license of the ordinary, and a prohibition was prayed upon the suggestion that since the marriage act the offence was only cognizable in the temporal courts. The Court did not absolutely determine the point, but the prohibition was

(a) Lyndwood, book 4, tit. 1, De Sponsalibus et Matrimonio.

(b) This now by stat. 4 Geo. 4, must be on three Sundays.

made absolute as to marrying without banns or license, the plaintiff having leave to declare in prohibition, in order that the question on the marriage act might be more solemnly argued and decided, thereby, as I understand, intimating an inclination against the jurisdiction of the Ecclesiastical Court; not deciding that point, as nothing further appears to have been done in the case; it cannot therefore be considered as a binding authority, and the rather, because the arguments upon which the application for a prohibition was founded, or the reasons of the judgment, are not given at length in the report. It is [75] certainly somewhat extraordinary that, considering the great lapse of time between the passing of the first marriage act, and the present day, no traces are to be found of any other proceedings, either against parties, or clergymen, in the records of these courts, nor, as I believe, in the reports of cases occurring in the courts of common law, and the absence of any such proceedings may in some degree countenance the suggestion that the general and received opinion has been, that the ecclesiastical jurisdiction no longer exists; otherwise numerous cases have occurred in which it might be supposed that the law would have been put in force; but this is not conclusive, the law may exist, though it may have been suffered to sleep.

In the absence therefore of any direct precedent, the Court must consider this question of law upon principle, and such analogies as decisions in other cases may furnish for its guidance. Now it must be, and indeed has been, admitted that these courts have no power to inquire directly and originally as to any pleas of the Crown, and upon the authority of Lord Hardwicke's opinion in the same case of *Middleton v. Croft* it may perhaps be further admitted that an Act of Parliament imposing a penalty recoverable in the temporal courts upon a particular offence, formerly cognizable in the Ecclesiastical Courts, would repeal any authority which those courts had by force of the canon law, unless there were words reserving the jurisdiction of those courts. But it would still remain as in that case to be inquired whether the cognizance which these courts had of the particular offence charged in these articles did at the time of the passing of the marriage act solely and entirely depend upon the [76] canon law, or whether that law was not sanctioned and confirmed by Acts of Parliament, and thereby made part of the statute law; and if so, then, whether those statutes have also been repealed by the marriage act.

Now here the same case of *Middleton v. Croft* seems to furnish a pretty strong precedent. Lord Hardwicke having declared that the ancient canon law respecting marriages was binding upon the laity, and a fortiori therefore on the clergy, proceeded to consider another head of argument which had been urged, namely, that as the statute 7 and 8 W. 3, c. 35, had imposed a penalty of 10l. upon parties marrying without banns or license, to be recovered in the King's courts, it took away the ecclesiastical jurisdiction. Upon this his Lordship observed that "the general question, whether an Act of Parliament inflicting a pecuniary penalty or other temporal punishment upon an offence, of which the spiritual court had a prior jurisdiction without a special saving thereof, doth not take away such jurisdiction, hath been much agitated and undergone diversity of opinions." He then proceeds to mention several cases in which different decisions had been given, and adds, that the case of *Matthews v. Burdett* (2 Salk. 672) in the first year of Queen Anne was thought of so much difficulty as to be solemnly argued, but by reason of the death of one of the parties it was never determined: "It must, however," he continues, "be admitted that where the ecclesiastical censure and temporal punishment are both levied against the same identical offence, the rule of *nemo bis [77] puniri debet pro eodem delicto* is a strong objection against allowing such a double proceeding, for how could a sentence in the Ecclesiastical Court be pleaded by way of autrefois convict to an action or information on the statute."

This mode of reasoning seems to admit that the case in Lord Hardwicke's opinion had not at that time received any positive decision. It is therefore to be collected from these observations, and what follows, that it was at least the inclination of Lord Hardwicke's opinion, as well as that of the other judges of the Court of King's Bench, whose judgment he was delivering, that if the statute of 7 and 8 W. 3 had imposed the penalty for a breach of the public order of the church, and as a punishment for that offence; the jurisdiction of the Ecclesiastical Court would have been repealed, so far as it depended upon the canon law alone; but considering that that statute, which imposed a duty on licenses, was passed *diverso intuitu*, i.e. for the protection of the revenue, the Court was of opinion that the statute and the canon law might both consist.

In the present case, however, the statute and the canon law are both directed against the same offence; the distinction, therefore, made in the case of *Middleton v. Croft* does not exist, and if the matter rested there, this Court would, I think, be bound to hold that the Ecclesiastical Court had no power to entertain this question, supposing it to amount to a charge of felony. But the judgment in that case did not solely proceed upon the ground of that distinction, for Lord Hardwicke continues, "Further, there is another ground to support this proceeding in the Ecclesiastical Court, [78] and to distinguish this case from those which have been cited in argument. The rubric prefixed to the office of matrimony in the Book of Common Prayer, both that of 2 and 3 Ed. 6, and 13 and 14 Ch. 2, says, first the banns of all that are to be married together must be published in the church thrice on several Sundays or holidays in the time of divine service."

"This provision is confirmed," he says, "by the several acts of uniformity of these Kings, and by reference is expressly made part of the respective acts. The act of uniformity, 1 Eliz. c. 2, re-enacts the Book of Common Prayer of Ed. 6, without any alteration in this particular, and has this clause, sect. 16, 'Be it further enacted, that all archbishops, bishops, and all other their officers exercising ecclesiastical jurisdiction, as well in places exempt, as not exempt within their dioceses, shall have full power and authority by this act, to reform, correct, and punish by censures of the Church, all, and singular persons who shall offend within any their jurisdictions or dioceses against this act and statute; any other law, statute, privilege, liberty, or provision heretofore made, had, or suffered to the contrary notwithstanding.'"

The act of uniformity, 13 and 14 Ch. 2, c. 4, s. 24, runs thus: "And be it further enacted, that the several good laws and statutes of this realm, which have been formerly made, and are now in force for the uniformity of prayer and administration of the sacraments within this realm of England and places aforesaid, shall stand in full force and strength to all intents and purposes whatsoever, for the establishing and confirming of the said [79] Book of Common Prayer, hereinbefore mentioned, to be joined and annexed to this act, and shall be applied, practised, and put in use for the punishment of all offences contrary to the said laws with relation to the book aforesaid, and no other." The inference which Lord Hardwicke drew from these enactments was, first, that by the express words of the 1 Eliz., the act of uniformity, offences against that act were punishable by the censure of the Church; and, secondly, that by the act of uniformity, 13 and 14 Ch. 2, the power of the ordinary is continued and directed to be applied and practised for punishing the like offence against the rubric of the present Book of Common Prayer.

Lord Hardwicke then proceeds, "Hereupon a new question arises, supposing that the enacting this pecuniary penalty by statute 7 and 8 W. 3, c. 35, might, by implication, have taken away or repealed any authority which the spiritual court had originally in this matter, by force of the canon law, whether it shall operate to take away a jurisdiction expressly given to it by a former Act of Parliament, and consequently, pro tanto, to repeal that Act of Parliament. The rule touching the repeal of laws is, *Leges posteriores, priores contrarias abrogant*; but subsequent Acts of Parliament, in the affirmative, giving new penalties, and instituting new methods of proceeding, do not repeal former methods and penalties of proceeding, ordained by preceding Acts of Parliament without negative words; and as in 7 and 8 W. 4, c. 35, there are no negative words, both may stand together, and either the one or the other may be put in execution. Besides, a latter Act of Parliament hath never been construed to [80] repeal a prior act without words of repeal, unless there be a contrariety and repugnance between them, or at least some notice taken of the former law, in the subsequent one, so as to indicate an intention in the law makers to repeal it." So that Lord Hardwicke's opinion seems to be that, in order to repeal an existing statute, the latter statute must either have express words of repeal, or must be contrary to the provisions of the law said to be repealed; or that, at least, mention must be made of that law, shewing an intention of the framers of the latter Act of Parliament to repeal the former.

How then does the matter stand in this respect, with reference to the present case, if tried by these tests?

First. There are no express words of repeal in the 4 Geo. 4, c. 76, so that the case stands clear of that objection.

Secondly. Are the provisions of the marriage act repugnant, or contrary, to the

existing law? I can find none such; on the contrary, they seem to be confirmatory of it, as will appear more particularly in considering the third test proposed, namely, whether there was any intention on the part of the legislature to repeal the pre-existing law, to be discovered either with reference to the provisions of the 26 G. 2, or 4 G. 4. These acts direct that the banns shall be published in the parish church, or in some public chapel, in which public chapel banns of marriage have been usually published of or belonging to such parish or chapelry, wherein the persons to be married shall dwell, according to the form of words prescribed by the rubric prefixed to the office of matrimony in the Book of Common Prayer (these rules being clearly drawn [81] from and founded on the ancient canon law) during the time of morning service, or of evening service, if there shall be no morning service, in such church or chapel upon the Sunday upon which such banns shall be so published immediately after the second lesson; and whenever it shall happen that the persons to be married shall dwell in divers parishes or chapelries, the banns shall in like manner be published in the church or such chapel as aforesaid belonging to such parish or chapelry wherein each of the said persons shall dwell, and that all other the rules prescribed by the said rubric concerning the publication of banns and solemnization of matrimony shall be strictly observed. So far, then, the Act of Parliament differs from the rubric, in directing that the banns shall be published on three Sundays (not holydays as in the rubric) and after the second lesson, instead of after the Nicene Creed, but in every other respect it adopts and confirms the rule therein given for the publication of banns and solemnization of matrimony, and is, therefore, very far from indicating any intention to repeal the existing law in any other particulars than those to which I have referred; but the tenor of the act, in other places, clearly supposes that the ecclesiastical law continued in force and operation. By the subsequent sections of the same Act of Parliament, and also in 4 Geo. 4, c. 76, it is provided that no minister in solemnizing marriages between persons both or one of whom shall be under the age of twenty-one years, after banns published shall be punished by ecclesiastical censures for solemnizing such marriages without consent of parents, or guardians whose consent is required by law, unless [82] such minister shall have notice of the dissent of such parents or guardians, and in case such parents or guardians, or one of them, shall openly or publicly declare or cause to be declared, in the church or chapel where the banns shall be so published at the time of such publication, his, her, or their dissent to such marriage, such publication of banns shall be absolutely void. This section of the Act of Parliament certainly repeals that part of the 62nd Canon of 1603 which prohibited marriages between minors before the parents or governors of the minor personally, or by sufficient testimony, signified their consent to the marriage. But supposing that the minister, after notice of dissent, should proceed to the solemnization of the marriage, he would clearly not have been exempted from ecclesiastical censures, and would as clearly be liable to be convicted of felony and to transportation for fourteen years, for knowingly and wilfully solemnizing marriage without due publication of banns; the publication being by the same sections declared to be absolutely void. These then are strong indications that it was not the intention of the legislature to repeal the ecclesiastical law on this subject; but that both should stand together. I cannot, therefore, but think that these Acts of Parliament do not, and were not meant to, repeal the authority of the Ecclesiastical Courts in cases of this description, but that one or the other may be put in execution; and this, even in cases where the conduct of the minister may have been such as to render him liable to an indictment and conviction of felony.

But does it follow that the offence imputed by the present articles necessarily constitutes, or that [83] Mr. Wynn would be convicted of, felony if the whole of the articles were proved? It is not in any one part, or in the whole taken together, alleged that the party cited has knowingly and wilfully married any persons without due publication of banns; true it is that he is accused of publishing the banns of marriage, and of solemnizing matrimony between persons neither of whom were residing in his parish, and this may by reference to the provisions of the Act of Parliament be considered as a marriage without due publication of banns; the clear intendment of the law being that banns shall be published between persons resident in the parish, and that banns not so published shall be null and void. But then the minister must knowingly and wilfully offend against the act to incur the penalty. Now the ecclesiastical law is in this case sought to be enforced against him, for having neglected

to satisfy himself that the parties whose banns were published were resident, or dwelt, within his parish—for not using the means provided by the law to satisfy himself of the residence of the parties before he published the banns, or before he proceeded to solemnize the marriage between parties whose banns had been published by other persons in his church, and not for any wilful violation of the law.

It is, indeed, true, as observed by Dr. Phillimore, that the law is not imperative upon him to require seven days' notice before he publishes the banns, nor would he be punishable for publishing the banns without that particular notice, or the expiration of the seven days; but if he chooses to dispense with the notice which he is entitled to require, and if it should turn out that the parties are not entitled to [84] have the banns published in his parish, he must take upon himself the consequence of his own neglect to do that which the law has provided for his security; he cannot be allowed to shelter himself under the excuse that he was ignorant of the fact of their non-residence in the parish, when he might, and ought to, have inquired into the facts. This view of the law is supported by cases which have occurred elsewhere, particularly in the Court of Chancery, which, although they may not perhaps have the authority of absolute decisions upon the point; yet as the observations made therein necessarily arise out of the proceedings, and are intimately connected with them, and are not therefore to be treated as mere obiter dicta; and considering the persons from whom they fall, and the frequent repetition of them, they are entitled to great weight and attention.

In the case of *Moore v. Moore* (2 Atkyns, 157), in 1741, which was before the marriage act, 26 Geo. 2, Lord Hardwicke said, "It is very surprising when canons, with respect to marriages, have laid down directions so plainly for the conduct of ecclesiastical officers and clergymen (which though they have not the authority of an Act of Parliament, and consequently are not binding upon laymen, yet certainly are prescriptions to the Ecclesiastical Courts, and likewise to clergymen) that there should be such frequent instances of their departing from them, and introducing a practice entirely repugnant to them, vide Can. 62, 102, &c., in 1603, all of them extremely plain in their directions to ecclesiastical officers and clergymen: one would think no body ever read them, neither [85] the officers of the spiritual courts, nor clergymen, or they could not act so diametrically opposite to them.

"No ecclesiastical persons can dispense with a canon, for they are obliged to pursue the directions in them with the utmost exactness, and it is in the power of the Crown to do it only.

"What Mr. Charles (the clergyman) swears I believe is true, that it is very frequent for surrogates to fill up the blanks in licenses with the name of any other parish, and this in some measure may justify him, as it is the common method among clergymen; but then this will not excuse with regard to penalties in the canon, which expressly directs that no clergyman shall presume to marry a person out of the parishes in which the man and woman reside."

In *Priestly v. Lamb* (6 Vesey, 421), in which there had been a marriage by banns at the parish church of St. Andrew, Holborn, between a young lady who was at school at Camberwell, and a person who had chambers at Furnival's Inn. The parties left Camberwell on the morning of the marriage, and it did not appear that the lady had actually resided in Holborn; they were afterwards again married at Lambeth, and the clerk of the parish stated in his affidavit that it is not customary to make any inquiry as to the residence of parties applying to be married; Lord Eldon said, "By the affidavit of the clerk of the parish of Lambeth it is disclosed that they conceive in that parish that they do their duty to the public and to the individuals whom they are to marry, never making any inquiry as to [86] the residence of the parties. In the canon law which binds the clergy of this country, from 1328 to 1603, it is laid down that it is highly criminal to celebrate marriage without a due publication of banns, which must be interpreted a publication of banns by persons having to the best of their power informed themselves that they publish banns between persons resident in the parish; and very heavy penalties are by that law inflicted upon clergymen celebrating marriage without license, or a due publication of banns." He then goes on to mention the penalty by statute, felony, and adds, "A subsequent clause makes it felony in a clergyman to celebrate marriage without license or publication of banns. I do not mean to intimate that a clergyman believing there was a residence would be guilty within that clause. But upon the principles of the common

law, as well as the statute law, laying penalties upon marriage without license or a due publication of banns, though such a fact should not be within the meaning of that clause, it has the character of an offence within the law of this country. What other sense can be given to the 10th section of the act, which, looking at the person ruined, as this girl is, enacts that, after there has been a marriage de facto with publication of banns, no evidence shall be given to disprove the fact of residence in any suit in which the validity of the marriage comes in question. But for all other purposes it may be the subject of inquiry; and the law of the country would reach it by a criminal information." Lord Eldon goes on, "From what I have seen in this Court, alluding to the cases in which Lord Thurlow and Lord [87] Rosslyn ordered the attendance of the clergymen, I know that this subject is carried on with a negligence and carelessness that draws in gentlemen of good intentions; and I feel that it may be very difficult in this great town with all possible diligence to execute this duty as effectually as the law seems to require that they should execute it: but where a case has occurred in which it is clear that if any one of the parties had done what the law required from all of them this marriage could not have taken place, I must say it amounted to a criminality, which I hope will not occur in future." Observations to the same effect were also made by Lord Eldon in the cases of *Nicholson v. Squire* (16 Ves. 259), and *Warter v. Yorke* (19 Ves. 453).

For the several reasons, therefore, which I have stated, I am of opinion that the original jurisdiction which the Ecclesiastical Courts possessed and exercised in cases of this description is not taken away by any of the statutes; that the ordinary is still entitled to proceed to the correction of any of his clergy who may offend against the order of the Church in publishing banns and solemnizing matrimony in any other manner than that prescribed by the law; and that if the charges contained in these articles shall be established by evidence, Mr. Wynn is liable to be canonically punished for such offence.

I now proceed to consider the next objection raised in argument, which is against the jurisdiction of the particular Court in which these proceedings have been instituted, namely, in the Consistorial Court of the diocese, in which the parish in question is locally situated, and on this part of the case it is said that the parish of St. Nicholas is pleaded to be in the deanery of Hereford, the dean being described as ordinary, and that there is no averment that the bishop has any jurisdiction in this part of the diocese at any time; or that if he has, it is not alleged that there was any triennial visitation at the time this suit commenced; it being merely pleaded inferentially in the 18th article, amongst other things, that "by reason of the triennial visitation of the bishop, the party cited was liable to the jurisdiction of the Consistorial Court." When this objection was first raised it made some impression on the mind of the Court, and it had some doubt whether, this being a criminal suit, it could permit the parties to plead the jurisdiction more fully; but on further consideration, and looking to what has been done in other cases, particularly in that of *Schultz and Hodgson* (1 Addams, 281), in which, even after articles had been admitted, and an issue given in the Court below, the cause having been appealed in a subsequent stage, this Court permitted additional articles to be given in; not indeed pleading new matter, but by way of supply of proof of what had been before pleaded. So here, particularly as the articles have not been admitted, and consequently issue has not been joined, I think that the Court is at liberty to permit the party to plead the fact of the bishop's triennial visitation at the time in question, and to exhibit a copy of the inhibition in supply of proof; and the rather, because no protest to the jurisdiction of the Court has been made in act on petition, [89] nor has it been intimated or suggested that the Court had not jurisdiction; all that is said being that the jurisdiction does not clearly appear on the face of the articles; all the subsequent acts of the party rather tend to confirm the jurisdiction than to impeach it: and on this additional ground, that, as was stated by Dr. Lushington, the bishop *primâ facie* has jurisdiction over the whole of the diocese, and that it lies upon the party impugning his jurisdiction to shew that he has parted with it, and that even if he had, he might still have a concurrent jurisdiction, or even an exclusive one, in the time of his triennial visitation; and it is for its own satisfaction that the Court requires this addition to the articles.

Having thus disposed (so far as this Court can dispose of it) of the question of general and particular jurisdiction, I proceed to consider the specific objections which have been made to the articles themselves, and here it may be observed that in all

cases, but particularly in cases of correction, the articles should contain a clear and distinct statement of facts intended to be proved—not travelling into extraneous or argumentative matter—and that they should be as succinctly drawn as the nature of the case will allow; and the present articles have been objected to as not conforming to these principles, and in some measure I accede to the observation; I think that they are in some measure too diffuse, and that they will bear curtailment; but I do not think that the objection that too many charges are contained therein, or that they impose an undue burthen upon the appellant, is well founded. I think the case required an iteration of specific instances, and that this has [90] been occasioned by the act of the party himself in continuing the practice after the remonstrances of his ordinary.

The Court then, after minutely canvassing the objections taken to the articles, pronounced for the appeal, rejected some of the articles, and directed others to be reformed.

The articles were afterwards admitted as reformed, and were in substance as follows:—

First. The institution of the Rev. Thomas Wynn, on 16th April, 1820, to the rectory of St. Nicholas, in the city of Hereford.

Second. An authentic copy of the entry of such institution in the muniment book kept in the registry of the Dean of Hereford.

Third. That in and by the 62nd of the Constitutions and Canons of 1603 it is provided, “That no minister upon pain of suspension per triennium ipso facto, shall celebrate matrimony between any persons without a faculty or license duly granted, except the banns of matrimony have been first published three several Sundays or holydays in the time of divine service in the parish church or chapels where the said parties dwell, according to the Book of Common Prayer.”

Fourth. That by the 2nd section of statute 4 Geo. 4, c. 76, it is enacted, “That from and after the first day of November, 1823, all banns of matrimony shall be published in an audible manner in the parish church or in some public chapel, in which [91] chapel banns of matrimony may now or may hereafter be lawfully published, of or belonging to such parish or chapelry wherein the persons to be married shall dwell according to the form of words prescribed by the rubric prefixed to the office of matrimony in the Book of Common Prayer, upon three Sundays preceding the solemnization of marriage during the time of morning service, or of evening service (if there shall be no morning service in such church or chapel upon the Sunday upon which such banns shall be so published) immediately after the second lesson; and whensoever it shall happen that the persons to be married shall dwell in divers parishes or chapelries, the banns shall in like manner be published in the church or in any such chapel, as aforesaid, belonging to such parish or chapelry wherein each of the said persons shall dwell; and that all other the rules prescribed by the said rubric, concerning the publication of banns and the solemnization of matrimony, and not hereby altered, shall be duly observed; and that in all cases where banns shall have been published, the marriage shall be solemnized in one of the parish churches or chapels where such banns shall have been published, and in no other place whatsoever.” That by the 7th section of the said act it is expressly provided, “That no parson, vicar, minister, or curate shall be obliged to publish the banns of matrimony between any persons whatsoever, unless the persons to be married shall, seven days at the least before the time required for the first publication of such banns, respectively deliver, or cause to be delivered, to such parson, &c. a notice in writing, dated on [92] the day on which the same shall be so delivered, of their true Christian names and surnames, and of the house or houses of their respective abodes within such parish or chapelry, as aforesaid, and of the time during which they have dwelt, inhabited, or lodged in such house or houses respectively.”

Fifth. That notwithstanding the premises you, the said Rev. Thomas Wynn, have been for several years last past in the frequent practice of publishing in your said parish church of St. Nicholas the banns of marriage between persons described in such banns as of or belonging to your said parish, although at the times of such banns being published neither of such persons were resident in or of, or belonging to, your said parish; and afterwards of marrying certain of the persons whose banns were so published in virtue of such undue publication, as hereinafter particularly set forth.

Sixth. That by reason of the premises, the marriages had in your said parish have,

for several years last past, been much more numerous than they would have been had the same been solemnized between persons only of your said parish; in part supply of proof, that by the last returns of population made pursuant to the act of 11 Geo. 4, c. 30, the population to whose use your said parish church is appropriated for marriages is 1134, and no more, and that the total number of marriages in your said church, within the period of six years, on the 31st of December, 1833, was 266.

Seventh. That the following, among other marriages, were had and solemnized by you, the said Rev. Thomas Wynn, in your said parish church in virtue of banns published between the parties, in [93] which banns both the said parties were described as of your said parish of St. Nicholas, to wit, on 31st of December, 1828, Thomas Powell Chamberlain to Sarah Colecomb; in 1832, 5th of February, William Prosser to Ann Coburn; 2nd of April, Richard Preece to Ann Gwillam; that neither of the said parties were resident in or parishioners of your said parish, but were at such times severally and respectively resident as follows:—Thomas Powell Chamberlain and Sarah Calcomb, both in the parish of Much Mansel, in the county of Hereford; William Prosser and Ann Coburn, both in the parish of All Saints, in the city of Hereford; Richard Preece and Ann Gwillam, both in the parish of Stoke Edith, in the county of Hereford, &c.

Eighth. That in the year 1833 the following, among other marriages, &c. &c., setting forth twelve instances in the same form as in the preceding article.

Ninth and tenth were struck out.

Eleventh. Also, that within the current year, 1834, the following, &c., 2nd of February, Richard Ackland to Mary Lewis; 10th of February, Thomas Jones to Elizabeth Pritchard; 16th of February, John Lloyd to Mary Lloyd; that at such times not resident in, &c. as in the former articles.

Twelfth and thirteenth were struck out.

Fourteenth. That in the commencement of this current year, 1834, you, the said Thomas Wynn, were duly remonstrated with respecting your irregular conduct in marrying persons who did not dwell or reside in your said parish of St. Nicholas, by your ordinary, the Dean of Hereford, and warned to be more careful for the future in relation thereto; but we further article and object that, notwithstanding [94]-ing such remonstrance and warning, you, the said Rev. Thomas Wynn, continued to publish the banns of matrimony between persons who did not dwell or reside in your said parish; and thereupon your ordinary, the Rev. John Merewether, Doctor in Divinity, the Dean of Hereford, wrote and sent you, on or after the 14th of March, this year, a written admonition in words following (that is to say):

“Rev. Sir,—I had hoped that my visit to you would have had the desired effect, and it was my earnest wish by that course, which I adopted as most likely to prevent anything disagreeable to your feelings, to induce you to guard against such gross irregularities for which you are responsible (not the clerk), and thus to prevent the painful necessity of further interference on my part. I regret to find, by official communications made to me since my return, that the evil still continues, and that several most flagrant cases have occurred.

“It now becomes an imperative duty on me, as ordinary, to require that in all cases of the publication of banns, you will insist in having seven days’ notice according to the Act of Parliament, and will personally satisfy yourself that the parties are actually and bonâ fide inhabitants of your parish, or at least one of them, and that you will not marry any couple, one of whom belongs to another parish, without the certificate of the publication of banns in his or her parish. I must also require, in case you have any parties under publication of banns at this time, that [95] you will satisfy yourself that they are resident in your parish, or that you will suspend the future publication of them until you are so satisfied.—I am, Rev. Sir, your faithful servant,

“JOHN MEREWETHER, Dean.”

And we further article and object to you, &c. that your said ordinary, the said Dean of Hereford, did on or about the 17th of April in the current year write and send to you a letter in the words following (that is to say):

“Dear Sir,—I am informed that a couple whose banns have been published in your church the second time last Sunday, by name William Watkins and Ann Dovey, are not parishioners, nor residents in your parish; the man took a lodging, and slept one night in that lodging, where some of his things remain, but that you are aware is

not sufficient. I should have been sorry had this come to my knowledge after the persons had been married, but it proves the necessity which exists for my pressing on you the duty of personally ascertaining the fact of residence, and the strict observance of the provisions of the Act of Parliament.—I remain, dear sir, your faithful servant,

“JOHN MEREWETHER.”

Deanery, 17th April, 1834.

Fifteenth. Also, &c., that notwithstanding as well the personal remonstrances and warning, as the [96] written admonitions and injunctions of your said ordinary, &c., as pleaded, you, the said Rev. Thomas Wynn, continued to go on in your unlawful and irregular practice of publishing the banns of matrimony in your said parish church between persons, &c., and that since such remonstrance you have, in the course of this current year, 1834, published the banns of matrimony between the following persons respectively, all described of your said parish, to wit, William Watkins and Ann Dovey; James Jones and Elizabeth Cotterell; Henry Woodhouse and Susan Pulling; John Baker and Jane Hinton; John Smith and Mary Cooper; further (as before), that neither of the said parties are of your parish, &c. &c.

Sixteenth and seventeenth were struck out.

Eighteenth. That you, the said Rev. Thomas Wynn, are of the parish of St. Nicholas, in the deanery of Hereford, and therefore, and by reason of the premises, and of the inhibition issued by the lord bishop of the diocese of Hereford, at or on account of his triennial visitation, and of your appearance herein given, were and are subject to the jurisdiction of this Court; and we further article and object that notice of such inhibition was duly given to the parties inhibited pursuant to the tenor thereof, and that the same came into operation on the 10th of July, 1834, and continued in operation for the space of three months, and in part supply of proof of the premises a copy of the original inhibition was exhibited.

Nineteenth and twentieth. The usual concluding articles.

[97] GRIFFIN AND AMOS (LEGREW AND OTHERS INTERVENING) v. FERARD. Pre-rogative Court, Dec. 8th, 1835.—A paper not dispositive upon the face of it, nor shewn to be by extrinsic evidence, not entitled to probate.

Judgment—*Sir Herbert Jenner*. The question in this case arises as to the validity of a paper propounded as a codicil to the will of Daniel Agace, Esq., who died in the month of April, 1828, having made and duly executed a will and two other codicils; respectively dated the will, 12th of April, 1820, the first codicil, 13th of February, 1826, the second codicil, 20th of April, 1828.

The paper in question, which is all in his own handwriting and is addressed to his executors, being dated on the 20th of April, 1820, is signed by the deceased, but not in the presence of witnesses.

Shortly after the deceased's death these papers were all found together, in the same envelope. Upon applying for probate, a doubt was suggested by the registrars of the Court whether the paper of the 20th of April, 1820, was testamentary, and it was stated in argument that, on this doubt being raised, the opinion of counsel was taken, when the parties were advised that the paper was not testamentary; and accordingly probate was taken of the will and the regularly executed codicils; it [98] being as alleged at that time considered to be immaterial whether the paper now propounded was included in the probate or not. Circumstances, however, have since occurred which have rendered it necessary to take the opinion of this Court as to the character of this paper.

The probate was accordingly called in, and the paper has been propounded by two of the executors named in the will, and also by other parties claiming an interest under it, who have intervened in the cause, and have brought in an allegation supplemental to that which was offered on behalf of the executors; and on the admissibility of these allegations the Court is now called upon to determine.

Before considering the facts pleaded in the allegation, it may be proper to look at the instrument itself, and what it purports to be, for the terms in which it is expressed may be so clearly dispositive as not to require any extrinsic aid to entitle it to probate; or, on the other hand, it may bear so little the character of a testamentary disposition, as to be scarcely capable of having that character impressed upon it, by any circumstances whatever; it is in these words: “I hereby inform the executors named in my last will and testament, dated 12th of April, 1820, that the sum of twenty thousand

pounds, three per cent. consolidated annuities, part of the stock standing in my name in the books of the Governor and Company of the Bank of England, is stock in trust conformably to the will of my late uncle, Zachariah Agace, late of Stamford Hill, in the parish of Hackney, in the county of Middlesex, dated the 3rd of November, 1775, and which said sum, after my decease, [99] is by his said will directed to be divided among sundry persons, his relations. I therefore hereby request my said executors to transfer and divide the said sum of twenty thousand pounds, three per cent. consolidated annuities, in conformity with the directions given in the will of my said uncle." It is dated Ascot Place, 20th of April, 1820, is signed by the deceased, and is addressed to his executors: the main purport, therefore, of the paper is to inform his executors that the sum of 20,000*l.* consols, part of the stock standing in the deceased's name, was not his property, but was held in trust conformably to the will of his late uncle, and that after his (the writer's) decease it was directed to be divided between sundry relations of his uncle; and he therefore requests the executors to transfer and divide that sum in conformity with the instructions given in his uncle's will.

On the face of the instrument, then, it does not purport to dispose of any property belonging to the deceased, it is mere information to his executors that the stock mentioned in it does not belong to him, but to the persons entitled under his uncle's will, to whom they are to transfer it; it is, therefore, merely explanatory, giving his executors necessary information for their guidance, as *prima facie*, the stock standing in his name would appear to be his property: and such seems to have been the understanding of all parties who conceived, as will presently appear, that the property passed under the will of Zachariah Agace, and not under that of Daniel Agace; such also seems to have been the understanding of the deceased himself, who does not appear to have had any idea that he [100] had anything more than a life interest in the property mentioned in it. Notwithstanding, however, this impression of the parties, it is certainly open to them, even at this time, to contend that the paper is a part of the testamentary disposition of Mr. Daniel Agace; and that as such, whatever be its form, it is entitled to the probate of this Court. It is undoubtedly true that the Court is not precluded from granting probate of a paper on account of the form in which it is drawn up. Papers having less testamentary appearance than the present (which is addressed to the executors) have been admitted to probate, such, for instance, as deeds of gifts, notes of hand, drafts upon bankers, and others; the Court only requiring to be satisfied that it was the intention of the deceased that they should be carried into effect after his death, although the purport of the instruments might not be strictly testamentary.

It is then necessary to consider the circumstances which are pleaded in these allegations from which the Court is to collect that this paper was written by the deceased, *animus testandi*, for that I apprehend is necessary to be proved, where the paper, upon the face of it, does not purport to be of a testamentary nature; for there seems to be this distinction in the consideration of papers which are in their terms dispositive, and those which are of an equivocal character, that the first will be entitled to probate, unless, as in the case of *Nicholls v. Nicholls* (2 Phill. 180), cited in the argument, they are proved not to have been written *animus testandi*; whilst, in the latter, the *animus* must be proved by the party [101] claiming under it, and this I take to be the sum and substance of the principles which have been established by the cases which have been adverted to in argument, which it would be useless to notice farther, for it would be to set about proving first principles, if the Court were to cite cases, for the purpose of shewing that the object of all inquiry in a Court of Probate is to ascertain the intentions of the alleged testator, even in the case of an executed dispositive instrument; for, as the Court observed in the same case of *Nicholls v. Nicholls*, a witness attests a will for the purpose of giving authenticity to the *factum* of the instrument, the *animus testandi* is the very point into which the Court of Probate is to inquire, the mere act of witnessing or signing does not exclude, of necessity, the absence of the *animus testandi*, any more than the mere act of cancellation excludes of necessity the absence of the *animus revocandi*. It may have been signed under duress, or under other circumstances, when there was no intention to make a testamentary disposition.

Now that the paper propounded in this case is of an equivocal character at least, cannot, I think, be doubted; no person reading it can pronounce that, of itself, and abstracted from all extrinsic circumstances, it purports to dispose of any part of the

writer's property, or of that over which he had a disposing power ; and in fact, as has already been stated, it has not hitherto been treated as such, or as having a testamentary character either here or elsewhere ; and the parties who propound it have accordingly thought it incumbent on them to set forth the special circumstances from which its character is to be defined.

[102] The first article of the allegation on behalf of the executors pleads the death of the uncle of the deceased in this cause in 1778, and that by his will, dated in 1775, he gave his brother, Jacob Agace, during his life 300*l.* per annum ; to his nephew, Zachariah Agace, 150*l.* per annum ; to his nephew, Daniel Agace (the deceased in this cause), 150*l.* per annum ; and in case either of his nephews should die, the other to inherit the whole 300*l.* ; and in case of the death of his brother Jacob, without issue, then the two nephews, Zachariah and Daniel, were to inherit from his brother Jacob ; so that the survivor was to take the whole 600*l.* per annum for his life. Mr. Zachariah Agace went on to assign his reason for giving his brother and nephews the interest of the money only, which was that in the event of their dying without issue the money might be divided amongst his relations ; namely, his cousins, James Legrew, Mrs. Susan Goddard, and Mrs. Esther Privo, in three equal shares, it being clearly understood, the testator adds, " what I leave is to them and their heirs ; " and it goes on to plead that the deceased's three cousins survived him.

The allegation then went on to plead that no particular fund having been specified by the deceased out of which these annuities to his brother and nephews were to issue, the executors, of whom Mr. Daniel Agace was one, and ultimately the survivor, set apart the sum of 20,000*l.* three per cent. consols to answer them, and that at the time of the death of Mr. Daniel Agace this sum, being part of a larger sum in the same stock, was standing in his name.

The third article pleaded the death of Mr. Daniel Agace in April, 1828, and the factum of the will [103] and two codicils, by which, after giving several legacies to different persons, he bequeathed the rest and residue of his estate and property of what nature and kind soever to Ann Ferard, who is the other party in this cause.

The allegation then pleaded the writing of the paper propounded as directions to his executors, on the 20th of April, 1820, and that it was found in the same envelope with his will, and two executed codicils ; the doubt that arose as to its character ; the exclusion of it from the probate ; and that it had been necessary to obtain the judgment of the Court as to its title to probate, in consequence of certain proceedings relative to this sum of 20,000*l.* consols in the Court of Chancery ; and concluded with pleading the paper to be in the handwriting of the deceased.

The nature of the proceedings in the Court of Chancery was not stated in the allegation of the executors ; but in the supplemental allegation given in by the proctor of the parties intervening, those proceedings are set forth, and very properly.

It appears that in Easter Term, 1829, a bill was filed by them as the representatives of the three cousins named in the will of Mr. Zachariah Agace against the executors of Mr. Daniel Agace, praying that it might be declared that they (the plaintiffs), having survived Mr. Zachariah Agace, were entitled to equal shares of the 20,000*l.* consols, and to the dividends which had accrued since the death of Mr. Daniel Agace, and that the same might be transferred to them ; claiming, therefore, under the will of Mr. Zachariah, and not under that of Mr. Daniel Agace, which does not seem to have been even alluded to. The cause came on to be heard [104] before the Master of the Rolls, who, on the 25th of February, 1831, dismissed the bill, but without costs, and this decree was confirmed by the Lord Chancellor on the 15th of November in the same year, on the ground as alleged, that the bequest over being too remote in construction of law, it was consequently void ; and the allegation pleads that by reason thereof, Daniel Agace was possessed of a legal and equitable interest in, and had a testamentary power over, the said sum or part of it, as well at the time he wrote the codicil propounded, as at the time of his death, and that he wrote the paper in question with the intention of carrying into effect the will of Zachariah Agace, and more especially of bequeathing the sum of 20,000*l.*, over which he had a disposing power, and in which he had a legal and equitable interest.

It then pleaded that the residuary legatee under Mr. Daniel Agace's will filed a bill in Chancery, on the 5th of June, 1835, against the executor of his will, praying that it might be declared that, according to the true construction of Mr. Zachariah

Agace's will, she had become entitled to the said sum of 20,000*l.*, three per cent. consols, and the dividends accrued thereon since Mr. Daniel Agace's death.

Such is the substance of the two allegations, and it may be observed that the original character of the paper cannot be altered by any thing which has subsequently occurred—if it was testamentary when written, it still retains that character, if merely explanatory, it remains so—and the circumstances pleaded are of no other use than as affording the means of enabling the Court to judge *quo animo* it was written.

[105] I have already said that the paper does not appear to me to be “*per se*” dispositive, neither do I think that the circumstance of its being found with the will and two codicils infers that the deceased considered it to have, or intended to give it, a testamentary character; the information which it conveys was necessary for his executors, and no fitter place for deposit could be selected than that in which the will and codicils were placed, where it would meet the attention of the executors, at the same time, with those instruments which they were to carry into execution; that circumstance, therefore, may be laid out of consideration, as may also for the same reason, that of its being addressed to his executors, and who, as Mr. Daniel Agace was the surviving executor of his uncle, became the representatives of the latter, and, as such, the persons to carry the unexecuted trusts of his will into effect.

The next consideration is, Did the deceased know that this property belonged to him?—certainly not at the time when the paper was written, for the object of the paper is to tell his executors that that part of the property was not his, and there is but little probability that he obtained any further information on that point before his death, it nowhere being suggested that any doubt had arisen as to the legality of the disposition contained in Mr. Zachariah Agace's will till after Mr. Daniel Agace's death, when it became necessary to ascertain the right of the several claimants to it; if then Mr. Daniel Agace was ignorant that the legal or equitable interest in this property vested in him—whatever the law may presume as to a man's knowledge of his own rights—he could not have had an inten-[106]-tion of disposing of it. True it is that a person may dispose of property by will without knowing that he had the *jus disponendi*, as in the case of a residuary legatee, who would be entitled to whatever personal property might accrue to the deceased between the date of the will and the time of his death, when it is to have effect, nay, would become entitled to property which the deceased never did know he possessed, either by succession to a person of whose death he was ignorant, or under some testamentary disposition of which he had no knowledge. But this proceeds entirely upon the principle that it must be presumed to be the testator's intention to give to the person named residuary legatee whatever was not specifically bequeathed. If, therefore, this paper were clearly testamentary, the Court would have no right to inquire whether the deceased knew his right or not, but would be bound to grant probate of it, and leave its effect to be afterwards determined. But the case is very different where the question is, with what intention a paper, not clearly entitled to a testamentary character, was written; in such a case, a knowledge of the *jus disponendi* seems to be essential to the *animus testandi*, the latter could hardly exist without the former; and as I think it to be perfectly clear in this case that the deceased was ignorant that he possessed the *jus disponendi* of this stock, he cannot be considered to have written this paper with the intention of bequeathing it.

It has been said that Mr. Daniel Agace might, as an honest man, have thought it incumbent upon him to carry his uncle's intentions into effect, and not to take advantage of the legal objection to the disposition contained in his will; but this argu-[107]-ment again supposes that he knew that he possessed the right; if he did not, there was no room for the operation of those honourable feelings upon his mind. None of these circumstances then, whether taken singly or combined together, are in my judgment sufficient to give a testamentary character to this paper which it did not of itself possess. Again, if we look to the persons by whom the benefit of this property is now claimed, is there any reason to suppose that the deceased would have bequeathed it to them, had he known that he had the power to do so?—unless, indeed, under the impulse of those feelings which have been suggested as likely to have influenced him to fulfil his uncle's wishes—they are the representatives of the original legatees, with whom he is not shewn to have lived on terms of intimacy, or even to have been acquainted; the parties whom they represent, and who were the particular

objects of Mr. Zachariah Agace's testamentary bounty, had been dead long before the testator made his will; he could hardly, therefore, have had any strong feeling in favour of persons so remotely connected with him, at least so as to make it probable that he would have left this large sum to them, whose names even do not appear in these papers, in preference to the person for whom he has testified his regard and affection, by making her his residuary legatee.

A good deal of stress has been laid in argument on the latter part of this paper, in which the deceased requests his executors to transfer the property, and to divide it in conformity with the directions of his uncle's will, and it has been said that precatory words, or words of request, are as strong [108] as positive and absolute bequests, where the fund to be disposed of, and the persons intended to take it, are clearly designated; and of the truth of this position there can be no doubt where the paper in which they occur is clearly testamentary, but it does not by any means follow that the use of such terms will give that character to a paper to which it is not otherwise entitled.

I have not hitherto adverted to the different form in which this paper is drawn up from that of the two codicils, or to the description which is given of them.

The will and two first codicils are regularly drawn by a solicitor, and are regularly attested, which it may be said was necessary, as they related to real as well as personal property, which is true, and might, perhaps, have accounted for the paper propounded not being executed in the presence of witnesses, but the same observation will not account for the difference in the description of them; the two executed codicils being expressly declared to be, the one a codicil, and the other a second codicil to the will of April, 1820, whereas the paper propounded, though written before either of the other codicils, has no such title given to it; on the contrary, it is excluded in the enumeration of the codicils; thus evidently shewing that the deceased did not consider it as a part of his will, and he could not have forgotten it, as when he placed the second or last codicil with his will, as late as the month of April, 1828, shortly before his death, this paper must have presented itself to his view.

Upon the whole, then, I am of opinion that the facts stated in these allegations are not sufficient to en-[109]-title this paper to probate. I am not unaware of the importance of the interests involved in the decision of this question, or of the responsibility which I am taking upon myself in pronouncing against the validity of this paper, and in refusing probate of it; and, thereby, so far at least as this Court is concerned, precluding the parties from resorting to another Court for the purpose of obtaining its opinion upon the construction of it; and I need hardly say that I should have been glad to have been relieved from the necessity of so deciding, if I could, with propriety, have declined to do so; but sitting here as judge of a Court of Probate, I am bound to form the best opinion I can as to the character of every paper, to which the sanction of its seal is sought to be obtained, and having formed my opinion, to declare it without reference to the consequence which may follow from it.

In this case my opinion is, that this paper is not testamentary, and I therefore reject the allegations propounding it.

[110] ALLEN v. BRADSHAW. Prerogative Court, Dec. 14th, 1835.—A power in a feme covert, to dispose of personal property by will, "to be by her signed and published in the presence of, and to be attested by, two or more credible witnesses," held not to be sufficiently exercised by a writing purporting to be her will, and to be signed, but omitting to state that it was published by her in the presence of two witnesses; extrinsic evidence of the fact of publication not being admissible.

Lushington in support of the allegation.

The King's advocate contra.

Judgment—Sir Herbert Jenner. The question for the decision of the Court is whether the allegation now offered is proper to be admitted; the object of it is to propound a paper-writing as containing the last will and testament of Mrs. Grizzel Allen, which is all in her own handwriting, and is dated the 15th day of the 10th month (that is October), 1829, and purports to have been signed by her in the presence of two witnesses, whose names are subscribed as attesting her signature to the instrument.

The deceased being a married woman, it became necessary to set forth the power under which she was entitled to make any disposition of her property by will, and

accordingly the first article of the allegation pleaded an extract from the will of her former husband to the following effect:—"As to, for, and concerning the sum of 8000l., part of my said residuary estate, or such trust money, and trusts, as aforesaid, I declare that the same shall be in trust for such person, or persons in such shares and proportions, manner, and forms, and to be paid and transferred at such time or times, as my said wife Grizzel Birkbeck by her last will and testament in writing, or any writing, or appointment in nature thereof, or any codicil or [111] codicils thereto, to be by her signed and published in the presence of, and to be attested by two or more credible witnesses, shall give, bequeath, direct, or appoint the same, and in default of such gift, bequest, direction, or appointment; or in case any such shall be made, and the same shall not amount to, or be a complete appointment or disposition of the said sum of 8000l., or so much, and such part thereof only as shall not be so appointed or disposed of, as aforesaid, as the case may be, in trust for the next of kin of my said wife according to the statute of distribution of intestate's effects."

The second article pleaded the factum of the instrument by virtue of the power just recited, and, amongst other things, that the deceased did on or about the 15th of October, 1829, sign her name thereto, and did publish and declare the same as and for her last will and testament in the presence of John Capper and Thomas Binns, and other credible witnesses, and that the said John Capper and Thomas Binns then at her request, and in her presence, and in the presence of each other, did attest the said will as witnesses, John Capper, one of the said witnesses thereto, writing with his own hand the words, "witnesses to the signature of the said Grizzel Allen;" and the article concluded in the usual form.

The third article pleaded the death of the deceased on the 15th of July, in the present year, without parent, brother, sister, uncle, or aunt, leaving Joseph Bradshaw, her nephew, and several other nephews and nieces her next of kin.

Such is the purport of the allegation which is brought in on the part of Mr. William Allen, the [112] husband of the deceased, to whom she had by the paper propounded left the remainder of the sum of 8000l., over which she had a disposing power, and the residue of her property of every description, and whom with her nephew, Samuel Hoare, she had appointed executors of her will.

The question then to be considered is whether this will, so executed by the deceased, is a good and valid execution of the power of disposition given to her by her first husband; if it is not, the allegation must be rejected.

The case was originally brought before the Court in the shape of a motion, made on behalf of the husband; but the Court, thinking that a question of this importance should not be disposed of in so informal a manner, directed that the paper should be regularly propounded, which has been accordingly done, and there are now two parties appearing in the cause, Mr. Allen, the husband, and Mr. Joseph Hoare Bradshaw, the nephew of the deceased, and who will be entitled to a share of the 8000l., if the Court shall be of opinion that the power has not been duly executed, and the case has been argued with great ability by their respective counsel, who have referred the Court to several cases in support of their arguments, to which it may be necessary to advert.

The first subject for consideration is, what is required by the instrument, under which the power of disposition is given to this lady over this sum of 8000l.?

The second, has she complied with what was so required of her?

Now the power of disposing of this sum is to be executed by "her last will and testament in writing, [113] or by any writing of appointment in nature thereof, or any codicil or codicils thereto, to be signed and published in the presence of, and to be attested by, two or more credible witnesses." The paper propounded purports to be her last will and testament—it disposes of the 8000l.—it is signed by the deceased, and appears to have been so signed in the presence of two credible witnesses, who have attested it; but it does not appear upon the face of the instrument itself, or the attestation clause or memorandum, that it was published in the presence of the witnesses, or that the publication was attested by them. The clause is to this effect; this my last will and testament is written by me, Grizzel Allen, and signed this 15th day of the 10th month, in the year one thousand eight hundred and twenty-nine, in presence of the undersigned witnesses; then follows in the handwriting as pleaded of Mr. Capper, "witnesses to the signature of Grizzel Allen," John Capper, Thomas Binns; to which their residences and occupations are added.

On the face then of the instrument itself, all that purports to have been done in the presence of the witnesses, or to have been attested by them, is the signature of the deceased.

Nothing is said as to the publication of it, and then the question is:

First, whether without publication, as well as signing, the power is well executed; and secondly, if not, whether, as the publication is not mentioned in the memorandum of attestation, extrinsic evidence can be received to supply the defect.

As to the first of these questions, the necessity that the instrument should be published as well as signed, it may only be necessary to observe that if [114] signing does not include publication, the act of signing will not be sufficient. (a) Sir Edward Sugden, in his elaborate work on Powers, lays it down as a general rule "that every circumstance required to the execution of a power must be strictly complied with," which rule, as a general position, cannot be denied, nor indeed was it attempted to be controverted in argument; and which he considers as "so clear and plain" as to require no further observation; "were there not many cases in which particular expressions imposing restraints on powers, or the modes of executing them have received a judicial exposition."

Is then the signature of the deceased equivalent to publication?

Now this has been already decided in the negative, in the case of *Moodie and Reid*, (1 Maddock, 517) by Sir Thomas Plumer, and afterwards by the Court of Common Pleas, upon a case sent from him between the same parties (7 Taunton, 355), in which the instrument was required, as in the case before the Court, to be signed and published in the presence of, and attested by, two or more credible witnesses. The paper was signed in the presence of, and attested by, two witnesses, and there was some evidence to the effect that the witnesses understood at the time that the writing which they attested was the will of the deceased. Chief Justice Gibbs says, "A will as such requires no publication—be publication what it may—a will may be good without it. But here the power is to be by a will signed and published, therefore there must be some pub-[115]-lication; now the will must be signed, published, and attested, and there must be some attestation here of signing and publication." He goes on to say, "Here the witnesses have attested the signing; the question is, have they attested the other formality of publication in attesting the signing. If the act of testatrix in calling on the witnesses to attest her will be a publication of it, then their attesting that she signed it attests her publication also, because they attest that by which she publishes it." The result, however, was that the certificate returned to the Vice Chancellor was, that the will was not a due execution of the power.

The case of *Stanhope and Keir* (2 Simons and Stuart, 37) (1824) is to the same effect; the will was required to be signed, published, and attested, but it only purported to be signed by deceased in the presence of the three witnesses whose names were subscribed; it also appeared in that case that administration with the will annexed had been granted by this Court, yet the Vice Chancellor, Sir John Leach, was of opinion that the power was not well executed, and overruled the plea.

It may then be assumed on the authority of these cases—in the absence of any of a contrary import, and none such have been cited—that a power to dispose of property by a will signed, published, and attested, is not duly executed by a will signed and attested, unless there is some further act of publication shewn than is implied by the mere act of signing, and the attestation of that act by the witnesses; as then the will here propounded does not purport on the face of it to have been published, as well as signed, in the presence of the witnesses, and [116] as the clause of attestation takes no notice of the publication; the next consideration is, whether this deficiency can be supplied by evidence, dehors the instrument itself. Now if this were *res integra*, the Court might possibly feel considerable difficulty in coming to a conclusion that such evidence could not be received. But if it find the point already determined by decisions of those courts, to which questions of this kind are much more familiar than to itself, and to which they more properly belong; it would ill become this Court to indulge in any speculation as to the probability that those decisions might be reversed on appeal by the highest tribunal of the country—the House of Lords. This Court is, I think, bound to follow in the course pointed out by the decisions of the different Courts of Equity, supported and confirmed by the several courts of common law.

(a) Sugden on Powers, ch. 5, sect. 3, of the compliance with the conditions annexed to a power, 5th edit. p. 218.

The cases are not, perhaps, very numerous, but they are quite sufficient to establish the law, so far at least as the courts by which they have been decided can have that effect, and it may be a sufficient answer to one part of the argument urged by the learned counsel for Mr. Allen to say that the law does not depend upon one single case, but upon several, all of one uniform tenor. It is true, indeed, that in the case of *Wright v. Wakeford* (4 Taunton, 213 (1812)) there was a difference of opinion between the judges of the Court of Common Pleas, the Lord Chief Justice Mansfield, to whose opinion great weight is due as a most learned equity lawyer, differing from the other three judges, who were also men of the greatest eminence and knowledge in their profes-[117]-sion; and if that case had stood alone it might have been too much to say that it was sufficient of itself to settle a disputed point of law.

But whatever may have been the extrajudicial opinion of other judges or eminent writers as to the soundness of that decision, there is not to be found a single case in which a contrary decision has been pronounced; whilst there are, as I have already said, several in which it has been followed. Now, without going into the particulars of the case, the effect of the decision was, that it was necessary to the due execution of the power, first, that the consent of the parties, which was required, "should be testified by some writing under their hands and seals;" and secondly, that the fact of their putting their hands and seals to such writing should be attested by two or more witnesses. And that as a question of law, the fact of signing as well as sealing in the presence of witnesses must be stated, by the true construction of the terms of the attestation, to which, say the learned judges, "our attention must be confined, and we do not think that the signature of Thomas Wood and his son is comprehended in the words made use of in the attestation;" and further, "that the attestation required to constitute a due and effectual execution of the power ought to make a part of the same transaction with the signing and sealing the writing, testifying the assent and approbation of the parties (Thomas Wood and his son), such being the usual and common way of attesting the execution of all instruments requiring attestation." Thus deciding as far as that Court could decide that the observing of all the formalities required to the due execution of the power must [118] appear in the clause of attestation, drawn up contemporaneously with the transaction itself; and that it could not be supplied, as was attempted in that case, by a full clause of attestation subsequently added.

This case, in 1812, appears to have been the first in which the question was solemnly argued and determined, and it was acted upon by Lord Chancellor Eldon (17 Ves. 454), who, upon receiving the certificate of the judges of the Court of Common Pleas, dismissed the bill, which was for a specific performance against a purchaser. This case was followed by that of *Doe v. Peach* (2 Maule and Selwyn, 576), in the Court of King's Bench, Easter Term, 1814; and again in *Wright v. Barlow* (3 Maule and Selwyn, 512), King's Bench, Hilary Term, 1815; by *Moodie and Reid* (1 Maddock, 517, and 7 Taunton, 355), already mentioned; by *Stanhope and Keir* (2 Simons and Stuart, 37); by *Doe on the demise of Hotchkiss* and *Pope v. Pearce* (6 Taunton, 402), to which it may be necessary to advert again for another purpose, and by others, all going precisely to the same effect: that that which passed at the time of the execution of the instrument must be determined by what appears in the attestation clause, and that no extrinsic evidence can be received in aid.

It has, indeed, been argued that, from the case of *Wright v. Barlow*, Lord Ellenborough appears to have been of opinion that the law was not, when that case was determined, considered to be finally settled, or he would not, as he is reported to have done, have offered to turn the case into a special verdict, so that it might come before the twelve [119] judges, his Lordship observing that he could not say to what decision the Court might come with the assistance of the other judges; but this offer not being accepted, a certificate was returned to the effect that the Court was of opinion that the power was not duly and effectually executed, and the certificate was signed by Lord Ellenborough, Mr. Justice le Blanc, and Mr. Justice Bailey, all men of great eminence, who, it must be assumed, would not have subscribed their names to such a certificate unless they had been satisfied that the law was sufficiently settled and established to justify them in so doing; and, although it has been said that the commonly received opinion of the profession was against the principle laid down in those cases, it is somewhat remarkable that no person has yet been found sufficiently bold to venture upon taking his case to the House of Lords, in the hope of inducing that House to come to a different conclusion.

The attention of the Court has also been directed to the act of 54 Geo. 3, c. 168, which recited that doubts were entertained as to the validity of instruments required to be signed, or to be under the hands of the parties, when the word signed was omitted in the memorandum of attestation, and although the same must have been actually signed by the person whose signature was required thereto; and it was thereupon argued that, in the opinion of the legislature, the question was not considered to have been set at rest, and was still open, but it is to be observed that this act was passed in 1814 or 1815, that it is retrospective only in its enactments, and that it only provides for the omission of the word "signing," without having any re-[120]-ference to those cases in which any other of the formalities required by the instrument creating the power was unnoticed in the memorandum of attestation. The act, therefore, leaves the question respecting the case now before the Court untouched, and is no authority therefore recognizing that doubtful state of the law as to the omission of "publishing" in the attestation where that is required as well as "signing."

But whatever may have been the effect of the act, the courts have proceeded in the same track as before it was passed; the act passed in 1814 or 1815. *Moodie and Reid* was, in 1816, in Chancery, and in 1817, in the Court of Common Pleas—*Stanhope and Keir*, in 1824. As far, therefore, as any question of law can be said to be settled by repeated decisions of courts of competent jurisdiction in each department of the law—by the Courts of Equity—the King's Bench and Common Pleas—without the actual decision of the final Court of Appeal, this point must be considered as too firmly established to be disturbed by any opinion which this Court can form, even if it should be presumptuous enough to differ from them.

But it has been further contended that this Court, sitting here as a Court of Probate, is not necessarily limited by the same rules as the Court of Chancery, or the common law courts; that its duty is to ascertain the intentions of the party, and that it is not bound down to any particular mode by which it is to proceed, in order to obtain the necessary evidence for that purpose, and, consequently, that it may travel out of the memorandum of attestation and receive evidence of what did actually take place. But I cannot entirely assent to this doctrine, no case has been cited in support of it, and it would be somewhat extraordinary if this Court could exercise such a latitude of discretion, which is not entrusted to any other. It is undoubtedly true that this Court is always anxious to carry the intentions of testators into effect, so far as the law will permit, but then it must first ascertain that the alleged testator has a legal capacity to make a will before it can enquire as to the intention with which the testamentary act was executed. It cannot grant probate of the will of a married woman; when that fact appears, without requiring the production of the instrument, under which she has acquired a privilege to which she was not before entitled, and when it is satisfied that she has the potestas testandi, the Court must then see that she has complied with the requisite formalities.

Formerly, indeed, the Court did not take upon itself to enter with any great minuteness into the construction of the powers under which wills of this kind were executed, or as to the due compliance with their conditions, but it seems now to be considered that the Court of Probate is bound to decide in the first instance whether the power has been duly executed, before it gives the instrument the sanction of its seal.

If the Court felt any real doubt on the point, it might, perhaps, be the safer course to pursue to pronounce for the validity of the paper, as in that case the Court of Construction would not be bound to give effect to the disposition contained in it if that Court should be of opinion that the power was not well executed, as was done in the case of *Stanhope and Keir*, whilst, on the other hand, if this Court should reject the paper, its decision would be [122] final; as the Court of Construction will not proceed to the consideration of the effect of any testamentary paper till it has been proved in the proper Ecclesiastical Court.

These considerations might, as I have said, induce the Court to incline to admit, rather than reject, a paper brought before it, with respect to which it entertained a real doubt, but cannot operate on its mind when no such doubt exists.

The case of *Doe on the demise of Hotchkiss and Pope v. Pearce* (6 Taunton, 402), which has been already mentioned by the Court, in its circumstances more closely resembles the present case than any of those which have been cited, and seems to have some, perhaps not a very remote, bearing upon this part of the argument: the marginal note is, "A defective attestation of the execution of a power cannot be supplied by parol

evidence of the attesting witness given on a trial." In that case the question arose as to real property, with respect to which a power of disposition was given "by any deed or deeds, writing or writings, under hand and seal, and attested by two or more credible witnesses." The power of disposition was attempted to be executed by will, purporting to be signed and sealed by the testator, and the attestation was in the following words:—"Signed in the presence of us, this 20th day of May, 1795. A. Robinson, E. Sweet, J. Byles." An action of ejectment having been brought, the party claiming under this will produced one of the attesting witnesses to prove amongst other things that the seal was affixed to the will at the time when the same was executed by the testator, and attested by the witnesses, the [123] other witnesses were not called, nor was any evidence given to shew whether they were alive or dead, but that does not seem to have been thought material, and the question simply was, whether the omission in the attestation clause could be supplied by parol testimony. In delivering his judgment, Lord Chief Justice Gibbs said, "It is impossible to distinguish this case from that of *Wright v. Wakeford*, which was before this Court; and my brothers, Heath and Chambre, joined in that certificate; the judgment must, therefore, be for the plaintiff for one-third part of the premises."

This case therefore, determines that parol testimony cannot be received in an action of ejectment to supply the deficiency in the attestation clause as to the execution of a will made in pursuance of a power; and seems, at least, to supply a principle on which this Court, as a Court of Probate, may act with safety in rejecting the same evidence in a suit respecting a will of personalty.

I have purposely abstained from noticing that part of the argument in support of this allegation which was drawn from the inconsistency of the decisions which have been pronounced as to the admission of parol testimony, to supply defective attestations of wills of land under the statute of frauds, and those of wills executed under powers; and for this plain reason, because, however forcible those arguments might have been when the question was first mooted, it is now much too late to enter into the consideration of them, after the distinction between the two classes of cases has been so often recognized on grounds which I have no doubt were sufficiently intelligible and satisfactory to the minds of those very learned persons, by whom it was adopted and acted upon.

[124] I have also omitted to notice the case of *M^{rs} Queen v. Farquhar* (11 Ves. 467), in which the decision is supposed to be inconsistent with those cases which have been already mentioned, because there was this obvious distinction between them, that the signing of the deed, by which the power in that case was to be executed, was not required to be attested by the witnesses, though it was required to be signed in their presence; the omission, therefore, in the attestation clause, to notice the act of signing was permitted to be supplied by parol testimony, simply upon the ground that the attestation of the signature was not a formality required by the instrument creating the power.

Such are the grounds upon which the Court has come to the conclusion that this will, now propounded, is not duly executed according to the conditions of the power, under which alone this lady, as far as appears to the Court, could make any testamentary disposition whatever, and as this is the first case upon this point which has come before this Court, I have thought it right to state more fully, and in more detail than was perhaps necessary, the reasons on which my judgment is founded; it is certainly to be lamented that the clear and manifest wishes of the deceased should be thus defeated, and it is unfortunate that she did not avail herself of the assistance of her professional adviser, under whose superintendence this miscarriage of her intentions would not have occurred: but however reluctant I may be to come to such a conclusion, I feel myself bound to pronounce that this paper cannot be supported, and I consequently reject the allegation propounding it.

[125] *BAKER v. BATT*. Prerogative Court, Jan. 19th, 1836.—The will of a married woman prepared by the husband's solicitor unknown to the deceased, from instructions given by the husband; he being appointed sole executor and residuary legatee; departing from the intentions of the deceased, previously expressed by her; pronounced against, and the husband condemned in costs.

[Affirmed, 1838, 2 Moo. P. C. 317; 12 E. R. 1027 (with note). See also *Von Stentz v. Comyn*, 1849, 12 Ir. Eq. R. 638; *Farrelly v. Corrigan*, [1899] A.C. 571.]

Addams in support of the will.

The King's advocate and Curteis contra.

Judgment—*Sir Herbert Jenner.* Susannah Baker, the deceased, in this case, died on the 21st of April, 1834, a married woman, the wife of William Baker, party in the cause, who was her second husband, to whom she was married on the 16th of July, 1833. At the time of her marriage she was possessed of property, which came from her first husband, to the amount of 5000*l.*, secured on a note of Messrs. Whitbread, and also of furniture of considerable value. On her marriage, 2500*l.* were given up to her husband, the remaining 2500*l.* were by settlement transferred to a trustee, for her sole and separate use, during the joint lives of herself and husband; and in case of her surviving him, the principal was to be transferred to her; but in the event of Baker surviving her, the principal was to be paid to such person as she should appoint by will, attested by two witnesses, and in default of such appointment to such persons as under the statute for distribution of intestate's effects would have been entitled thereto, if she had died unmarried and intestate. By the settlement it was also agreed that in the event of Mrs. Baker surviving her husband, an annuity of 150*l.* should be paid by his representatives to her for her life.

[126] The marriage took place on the 16th of July, 1833.

On the 21st of April, 1834, Mrs. Baker died, having as alleged executed her will on the 19th of the same month, by which she purported to have executed the power reserved to her by her marriage settlement; the contents of the paper are as follow:—“She gives to “her two nephews and her niece”—their names are not mentioned—“the children of her late brother, 200*l.* each.” “To the four sons and two daughters of Mr. Beasley, brother-in-law of her late husband, 100*l.* each.” To Mr. Phillips of Harrow on the Hill, father of her first husband, 100*l.*” “To Eliza Phillips, niece of her first husband, and daughter of Mrs. Brown, 200*l.*” “To Mr. Temprell (spelt Templer) of Anne's Place, Hackney Road, and Mrs. Templer 10*l.* each for mourning, the residue to her husband, his executors and administrators, and she appoints him sole executor.”

The paper purports to have been executed by a mark in the presence of two witnesses, a Mrs. Jane Foweraker (sister of Mr. Baker) and Ruth Heath, who was attending the deceased as nurse, who, as well as the deceased, is a markswoman. It was prepared by the solicitors of the husband from instructions verbally communicated to them by him so early as the 20th of February, though it remained unexecuted till the 19th of April. The solicitors who prepared it had no interview with the deceased, who was an uneducated woman, unable to write and scarcely if at all capable of reading. She was in a state of great debility and nearly approaching her death at the time of the alleged execution, and there is no evidence to shew that she had any knowledge of [127] the existence of the paper. It is a case, therefore, in which the evidence in support of such an instrument requires to be narrowly watched, and in which the onus probandi lies very strongly on the party propounding it. From this paper it seems that the deceased had two nephews and a niece, but it turns out that only one of them, James Batt, the party in the cause, is legitimate, and who as the sole next of kin would, under the terms of the settlement, be entitled to the whole sum of 2500*l.*, in case she had died intestate.

The history of the deceased appears to be shortly this; she was the widow of Mr. Thomas Phillips, a publican, in Blandford Street, who died about the year 1828 or 1829. Mr. Baker had taken the public-house formerly kept by Mr. Phillips, and it appears that some degree of intimacy had subsisted between Mr. Baker and his family and the deceased for some years before the marriage took place. Upon her marriage, the deceased, who to that time had continued to live in Blandford Street, went to live at Notting Hill, Kensington, where she died after an illness of some months. Mrs. Heath stating that she nursed her for thirteen weeks, and it appearing that since her marriage she was constantly ailing. What the precise age of the deceased was at the time of the marriage does not very exactly appear. Mrs. Temprell says she was upwards of sixty years of age; Mr. Temprell, sixty or about that age; Mr. Hora, the apothecary, says from fifty to sixty; and Mr. Gray says, upwards of fifty.

Of Mr. Baker's age there is no direct evidence, but he appears to have grown up children, one of them married, so that he could not have been a [128] very young man, and Mrs. Foweraker, his sister, describes herself to be forty-eight. So that with respect to age there probably was no such disproportion between them as to render it

very improbable that she might survive him. With respect to constitution, the difference might be greater, and render the chance of her surviving her husband more precarious.

Mrs. Temprell says, after stating that Mrs. Baker could neither read nor write, so she made her mark (to the settlement). "Poor thing! she had not a tooth in her head nor a hair upon it, and she was neither shape nor make; in short, in a day's march you would not find so ordinary a looking person, and she was upwards of sixty years of age;" she says, "that about six weeks after her marriage she complained occasionally of feeling very ill, and that it seemed as if cords were drawn round her chest and prevented her breathing. Deceased had been ill I consider from October, the doctors called her complaint disease of the heart." Mr. Temprell says "she had been ailing before her marriage, but not to say ill, till four or five months before she died." Mr. Gray says, "There was no probability of her surviving her husband, as she was in ill-health at the time, and he should think sixty years of age." Mrs. Heath says that "for the first two months after the marriage they slept together; after that, on her second visit, she became too ill, she attended her thirteen weeks, and understood she had been confined a month before."

Sarah Piper who had lived with her six years deposes, "That she was very ailing after her marriage, and kept a good deal to her room. I [129] do not consider she was in health from the time of her marriage;" and Mr. Hora, the apothecary, who was called in to attend her in December, 1833, says, that "she died of effusion on the chest, but her constitution was worn out—that he has no doubt she had suffered partially from her complaint (dropsy) for a considerable time before he attended her, or at least had a tendency to it."

As to Mr. Baker, he does not appear to have had any thing the matter with him, and since the death of the deceased it seems that he has married a third wife (for he was a widower at the time of the marriage with the deceased), and is described as a well looking man: from this description of the parties it certainly was by no means improbable that he should be the longer liver, and there was little danger that the claim to the 150*l.* per annum would ever be made; he was probably the younger of the two, and certainly much stronger in point of constitution, and considering the account given of the deceased by Mrs. Temprell, allowing for some degree of exaggeration, she was by no means an object peculiarly attractive, and it would not, perhaps, be doing any very great injustice to Mr. Baker to suppose that he was more influenced by pecuniary motives in allying himself in marriage to the deceased, than by her personal appearance. But this is a part of the case, founded pretty much on conjecture, and to which very little attention is due: there must be something much more stringent than this to enable the Court to found any conclusion upon it, and probably the Court would not have adverted to it at all, but that it was dwelt upon by the counsel on both sides, who must therefore have thought it important to the view which [130] they took of the case. It is much more important to inquire whether there is any evidence on which the Court can rely as to the real intentions of the deceased with respect to the disposition of her property, and the alleged attempts of the husband to obtain a will from her, contrary to her wishes and intentions. It therefore becomes necessary to advert to the transactions in this case, in order to see what was the conduct of the parties; for this purpose it may be material to consider what the situation of the parties at and just before the time of the marriage was. Mrs. Baker was living in apartments, having, as Piper says, "a good deal of furniture of her own," which Mr. Temprell deposes "could not be worth less than 600*l.*," and having also the sum of 5000*l.* at her own disposal.

Mr. Baker kept wine-vaults and a public-house in Blandford Street, having a family, and being in some degree embarrassed in his affairs, at least if any credit is to be given to the accounts of Mr. Gray and Mr. and Mrs. Temprell. Mr. Temprell says, "At first, I know deceased wished to have all her property settled upon herself, but after some persuasion she gave way; and as Mr. Baker was in debt, she should not like to let him be in difficulties, and gave up 2000*l.*, to pay what he owed to Messrs. Whitbread; but he induced me to solicit of her an additional 500*l.*, which I assented to do and obtained, though she never, I believe, liked me for it afterwards, and often spoke of my having overpersuaded her in that matter; but I did so because she had become security for her late husband's brother, Henry Phillips, for 200*l.*, and this sum Baker would have to pay; and he represented that he must [131] have a new horse and chaise; so I suggested to her to give up that additional sum."

Mrs. Temprell also says, "She (deceased) spoke to me about her marriage and intended settlement, not what Mr. Baker was going to get from her, but what he was going to settle on her, that is, his public-house in Blandford Street. Mrs. Baker had several interviews with my husband and myself on the subject of such settlement. Mr. Baker also came; but there seemed strange mistakes about it; he at first explained that in proposing to settle the house upon her he expected her to come to work in it, and that she would also settle on him the 5000l.; when this was explained to her she was near giving up the marriage altogether, but it had got spread abroad, and she, partly by his persuasion, and partly through the influence of my husband, consented to settle part of the money on him; it turned out that he was in debt to the amount of 2000l. to Messrs. Whitbread, and this sum she consented to pay off for him; and then he talked a great deal about her giving 500l. more; he said she had put herself under an engagement to her husband's brother, which her husband would have to pay, and then she would not sit behind the horse he had, and he must get a new one; and he should like to have a hundred pound or two in his pocket, in case he saw a cottage that they liked, and Mr. Temprell, in consenting to propose this to her, said, as I well recollect, 'If I do this, Mr. Baker, you won't ask for any thing more; he answered no! indeed he should be quite satisfied, and instead of wishing for any more, he should wish that the rest should [132] go to her relations and the family of her late husband, as was well known to be her intentions.'"

Now if this account be true, there can be no doubt that Mr. Baker was at this time in embarrassed circumstances, and that he looked to deceased's property as the means to extricate himself from them. In some parts of this account, indeed, there is room neither for corroboration nor contradiction, as the circumstances occurred between these parties only, but in others not so; was Mr. Baker indebted 2000l. to Messrs. Whitbread? was this sum paid off with deceased's money? if not, this might have been pleaded and proved. If the fact were as stated, then the story is corroborated; and Mr. Baker's conduct was not quite so disinterested as is suggested, and he certainly shewed no want of anxiety to promote his own advantage; and if the statements of Mr. Gray and Mr. and Mrs. Temprell are entitled to credit, he was not very scrupulous as to the means by which his object was to be accomplished.

The Court forbears entering into the particulars of what is stated to have passed during the preparation of the settlement, and of the communications and proposals said to have been made at that time, and subsequently to Mr. Gray and Mr. Temprell by Baker, with a view to obtain the possession of the whole of the property of the deceased, because some very strong observations have been made upon the conduct of those individuals, and the manner in which they have given their evidence; and, because, although the Court is by no means prepared to go the whole length of imputing wilful and corrupt perjury to them, there are some [133] parts of their testimony which are inconsistent and irreconcilable with each other, and it would, therefore, be improper to hold that Mr. Baker was guilty of what was imputed to him by them; to the evidence, therefore, of these two witnesses, the Court is not inclined to pay much attention, at least not to rely upon it for the purpose of fixing these imputations upon Baker. The objection does not apply to the evidence of Mrs. Temprell; at the same time it is manifest that she was no friend to Baker, and she disapproved of deceased's marriage with him, and acted together with her husband and Gray in endeavouring to induce deceased to execute a will under which he was not to take any interest; against this, however, it is to be observed that she was the most intimate and confidential friend of deceased, (a) and was, therefore, a person to whom it was natural that the deceased should resort for advice, in the disposition of her property, and in any difficulty with which she might have to contend: but still the Court will not rely upon her evidence further than as she is confirmed by others, and by the necessary course of the transactions to which she deposes, or as her account is admitted to be and argued upon as being correct. With these observations on the character of the evidence the Court passes to the consideration of the only important question in this case; namely, whether this paper which is now propounded is proved by evidence upon which the Court can rely to be the will of the deceased; and this will depend upon the degree of credit which the Court is to give to the evidence of Mrs. Foweraker and Mrs.

Heath, [134] for I entirely agree with the observation which has been made, that if the whole of their evidence is to be taken as true, there is an end of the whole case ; for they not only prove the act of execution, and knowledge of the contents, but activity and volition in an extraordinary degree, so much so as to render it a matter of some difficulty to conjecture why the execution of this instrument was so long delayed. But the effect of their evidence cannot be duly estimated without examining the previous testamentary acts attributed to the deceased, as compared with that which is now propounded ; the contents of which having been already stated it is not necessary to repeat.

It appears, then, that the deceased having married in the month of July, 1833, and having reserved to herself the disposal of a moiety of the property which she possessed, or in the event of her making no disposition, secured it to her next of kin, her nephew, Mr. James Batt, not long after her marriage, contemplated a testamentary disposition of her property, and it is abundantly proved, and indeed admitted, that she was desirous of having a will executed, to what effect will presently appear.

In the month of November, 1833; it is alleged that she gave directions to her husband to get a will prepared for her, and that he, in pursuance of those directions, proceeded to Messrs. Poole and Gamlen, of Gray's Inn, who had been employed as his solicitors, and gave them verbal instructions for the preparation of a will to be executed by the deceased, nothing being produced to them in writing ; the deceased, indeed, as before observed, is admitted to have been at all times incapable of writing. The [135] instructions are taken down in writing by Mr. Gamlen, and a draft will is prepared ; whether a fair copy for execution was ever made appears to be doubtful, although the impression upon Mr. Gamlen's mind is that it was, still, as there is no charge for it in his books, he declines to swear to it positively ; and, perhaps, the circumstance is not of sufficient importance to make it necessary to pursue the inquiry further. The instructions, however, are complete, and are so considered by Mr. Gamlen, for he draws a will from them and produces the original instructions and the draft, and they are annexed to his deposition, and are marked No. 1, and purport to have been given on the 23rd of November, 1833. The husband is appointed sole executor and residuary legatee ; the amount of the pecuniary legacies is about 1800*l.*, leaving, therefore, a balance of 1700*l.*, subject to the funeral expenses, to the husband, besides any savings which might have accrued during the life of the deceased.

Now it is admitted that there is no direct proof of the instructions for this paper having come from the deceased ; but it is said that the inference that they did is as strong as positive proof. It then becomes necessary to look at the evidence of Mr. Gamlen upon this point ; now that Mr. Gamlen had no communication with the deceased is admitted, all his information comes from Baker himself, the person principally benefited by the proposed disposition. It is said that if Baker had any purpose of fraud, he would not have had recourse to this respectable house, and it is therefore to be taken as a proof of bona fides that he does apply to them, but this is an inference to which the Court cannot [136] altogether accede, when it considers the means which were taken to prevent them from having communication with the deceased, and to blind them, or rather Mr. Gamlen, as to her real state and condition. Had Mr. Gamlen been taken to Notting Hill, to have attended the execution of this, or of either of the other papers prepared by him, the case might have borne out the inference, and the Court would have had the satisfaction of having the testimony of Mr. Gamlen upon the accuracy of which it might with the greatest confidence rely. But the case is not so ; Mr. Gamlen does not see the deceased, and his offer to attend her is declined : his evidence to this part of the case is on the second article ; he says that "he had no acquaintance with the deceased, but had known her husband about three years, he having been recommended to his firm about that period to transact some business by a client of theirs in the country." To the thirty-fourth interrogatory he says "he never saw the settlement, though he asked for it, but Baker said there would be a difficulty in obtaining it from the trustee." He says to the thirty-fifth interrogatory, when speaking as to a subsequent will prepared for deceased in the month of February following, being that which is now propounded, with some alterations, that "he was informed by Baker that his wife was unable to write, not that she could not read. He represented her inability to write as owing to some bodily infirmity, and deponent had not the slightest idea but that she was perfectly capable, had she been well, of reading and writing too, and that she was a highly

respectable woman ;" he says, "Mr. Baker is a very respectable, good [137] looking man, and deponent was not aware but that he had been long married to Mrs. Baker, and that she was an educated woman; the reason why he wrote in the attestation to the will that the same had been read over to the deceased, who appeared to understand the same, and the words, the mark of Susannah Baker at the foot thereof, was because he considered that, as the deceased could not write, it was necessary to have the usual clause of attestation for a markswoman; certainly the producent (Baker) did not, on giving him instructions, inform him that his wife could not read, but only that she was unable to write, and that by reason only of some bodily infirmity." This interrogatory is addressed to Mr. Gamlen, with reference to the paper propounded; but it is clear that the same information as to the deceased's inability to write, and the cause of it, must have been given to Mr. Gamlen on the first interview, as the attestation clause on the draft will has the words interlined; "the same having been read to her, and she appearing to understand the same." To the thirty-sixth interrogatory he says, "Mr. Baker described the relations who were to have the first legacies, not by name, but by relationship, as the two nephews and niece of her late brother, as I told him that I must have their names; I asked him for them; he said he did not know their names, and I remember I particularly desired him to ask Mrs. Baker for their names, but he did not obtain them." Such then is the account of Mr. Gamlen, as to the manner in which the instructions for the first testamentary act of the deceased were given to him, and I cannot but think that it is any [138] thing but creditable to Mr. Baker, and certainly does not at all satisfy me that the instructions came from the deceased herself, or that they were communicated to her.

The disposition is greatly in favour of Mr. Baker, not, perhaps, apparently so to Mr. Gamlen, who was totally unacquainted with the previous history of these parties, or the amount of property which had been given up to Mr. Baker on the marriage, or the manner in which the remaining part of it was to go in the event of the deceased making no disposition of it: on the contrary, he seems to have thought that the legacies were so much deducted from that to which the husband would have been entitled; indeed he expressly says, in answer to the same interrogatory (thirty-sixth), "that the instructions for the will appeared to his (Baker's) prejudice in great part, by the legacies left to relations, and in the second will more so than the first;" so that in the representation made to him by Baker there was nothing to awaken his suspicion as to the integrity of the transaction, and he, therefore, had no difficulty in preparing the will from the instructions of Baker, without ascertaining the wishes of the deceased from herself: but had Baker told him that he had already received 2500l. from deceased, that if no disposition was made of the remaining 2500l. it would go to his wife's relations in exclusion of himself; and that, therefore, whatever remained after the legacies were paid, would be so much clear gain to him; and, above all, had Mr. Gamlen been informed that the deceased's inability to write was not occasioned by bodily infirmity, but by ignorance, and that if she could read at all, it was with the [139] greatest difficulty, I am quite sure that Mr. Gamlen would not have prepared such a will as this without having seen the deceased, and ascertained that it was consistent with her intentions and wishes. But, again, how is the inference borne out that the instructions for this will must have come from the deceased herself, when this circumstance is adverted to, that at no time does Mr. Baker appear to have applied to the deceased for the names of her nephews and niece, although expressly requested by Mr. Gamlen to do so? their names nowhere appear in any of the papers prepared by Mr. Gamlen; had he, as he must have done if he received the instructions from the deceased, communicated to her what had passed between him and Mr. Gamlen, he must have been put in possession of the names of these legatees, and have informed Mr. Gamlen of them at the subsequent interviews. Again, could there have been any doubt that, if these instructions had proceeded from the deceased, and she had been anxious to have them carried into effect, there could have been no difficulty in obtaining a copy of the settlement from Mr. Temprell upon an application from her through Mr. Gamlen? But no application is made, and Mr. Gamlen is directed to make the best will he could without seeing the settlement, which he accordingly does, in general terms only referring to it, and without any knowledge of its provisions, further than that the deceased had 2500l. to dispose of.

Now all these circumstances taken together, so far from implying any knowledge of these instructions on the part of the deceased, to my mind convey a directly con-

trary inference, and satisfy me [140] that this was the act of Mr. Baker alone. But this inference is still more strongly supported by what was passing in another quarter about the same time ; annexed to Mr. Baker's affidavit as to scripts are several paper writings, purporting to be instructions for a will, and the draft and fair copy of a will prepared for execution by the deceased, containing a very different disposition of her property from that contained in the paper which the Court has just been considering.

The instructions as originally taken are in the handwriting of Mrs. Temprell, afterwards altered by Mr. Gray, by whom the fair copy for execution was also prepared.

These instructions are represented to have been given in the first instance by the deceased to Mrs. Temprell, by her communicated to her husband, and afterwards delivered to Mr. Gray, who attended the deceased, and received her final instructions for the will drawn from them, but which was never executed.

Nothing can be more natural than the manner in which the instructions are given, or bear more clearly the marks of fixed intention at the time.(a) That deceased did give instructions to Mrs. Temprell is admitted, though it is suggested that they were obtained by misrepresentation and undue influence, without, however, any evidence to lead to such a supposition, except a declaration said to have come from the deceased at a late period of time, spoken to by Heath, and which it may be necessary hereafter to notice : and that the deceased knew that a will was prepared by Mr. Gray, and [141] that it remained in his possession up to the time immediately before her decease, is evident from the declaration which she made to Mr. Brown on the 14th April, 1834, although she said it wanted alteration.

Now that the deceased should have contemplated such inconsistent dispositions at this time, as are evidenced by these papers, is, I think, one of the most improbable suggestions that can be conceived ; and it is almost equally so, that she should have meant to mislead her most intimate and confidential friend, Mrs. Temprell, in this respect ; and if the Court is to say which of them is the true index of the deceased's mind at the time, it can have no difficulty in saying that it is the instrument prepared by Mr. Gray. The disposition is natural, it provides for those whom she considered to have claims upon her, either by their relationship to herself, or to her first husband, or from the terms of friendship on which she had lived with them. It does not altogether pass by the members of the family of her husband, Mr. Baker, from whom she had received attention, for under the instructions as originally taken legacies were left to the two sons of Mr. Baker, and her clothes, which Heath says she declared an intention of leaving to Miss Sarah Baker, are given to her ; and in the will as finally altered for execution the legacies originally intended for the sons of Mr. Baker are given to Miss Sarah Baker, who seems to have been a favourite of the deceased ; and that deceased should have applied to Mrs. Temprell for advice, and afterwards have employed Mr. Gray, is extremely natural from the relative connexion of the parties with each other ; Mrs. Temprell being at this time, [142] at least, her most confidential friend, and Mr. Gray the person who had prepared her marriage settlement for her. Looking then to the contents of this paper, emanating, as I think they are clearly shewn to have done, from the deceased herself, and coupling them with the account given by Mr. Gamlen, and the conduct of Baker, there is in my mind the strongest reason to presume that the deceased had no knowledge whatever of the preparation of the draft will prepared by Gamlen, or that she ever had an intention of making such a disposition of her property as is contained in it, at all events there is no proof that she had.

The Court has dwelt longer on this part of the case than its immediate connexion with the real question perhaps required ; because as this paper is the foundation of all that subsequently follows, as it forms the substratum of the will now propounded, it seemed necessary to trace as accurately as possible the workings of the deceased's mind through the several stages of these transactions, and the conduct of the parties concerned in them, and because, if Mr. Baker is found to have commenced in fraud, it will raise the vigilance of the Court and make it observe his subsequent conduct with jealousy.

Nothing further appears to have been done with respect to the first paper of the 23rd of November, 1833 ; nor does Mr. Baker seem to have had any further interview with Mr. Gamlen till the 20th of February, 1834.

(a) Evidence of Mrs. Temprell in the 5th article.

It was said, if the deceased had finally made up her mind to execute this paper, why did it remain in its present unfinished state? to this it is replied that she was deterred by fear of her husband, [143] who had been worretting her to make a will in his favour; to this it is rejoined, this cannot have been the true motive, for Baker went into Devonshire about the 1st of January, and returned about the middle of February; during that time there certainly was sufficient opportunity, as far, at least, as any interference on his part could have prevented it, to have had the will prepared by Mr. Gray executed. It does appear that in the month of December an appointment had been made for the execution of it, but which did not take place, in consequence, as it is said, of the fear entertained by the deceased that her husband should know of it, and from that time she never left her house, and Mr. and Mrs. Temprell seem to have had very little intercourse with her during her husband's absence, in consequence of a slanderous report which he had spread that they had procured her signature to a will at a time when she was in a state of incapacity, produced by something which they had administered to her. The existence of this report is not denied, indeed, it was said in argument that there was sufficient ground for it, although in the absence of all evidence to support it; and the ground for it being disproved by the fact that no such paper was executed. Mr. and Mrs. Temprell, therefore, were prudent in not attempting to procure the execution of the will in Mr. Baker's absence.

The next act of a testamentary nature is that which occurs on the 20th of February, when Mr. Baker again goes to Mr. Gamlen, and gives instructions as from his wife for an alteration of the draft will formerly prepared; and upon this occasion the same communication takes place between Mr. Gamlen and Baker as before; the former has no [144] further information as to deceased's inability to write, the names of the nephews and niece are not communicated to Mr. Gamlen, and finding that the interest which Baker would take under this second paper was less than under the first, he suspects no imposition, and accordingly prepares a fair copy for execution which he delivers to Baker. Mr. Gamlen says (a) "that at this interview he offered to go and see Mrs. Baker," but Baker said "there was no occasion for it." Mr. Gamlen then was equally ignorant as to the real state of the deceased, as on the former occasion; he has no suspicion, for he conceives the disposition of the property is prejudicial to Mr. Baker's interests, and he is led to believe that in declining his attendance upon the deceased, Mr. Baker is only actuated by a desire to avoid expense—whether that was his real motive may be doubtful. Now this paper remains unexecuted from the 20th of February to the 19th of April; why, does not very satisfactorily appear. But between these two periods several circumstances occur, to which it will be necessary now to advert; whether anything passed between Baker and his wife relative to this paper, or the former, there is no evidence to shew; but it seems that on the 27th of March Mrs. Temprell goes to the deceased's house, at Notting Hill; her illness had much increased, and she was confined to her bedroom, her strength gradually declining. Mrs. Temprell speaks to what passed on this visit in her deposition on the ninth article, and I refer to her account of this visit with the greater confidence, because she is in some degree confirmed in it by [145] Heath and Piper, adverse witnesses, who admit that she was there and had an interview with the deceased, and told them for what purpose she had come, and also because she deposes to many circumstances in which, if she has spoken falsely, she was open to contradiction by other persons. She states then that she was fetched on the 27th of March, the day before Good Friday, by Mrs. Brown, who came for her and urged her to go to deceased to induce her to sign her will; Mrs. Brown, she says, at this time knew that there was a will prepared, for Mr. Temprell, in order to convince Mrs. Brown and her husband that Baker's charge about the poison was false, had shewn them the will unsigned, and Mrs. Brown urged her to get the will signed; Mrs. Temprell at first objected, as she had a legacy of 100l. in it, but at length yielded to Mrs. Brown's persuasion and went to deceased. Now is this part of the story true or false? if false, Mrs. Brown was capable of contradicting the whole of it; she is not produced, and I must therefore presume that she could not deny that all this had passed; then, if it is true, it shews that there was nothing clandestine in it; and that the fact of the will having been prepared, and that Mrs. Temprell had a legacy of 100l. in it, was known to Mrs. Brown, and that the will was unsigned; and it further shews that the deceased's confidence in Mrs.

(a) To the 3rd article.

Temprell was not at this time diminished—indeed Piper states in answer to the fifth interrogatory, “Mrs. Heath might say, though she does not recollect that she did, that she was glad that Mrs. Temprell was come, for Mrs. Temprell was deceased’s very particular friend;” and to the tenth interrogatory, “that deceased [146] always spoke of Mr. and Mrs. Temprell in terms of the greatest respect and friendship, and that having few friends, Mr. and Mrs. Temprell were the persons she was most intimate with.” The deceased, then, on this occasion, expressed her approbation of the contents of the will, and her anxiety to sign it, but was alarmed at the difficulty of doing it without Baker’s knowledge, and proposed that it should be done without witnesses; that she seemed very anxious about it, and asked whether Mrs. Temprell could not come the next day; but that being Good Friday, it was arranged that Mrs. Temprell should come on Saturday the 29th, and in the mean time that Mrs. Temprell should consult Mr. Gray as to the necessity of the presence of the witnesses at the execution; that certain alterations should be made, namely, by taking away the legacies to 50l. each to Baker’s two sons and giving them to his daughter Sarah, who had been very attentive to her, and 10l. to Nurse Heath, and 10l. to Sarah Piper. She then takes her leave of deceased and returns to town, where she sees Gray, informs him of what had passed, and of the alterations proposed, which were accordingly made, and it was then settled that Gray and Webb who had witnessed the execution of the marriage settlement should accompany Mrs. Temprell to Notting Hill for the purpose of getting the will executed, if it could be so arranged as to be kept secret from Baker, of whose knowing it Mrs. Baker seemed to have great dread and apprehension.

On the 29th of March Mrs. Temprell, Gray, and Webb proceed to Notting Hill; Mrs. Temprell goes to the deceased alone, and endeavours to prevail upon her to execute the will, but deceased [147] refuses, under the apprehension as she declares that her husband will know of it; and when she finds that the witnesses are in the house, she becomes greatly alarmed and agitated, and desires that they should go away immediately, which they do; and Mrs. Temprell, after expressing some anger at the deceased for having given her the trouble of coming to her for no purpose, also takes her leave. Such is shortly the history of what passed on the 29th of March on the subject of the execution of this will, and in which the deceased again expresses her approbation of its contents, and her determination to execute it, although she does not then proceed to do so, alleging that whatever measures might be taken to ensure secrecy, her husband would be sure to discover it.

The next transaction which it is necessary to notice is that which occurs on the 8th of April. It will be recollected that on the 20th of February a fair copy prepared for execution, being, in fact, the paper now propounded, but in its original form, was delivered by Mr. Gamlen to Baker, and it is pleaded that it was then given to deceased, in whose possession it continued, it having been deposited in one of her drawers in her bedroom, and where it remained from that time in the same state in which it had been prepared by Mr. Gamlen; although the paper which is much worn does not bear that appearance, it looks much more as if it had been carried about in the pocket, and it appears to have seen some service.

On the 8th of April, Baker again goes to Mr. Gamlen and gives him instructions for a new will. The account which he gives is on the fourth article of the allegation. Instructions were given and a [148] fair copy prepared for execution, which, however, remained in Mr. Gamlen’s possession till the 14th of April, when it was given to Mr. Brown under the circumstances which will be presently stated.

The contents of this paper are very different from any of those which had been already prepared; in all of those the legacies were to be paid on the deceased’s death; but, by the present, they were to be postponed till Baker’s death, he in the mean time having the interest of the whole, so that the advantage intended for deceased’s relations and friends was to be postponed to a period which might be sufficiently distant.

That any thing of this kind should have occurred to the deceased herself is very improbable, and is not to be presumed from what she is previously said to have done; at what time she began to entertain this notion there is nothing to shew, nor are there any expressions coming from her which tend to support the suggestion that the idea originated with or was adopted by her; on the contrary, if Heath is to be believed, the suggestion was Baker’s, and was not acceded to by her; she says the deceased

told her that Baker wanted her to leave him the whole property while he lived, and that then there would be more for the others afterwards; but," she continued, "they will all expect something at my death, and they'll be better pleased to have something now, for they do all want it, and they can go into business with it."

If then this account be true, the deceased and Baker entertained different opinions as to the propriety of the disposition of her property; and it affords, therefore, no ground for inferring that she [149] desired her husband to get a will prepared to that effect: and in the absence of all evidence this is decidedly not a case in which Mr. Baker is entitled to any presumption in his favour. From the instructions then given a will is prepared for execution, but remains with Mr. Gamlen till the 14th of April, for on that day it is pleaded that Mr. Brown called at Mr. Gamlen's office for it, and that it was delivered to him for the purpose of getting it executed by deceased. This brings the case then to the last week of the deceased's existence, and as there are many important circumstances which take place in this short interval which will require to be noticed, it may be necessary to consider what was the deceased's condition at this time, and what was the state in which her supposed testamentary acts stood.

She had been gradually declining in strength and was in a state of great debility—as stated by Hora—confined to her bed, suffering great oppression on her chest, with difficulty of breathing, but retaining the use of her faculties, although at times wandering a little, from the effect, as it is said, of the medicines administered to her, and some times perhaps labouring under some degree of stupor, from which, however, when roused she recovered, and it is admitted on all hands that, as far as capacity is concerned, she was in a condition to execute any testamentary act, if she were disposed so to do.

At this time she had, according to Mr. Baker's allegation, the will prepared for execution on the 20th of February in her possession: the will also of November, 1833, she knew to be in Gray's possession; if she had been consulted at all upon the [150] subject, she knew that the will of the 8th of April was prepared, or in a state of preparation; that she had up to this time made any allusion to any of the papers for which Baker had given instructions is not stated by any witness; neither to Mr. Hora, who had several times urged her to make her will, having been requested by Baker to press her to settle her affairs, though not as he says to make a will in his favour; nor to Heath, who had been her constant attendant for thirteen weeks, had she uttered a syllable concerning her will, except, indeed, upon that occasion, on the 27th of March before alluded to, when she observed that she hoped Mrs. Temprell would not come again, that the will was not her's, but Mrs. Temprell's; and to Piper she seems to have been equally reserved.

Upon the 14th day, then, of April, just one week before her death, Mr. Baker's son, Robert Baker, called upon Mr. Brown and told him that Mrs. Baker wished to see him, that she was very bad and wished to see him about her will; evidently, therefore, leading Brown to understand that he was sent for by deceased's special direction; he consented to go, but says they first went to Mr. Gamlen's chambers for the will, which he delivered to them, having first given Mr. Brown instructions as to the manner in which it was to be executed, at which Mr. Brown says he felt disappointed, as he thought the solicitor was to go with him; but this formed no part of Baker's plan. In their way to the deceased's, Mr. Brown read the will, and finding that the interest of the money was bequeathed to Baker for life, and that after his death, and not before, the legacies which she had left were to be paid to her poor nephews and niece; he told Mr. [151] Robert Baker that he would have nothing to do with getting such a will as that signed by the deceased, that "he was sure the deceased never intended to execute such a will as that."

As they approached the deceased's house they were met by Baker, who told them that the deceased had altered her mind, and she meant to give what she gave to her nephews and niece at her death and not at his; Brown told him he was glad of it, but that he had got the will in his pocket; Baker replied that it was of no use, as she had altered her mind, but as he was so near he might as well go on, as she would be very glad to see him; and in answer to the twentieth interrogatory Brown says "he told Baker that if the will he had with him was her will, she must get some one else to read it to her, for he would not, as he did not think it could be her intention." This pretty plainly speaks what Mr. Brown's opinion of the transaction was, and even

after the death of the deceased, when there was a suggestion of ending the dispute as to the will by compromise, he entertains the same opinion as to Baker's conduct; when it was proposed to give Baker a few hundreds and the rest to her poor relations, he assents to the proposition, adding (to the sixteenth interrogatory) "that the impression on his mind was, that Baker in getting what he did of deceased's money on her marriage had had as much as he ought, and that the poor relations ought to have the rest." Mr. Brown went to the deceased and had some conversation with her, but does not mention that he had the will with him.

Now it was argued that the circumstance of Baker having asked Brown to go on to the deceased is a [152] proof of fairness on his part, and that he had nothing to conceal, otherwise he would not have applied to Brown; but the Court does not think that much can be made of that circumstance, for that Baker was anxious to get a will executed by deceased, and that under those which he had caused to be prepared he had a considerable benefit is abundantly clear; and it is, therefore, probable that he had been endeavouring, though without effect, to induce the deceased to sign a paper to the effect of that which had been drawn up by Gamlen; for that some conversation had passed between her and Baker on the subject of her will is evident from her manner of addressing Brown, as described by him in answer to the twenty-second interrogatory; he says "she expressed pleasure, not surprise, at seeing him, and broke out at once on the subject of her will; 'she hoped he had not come to bore her about that; ' he at once told her he had not, 'she had been bored enough about it already;'" evidently alluding to something that had recently passed, and not as Mr. Brown seems to imagine to what occurred between her and Mrs. Temprell on the 27th of March, more than a fortnight before; and from his answers to the nineteenth interrogatory it should seem that deceased had complained to Mrs. Brown that Baker and all his family had been teasing and worrying her to make a will, but that it was of no use; although this might have happened, as he says, sometime before when the deceased attended Dr. Rees; if so, it seems to corroborate what is stated by Mrs. Temprell and others, of Baker's urgency to obtain a will from her.

On this occasion she makes no allusion to any [153] will which had been prepared for her through Baker, nor indeed to any will but that which was in Gray's hands, and which she recognised as containing, in substance, her will, though she says it required several alterations, and she tells Mr. Brown when she is better she will call upon him and pay Gray for his trouble, get the will from him, and go with Brown to some lawyers to make the alterations. So far then from having at this time, 14th of April, an intention of executing the will of the 20th of February, she says nothing from which it can be inferred that she knew of its existence.

Mr. Brown then takes his leave of her under the impression, certainly, that at this time she did not entertain any intention to make a disposition of her property in favour of Baker, or that she had any other paper of a testamentary nature than that which she said was in the possession of Mr. Gray.

Now it has been suggested that from all that passed on this occasion, it is to be collected that the deceased did not conceive herself to be in danger, that she only complained of shortness of breath, and thought she should soon be better; and therefore, and on that account alone, postponed the execution of her will; but this, considering all the circumstances, seems hardly possible; she had been long confined to her bed, so that it is difficult to conceive that she should have so far deceived herself as to her real state, particularly after Mr. Hora had stated to her the necessity of settling her affairs, and she could only have made use of the expressions attributed to her with the view of inducing Mr. Brown not to enter upon the subject of her will at that time, and nothing further than what has [154] been alluded to passed between them. If she was sincere in what she said to Mr. Brown about the will in Gray's hands, she seems to have had no intention of executing it in the form in which it then was, though she might adhere to the substance of it; but if not, then she might wish to avoid importunity upon the subject, but certainly it will not warrant an inference that she was contemplating the execution of the paper of the 20th of February; and yet, according to Heath, she had on the morning of this very day held a long conversation with her as to the manner in which she meant to dispose of her property, in the course of which she is represented to have declared her intentions almost in direct conformity with that instrument; certainly when Mr. Baker left her on that morning, he had no idea that she had any such intentions; he intimates

nothing of the kind to Brown when he meets him, beyond saying that she had altered her mind and meant to give what she intended for her poor relations to them at her death and not at his; whether any such intention was expressed to him by the deceased, there may be considerable doubt; his conduct does not seem consistent with such a supposition, for on going to London he calls upon Gray and Temprell and has a conversation with them, the particulars of which for reasons before assigned it is not necessary to state, further than that it is evident that at this time he had no expectation or idea that the deceased had it in contemplation to execute any testamentary act.

After having seen them, he has also an interview with Mrs. Temprell; what passed between them is stated by Mrs. Temprell on the 13th article of the allegation, and this appears to have been the [155] first time of their meeting since December, 1833, when the report before referred to had been set about by Baker; Mrs. Temprell says in allusion to this circumstance that "Baker seemed at first very confused and awkward, and said he would give a hundred pounds to any one who would make out that he had said so;" and after some short conversation on that subject she goes on to state what he said to her, and which it is right to give in the words of the witness (on the thirteenth article). "He pressed me very much to go and speak to his wife; he said he understood there was a will but it was not signed; I told him it was as he supposed, but I had promised her not to trouble her again on that subject. 'Oh,' he said, 'he did not want me to ask her, her wanted to ask me, her wished to sign her will;' I said that altered the case, and he then from himself pressed me to go, and said if I would, he would come up and fetch me in his chaise next day; he said, 'Her was very bad, her was a dying and could not live many days.' I told him it was not of much matter to him whether she signed the will or not, for she had left the greatest part of her property to her own relations, I said as much as 1760*l.*, and that there was 50*l.* a piece to the Beasleys, and 100*l.* to Miss Brown, and she had left me 100*l.*; but I said there was a something for his family, I did not tell him how much, I said if she don't sign it her relations will get it, and if she does it won't make much difference to you; 'Well,' he said, 'let it be how it would he wished it done;' and as he buttoned his coat to go he said, 'If her don't leave me some of her money, I don't think I'll [156] order her funeral, still,' he said, 'no matter he wished it signed,' and if I would come and talk with her he should be very much obliged, and so at last I promised."

Now this communication with Mrs. Temprell is of great importance. It shews not only that Mr. Baker himself was extremely anxious to have a will executed by the deceased, and that he despaired of being able to effect it by his own influence with her; but it proves also that in his opinion the deceased's confidence in Mrs. Temprell continued unabated, and it also proves that at this time he was acquainted with the contents of the will prepared for the deceased by Gray, and that it was unsigned at this time. Now it is admitted that this interview did take place, and it has been argued upon as shewing the disinterested character of Baker's anxiety for the execution of the will, inasmuch as although he was aware that the contents of the will which Mrs. Temprell had referred to were unfavourable to him, he still continues desirous that she should go to deceased; "Well," he said, "let it be how it will he wished it done;" but it does unfortunately appear that this disinterested anxiety for the interest of deceased's relations does not long continue. On the next day, on which it was arranged that Mr. Baker should call upon Mrs. Temprell and drive her to Notting Hill, whilst they were on their way thither, Mr. Baker began to say how he thought the deceased ought to leave her money, and Mrs. Temprell goes on to depose "that he went through a plan of his own, quite different from her's," and concludes, "as to the rest I have put that down for myself, it's only about 1000*l.* or some such sum." He did not [157] put any paper into Mrs. Temprell's hands on this occasion, but said he had drawn out one to that effect, and had given it to Mrs. Brown at the house (which turns out to be the fact, although it has not been thought proper to examine Mrs. Brown, who might perhaps have been able to give a more accurate account of the contents of the paper than Mrs. Temprell). Heath states (to the seventh interrogatory) that she did deliver a paper to Mrs. Brown and Mrs. Temprell on or about Tuesday, the 15th of April; "such paper had been given to her by Mr. Baker with directions to deliver it to Mrs. Brown. He did not tell her the contents or purport of it, nor did she know the same in any way; but, she adds, "I do believe it was intended as instructions for such a will as Mr. Baker wished the deceased to make, I so believed from what took place on the occasion, Mrs. Brown said she would

fetch Mr. Brown and then she thought it would be done, and she said she had rather Mrs. Temprell should go up and read it to her, and Mrs. Temprell did go up, but presently came down and said it was of no use, and said she would burn it, but I did not see her do it."

She therefore confirms Mrs. Temprell's account as far, at least, as to her visit to deceased upon the 15th of April; to the delivery of a paper by Baker's desire to Mrs. Brown; to the conversation between Mrs. Brown and Mrs. Temprell, and to the fact of Mrs. Temprell having gone up alone to the deceased, her return and saying it was of no use, and that she would burn the paper.

Now, then, finding Mrs. Temprell confirmed by this adverse witness in so many particulars, it may not [158] be unreasonable to suppose that she has stated the particulars of what passed on this occasion between her and the deceased when they were alone; her deposition is to this effect (thirteenth article). "By this time we had come to the top of Notting Hill, where, instead of driving to the house, which is at some distance below, he said he would stop there and feed his horse if I would walk in; I accordingly did so, I observed Mrs. Brown at the window, and on going in she seemed surprised at my coming, and still more when I said Mr. Baker had fetched me, so that we met there; she told me she had a paper in her possession which Mr. Baker wanted her to read to the deceased, but she did not like, as her daughter's name was in it for a legacy; she gave me the paper and I found it corresponded with what Mr. Baker had told me in coming along, and I said as I had been brought so far in it I would go through with it. I went up stairs to Mrs. Baker, whom I found much worse than when I last saw her, and extremely surprised to see me; she said Mrs. Temprell the moment Mrs. Brown saw you come in at the gate and told me, I was sure it was Baker's doings to fetch you; well, I then told her all and opened the paper and began reading it, but she stopped me at once and would not let me read any more, saying in a way of ridicule, 'Mr. Baker's a nice man indeed.' I went on so far as to tell her that he had left himself 1000*l.* in it, and she again, in a solemn manner, declared that he never should have a shilling more of her money, that he had had enough already, and that she never would alter that will; but she declared it was then she feared too late, and if she died [159] without signing it she would be content, as she knew how the money would go if she made no will; she also declared she was most determined to have a person to attend upon her who would keep Baker altogether away from her, that he never should enter her presence again while she was alive, that when she was dead it was of no consequence; but she added, you know Mrs. Temprell how quiet has been recommended to me, and here have I been worried out of my life about this property, but it's of no use, I'm determined about it, and I have often sent him out of my room, that now he shall never enter it again; after some more similar remarks I took my leave. I went down into the kitchen where Mrs. Brown, Mrs. Heath, and the servant were, and I told Mrs. Brown, in their presence, it was just as I expected, Mrs. Baker would have nothing to do with the will, and as it was of no sort of use, and I felt quite angry at having been brought from my home in such a manner, I put the paper into the kitchen fire, where it was burnt in all their presence, and said, 'You see she'll die without a will.'"

Nothing can be more clear and decided than the deceased's conduct on this occasion; nothing can more clearly demonstrate her determination not to leave any part of her property to Mr. Baker, or a more determined adherence to the will prepared by Gray, and I see no possible reason to doubt that what Mrs. Temprell has stated is perfectly correct, or the sincerity of the deceased.

Now if all this really did pass, how extraordinary will appear the account given by Heath, the witness upon whose testimony the case on behalf of [160] Mr. Baker must mainly if not almost entirely depend; as she is the only individual to whom it is suggested that the deceased made any communication as to her testamentary intentions preparatory to the instructions which are said to have been given to Baker on the 16th or 17th of April, and which led to the asserted execution of the will propounded on the 19th.

It will be recollected that instructions had been given by Baker to Gamlen to prepare a will for execution on the 8th of April preceding, that a fair copy had been prepared; and that on the afternoon of the 14th of April Brown had gone down to Notting Hill with that will in his pocket; with respect to which, however, Baker told him she had changed her mind, and to which no allusion was made by the deceased

in her conversation with Mr. Brown, the only paper referred to being that which had been prepared by Gray; and it will also be borne in mind that on the same day the interview between Baker and Mrs. Temprell had taken place, and that, in consequence of what had then passed, Mrs. Temprell had gone to the deceased on the next day, and had produced to her a paper purporting to contain a disposition of her property, drawn up by Baker, and delivered to her by Mrs. Brown, who had received it from Mr. Baker for the purpose of endeavouring to prevail upon deceased to sign it, but that she refused.

Now the account which Heath gives is this; it is on her examination on the second article of the condidit she had said, on the first article, that "the deceased told her that she had had her money settled upon herself, and she could make a will; but she told me if she did not make a will, all her [161] property would go to her nephew, James Batt; she did not say how, whether by her marriage settlement, or her husband's will, only that he would come into it all if she did not make a will. She then goes on to depose that "she did, however, make a will, and I saw her sign it, and I witnessed it, I did so in manner as I will depose." She then proceeds to relate the manner in which the conversation began and the purport of it: this took place on the Monday, a week before her death; this was on this same 14th of April. "On the Monday in the week before she died I was nursing her when, as we were alone together in her room, the front room on the first floor where she was confined to her bed, she said to me, Mrs. Heath, 'I don't think I shall get better of this illness, and I think the sooner I make my will the better,' or words to that effect. I replied I think so too, Mrs. Baker, or to that effect. She then went on to tell me what she meant to do with her property. She said she should like to leave Mrs. Beasley's children a hundred pounds a piece, they were her late husband's, Mr. Phillips's sisters' children, there are six of them, and she added she should like to leave Mr. Phillips's father one hundred too, and Miss Brown two hundred, that is a daughter of her late husband's brother, her name is Phillips too, but they call her Brown, because her mother had married again a man of that name. I recollect she said as the reason why she gave her more than her husband's father that Mr. Phillips was old and would not want it long, and one hundred would be enough for him. She also said she should [162] like to leave her own brother's children, the three Batts, two hundred each; and she then added, Mr. Baker wants me to leave him the whole property while he lives, and that then there will be more for the others afterwards? but she continued, they will all expect something at my death, and they'll be better pleased to have a something now, for they all want it, and they can go into business with it, and I think I have done what's right, don't you think so, Mrs. Heath? I said, indeed, I did think so. This is as near as I can recollect what she told me of her intentions on the Monday, but she did not at that time tell me any more, nor whether she should leave her husband anything, or should give directions to any body to make a will for her."

Now that she should have chosen this particular time to make this communication to Heath, being the first occasion on which she had mentioned the subject to her, although she had been in constant attendance upon her for twelve weeks preceding, does appear most extraordinary, particularly when it is further considered that this must have immediately followed on her refusal to execute the paper prepared by Gamlen, by which the husband was to have the whole property for life; and the account is still more improbable with reference to what passed between the deceased and Brown on the afternoon of the same day, and to the communication between Mrs. Temprell and Baker. But if the account of what passed on this day, Monday the 14th, is improbable on the face of it, that which occurs on the 16th is still more so, for in the in-[163]-terval Mrs. Temprell had visited the deceased, had read to her the paper left with Mrs. Brown by Baker's desire, which she had refused to execute, and had declared that Baker should have no part of her property. The account is this:

"I recollect, however, on the Wednesday she was worse, and said to me, 'I wish my business was settled,' I asked her what business, and she said her will, and she should like to have it settled, and said she felt so much fluttering at her heart. I said if she pleased I would go down and tell Mr. Baker, and she said do! but when I went he was gone to town."

And the person she sends for is Mr. Baker himself, who, however, had left the house before he received the message; but on his return on the evening of the same

day he is, as Heath states, alone with her for two hours, at the end of which time Heath goes into the room and says to her, "Mrs. Baker you look better," to which she replied, "I feel more happy, I've given Mr. Baker directions, and it's all done but signing"—all done but signing! why, it had all been done but signing for two months, for, according to Baker's account, she had had it in her possession from the 20th of February, snugly deposited in her drawer, from whence it must have been taken out for the purpose of being used on this occasion; for that is the will which is subsequently executed, and it is not pretended that any other was drawn up; and strange to say, not a syllable is mentioned to Heath of such a paper being in existence; for she goes on to say "that on the next morning, the 17th, on opening the drawers in deceased's bed-room, in [164] the middle drawer, she saw a paper, which she had not before seen and noticed it to her;" deceased said, "I suppose it's my will, give it me," which she did; "deceased took it and looked at it off and on for nearly an hour;" and adds, "She could not read writing much, she could a little," and mentions a circumstance respecting a letter from the deceased's late husband's brother, which, after looking at it, she said was a begging letter; and so this poor woman who could with the utmost difficulty contrive to read enough of a letter to discover that it was a begging one is to be taken to have been looking on and off this will for an hour, and thereby to collect a knowledge of its contents; she having, during two months preceding, had an opportunity of referring to it whenever she pleased, and it having been drawn up by her express directions, for such is the case set up by Baker. The whole story is grossly improbable; she goes on to describe the paper which deceased gave her to replace in the drawers, saying, "It only wants signing, but there must be two people to witness it;" so that, at this time, she was perfectly aware that it would be utterly useless to sign it, unless in the presence of two witnesses; but she goes on to ask whether Heath will be one; she replies, she cannot write; deceased says, "That's of no consequence, you can make your mark," and then adds, "I should like Mrs. Foweraker to be the other witness," that is Mr. Baker's sister, but she did not desire she should be sent for; and the witness then says that Mrs. Foweraker was in the habit of coming to see her, but she had not come before for a fortnight; but Mrs. Baker said, "Perhaps she will [165] come before the week is over;" and it did so happen that she came the next day, "but only to pay her a visit." Now, then, the intention of the witness is to represent that, contrary to her usual habits, Mrs. Foweraker had not been to see the deceased for a fortnight, that that was an unusual length of time for her to absent herself; and, therefore, that there was nothing extraordinary in the deceased's apprehension of a visit from her in the course of the week, or in the fulfilment of her augury, by the appearance of Mrs. Foweraker so opportunely.

Now what says Mrs. Foweraker, on the first article of the condidit? "She has visited them since their marriage, and staid a few days with them at Gravesend, she has also staid with them at their house, Boyne Terrace, Notting Hill;" but at what time, or on what occasion, she does not inform us, whether within the last six months or any other time; but she adds she went to see her on the 18th of April, that is Friday. "I had heard," she says, "she was ill;" why, she had been ill and confined to her house from December, 1833; "but at that time I was ill myself, I had been confined to my bed six weeks; but, being then better, went to see her, not intending to stay, but deceased requested me to do so, and I remained there all night." At all events, then, Mrs. Foweraker had not been to visit deceased for six weeks before the 18th of April: "she had heard of her illness," which had certainly much increased from the month of February, when Mr. Hora was called in for the second time, and it is plain that she had not visited the deceased since [166] her illness, and it is not, therefore, by any means improbable that she had not seen her for two months, or perhaps a longer time.

Now it is said that this is no such contradiction between the witnesses as to infer perjury on the part of Heath, and perhaps that observation may be well founded; but it certainly is a most extraordinary circumstance that the deceased should have selected a person to be a witness to her will whom she had not seen for six weeks, perhaps two months, on the bare speculation (for no person is sent to her) that she might possibly come before the expiration of the week. But was she, in other respects, a likely person to be selected as a witness?

In answer to the fifth interrogatory Heath says that "when she was first taken

ill, she had a great dislike to Mrs. Foweraker, Mrs. Temprell had said some ill-natured things against her which Mrs. Baker at first believed, but after a time did not notice them—"but latterly Mrs. Foweraker had staid on more than one occasion at the house, and the deceased has asked her so to do, and not requested that she might be sent away;" and on her second examination, in answer to the seventh interrogatory, she says, "I know that deceased had a great dislike to Mrs. Foweraker; she requested that she might not nurse her, but not that she might be kept altogether away from her, her fall-out with Mrs. Foweraker had been made up, and Mrs. Baker herself told me that she had found out that it was more Mrs. Temprell's doing than Mrs. Foweraker's, but I never could make out what it was; I am sure, however, that during [167] the time I nursed her the deceased was not averse to seeing her as a visitor, for she came several times, and deceased was glad to see her."

The witness does not state at what time the quarrel took place, at what time a reconciliation was effected, or when the last visit was paid; certain it is that it was not within six weeks, and this makes the account still more improbable, and certainly gives rise to a conjecture that the selection of Mrs. Foweraker was the act of Mr. Baker, rather than that of the deceased. This is what passes on the 17th of April between Mrs. Heath and deceased. On the next day Mrs. Foweraker visits the deceased, and upon her getting up to take leave deceased requests her to stop; from Foweraker's account, nothing passes on the subject on that day between her and deceased; but on the next morning, the 19th, the alleged execution takes place, and certainly nothing can be more strong than the evidence of Heath to the observance of all the requisites for the due execution of a will (and which she repeats in answer to the second interrogatory), but the question is whether she has deposed in such a manner as to be entitled to implicit credit, under all the circumstances. Upon her second examination on the first article, after having spoken of the attention paid by Mr. Baker to the deceased, she says, on the subject of her intentions to benefit her husband or his children by her will, she never heard her say much, indeed she says, "I never heard her speak at all on the subject till the last week of her life, and then on occasion of her feeling so ill, and saying she did not think she should live [168] and she wished the business was settled, and that she wished me to be a witness to it, she did speak of it, she said she should leave her relations legacies, and that Mr. Baker was to have the rest, but she said there would not be much for him after all the legacies were paid." On her former examination she had said that deceased did not say whether she would leave her husband any thing—this seems, therefore, an after-thought—and the remark as to the small amount of the benefit to him is not very probable to have been made by her, considering that it will amount to nearly 1000*l.*, and that she had refused to execute the will suggested by him, by which he was to have a legacy to that amount.

Upon the sixth article, on her second examination, this witness has mentioned incidentally a circumstance on which much stress has been laid, but which would more naturally have found its place in her examination on the condidit, and it is this; that in speaking of the capacity of deceased, at and during the whole of her illness, and up to the moment of her death, and particularly on the 19th of April, the day the will was executed; she says on the day before, that is, on Friday the 18th, "she told me to take Mr. Hora into the next room to shew the will to him, in order that Sarah might not know of it, she did not say why he was to see it, nor did I hear any thing of their discourse; I merely mention it to shew how well she was in her mind, and how able she was to make her will, &c."

Now on this circumstance, so incidentally mentioned, a great deal of argument has been founded. [169] It has been asked if any purpose of fraud was to be answered, why should this paper have been shewn to Mr. Hora, as one word mentioned by him to deceased would have immediately discovered the fraud and defeated the purpose of the parties? and this is certainly true; but a good deal will depend upon the manner in which this communication was made to Mr. Hora. If Heath told him that it was by the desire of the deceased that she shewed him the paper, the probability would certainly be that he would mention the subject to her, and the consequences suggested might have followed; but if it was shewn to him by Heath as of her own accord, without mentioning that it was by desire of deceased, then Mr. Hora, who had, as he says, applied to and urged the deceased to settle her affairs, but who had been silenced by her, and desired never to mention the subject again, there was,

perhaps, not much danger to be apprehended; but it certainly is somewhat extraordinary that if, as Heath says, this communication was made to Mr. Hora by desire of deceased, that she should not have made any allusion to it, and that she should not have asked him to be a witness to it, particularly if, as Heath says, this took place on Friday the 18th, probably before the arrival of Mrs. Foweraker, of whose intention to visit her on that day the deceased could not have been aware. But let us see what account Mr. Hora gives of this circumstance; speaking of his attendance upon her and of the state of her case, he says he has no memorandum of having attended upon her, but he has no doubt that he did, and he mentions having met Baker going to London, as he was going to visit [170] the deceased; Baker said the deceased was better, "she has made her will," and this he believes was on the 19th of April, and certainly agrees with the case set up that the will was not executed till that morning; and at the conclusion of his deposition he mentions the circumstance of Heath having put this paper into his hands, saying, Mrs. Baker has made her will; and on his observing that it was not signed, Heath pointed out to him a little cross upon it, but he took very little notice of it. Now, then, it is quite clear that, whenever this paper was shewn to Hora, it had not been executed as it at present appears; if this was on the Friday morning, of course the signature of the witnesses would not have appeared; but if on the Saturday morning, as is clearly the strong impression on the mind of Mr. Hora, and from the expression made use of by Baker, "that she had made her will," it is more probable to have taken place on that day; there does seem some room for doubting, at least, whether the execution of this instrument did take place in the presence of witnesses, and for suspecting that the mark was put in their absence, whether by deceased or not, and then that they signed their names afterwards.

For what purpose could the deceased have made the mark to it on the Thursday night? As Mrs. Foweraker says, her brother told her she had, for she knew that the presence of two witnesses was necessary; and when the Court sees that this small cross, which it is on all hands admitted to have been on the paper, is so completely covered by the mark now appearing upon it as to render it imperceptible, it does seem to countenance a suspi-[171]-cion that the Court has not the real state and course of the transaction laid before it, and that the mark purporting to be that of the deceased was made by some person having more complete command over her hand than, in her weak state, she could possibly have had.

I do not think it necessary to advert more particularly to the evidence of Mrs. Foweraker to the general circumstances of the execution: she deposes much to the same effect as Heath, though not so much in detail, for if Heath's account does not satisfy me of the genuineness of the transaction, there is nothing in Mrs. Foweraker's which can supply the deficiency; and I confess that, looking to all the circumstances of the case, I am of opinion that it is one of a most suspicious character; that the disposition contained in the paper propounded is not proved to my satisfaction to be such as it was probable that the deceased would have made, or wished to be carried into execution. I think the conduct of Baker, the husband—the party conveying the instructions for the preparation of this instrument, from whence he is to derive a considerable benefit, which it is my conscientious opinion it was not the intention of the deceased to confer upon him—his misrepresentation to Mr. Gamlen of the cause of deceased's inability to write; his declining the attendance of Mr. Gamlen when offered: the applications which he made to different persons to get a will executed by the deceased, and the nature of the disposition to his own advantage: his conduct altogether savours too much of fraudulent contrivance to entitle him to any favourable consideration; and I am further of [172] opinion that the account given by Heath is marked in many parts with such circumstances of improbability as to prevent the Court from giving her that degree of credit which would enable it to decide in favour of the validity of this paper; I therefore pronounce against it, and condemn Mr. Baker in costs.

[173] REPORTS OF CASES ARGUED AND DETERMINED IN THE ECCLESIASTICAL
COURTS AT DOCTORS' COMMONS.

RAY *against* SHERWOOD and RAY. Consistory Court of London, Hilary Term, 1st Session, Jan. 18th, 1836.—The service of a citation sufficient to constitute pendency of suit.—Held that the father, quâ father, has not sufficient interest to institute

a suit in the civil form for the purpose of annulling the marriage of his daughter when of age.

On admission of the libel.

This was a question as to the admissibility of a libel in a cause of nullity of marriage by reason of affinity. The facts and circumstances of the case are sufficiently set forth in the judgment of the Court.

Addams and Nicholl in opposition to the libel.

The King's advocate, Phillimore, and Haggard in support of the libel.

Burnaby for Miss Ray.

[174] *Judgment*—*Dr. Lushington*. The facts which gave rise to the present suit are as follow :—In the month of June, 1835, Emma Sarah Ray was married to Thomas Moulden Sherwood. He had been previously married to her sister, who had died some time before the second marriage. On the 24th August in the same year a citation was taken out against both these parties at the instance of Robert Ray, alleging himself to be the father of Emma Sarah Ray, and as such interested in the legitimacy of her issue. The proceeding was in what is called the civil form, and the citation was personally served on both parties on the 24th August, the day of its date. The citation calls on the parties to appear on the third day after service, if that be a court-day, if not, on the court-day next ensuing. The 9th of September was the first court-day, and then the citation was returned into Court. Proxies for Mr. Ray and his daughter were brought in on that day. On the 9th of October a proxy for Mr. Sherwood was exhibited. On the 9th of September the libel was brought in, and on the 17th November additional articles.

The contents of the libel are as follow :—It pleads in the common form ; first, the marriage of Mr. Ray, the father, and the birth of two daughters, Anna Rachel Louisa and Emma Sarah ; the marriage of Anna Rachel Louisa to Mr. Sherwood in the year 1827 ; her death in April, 1834 ; and this marriage in June, 1835. These are facts necessary to be pleaded in every suit of this description.

It further specially pleads that the marriage [175] was clandestine, that the parties were not resident in the parish where the marriage took place, and that it was not discovered till the 22d August, 1835, these proceedings having commenced on the 24th August. And it may be expedient, in order to clear the way, for me to express my opinion as to these special and peculiar circumstances, and to say that I conceive they cannot have the least bearing on the judgment which I have to pronounce ; because, in the first place, I know not how it is possible that the clandestinity of the marriage could affect its legality with reference to the relations of the parties ; and, in the second place, because it has been finally settled that the non-residence of the parties in the parish cannot be pleaded in any suit for annulling the marriage itself ; and, thirdly, because I do not think the expedition with which the party has attempted to avail himself of his right can affect the ultimate decision of the cause.

The additional articles plead, first, a letter of Mr. Sherwood, to prove concealment, which is pleaded in the 10th article of the libel : and secondly, that Emma Sarah Ray is entitled, under the will of her great uncle, to some property.

The admissibility of the libel and articles has been very fully, laboriously, and learnedly argued, and I cannot but feel indebted to the counsel on both sides for furnishing me with so much information in this case.

Two objections have been urged to the admissibility of the plea, in other words, to the maintenance of the suit itself. The first is, that however competent this proceeding might formerly have been, [176] the Statute 5th and 6th Will. IV. c. 54, passed in the last session of Parliament, has rendered all such marriages valid, save those which fall under a distinct exception in the Act itself : secondly, that the father has no legal interest sufficient to give him a *persona standi*, or which can entitle him to carry on a civil suit.

On looking to the statute in question, no one can entertain a doubt that the validity of this marriage is unimpeachable, unless, according to the terms of the statute, there was "a suit depending at the time of the passing of the Act," videlicet, on the 31st August. Marriages liable to be objected to on the ground of affinity are, by the operation of this Act, generally made completely valid to all intents and purposes, with the exception I have before mentioned, and the onus of bringing the case within the exception falls on the promoter of the suit, and in this case it is contended on his behalf that he has discharged that onus by proving the service of the citation on both

parties on the 24th August, that is, seven days before the Act came into operation. The counsel for Mr. Sherwood have contended that this was insufficient; that there is no *lis pendens* without a *litis contestatio*, which clearly had not taken place in this cause on the 31st August. The question I have to determine, with reference to this point, is what the Legislature meant and intended by the expressions in the Act of "a suit depending at the time of the passing of the Act." The object of the Legislature, so far as I can collect it from the words of the statute, was, in the first place to prevent such marriages in future, by rendering them null and void; and, [177] secondly, to prevent the uncertainty which existed under the old law, as to the status and condition of children, and the rights they might have.

The proceeding contemplated related to the Ecclesiastical Courts only: and the first consideration, as it strikes my mind, which I have to determine, is whether the expressions used in the statute are technical expressions, well known and admitted, and recognised in the Spiritual Courts; if so, I apprehend the Legislature must be presumed to have used them in that sense: in the same manner as if, with reference to other tribunals, the Legislature had used the expressions "heir-at-law," or "tenant in tail," which are technical terms, and which must be supposed to be used in a technical sense. It has been said, in this case, that it is the known acceptance of *lis pendens* to mean the proceedings after the *litis contestatio*. How is such an averment to be proved? In the first place, if I could have found any decisions of these Courts which were applicable to this point, I should have considered them the very best proof of this averment. None have been cited, and to my knowledge, and as far as my search and investigation have gone, none exist in which the question has been discussed and decided.

The next mode, though perhaps a less satisfactory method, is to look to books of practice; and looking to books of practice, I do not find that the position has been laid down as generally recognised or admitted: it is rather an inference from the divisions into which the subject has been parted, than a doctrine sanctioned by daily experience. There appears a doubt as to the ac-[178]-curacy and certainty of the divisions themselves, and as to what is said to form the *judicium*. Oughton, I find, in his *Synopsis*, says: "*Judicium ex tribus constat, videlicet; principio, quod est litis contestatio; intermediis, quæ sunt probationes; fine, qui est sententia.*" "*Litis contestationem præcedunt nonnulla (quæ præparatoria judicii appellantur); utputa, citatio, certificationum, procuratoris constitutio, libelli oblatio.*" So that, according to his definition, even the appearance of the proctor in the cause, and the offering of the libel, are merely preparatory proceedings, and prior to the *litis contestatio*. In Conset (pt. 2, c. 1, s. 1, par. 3), it is said: "That which (according to Wesembecy) is called preparatory to judgment (but is no essential part of it) is the citation and the mediate parts (scil.), the proof made in the cause. But Mynsinger proves the contrary (scil.), that the *jus vocatio*, this calling to justice, or the citation, is to be accounted for the very foundation of the judicial order, being, as it were, the *causa sine quâ non.*" To be sure, it is a rather startling proposition that by possibility the proofs could be taken in a cause, and yet there be no *lis pendens*.

I confess in this state of things I find extreme difficulty in saying that the *lis pendens* is entirely governed by there being a *litis contestatio*. In the first place, a *litis contestatio* exists only in plenary suits, and it is not easy to say what is equivalent to the *litis contestatio* in summary and other proceedings. This point was very much considered in the case of *Byerly and Windus* (5 Barn. and Cres.), which [179] went to the Court of King's Bench. Mr. Justice Bayley says there, if the report is correct, "According to the usage and course of proceeding in the Courts Christian, neither the personal answer nor the plea ever put in issue any of the facts in a libel; they are put in issue or admitted by a previous step—a negative or affirmative issue; a negative issue denying what the libel states, an affirmative issue admitting it." This is true respecting the plenary form, but it is exceedingly difficult to say what the *litis contestatio*, or joining issue, is equivalent to, in the summary form of proceeding. Again, if the *litis contestatio* be necessary to constitute a *lis pendens*, the contumacy of a party may completely defeat it. For an instance of this kind occurred about a twelvemonth ago, where the party absconded; and in such cases the party legally interested may have used all due diligence in promoting the suit, and yet by the contumacy of the party proceeded against, justice may be defeated.

In order to throw a light upon this doubtful point, a variety of authorities have

been cited from the civil law. Now I must observe that, to constitute these authorities law in England, they must have been received and acted upon here; and especially is it necessary to adhere to this principle, when it is sought by them to bind the Legislature to the use of a technical expression. These are authorities, not as to a great principle of law, but to the practice of foreign Courts; and, therefore, *à fortiori*, they must be received and acted upon here, in order to be entitled to any weight at all. In the third place, without going through all these authorities [180] minutely, which would occupy a considerable and unnecessary space of time, I think I may truly say that they are not all clear and consistent upon the subject, but that there are material differences between these writers.

I find that in Scotland, where the whole system of ancient jurisprudence is mainly built on the civil law, and where reference is hourly made to books of authority on the law and practice of that system, a question similar to the present was raised in the year 1787, in the case of *Morrison and Allardes*.(a) In that case, which was a matrimonial suit, a question arose as to the term *lis pendens*, and what constituted a *lis pendens*; and this distinction occurs, that originally by the law of ancient Rome the service of the citation did not constitute a *lis pendens*, by reason that the citation or summons itself was so vague and uncertain, being without specification, that no person could say what was the matter in dispute. But this fact was stated in the argument; that after the time of Justinian, and when the citation served in the cause contained a more accurate specification of the facts and the proceedings, the question assumed a different aspect, and was differently decided. Singularly enough, that point in the argument, whether or not the issue of the citation constituted a *lis pendens*, excited the greatest difference of opinion amongst the learned judges who then presided in the Scotch Courts. There were no less than three on one side, and two on the other; and the two dissentients were as learned persons, men of as high character for legal knowledge as ever adorned the Scottish bench. On one side were the Lord President Dundas, the Lord Justice Clerk Miller, and Lord Eskgrove, who held that the service of the citation did not constitute a *lis pendens*; on the other side, Lord Monboddo and Lord Braxfield held the contrary. Lord Braxfield is admitted to have been one of the most eminent of the learned judges of that country. In tracing this question further, I find that it was considered at the time, that the subject was left in doubt and uncertainty; and Mr. Bell, the learned commentator on the law of Scotland, says that it is still considered unsettled.

These considerations bring me to this point: I am not satisfied in my own mind that there is any distinct technical meaning notoriously attached to the expression *lis pendens*. I am not satisfied in my judgment that the meaning sought to be attached to it by the counsel for Mr. Sherwood has been clearly and distinctly recognised by ecclesiastical law and practice. I am not satisfied that the civil law is clear or uniform on this point, or received here.

Then how stands the question with reference to analogous proceedings in other Courts of this country? It is not necessary to penetrate deeply into the mode in which the subject has been considered in Courts of Common Law, because I have had the good fortune to find a decision in a Court of Equity, which appears to have a strong bearing on the subject; a decision which, from the period at which it took place, I consider more valuable than if it had been pronounced in any proceeding at the present time. The case which I advert to is that of *Pigott against Nower*, which is reported in 3 Swanston's [182] Reports. The case itself was decided by Lord Nottingham in the year 1677. I will state the reason why the decision in this case is entitled to great weight. In the first place, it is notorious that the proceedings in the Court of Chancery were originally much more founded on the doctrines and practice of the civil law than those of the Common Law Courts of the country were. In the second place, the decision was given at a time when the proceedings of that Court were more in conformity to its ancient forms of process than they have subsequently been. Thirdly, it is the authority of Lord Nottingham, than whom a higher authority could not be produced.

Lord Nottingham, in deciding the question, laid down what he considered to be a *lis pendens*. "I conceived," he says (it is a paragraph in a note, p. 535), "that a judgment after the teste of a subpoena, and before the return of it, or before the bill

(a) Morrison's Diet. of Dec. 8335.

filed, is a judgment pendente lite; for when the subpoena is returned, it is depending from the teste of it, as all other originals are, and so much was implied in the resolution of *Burgh v. Francis*. It was objected that it could not properly be said *lis pendens* till the bill filed, because, till then, the true cause of suit is not known, the subpoena being only *quibusdam certis de causis*; but I regarded not the objection, because every subpoena is as certain as a *latitat*, and yet the common law allows a *latitat* to bind from the teste, and the Chancery will favour a subpoena more than a *latitat*; nay, perhaps it will [183] control the common law in case of a *latitat*, as I have said before in *Parker and Dee*." This appears to be the common sense of the rule, that is, that the *lis pendens* should be considered to commence from the time of taking out the formal proceedings, from whatever Court they may originate, and serving notice of those proceedings, or attempting to serve it on the defendant, provided the instrument initiating or commencing the process shall, with sufficient clearness and certainty, state the object of the suit: for this appears to be the principle which has governed from the time of Justinian to the present day. Now the citation, in this case, does clearly shew the parties to the suit the jurisdiction, and the objects sought to be obtained by the suit. Then I am strongly inclined to come to the conclusion that Parliament has used these words in a general sense, and I can discern no adequate reason for imposing a more restricted meaning. I conceive that the Legislature intended that the relief proposed to be given should not be extended to cases, save where persons having an interest had already asserted that interest by the commencement of legal proceedings. I cannot conceive any just or adequate cause for a different intention, and for depriving them of their right to prosecute a suit, which, in this case, was as much commenced *bonâ fide* by the party, by the service of the citation, as if a *litis contestatio* had taken place. For these reasons I have come to the conclusion that it is my duty to overrule the first objection, and to state my conviction that Mr. Ray is not barred from prosecuting this suit on the ground that no suit was depending in the Ecclesiastical Courts at the time of the passing of the Act in question.

[184] I now come to the consideration of the second point which has been raised in this case, on which, I confess, I have felt infinitely greater difficulty; whether it is competent to Mr. Ray, the father, to bring a suit in a civil form. There are two forms of proceeding in such cases—criminal and civil; and it may be necessary to consider the object of both. In the criminal form of proceeding the office of the Judge may be promoted by any one, with the permission of the Judge himself; the promoter need have no interest; for the object of the suit is to punish and prevent the commission of that which the law deems an offence; it does not seek to secure or advance the interest of any one, if such effect is produced by the sentence, it is purely incidental, and no part of the judicial object of the suit. With respect to a civil suit, it is admitted on all hands that to enable any person to institute a suit in the civil form, the individual seeking to commence the suit must make out an interest of some kind or other. The difficulty appears to be to determine what that interest should be. But the fact that the party proceeding should have an interest clearly defines the nature of the suit, namely, that it is not *ad publicam vindictam*, but for the interest of the party concerned, who brings the suit.

To prevent all confusion I may observe, before I proceed further, that all considerations as to suits in respect to minors have no application to the present question. Here both parties are of age; the parent, as the natural guardian, has no power to bring such a suit, nor, if he were dead, would any testamentary guardian have any authority whatsoever so to proceed.

Again: I observe that a case might arise in [185] which a father himself might not have such an interest as that set up. For instance: if Emma Sarah Ray had been previously married, and had children surviving, the father clearly would have no interest in case of intestacy, and, as father, it is clear that he could not bring this suit. Any offence to his feelings, any desire to prevent an intercourse he might deem culpable—all such objects would be properly and fitly attained by a criminal proceeding; but they are not at all within the view or compass of a civil suit, which protects only the civil interests of mankind. These considerations appear to me to advance the case another step, and to shew that it is, as next of kin, entitled in case of intestacy, only, and without reference to the paternal character, in any other view, that the right to prosecute must be contended for: for I see no

sufficient legal ground to support the argument, which has been ingeniously contended for, that a father, quâ father, has any right whatever which is not equally incidental to other relations. Now, in following up this view of the question, two very important points suggest themselves; the first is, that the relationship of the party proceeding in the suit may be denied, and a preliminary suit of interest, as it is called, may take place. The second is, that the relationship of the party proceeding in the suit may be that of a cousin, or any relation entitled, in case of intestacy, to share in the property of the party, to almost any degree of remoteness. I do not find that, either in the case or in the argument, there is any preferential distinction on the ground of interest in case of intestacy. The point then is this: Will the in-[186]-terest, in case of intestacy, be sufficient, without regard to the degree of relationship?

In my inquiries into this subject I have endeavoured to ascertain whether this question has been decided in any former case by competent authority; for it would be a great relief to my mind if I could truly say that it had been so decided, and I had only to submit to the authority of precedent. In the case of *Faremouth and Watson* (1 Phill. 355) the point incidentally arose; but it cannot be truly said that the Judge decided it. In that case the interest was a pecuniary and beneficial interest, there was a remainder to the person promoting the suit, contingent on one of the parties married dying without lawful issue. I have no hesitation in saying that the learned Judge, the then Dean of the Arches, did consider that such was an adequate interest to enable the party to maintain a civil suit. Incidentally a discussion took place as to whether a person entitled to share in an intestacy had a *persona standi* in a suit of this nature; but the question was not necessary to be decided, and it was not decided. The learned Judge, Sir John Nicholl, has had the kindness to let me look at his notes, and I find that, after a discussion of this question, the expressions which fell from him were the following:—"He was disposed to hold that such interest would be sufficient." I have the greatest deference and respect for the opinions of that learned Judge, and it is not necessary for me to say that for any judgment he may have given, or opinion he may have expressed, I entertain the highest [187] regard; but of this I am certain, that if I were to consider, under the circumstances, this as a binding determination upon me, he would be the first to blame me for so doing. I am sure he would think that, giving the utmost consideration to the discussion which has been had upon this point, I ought not to consider this as a dictum binding upon me as a precedent, but that I should look at the question on principle; I should be doing him injustice if I imagined he entertained a different opinion. The next case is that of *Turner and Meyers* (1 Hagg. Con. 414). That case certainly does not in any way settle this point, though I shall presently have to consider the judgment in that case, and its material bearing on the present. It is useless to state other authorities. After the fullest search I have been able to make I find that by none of them has the question been definitively settled.

The next mode, then, after considering whether the law is settled or not, is to look at the practice of this Court; to see whether there has been such long and uniform usage, in uncontested cases, as to enable the Court to place reliance on such usage, so as to hold it to a certain degree the law of the Court. I am enabled to say that, neither in number of precedents, nor on any other ground, is there any thing, in the practice of the Court, sufficient to lead me to any such conclusion.

Then, I am at last driven to consider and to decide this point on principle; I am to determine whether an interest in case of intestacy be sufficient—the words of the citation put it on this ground, as relates to the legitimacy of the children only—that is the only point of the case now to be [188] decided. The interest of a father, quâ intestacy, might be as much affected, if there were a lawful husband, as by legitimate children. Is this the interest which the law contemplates? I see no means of tracing the origin of these proceedings, which are buried in the darkness of antiquity. The absence of all reports and information renders it impossible to say what was the true origin of the law on this point. At first, by our own law, these marriages were not only null and void, ab initio, but always continued so. It has been truly stated that it was the interference of the Common Law Courts which, in such cases, prohibited the Spiritual Courts from bastardizing the issue, after the death of one of the parties, that created the distinction—the very unnatural distinction—of voidable and void: for voidable is void ab initio. Having nothing but conjecture to guide me, so far as I can conjecture, it may be supposed that, as by possibility the Judge might refuse to

allow his office to be promoted, a civil form was therefore allowed to persons having an interest, to protect that interest, which would be otherwise damified. But this does not lead me to the definition of the species of interest deemed sufficient. What is the test? How am I to try it? Whether is it a devisable interest, or transferable, or what else? Such an interest as this may be called *spes successionis*. I lay out of the question the fact whether this lady actually had property, respecting which she might die intestate; because I am convinced that the right to sue never can depend on the fact.

In considering what the test should be, I am, to a certain degree, led to a branch of the law with which we in these Courts are not very familiar, and respecting which I entertain great difficulty in following up my examination. Suppose devisability to be considered a test. The distinction is, that contingent and executory interests may be devised, provided the person who is to take is certain, and the interest would be descendible, if not devised. This distinction is laid down in *Roe v. Jones* (1 H. Black. 30. 3 T. R. 88). Here, clearly, the interest would not be a descendible interest; it is one of a possible nature only, and not descendible. Is the test to be the power of contracting for the transfer of it? I feel that this is a subject which I am not able to investigate in all its ramifications. I do not know that I can come to the conclusion that it is competent to any person to contract for the sale or transfer of this interest, even suppose it can be called an interest not subject to defeasance. I very greatly doubt the possibility of this being the true test: for, supposing such an interest capable of being transferred, I know not why another relation, having a strong hope of succession by the death of a nearer relation before the person in question, might not set up a claim; a father has an interest in case of intestacy, but a father has a degree less interest than a son. I will put a case: suppose a lunatic of twenty-five, a father greatly advanced in age, and a brother; the brother's indirect chance might be more valuable than the father's interest: yet if this were admitted, the consequence would be perfectly absurd, for it would travel ad infinitum; for any person having an interest *spes successionis*, if it might be transferred, would be entitled to sue in a civil suit.

I do not like to venture an opinion as to what [190] species of claim might be made the subject of contract in equity. Many things may be the subject of contract which cannot be called an interest, though possibly valuable, as personal service, and covenant not to carry on business: is this an interest which would survive to an assignee in bankruptcy? I find in Scotland, where the civil law is in force and has power to adjudicate for debt every species of property, that such a *spes successionis* is not capable of being adjudged for debt. Does this species of right or interest give a person, having it, the power to interpose in any case, or any right of action? For, after all, that is the point. In other words, has a person, interested in case of intestacy, a right of action, in respect to the property of the person who may hereafter die intestate? I apprehend not, except in case of lunacy; but that is distinguished from the present case; for in the case of a lunatic the *spes successionis* may be said to be different in its nature from the incapacity of the lunatic to make away with the property. Would a person have a right of action when the property belonged to an individual of sound mind? I apprehend none whatever in law or equity. Then I am at a loss to understand why a right of action should exist in this case, and not under any other circumstances.

Is there any authority bearing on this point? I think there is, and that is the authority of Lord Stowell himself. It is not a decision on the point itself, but it bears on the point at issue. Lord Stowell says, in the case of *Turner v. Meyers*: "Cases of consanguinity have been also mentioned, but in those the public have an interest to abate a scandal." The interest of the public in abating [191] a scandal is the ground of the criminal suit. "The criminal suit is open to every one; the civil suit to every one shewing an interest; but, in that respect, the father is by no means privileged, as he must shew a specific interest as well as any other person." Now what did Lord Stowell mean by these words? I doubt extremely whether he meant by "specific interest" merely an interest in case of intestacy. "As well as any other person;" I am inclined to be of opinion that Lord Stowell, in these expressions, meant an interest of a different kind, a more direct interest than the one in question. I think, therefore, that to a certain extent, and not intending to press the authority of Lord Stowell too far, these particular words do appear to bear upon the present question; and, not

meaning to shelter myself under the shadow of a great name, if I am in the slightest degree in error, I think, so far as his judgment is capable of being applied to the present case, it supports the view I have taken of the question.

Then, if this be the true state of the case, if there be no authority in favour of the right to sue on such an interest in case of intestacy only; if I must decide this point on principle, and if such an interest could not give a right of action in any other Court; if I am bound to hold that it is a mere spes successionis, not entitling the party to interfere with the status of others by civil action (and I have come to this conclusion, that so far as I have carried my inquiries, this is the true state of the case); then I am under the necessity of declaring that, in my opinion, Mr. Ray has not a sufficient interest to support the present suit.

The circumstance which was brought to my [192] attention before I proceeded to pronounce my decision cannot, and ought not in the slightest degree to, bias my view of the question; I mean that, in the present instance, there has been no cohabitation; and I learn from the proxy which has been exhibited in the cause that there is an inclination on the part of the wife to be relieved from the connexion. To this circumstance, I think, I am bound to pay no attention. It is the first duty of a Judge to ascertain what are the facts on which his judgment is to depend, and never to allow it to be warped by particular considerations, applicable to any individual case, which ought not to form any part of the matter for his decision. It may be true that, on this occasion, if the marriage could be set aside, it might be productive of happiness and comfort to all parties concerned; but true it also is that I am to decide the question as if no such considerations belonged to it, and as if it involved also the legitimacy or illegitimacy of the children.

I have now stated at some length the various reasons which have operated on my mind to lead me to this conclusion; and it is some satisfaction to me to know that there are ample means of reviewing my judgment; and if, on sifting and examining the grounds upon which my opinion is placed, it should appear to be unsound, the party may obtain redress and justice elsewhere. I am under the necessity of rejecting the libel and the additional articles.

From this decision an appeal was prosecuted to the Arches Court of Canterbury.

[193] RAY *against* SHERWOOD AND RAY. Arches Court, July 12th, 1836.—The service of a citation sufficient to constitute pendency of suit.—Held, that the father, quâ father, has sufficient interest to enable him to institute a suit in the civil form, for the purpose of annulling the marriage of his daughter, when of age, reversing the judgment of the Consistory Court on this point.

[Affirmed 1837, 1 Moore, P. C. 353; 12 E. R. 848 (with note).]

Judgment—*Sir Herbert Jenner*. This case comes before the Court on an appeal from the decision of the Judge of the Consistorial and Episcopal Court of London, who has rejected the libel offered in a suit of nullity of marriage by reason of incest, brought by Mr. Robert Ray, father of Emma Sarah Ray, one of the parties in the cause, against Mr. Thomas Moulden Sherwood and Miss Ray, as having an interest (so the father describes himself) in the legitimacy or illegitimacy of her issue.

The question depends on the Act of Parliament recently passed with reference to marriages of this description, which were voidable—Mr. Sherwood having married (as it is alleged) the sister of his deceased wife. The citation in the original cause was extracted on the 24th August, 1835, and was personally served on both parties the same day, and was returned into Court on the 9th September, the court-day immediately following the day on which the citation was extracted and served. An appearance was given for one of the parties, Miss Emma Sarah Ray, on that day; no appearance was given for the husband till the 14th October. The proctor then appeared for Mr. Sherwood, not under protest, but absolutely, and a libel was [194] prayed. The libel was brought in, and subsequently additional articles. The admission of the libel and additional articles was opposed; the case was fully argued in the Court below, and the Judge finally rejected the libel on the 18th January, 1836. From this rejection of the libel the present appeal is brought, and the case now comes on for the opinion of this Court.

Before I proceed to consider the peculiar circumstances of the case, and the grounds of objection to the libel, it is proper to state the facts pleaded; because it may be very important to see what is the case set up, before the Court proceeds to

apply the law to it. The libel in the first place pleads the marriage of the father and mother of the party in the present suit in October, 1799; the birth of several children, and, amongst others, of a daughter, born on the 4th January, 1807, and baptised Anna Rachel Louisa, and who was the first wife of Mr. Sherwood. It then pleads the birth of another daughter on the 14th June, 1812, who was baptised Emma Sarah, and who is the party in the present cause; so that, at the date of the marriage, she was not a minor, but of full age.

The libel then pleads the marriage of the elder of the two sisters on the 17th July, 1827, at the parish of St. George, Bloomsbury, by license, and that the issue of that marriage were two children, both now living. It pleads the death of Mrs. Sherwood, the first wife, on the 3rd April, 1834, and then sets forth the law applicable to the question before the Court, namely, that by the law and canons ecclesiastical now in full force in this kingdom, particularly the 99th Canon of 1603, "it is ordered and directed, that no person shall [195] marry within the degrees prohibited by the laws of God, and expressed in a table set forth by authority in the year 1563; and that all marriages so made and contracted shall be judged incestuous and unlawful, and consequently shall be dissolved as void from the beginning; and the parties so married shall by course of law be separated." It then goes on to plead that "by the first table of the degrees of marriage, set forth by the Most Reverend Father in God, Matthew Parker, by Divine Providence some time Lord Archbishop of Canterbury, Primate of All England, and Metropolitan, in the year of our Lord, 1563, it is expressly ordered that a man may not marry his wife's sister;" and it then refers to the canon and table.

In the 10th article it pleads the marriage now in question as having taken place on the 29th June, 1835, in the parish church of St. Mary, Whitechapel, in pursuance of banns published in that church only, "in which publication of banns both the parties were described as of that parish, although neither of them had ever resided in that parish." These words must be expunged from the libel before it can be admitted, the Court being expressly prohibited by the Marriage Act from inquiring into the residence of the parties in any suit touching the validity of a marriage once celebrated. It also pleads the entry of the marriage in the register book: and further, that immediately after the ceremony, for the purpose of preventing the marriage coming to the knowledge of the father and her family, and as previously arranged, Miss Ray returned to her father's house, and continued to live and reside with him and his family as she [196] had thencefore done; that she and Mr. Sherwood concealed from them the fact of marriage, as well as their previous intention to be married; and that the same was not discovered till the 22d August following, the citation being extracted on the 24th of that month, the intervening day between the discovery and the 24th being a Sunday, so that no step could have been taken earlier after the marriage was discovered.

The 11th article exhibits the entry of the marriage, and pleads the identity of the parties (that is, that the person married by the name of Emma Sarah Ray to Mr. Thomas Moulden Sherwood is the daughter of Mr. Robert Ray, and the sister of Anna Rachel Louisa Sherwood, the first wife of Mr. Sherwood.

The remaining articles are merely formal, pleading the jurisdiction of the Court over the cause and the parties; and the last article concludes with praying "that the marriage so had may be pronounced and declared to have been and to be absolutely null and void to all intents and purposes in the law from the beginning, by reason of incest, in pursuance of and in conformity with the aforesaid 99th canon, and laws ecclesiastical of this realm; and that the parties proceeded against may be condemned in the costs of the proceedings." Annexed to the libel are copies of the entries of the several marriages and deaths pleaded.

In the course of the proceedings additional articles were given in, as I have already said, which pleaded, in supply of proof of the 10th article, namely, the concealment of the marriage from the father, a letter alleged to have been written by [197] Mr. Sherwood and addressed to Mr. Henry Ray, who, I presume, is a member of this lady's family, which is dated (and this is not immaterial) on the 17th August, 1835, the discovery of the marriage not being made till the 22d of the month; they go on to plead that under the will of her maternal great uncle the daughter of Mr. Rae is entitled to considerable property, and in supply of proof is annexed an extract from the will of her great uncle.

These are the contents of the libel and additional articles, and if what is there pleaded can be established by proof, it is quite impossible to say that this is not a case which calls loudly for the interference of those Courts, to whose cognizance such questions properly belong. In the first place, this is a contract which is prohibited by the laws both of God and man—for so, sitting in an Ecclesiastical Court, I should be bound to consider it, even if I were, as I am not, among the number of those who privately entertained any doubt upon the subject. In the second place, it is a secret and clandestine marriage; perhaps not clandestine in the strict legal meaning of the term, for the term “clandestine” is applied by the law to a marriage where there has not been a due publication of banns, and I am not at liberty to enter into that question—but, morally speaking, and using the common acceptation of the term, it is a secret and clandestine marriage, purposely and studiously concealed from the knowledge of those who were directly interested to prevent one of the parties from entering into the unhallowed contract. Lastly, it is a case calling for the interference of the Court; because, as I collect from the libel, there [198] has been no cohabitation of the parties since the marriage, so that it is not too late now for the Court to prevent the consummation of the offence, if the law has not placed an insuperable barrier to any proceeding for that salutary purpose.

That this Court would and ought to lend its aid and assistance towards the accomplishment of so desirable an object cannot be doubted; and I have myself no hesitation in saying that I should feel great regret if I were to find myself placed in such a situation as to be obliged to reject this libel, and thereby in effect to pronounce that the validity of this marriage could not be questioned. What would be the condition of the parties and of the Court if such should be its present decision? Mr. Sherwood would have a right to claim the consortium of his wife; and if she refused to cohabit with him, he would be entitled to institute a suit in these Courts, not for the purpose of compelling her to return to cohabitation in his house (for into it she has never entered as his wife), but to afford him the consortium vitæ, which she has withheld from him by his own consent from the date of the marriage to the present time. The Court would thus be accessory to the commission of that offence, of which there is every reason to believe she is at the present moment innocent. And when the Court has issued its fiat to compel her to cohabit with her husband, it may be the next day, in another branch of its jurisdiction, be called upon to punish her for the very crime, to the commission of which the Court itself has been an instrument; for, looking at the words of the Act of Parliament, I am by no means prepared to say that, in prohibiting the Ecclesiastical Courts from annulling marriages of this [199] kind, subsisting at the time of the passing of the Act, the legislature has altered the law in any other respect.

I am not prepared to say that the parties may not be punished by the ecclesiastical law for the incest, though the validity of the marriage cannot be called in question. How stood the law before this Act of Parliament? Originally, as now, these marriages were void ab initio, when sentence was pronounced by the Ecclesiastical Court: and it appears that the Ecclesiastical Courts were in the habit of annulling these marriages, even after the death of the parties, after the death of both, or of one only. And this seems to have been the practice antecedent to the Canon of 1603, as will be evident from a reference to the *Articuli Cleri* (2 Inst. 614), by Archbishop Bancroft, in the 3d James I. (in the year 1606), whence it appears that the practice had existed for a long time before, and that the Ecclesiastical Courts complained of the interference of the Temporal Courts in cases of ecclesiastical cognizance, and, amongst others (in the 20th article), “That a prohibition had been awarded in a case of an incestuous marriage, suggesting, under pretence of a statute of Henry VIII., that it appertained to the Temporal Courts, and not to the Ecclesiastical, to determine what marriages are lawful, and what incestuous, by the Word of God.” To which the answer of the Twelve Judges was, “That these were cases that we (the Temporal Courts) may deal with, both with marriages and deprivations; as where they (the Ecclesiastical Courts) will call the marriage in ques-[200]-tion after the death of any of the parties: the marriage may not then be called in question, because it is to bastardize and disinherit the issue, who cannot so well defend the marriage as the parties, both living, might themselves have done.” The practice then clearly existed at that time of declaring these marriages void after the death of the parties, and the Temporal Courts interfered for the purpose of protecting the interest of the issue of such marriages, and not

that of the guilty parties; for as it appears from the case of *Harris v. Hicks* (2 Salk. 548), in the 4th and 5th of William and Mary, where a man had married the sister of his deceased wife, and it was suggested that the second wife was dead, and a son, the issue of the second marriage, would be entitled to lands; the Temporal Court in that case issued a prohibition against these Courts proceeding to annul the marriage between the parties after the death of one of them, but it did not prohibit them from punishing the survivor for the incest committed during cohabitation.

If this, then, was the state of the law at that period, what has occurred to alter it since? Nothing but this Act of Parliament, passed on the 31st August, 1835, the 5th and 6th of William IV., so often adverted to in the course of these proceedings. What did this Act of Parliament do? The title of it is, "An Act to render certain marriages valid, and to alter the law with respect to certain voidable marriages." And if the object of the Act had been to declare all such marriages existing at the time of the passing of the Act, notwithstanding they were originally illegal, good and valid mar-[201]-riages to all intents and purposes (as has been contended it does by the learned counsel for Mr. Sherwood), it might admit of a question whether, under such circumstances, this Court could punish the parties for incestuous cohabitation; but the enacting part of the Act does not declare any such thing. After declaring in the preamble—"Whereas marriages between persons within the prohibited degrees are voidable only by sentence of the Ecclesiastical Court, pronounced during the lifetime of both the parties thereto, and it is unreasonable that the state and condition of the children of marriages between persons within the prohibited degrees of affinity should remain unsettled during so long a period, and it is fitting that all marriages which may hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity should be ipso facto void, and not merely voidable;" then, in the enacting part of the Act I find these words: "Be it therefore enacted that all marriages which shall have been celebrated before the passing of this Act between persons being within the prohibited degrees of affinity, shall" not be good and valid to all intents and purposes, but "not hereafter be annulled for that cause by any sentence of the Ecclesiastical Court, unless pronounced in a suit which shall be depending at the time of the passing of this Act:" and the Act has nothing to do with marriages within the prohibited degrees of consanguinity.

The enacting part of the Act does not declare these marriages to be good and valid to all intents and purposes, as might be supposed from the title of the Act; and although the title, as well as the [202] preamble, may be important where there is any doubt or ambiguity in the enacting part of a statute, when a reference may be made to the title and preamble for the purpose of explaining such doubt and ambiguity; but the title can give no effect to the enacting words of a statute where those words are plain and unambiguous. I apprehend that they are independent of the title, which can have effect only so far as to obviate and explain doubt or ambiguity in the enacting part of a statute. I do not think, where the enacting part of the statute is to the effect "that all marriages which shall have been celebrated before the passing of this Act between persons being within the prohibited degrees of affinity, shall not hereafter be annulled for that cause by any sentence of the Ecclesiastical Court," that this amounts to a prohibition to the Ecclesiastical Court to punish the parties under another branch of the law for incestuous cohabitation. I apprehend the law is not altered in this respect, and that the Court is not prohibited by this Act from punishing parties for such cohabitation, although it cannot declare the marriage null and void.

Again, if we look to the preamble of the Act, it is not for the protection of the parties who have been guilty of the offence, for such it is by the ecclesiastical law and by the law of God, but for the protection of the children, for that is the purpose and object of the Act, to settle the state and condition of the innocent issue of such marriages, not to screen the delinquent parties. But whatever may have been the intention of the Legislature, and whatever may be the effect of this Act of Parliament, the marriage had between the two parties, [203] Thomas Moulden Sherwood and Emma Sarah Ray, is an incestuous marriage, and must ever so remain. The law of God cannot be altered by the law of man. The Legislature may exempt the parties from punishment; it may legalize, humanly speaking, every prohibited act, and give effect to any contract, however inconsistent with the divine law, but it cannot change the character of the Act itself, which remains as it was, and must always so remain, whatever be the effect of the Act of Parliament.

I have adverted to these points, which are not immediately connected with the real issue to be decided by the Court, in consequence of something which occurred during the argument, suggesting that the Court was bound to submit in this matter to the expressed opinion of the Legislature; and undoubtedly the Court would, if the intention or the opinion of the Legislature were clearly and expressly declared, be bound to follow the advice given to it; so that it was not immaterial for the Court to endeavour to ascertain what its true and real meaning was; and I am not prepared to say, looking at the Act of Parliament, that the Legislature has declared any opinion that such marriages are not contrary to the divine law—on the contrary, I think the Act itself shews that the Legislature entertained no opinion of the kind—for what is the fact? it says that “all marriages which shall have been celebrated before the passing of this Act,” that is, the 31st August, 1835, “between persons being within the prohibited degrees of affinity, shall not hereafter be annulled,” and so on. But after having stated in the preceding section the inconveniences arising from the ex-[204]-isting state of the law, and the prejudice which the children, the issue of such marriages, who are innocent, sustain thereby, it goes on to enact “that all marriages which shall hereafter (that is, after the 31st August, 1835) be celebrated between persons within the prohibited degrees of consanguinity or affinity shall be absolutely void to all intents and purposes whatsoever.” So that instead of expressing an opinion tending to shew that it considered such marriages innocent, and that they are not contrary to the divine law, the Legislature rather affirms the proposition by declaring all such marriages in future “absolutely null and void to all intents and purposes whatsoever.” The Legislature has expressed, as strongly as it could do, that these marriages are still illegal and contrary to the law of God; although, for the protection of innocent parties, not to screen the delinquents, it has declared that those marriages shall be unquestioned which were celebrated at the time of the passing of the Act, under the particular circumstances and conditions mentioned in the first section. But this is not a question which the Court is called upon to determine, and it is therefore not necessary to proceed further into the consideration of it.

It is proper now for the Court to consider the grounds upon which the admission of the libel, which is now before the Court, has been opposed by the counsel for Mr. Sherwood—for Miss Ray (under which name I shall call her, as there is no necessity for describing her as falsely called Sherwood, but I shall call her by her original name, her father's name, to which she is entitled until this marriage is pronounced good and valid) has [205] shewn herself desirous to retrieve the error into which she has fallen; she does not oppose the admission of the libel.

The grounds of objection are two—first, that by the recent Act of Parliament the Ecclesiastical Court is prohibited from entertaining this question; and secondly, that the party promoting the suit had no such interest as will entitle him to appear and pray the interference of the Court to declare this marriage null and void. The first of these questions will depend upon the construction of the Act of Parliament; the second, upon general principles which are not affected by the statute. Both have been argued with great talent, zeal, and industry by the counsel on both sides engaged in the cause (if I am so entitled to call it), and the Court has been referred to a variety of authorities, writers on the practice of the Courts, foreign and domestic, who have treated of the practice of Courts proceeding according to the Roman civil law; and it has also been referred to the decisions of Courts of Law and Equity; and, in short, no pains have been spared to furnish the Court with every information which could be deduced from any source which could bear upon the questions.

The Act of Parliament uses the phrase “all marriages,” which is perhaps a little extraordinary, and looks as if the Legislature had originally intended to say “all marriages should be good and valid,” and had afterwards altered its intention; for it says that “all marriages shall not hereafter be annulled,” which is a strange phraseology in an Act of Parliament; the meaning clearly is, that no marriage shall be questioned on this ground which shall then have been celebrated, unless [206] under particular circumstances. But it is necessary to see what the words of the act are: “That all marriages which shall have been celebrated before the passing of this act, between persons being within the prohibited degrees of affinity, shall not hereafter be annulled for that cause by any sentence of the Ecclesiastical Court, unless pronounced in a suit which shall be depending at the time of the passing of this act.”

The first question then to be considered is, what did the Legislature mean and intend by the words "suit depending in the Ecclesiastical Court?" It is contended that these words have a technical sense applied to them; that they are words of art; and being words of art, and being used in reference to proceedings in the Ecclesiastical Courts, the Legislature must be supposed to have used them in the sense applied to them by these Courts; and for the purpose of ascertaining the real meaning of these words the Court has been favoured with long and elaborate arguments, fortified and sustained by reference to the various authorities, foreign and domestic, to which I have alluded; and it has been contended from all these authorities that by "a suit depending in the Ecclesiastical Court" must be meant and intended a *lis pendens* (the technical term in these Courts), and that there is no *lis pendens*, and can be no *lis pendens*, until there has been a *contestatio litis*; and as a necessary consequence, that as there has not been any *contestatio litis* in this case, there can have been no *lis pendens*, and consequently no suit depending in the Ecclesiastical Court at the time of the passing of this act.

I confess it was not without some surprise that I [207] heard the enunciation of this proposition. Having had considerable experience in these Courts, and knowing how much it is in the power of an unwilling party to protract the arrival of the cause at this stage of the proceeding to a very late period of time, I confess it did appear to me somewhat strange to hear it gravely suggested and gravely argued that the words "suit depending in the Ecclesiastical Court" meant a *contestatio litis*; and to hear it as gravely suggested and argued that the Court could not pronounce a sentence annulling a marriage of this description, unless there had been a *contestatio litis* at the time of the passing of the act, and that the sense in which the Legislature must be supposed to have used these words would necessarily have the effect of defeating its own purpose; because I think, if that is the sense in which the Legislature used the words, it was almost impossible for any individual to be brought within the exception of the prohibitory clause.

If the terms are to be interpreted in the technical sense in which they are understood in the Ecclesiastical Courts, it would have been most difficult for the Legislature to have satisfied itself, by a laborious investigation of the practice of these Courts, as laid down in the books of authority, and by consulting the foreign commentators on the Roman civil law, that it had arrived at a definite and satisfactory result; it is almost absurd to suppose that the Legislature should have resorted to such sources of information for that purpose; and little less absurd to suppose, if it had, that it could have arrived at a satisfactory conclusion as to what a *lis pendens* is, according to the writers on ecclesiastical law, and the practice of those Courts [208] which have adopted the Roman civil law; for I am yet to learn from the authorities that have been cited what is the express equivalent of, or the meaning attached to, the phrase *lis pendens*. But I do not think it necessary to go into any of these authorities; I have not looked into them for that purpose, for I am satisfied that it could not have been the intention of the Legislature to use the words in a technical sense; and I am sure that the gentlemen of this bar, who are members of Parliament, would have been extremely surprised if they had heard, in the discussions on this bill in the House of Commons, any thing about the *lis pendens*, and that it was not till the *contestatio litis*, and that the *contestatio litis* would have the effect of protracting the period almost indefinitely, and that it would prevent any party from availing himself of the exception. I believe it never was the intention of the Legislature to give these words the narrow and technical sense attributed to them by the learned counsel for the respondent, but that the words were used in their common every day and popular meaning; that they were meant to exclude from the prohibitory enactments of the statute those who having rights had asserted those rights with a view of annulling marriages of this description.

What would be the consequences of a different construction of the Act of Parliament? Would it not lead to the most absurd consequences? First, with reference to the present suit—not suit, for I am not entitled to call it so—and I am told there is none, that there is no suit depending, though it has commenced. When did the suit commence? The citation was taken out on the 24th of August last year, and was personally served on both parties the same [209] day; it was returned into Court on the 9th of September; and here we are now on the 12th July, 1836, nearly eleven months after, it is admitted, the suit commenced, debating whether there is a suit

depending or not; and I see no reason why this question should not continue under discussion for another twelvemonth, or indeed for an almost indefinite period of time, if the party is willing to avail himself of all the delays which the forms of legal proceedings afford. Let us see what steps have been taken in the cause. I have already said that a citation has been taken out in the cause, and returned by the party on the 9th September, the earliest possible period. (And here I may notice that Mr. Ray is not one of those fifty persons who it was said might be lying-by to avail themselves of citations already taken out, if the Court should decide that this was a suit depending at the time of the passing of the Act; he did not provide himself with a citation for such a purpose; and if such instances should occur, the Court would know how to deal with them; but Mr. Ray, acting for the interest of himself and his daughter, at the earliest possible period took the requisite step for asserting that interest, and I have no doubt whatever that in this proceeding he is actuated by none but the purest and sincerest motives to protect the issue of the marriage of his daughter.) The citation being served on Mr. Sherwood, the other party, an appearance was given for him on the 14th October, not under protest, but absolutely (thereby admitting the jurisdiction of the Court, and that the Court was not precluded by the Act of Parliament from proceeding in this cause of nullity of marriage); and this was no hasty step on [210] his part, for he took six or seven weeks to consider whether or not he should submit to the jurisdiction of the Court; for though the citation was served upon him on the 24th August, there was not any appearance given on his part till the 14th October; and then he appears by his proctor, and authorizes him to pray a libel, which was the necessary step to bring the case to a conclusion, shewing that the objection to the jurisdiction of the Court, on the ground that there was no suit depending in these Courts, was an after-thought, and that it did not occur to any one of his legal advisers in the first instance to make this a ground of defence, and of objection to the jurisdiction of the Court. This objection, however, was brought forward in long and learned arguments, when the opinion of the Court was taken on the admissibility of the libel. All the circumstances of the case thus came before the Court, and these circumstances are not immaterial for the consideration of this Court. Mr. Sherwood has, therefore, admitted the right of the father to appear for the purpose of instituting a suit to annul this marriage when he authorized his proctor to appear absolutely; and all the circumstances of the case being now before me, I must say that if the letter annexed to the additional articles was written by Mr. Sherwood, I do not think the counsel has used too strong terms in describing it as an act of deep hypocrisy on his part. This marriage took place on the 29th June, 1835; it was carefully concealed from the knowledge of Mr. Ray, as far as the parties could conceal it. The daughter returns to her father's house in the same circumstances as before, there being no cohabitation of the parties; she continues to be an inmate of her [211] father's family; she resides under his protection; she is supported and maintained by him down to the present period; her character appears the same as before; Mr. Sherwood does not claim her as his wife; she does not assume the name of wife, nor is she so regarded by any other member of the family in the house at the time; he takes every means of concealing the fact from the knowledge of the other party; and he writes on the 17th August, five days before the marriage was discovered, a letter to a member of the family, which I do not go too far in saying must have been composed for the purpose of lulling suspicions (which may have been excited as to his intentions towards this daughter, which may have been observed by the family) until there was an end of all hopes of annulling the marriage by the passing of the Act of the Legislature. I do not suppose that Mr. Sherwood had any superior means of knowing what was going forward in either House of Parliament. It has been said that the bill excited a great sensation, and no doubt it was calculated to do so; and it is not unlikely that Mr. Sherwood's attention was called to it, and that he was induced to set on foot this marriage of the 29th June; and if he did address this letter on the 17th August, I can only say that it is properly described as an act of deep hypocrisy, and that he has no right to expect any favour at the hands of the Court. The Court is bound to apply the law equally in all cases, and he is entitled to the benefit of all the law allows him; but nothing further than that can be expected on the part of Mr. Sherwood.

But what have been the proceedings here? The whole process in the Court below is now before this [212] Court, and it appears that a libel was prayed and brought in;

its admission being opposed, it was debated in long and elaborate arguments, proceeding on the same grounds and the same authorities as on the present occasion; and the learned Judge of the Consistory Court of London took ample time to consider his decision; and the result was that he rejected the libel, thereby putting an end to the proceedings in the cause, if his judgment had been final; but, as I understand and collect from the arguments, not on the ground that there was no *lis pendens*, but on the other ground, of the insufficiency of the interest of the father to sustain the suit; but still I am told that, although a libel has been prayed and brought in, and though the admission of that libel has been debated, there is no suit depending in these Courts; and the result is, that if all these proceedings had taken place before the passing of the Act, and the Judge had thought the libel proper to be admitted, and the proctor had even been assigned to give an issue to the libel: still the meaning of the Act of Parliament is that all these proceedings amount to nothing, and that there is no suit depending in these Courts. Nothing surely can be more monstrous.

If the Legislature intended by dependency of suit a *lis pendens*, and there is no *lis pendens* till a *contestatio litis*, nothing can be more absurd than such a state of things: but in fact the absurdity does not end here, nor with the decision of the Chancellor of the Consistory Court of London; for this Court is now in possession of this cause on the 12th July, 1836, in the same shape and form as it was in the Court below in Michaelmas Term, 1835. An in-[213]-hibition was served on the Court below (or rather two inhibitions, for the party appeared under protest, and the Court sustained the protest as to one, and overruled the other, and therefore the whole of the time which has elapsed, is not attributable to the ordinary proceedings in the cause, part of the time having been occupied in the consideration of the protests to the inhibition); but an inhibition was served, the party appeared, proctors were constituted under the hands and seals of the respective parties, and the proctor for Mr. Ray has brought in a libel of appeal, at the prayer of the proctor for the other party, Mr. Sherwood. To this libel of appeal an issue has been given, so that there is a *contestatio litis* in the cause of appeal, though not in the principal cause in the Court below. The libel being given in, was admitted without opposition, and an issue was given; the proctor for the appellant was assigned to prosecute his appeal, and the process is brought in, which is the ordinary practice in an appeal from a grievance; the process or copy of the proceedings in the Court below being the proof of the libel of appeal (and there can be no other proof, for in an appeal from a grievance the proof consists in the acts of the Court below), these proceedings have been brought into this Court, and amongst them the libel in the principal cause, which was the subject of discussion in the Court below. The admission of this libel has been discussed and debated here, and this Court is now called upon to say whether the Judge of the Court below did right in rejecting it, or whether he ought not to have advanced one step more towards giving existence to this suit, by admitting the libel. For, strange to say, we are [214] gravely told, after all these proceedings in the original cause and in the Court of Appeal, the suit is not yet in existence, has not yet struggled into birth, but, though it has been "dragging its slow length along" since its commencement, it has not advanced yet so far as to be "a suit depending in these Courts."

Again, suppose this Court should decide that the Court below did right in rejecting the libel, Mr. Ray might not be disposed to abide by that decision, and might choose to take the opinion of the Court of Appeal, the Judicial Committee of the Privy Council; or, on the other hand, if the Court should be of opinion that the Judge of the Court below did wrong, and ought to have admitted the libel, Mr. Sherwood might choose to appeal from the decision of this Court, and to take the opinion of a superior Court. In either case the same steps must be taken again as when the case was appealed to this Court; an inhibition must be taken out with a citation, and a monition to this Court to transmit the process to the superior Court; the process must be transmitted, the proctor for the party must appear and exhibit his proxy, and pray a libel; the libel must be brought in, and an issue given to the libel of appeal, and the same course of proceeding must be adopted as in this Court: and after all this time consumed, the question will remain in the same state as it did in the Consistory Court of London on the 18th January, 1836, namely, whether there is any suit depending or not.

I cannot believe that there was any intention on the part of the Legislature to use

these words in a technical sense; but supposing that the intention of the Legislature was so, is it clear what the tech-[215]-nical meaning is; and is the Court to refer to all the various authorities in order to endeavour to ascertain the technical meanings attached to the words? It is by no means my intention to go through the numerous authorities (no light reading for the dog-days), in order to dive into the meaning of these learned commentators, which, as far as the Court has examined their works, would lead to no satisfactory conclusion. I confess that what was cited in the argument would not lead the Court to place any great dependence upon what is to be derived from the disquisitions and divisions of these learned writers, as to the proceedings in those Courts which are governed by the practice of the civil law; and I think I can find, with reference to the proceedings of this Court, sufficient to say what a "suit depending" is, according to the proceedings of these Courts, from which I have always understood, and have no doubt, that the practice of these Courts is best learned. I have always understood that from the instruments in the proceedings of these Courts, we can ascertain the practice of the Courts; and what are the instruments which have been employed in this suit? Referring to the process in the Consistory Court of London, I find a proxy exhibited on behalf of one of the parties cited, Miss Emma Sarah Ray; and that expressly recites that a cause was depending there. This occurs in the very first line of the proxy: "Whereas a suit of nullity of marriage is depending and undetermined in judgment in the Consistorial and Episcopal Court of London." That is the first thing I find in the proxy of one of the parties to this marriage, who is willing to retrieve the error she has committed, and to give effect to [216] the prayer of her father, to have this marriage pronounced null and void, and she authorized her proctor to give an affirmative issue on her behalf. I grant that Mr. Sherwood is not bound by any admission in the proxy of Miss Ray, the other party, and I know his proxy is conceived in different terms, and I give his legal advisers credit for the caution which they have used; for Mr. Sherwood's proxy merely recites that "a citation has issued," and authorizes his proctor to appear to that citation: but let us see how the proceedings stand, when the case is brought by appeal here.

When an appeal is alleged, *apud acta*, there is no recital of there being a cause depending. The next step is, when the inhibition is returned, and an appearance given (for I do not proceed to consider what took place under the protest). The proxy authorizing the appearance of the proctor for Mr. Sherwood in this Court is different from that in the Court below; and hence I am led to imagine that in the opinion of the learned counsel for Mr. Sherwood, who advised him in the first instance to object to the jurisdiction of the Court below, on the ground of there being no suit depending in that Court, the decision of that Court was satisfactory, and that he had not intended to urge the same objection; and it does appear as if I was warranted in such conclusion; for I find that there is not the same caution used in the proxy itself in this Court: it runs "Whereas there has been a certain pretended suit of nullity of marriage depending and undetermined in judgment in the Consistorial and Episcopal Court of London." So that here the term "pretended" is introduced, which is merely a word of form; but still, if it is [217] a pretended suit, there was a suit of some kind depending; and this is the ordinary form of proxy which is used on all occasions. Again, I find, when the parties are before this Court by their proctors so constituted, and authorized to appear, it is in an appeal from a grievance in a cause "depending and undetermined in judgment in the Consistorial and Episcopal Court of London."

The next step is the libel of appeal; and what does that state? True, it is the libel of appeal of Mr. Ray, and not of Mr. Sherwood: but it is in the same form as in other cases, and it sets forth that a suit was lately depending and undetermined in judgment in the Court below, and that an appeal has been instituted; and now the objection to the admission of the libel is that there is no suit depending in the Ecclesiastical Court, though the proxy of the party objecting to the admission of the libel, in his very first instrument, recites the pendency of a suit in these Courts. It may be said that the libel of appeal is an instrument drawn up by the party whose interest it is to establish the jurisdiction of the Court, and to shew that there was a cause depending. This is true; and in order to meet this objection, the Court directed libels of appeal to be looked up in other cases of a similar description by other parties. I find a case which I think has much the same complexion as the present, which was decided in the Court of Arches by my predecessor in this chair; the case of *Balfour* against *Carpenter* (1 Phill. 204), which is reported in the first volume of Dr. Phillimore's

Reports. It was an appeal from the Consistorial [218] and Episcopal Court of Exeter, from the rejection of a part of the libel in a suit of nullity of marriage, by reason of the license having been granted by a person who had no authority to grant it, and a part of the libel was rejected, and from that rejection an appeal was brought to this Court. I find the appeal is stated in this way. It was a business of appeal and complaint by William Balfour of a grievance; and in the libel of appeal is stated—"that it was a suit depending in the Consistorial and Episcopal Court of Exeter, in a certain cause of nullity of marriage," in which the Judge of the Court had rejected one of the articles of the libel, and from such rejection an appeal was brought to the Court of Arches. I have now before me the original papers in that appeal, and I find that the libel sets forth as I have stated that it was an appeal in "a cause depending" in the Court below; and it recites these words—"a cause of nullity of marriage depending in the Consistorial and Episcopal Court of Exeter;" and therefore it is not the form of proceeding in this cause only, but it is the customary form (and I may say the regular form), and it is the same in all the cases to which I have referred—and many other cases might be produced, for the form is the same in all cases of appeal: in all, the expression is "a suit depending" or "a cause depending," in respect to the question on which the appeal is brought, and the form is not peculiar to this Court. So much for the common sources of information from which we are accustomed to derive our knowledge as to the practice of these Courts, all of which concur in stating "a cause depending," notwithstanding that in an appeal from a grievance [219] on account of the rejection of the libel there can have been no *contestatio litis*, and consequently, according to the argument of the learned counsel for the respondent, there can have been no suit—no *lis pendens*. But in all these cases a cause is described as "depending" before the *contestatio litis*.

If it was necessary to cite authorities, I should like to refer to domestic writers, those who more particularly treat of the practice of the profession, deriving their knowledge from experience; and there is one authority which I will advert to, and only one, which supports the view I have taken, and which is in opposition to the argument used against the admission of the libel. I mean Oughton, in his *Ordo Judiciorum*, not that part in which he sets forth the different stages of a suit, or parts of the *judicium* (for writers differ from each other, and there is some confusion between the *causæ* and the *judicium*, even the authorities so much adverted to in the argument, and which, though foreign writers, are said to be guides as to our practice), but in that part where he treats of the order of proceeding in matrimonial suits. That authority (not in the passages which have been adverted or referred to by the counsel for Mr. Sherwood, but in another part of his treatise) speaks of proceedings "*lite pendente*," where there could have been no *contestatio litis*, and even before the return of the citation. In title 198, where he treats *De Citatione in Causâ Matrimoniali*, I find it thus laid down by him: "*Si agens in causâ matrimoniali credit vel dubitat partem ream citandam velle (lite pendente) ad alia vota convolare (id est, cum alio aut contrahere aut solemnizare matrimonium), curare potest ut in citatione inseratur inhibitiô contra partem ream ne (lite hujusmodi pendente) convolet ad alia vota; matrimoniumve aliunde quovis-modo contrahat, et quod si de facto antea contraxerit (id est, ante executionem citationis), illud in facie ecclesiæ solemnizari non procuret, sub poenâ juris et contemptus.*" So that, in a proceeding in *causâ matrimoniali*, if the party against whom the suit is instituted "*lite pendente*" enters into a contract of marriage with another person, the other party has a remedy, and this pendency of suit is ante executionem citationis; so that here is a *lis pendens* referred to before a *contestatio litis*. Again, in title 201: "*Si mulier contra quam agitur in causâ matrimoniali, non obstante pendentiâ litis et inhibitiône (quod lite pendente, non convolaret ad alias nuptias), matrimonium solemnizaverit vel matrimonium contraxerit cum alio; hoc allegato et probato est sequestranda (sumptibus petentis), lite pendente.*" And there are several other parts of the section *De Causâ Matrimoniali* which speak of a breach of the inhibition "*pendente lite*." In title 31, "*De Contemptu*," is this "*De modo petendi decretum in negotio contemptûs in causâ matrimoniali; nempe propter solemnizationem matrimonii (pendente lite) inhibitiône judicis in contrarium non obstante.*" Again, after reciting the issuing and serving of the citation with the inhibition, it proceeds: "*Quodque (vestris literis inhibitoriis, et executione earundem non obstantibus) ipsa, post executionem earundem (in contemptum juris et jurisdictionis vestræ non ferendum) matrimonium quoddam præten-*

sum (de facto) contraxit cum quodamvis et illud in [221] facie ecclesiæ solemnizari seu potius profanari curavit." It would seem to follow from these passages that this writer considered that there was a *lis pendens* after the issuing the decree or service of the citation; but it is impossible he could have had in view, in speaking of these proceedings, the *contestatio litis*; for, according to Oughton, the contempt is founded upon the breach of the inhibition after the service of the decree.

So that it appears, with reference to the customary form of the instruments in proceedings in these Courts, and also to the authority of Oughton, who has been relied on as an authority for the general practice of these Courts, that the *contestatio litis* is not necessary to constitute a *lis pendens*; that there may be "a suit depending in the Ecclesiastical Court" before the *contestatio litis*, and that the *lis pendens*, according to this authority, commences with the extracting and service of the citation; and if not, by analogy with other Courts, on the return of the citation, whenever it may be. To be sure, we may suppose a case in which there would be great hardship. For what is the fact? Till a late period it was not in the power of the Consistorial Court of London to appoint additional court-days; and, supposing that the sittings of the Court were over, no proceedings could have taken place till the first session of Michaelmas Term following; and the party, without any fault of his own, would have been precluded from the benefit of the exception from the prohibitory clause in the Act. I consider, then, in the first place, that it is not a technical meaning which we are to apply to the words "suit depending in the Ecclesiastical Court," no such technical meaning being intended [222] by the Legislature; and, secondly, I am of opinion that, if these words were to receive an interpretation according to the technical rules of practice of the Court, they would not take away the jurisdiction of this Court.

I therefore entirely agree in opinion with the Judge of the Court below on this point—that the jurisdiction of the Court is not taken away by the Act of Parliament on the ground that there was no suit depending, touching the validity of this marriage, at the passing of the Act, which is requisite in order to bring it within the terms of the exception of the Act, which requires that the sentence of nullity should be pronounced in "a suit which shall be depending at the time of the passing of this Act."

I have now made an end of the observations, perhaps long observations, upon the objection to the jurisdiction of the Court; and after the learned and elaborate arguments that have been addressed to it on that point, it seemed necessary to consider this question fully; for if the Court's jurisdiction is taken away, and it has no power to pronounce a sentence annulling the marriage, it is quite unnecessary to consider the other objection, whether Mr. Ray has such an interest as will entitle him to institute a suit, and to pray a sentence of the Court pronouncing this marriage null and void; and I now proceed to consider the second ground of objection to the admission of the libel and additional articles, namely, the right of the father to institute these proceedings.

I have already said that this question depends in no degree on the Act of Parliament. If the Court has jurisdiction to entertain this suit, the father has [223] the same right to institute a suit on the ground of affinity as on the ground of consanguinity; and if the Court is called upon to pronounce a declaratory sentence in respect to a marriage between parties within the prohibited degrees of affinity, the Court cannot pronounce against the right of the father, without pronouncing against his right to institute proceedings in respect to marriages between parties within the prohibited degrees of consanguinity, which the Legislature has left untouched; so that the question is not confined to the present case, but may occur in others.

I must observe that, in considering this part of the question, I do not feel the same confidence as I did in respect to the former part, and for this reason; on this part of it I have not the same consolation that my opinion, is consonant with that of the learned Judge of the Court below. In the former part of the case our opinions agree; but in this I have the misfortune to differ from his opinion, that the father has not a sufficient interest to institute the suit. After the learned and elaborate arguments which I have heard, and after considering the question, as I hope, maturely and conscientiously, I have arrived at another conclusion; and though I entertain great respect, and regard, and esteem for the knowledge, and talents, and accuracy of that learned person, I am bound to declare my own opinion, though it differs from that of

the learned Judge. I hardly need to say that I feel the misfortune of differing from him ; and it would have been a great comfort to me if he had arrived at the same conclusion as I have done.

This part of the case requires great consideration, and it appears to me that the arguments of the [224] counsel on this point (if the expression is not too strong) proceed on a fallacy : their arguments go on a supposition that it is a pecuniary interest which a father is bound to shew. I have been referred to proceedings in other Courts, to shew that a father, quâ father, is not allowed to bring an action for damages against the seducer of his daughter ; and other cases in which a father, quâ father, has no such right, have been mentioned to the Court ; and great stress has been laid upon this, that a father's interest, as next of kin, is not such an interest as will entitle him to institute a proceeding of this description.

Before I proceed to examine the law of the case, the situation of the parties is worthy of consideration ; and it is to be observed that Miss Ray was of full age, and had a right to contract marriage without the consent of another, and that if this is a legal marriage in other respects, she was sui juris and had a perfect right to contract it herself. But the question is whether, after contracting a marriage of this description, prohibited by the laws of the country, and of God, and admitting that it can be set aside by a suit in the Ecclesiastical Court, the question, I say, is, whether the father, under these circumstances, is not entitled to institute a suit for that purpose, she being at the time of the marriage, and being still, resident in his house, and forming a part of his family, whether that is not a sufficient interest, the "specific" interest mentioned by Lord Stowell in the case of *Turner and Meyers* (1 Hagg. Con. Rep. 414), or whether that learned Judge meant in that case that a father, like other [225] persons, should set forth a specific pecuniary interest, to entitle him to institute such a suit. It does not appear to me that this is the sort of interest which the father is called upon to set forth.

It is admitted that there is no case which decides this point. The case of *Turner and Meyers* does not decide it. That was a marriage sought to be set aside on the ground of insanity ; the law had to decide the status of the party. A marriage where a party is insane is no marriage at all ; so that different considerations apply to the two cases : and if Lord Stowell had said (though it appears to me he has not said so) that in such a case a father without a pecuniary interest would not be entitled to institute a suit to procure a sentence of nullity, the same considerations do not apply to this case. On the other hand, I am not prepared to say that there is any case which has determined that a next of kin, quâ next of kin, with a spes successionis, has been in express terms considered to possess a sufficient interest applicable to a proceeding of this kind. The case of *Faremouth v. Watson* (1 Phill. 355) is the nearest to it, but it is the only one. But still, in that case, after the explanation I have had, I am bound to consider that the point was not decided by the learned Judge (Sir John Nicholl), though there was a strong impression upon his mind (as I collect from what has been said on one side and the other, in the course of the argument) that such an interest would be sufficient ; he is said to have thrown out that a "slight interest" would be sufficient ; and the question is, what is that "slight interest?"

All the arguments on behalf of Mr. Sherwood, [226] which have been addressed to the Court on this point, proceed on the assumption of the interest being pecuniary interest—that such an interest, a pecuniary interest, gives a right to a father to proceed ; but no case has been cited ; and I understand that in the Court below no case was cited, and that the learned Judge of that Court was aware of no case in which it was laid down what interest would be sufficient to entitle a party to proceed civilly to annul such a marriage. I am unable to find any such case to which I can look in order to ascertain the nature of the interest which will entitle a person to proceed in suits of this description ; that is, other than as next of kin, or in remainder, and where it is not of a pecuniary character.

I can easily imagine many cases in which parties may not have such an interest as will entitle them to proceed. In the first place, a father has a right to institute a civil proceeding for the purpose of having the marriage of his minor child declared null and void ; but a stranger has no interest except as one of the public ; but as such can only institute a criminal proceeding, which is ad publicam vindictam. A stranger, therefore, who wishes to proceed in a civil suit, must shew a special interest ; and it seems to be admitted that, as a mere stranger, it must be a pecuniary interest.

Let us now consider who are the parties entitled to have a declaratory sentence of nullity of marriage on the ground of the parties being within the prohibited degrees in a civil suit? The first are the parties themselves, either of whom may bring a suit to have his or her own marriage declared null and void. Have they necessarily a pecuniary interest! It may be so: it may be that their pecuniary interest [227] is affected; but that is not the principle on which they are admitted to appear in such suits; for it is on the ground that it is material for their own sakes and that of the public that their status should be known; and the object of the proceeding is to have the status of the parties to the marriage defined by the sentence of a competent Court, and not on account of any pecuniary interest which they may have. Again, a father, as guardian of a minor son, may, as has been already observed, institute such proceedings; not on the ground of any pecuniary, but of a moral, interest which he has in the welfare of his child. So it is not a pecuniary interest which gives a guardian a right to institute a proceeding of this description in respect to his ward; and many other cases may be stated in which parties are allowed to bring suits of this description for the mere purpose of defining the status of the parties, which are not cases in which their pecuniary interests are involved. I have not referred to these instances for the purpose of shewing that the interest of a father in his major child is as strong as in the case of a minor, but only to shew the principle, which is, not that of having a pecuniary interest, but that it is important that the parties themselves, and the public, should know what their real status is.

The question then comes to this: Is the interest of a father in the marriage of a daughter or of a son, who has attained majority, and especially in the case of a daughter, is the interest of a father in respect to such daughter, who is still an inmate of his house, and a part of his family, sufficient to entitle him to proceed in a cause to have the marriage of such daughter or son declared void? What are [228] the considerations which apply to cases of this description? Does it follow, because the daughter or son has attained majority that therefore all the obligations which existed between them have ceased? Did they all terminate with minority? Are all the mutual and respective obligations, and duties and rights, of the parties—all the power, control, and authority of a father over such a son or daughter at an end the day they attain majority? I think clearly and undoubtedly not. So long as a son or daughter resides under the father's roof, though major, they still make a part of the family; and he, as the head of the family, has the care of the family, and is entitled to exercise a parental control over such persons. I do not conceive that a father is relieved from the obligation of maintaining, supporting, protecting, and advising a daughter so circumstanced: the mutual obligations and duties remain the same—that of protection and advice from the parent, and filial duty and reverence from the child.

This disposes of one class of cases, to which the Court has been referred; for I disclaim, for the reasons I have just stated, deciding this case on the ground of pecuniary interest, arising from the expectation of the father of succeeding to the property of his child, though I do not say that that may not be an ingredient; but I decide the question on higher and moral considerations, arising from the combination of circumstances, constituting the peculiar relation between father and child, which can be found to exist in no other relations of life. Even in the case which was referred to in the argument, to shew that the father, as father, has no right to bring an action against the seducer of his daughter; [229] that the father's right is founded on his claim to the services of his daughter, by a fiction of law applicable to the particular case; what is the case? what is the ground of this fiction of law, by which as father is allowed to bring an action to recover damages for the loss of the services of his daughter? That of an implied contract between them. I will venture to say that in no other relation of life is there any such implied contract; there is no such contract between uncle and niece residing in the same house, or even between brother and sister. Has the uncle or brother a right of action against the seducer of the niece or sister, on account of the loss of their services, though resident in the same house, and under the same roof, on the ground of any implied contract? Certainly not. They must both shew an actual and express contract between them, to entitle an uncle to bring an action for injury done to his niece who is in his service, or a brother to bring an action against the seducer of his sister; the law will not imply a contract between them, as between parent and child; therefore distinguishes the relation of parent and child from every other relation whatever.

But I was going to state that a daughter, resident in her father's house, is still subject to his control. It is true, when she has attained majority, she has a right to withdraw herself from his roof and from his protection, to contract marriage without his consent, and to provide for her own maintenance and support. But so long as a child remains under the father's roof, he or she is subject, in a qualified sense, to his control and authority.

In the system of law for the relief of the poor [230] I see a strong analogy to the case before the Court. So long as a son or daughter, notwithstanding he or she may have attained majority, continues to reside in the family, and in the house of the father, the settlement of the father is the settlement of the child. So in the case of a child who is impotent in body, and incapable of gaining a livelihood for himself, the burden of maintaining the child, even after it has attained majority, falls upon the father. This principle was recognised under the statute of Elizabeth, for the relief of the poor; and by the same law a grandfather may be assessed for the relief of his grandchild.

Can it then be said that a father, as such, has no interest in the legitimacy or illegitimacy of the issue of his daughter, whom he may be called upon to support? that he has no interest that the status of his daughter should be declared? He cannot resist the claim for the support of his child, if it has any infirmity of mind or body; he cannot resist the claim for maintaining the issue of his child; for the grandfather is bound by the positive law of the country, and still more by the law of Nature, to provide for his grandchildren, notwithstanding their majority. It is true the child may emancipate himself and become *sui juris*; still the parent cannot divest himself of the obligation, it being a part of the law of nature that a parent ought to support a child who is unable to support itself. Does not this imply an interest sufficient to sustain a suit to ascertain the status of the issue of his daughter? Let us see what is said on this subject by the writers on the law of this country. Mr. [231] Justice Blackstone (1 Black. Comm. ch. 16) lays it down in this manner: "It is a principle of law that there is an obligation in every man to provide for those descended from his loins; and the manner in which this obligation shall be performed is thus pointed out." And then he refers to the statute 43d Elizabeth, chap. 2, which directs in what manner the poor shall have relief afforded them: "The father and mother, grandfather and grandmother, of poor impotent persons, shall maintain them at their own charges, if of sufficient ability, according as the Quarter Session shall direct." It is true, the learned commentator goes on to state that "no person is bound to provide a maintenance for his issue, unless where the children are impotent and unable to work, either through infancy, disease, or accident; and then is only obliged to find them with necessaries, the penalty or refusal being no more than 20s. a month." It is sufficient for the father to provide necessaries; for, as he adds, the law did not mean to compel a father to maintain his child in ease and indolence. But this shews that, according to the policy of our laws, founded upon the higher principles of the law of Nature, the obligation upon a father of providing for his descendants continues even beyond his own children; for he may be called upon to maintain the issue of his own children; and it matters not that, with reference to the parties to the present suit, this may be a very remote contingency; the law is not made for particular cases. In *The Berkeley case* (*Lord Dursley v. Fitzhardinge*, 6 Ves. 251) Lord Eldon was of opinion, upon the authority of the case of *Smith v. The Attorney-General*, cited in the argument, that the smallest possible interest, provided it was vested, would entitle a party to file a bill for perpetuation of testimony.

This law, founded upon the law of Nature, has received an interpretation from a vast variety of cases. In the case of *The King v. The Inhabitants of the New Forest* (5 T. R. 478), it was held that a child was not emancipated till he gained a settlement for himself, or became the head of a family by marriage; it is expressly laid down that the emancipation is completed when the settlement is completed. Lord Kenyon said, "The son was not separated from his father; he had gained no settlement for himself; the son, indeed, did on the same day enter into a contract, which, when completed, would confer a settlement on the son." And in the case of *The King v. Sowerby* (2 East, 276), it is laid down that it is not sufficient that a son should be of age, and have an independent business of his own; if he remains under his parent's roof, he thereby makes his election to remain a member of his father's family, and is not emancipated. And many other cases are to be found in the different books of Reports,

all going to the same point, namely, that a child does not become completely emancipated from parental control, unless he shall have contracted some relation incompatible with that control, so long as he remains in his father's house, and continues to be a part of his family. There is one case in which I find this laid down in [233] strong terms—the case of *The King v. The Inhabitants of Roach* (6 T. B. 252): Lord Kenyon there commenting upon what was supposed to have fallen from him in *The King v. Witton-cum-Twambrookes*, is reported to have expressed himself in this manner: "I think I could not have said . . . because it never was my opinion that the mere circumstance of a son's attaining the age of twenty-one was an emancipation, so as to prevent his having a derivative settlement gained by his father afterwards, if the son continued to live with the father; for, if the son, with unbroken continuance remain with, and a member of, the father's family, he is not emancipated." And in the same case Mr. Justice Ashurst said, "In some cases, perhaps, it may be difficult to say what shall amount to a severance from a father's family. When a child becomes of age, it is optional in him either to continue with his parents or not, as he pleases." So it was optional with Miss Ray to have continued with her parents or not after she attained majority. "He is then sui juris. But if he leave his father's house and put himself under some other control, this is a kind of public notification that he means to leave his father's family; and if afterwards the father acquire a new settlement, it cannot be communicated to the son, because he has ceased to be part of his father's family." And it is for the purpose of shewing that a child, after majority, continuing a part of the father's family, is still subject in some degree to parental control, that the Court has adverted to the case. Mr. Justice Lawrence also observed in the same [234] case, "The daughter, being of age, put herself out of her father's control, and therefore ceased to be part of his family." These cases, and many others to the same effect, might be stated,^(a) which make the matter quite clear, and the Court can entertain no doubt upon this point.

These, then, are the grounds upon which I am disposed to decide this case, and not upon the narrow ground that the father has an interest of a pecuniary nature—the expectation of succeeding to his daughter's property if she should die a spinster and intestate—though that, I think, may be an ingredient in the case. In the case of *Watson and Faremouth*, the learned Judge seemed to incline to the opinion that the interest of a next of kin would be sufficient. It was not necessary in that case to decide the point—and he did not decide it; but it shews that he did not think it a monstrous proposition that the interest of a next of kin should be deemed sufficient to maintain a suit of this description. But again I expressly say, I do not decide this question on that ground, but on the higher principles of the law of Nature. My decision is grounded upon a combination of the various obligations, duties, rights, and interests, which distinguish the relation between parent and child from that which exists between any other individuals whatever; so that there can be no fear of any inconvenient extension of this principle to other parties, as was suggested in argument.

[235] I am of opinion that the interest of Mr. Ray in the legitimacy or illegitimacy of the issue of his daughter is sufficient to entitle him in these Courts to maintain a suit for annulling her marriage, resting my opinion upon the authorities I have referred to, and upon the principles on which those authorities are founded. It is a misfortune to me that I should differ from the learned Judge in this respect, but I am bound to state the conviction of my own mind. I am of opinion that the libel is proper to be admitted—not, indeed, in the form in which it now stands; the words "although neither of them, the said Thomas Moulden Sherwood or Emma Sarah Ray, had ever resided in the said parish of St. Mary Whitechapel," in the 10th article, must be struck out; because I am prohibited by the Marriage Act from inquiring into the fact whether the parties were resident in the parish where the banns were published.

The Judge then pronounced for the appeal, reversed the sentence appealed from, and retained the principal cause; and, after striking out the words "although neither of them, the said Thomas Moulden Sherwood and Emma Sarah Ray, had ever resided in the said parish of Saint Mary, Whitechapel," in the 10th article, admitted the libel.

From this decree an appeal was interposed on behalf of Mr. Sherwood to his Majesty in Council.

(a) *The King v. Everton*, 1 East, 526; *The King v. Bleasby*, 3 B. & Ald. 377; *The King v. Wilmington*, 5 B. & Ald. 525; *The King v. Lawford*, 8 B. & C. 271.

[236] *HAYLE against HASTED AND PIERSON.* Prerogative Court, Hilary Term, 3rd Session, Jan. 29th, 1836.—A sentence in favor of a draft will pronounced in a suit against the executors of a former will, is binding on the legatees named therein ; unless fraud or collusion can be shewn between the parties to the suit, or neglect or mismanagement in the conduct of it.

On petition.

Judgment—Sir Herbert Jenner. In this case Fanny Newson, the deceased, died a spinster, on the 14th December, 1833, at the advanced age of eighty-five years, leaving two sisters, Elizabeth Hinton, widow, and Martha Smith, also far advanced in years, and possessed of property to the amount of 25,000l.

On the 26th of March, 1832, she executed a will in the presence of two witnesses. At this time, Mary Newson, another sister, was living, but she died in August, 1833. The deceased also executed a codicil to her will, on the 1st November, 1833. By the will she gave all her three-and half per cent. stock to her executors, in trust for her sister, Mary Newson, for life, and after her decease, in equal moieties to her sister, Mrs. Hinton, and her daughter, Mrs. Hayle, independent of her husband, for their joint lives, and on the death of either of them, the survivor was to have the whole for her life ; on the death of the survivor, the principal was to go to Mr. James Newson.

[237] She also gave 100l. three per cents. to Mrs. Smith ; 500l. three per cents. to Mrs. Hinton, and a like sum to Mrs. Hayle ; and 100l. three per cents. to each of her executors. She then gave the residue of her property to her sister, Mrs. Hinton, and Mrs. Hayle during their joint lives, and the life of the survivor, and at the decease of the survivor, the principal to be equally divided between Mary, the wife of Captain Edwin Bloomfield, Caroline Newson, and Ann Newson ; and she appointed the Rev. Mr. Hasted, of Bury St. Edmunds, and Mr. Jaspar Pierson, of Framlingham, executors and trustees. The codicil, which is without date, but which appears to have been executed on the 1st November, 1833, and attested by Mr. Serjeant Taddy, bequeaths to the Rev. John Smith of Dilhorn, 500l. three per cents., and to the Rev. John Taddy, of Northill, Bedfordshire, 500l. three per cents. in addition to his legacy of 100l. in the will ; this codicil being written on the same sheet of paper as the will.

Shortly after the death of the deceased, the executors were sworn to the execution of the will and codicil, but in consequence of the will containing a direction that "in case the deceased should leave any paper in her handwriting with gifts or directions of any sort, they were to be considered as part of her will," it became necessary to make a search amongst her papers, to ascertain whether there were any such in existence ; and the result was, that several papers of a testamentary character written upon scraps of paper, some signed, and some unsigned, were discovered. The advice of counsel was then resorted to, and the executors were advised that they could not act with safety to [238] themselves without the judgment of the proper Court, as to the papers which were entitled to probate ; and, as in the course of the communications with counsel, a draft of a new will, of a subsequent date to the codicil prepared for the deceased, was produced, the parties were further advised that the whole of the circumstances should be communicated to Mr. Newson, the residuary legatee, that he might take advice as to the propriety of propounding that paper, he being entitled under it to a considerably larger interest than under the will of March, 1832.

In pursuance of the advice he received, Mr. Newson propounded the draft will, which would, in effect, if established, revoke the former will and codicil, and reduce very materially the benefit to Mrs. Hinton and Mrs. Hayle. Mr. Hasted and Mr. Pierson were executors in both papers, and they were made parties in the cause then instituted, and as such opposed the draft will, and prayed probate of the will of the 6th March, 1832, and of the codicil of the 1st November, 1833 : thus in effect representing and protecting the interests of all the parties benefited under those instruments respectively.

Affidavits as to scripts were brought in on both sides, and annexed to them were the various scraps of paper which had been found, together with the will of March, 1832, the codicil of November, 1833, and the draft will ; so that the Court had all the papers before it.

On the 28th April, 1834, a proctor appeared for Mr. Newson, the residuary legatee in the draft will, and another proctor for Mr. Hasted and Mr. Pierson, the executors in the will of October, 1832. [239] On the first session of Trinity Term, 27th May,

1834, the affidavits as to scripts were brought in; the draft will was opposed and propounded, the allegation propounding it being brought in on the second session, the 4th June, 1834.

On the third session, the 14th June, the allegation was admitted after opposition, and two witnesses were produced. On the fourth session, 24th June, publication—the witnesses produced being first examined—was prayed, and the cause was assigned for sentence on the second assignation on the bye-day. On the 10th July the case came on for hearing, when it was argued by counsel on both sides, and the Judge pronounced for the validity of the draft will propounded, as the last will of the deceased, and probate was accordingly taken by Mr. Hasted and Mr. Pierson, the executors.

These were the steps taken after the death of the deceased, and it does not appear to me that any undue haste or precipitation has been used, for the deceased having died on the 14th December, 1833, probate is not taken till the 10th July, 1834, and the progress of the cause through its different stages occupied from the 27th April to that period, which, considering that there was only one short allegation, on which not more than three witnesses were examined, was ample space for the purpose.

Probate having been taken by the executors they proceeded to act under it, the legacies were paid, and the effects administered; but in April, 1835, an application was made to the Court for a decree, calling upon the executors “to bring in the probate and to shew cause why it should not be revoked and pronounced null and void, as having been [240] obtained by fraud and collusion between the pretended executors, or one of them, and the pretended residuary legatee, to the prejudice, and without the knowledge, of the said Elizabeth Hinton and Fanny Hayle;” the words which the Court has just used, are those of the affidavit on which the motion for the decree was founded, and which affidavit is dated the 15th April, 1836.

Fraud and collusion being alleged, the Court, as it was bound to do, directed the decree to issue, calling upon the executors not, in the first instance, to bring in the probate, but to shew cause why it should not be revoked, as having been fraudulently, and under false pretences, obtained.

An appearance was given for the executors, and an act on petition has been entered into, containing the grounds upon which the several parties rest their case, and affidavits have been exhibited on both sides: Mrs. Hinton having died in February, 1835, Mrs. Hayle is the only party before the Court praying the revocation of the probate.

This paper having been regularly propounded, and witnesses examined in support of it, and a sentence pronouncing for its validity recorded; the executors of the former will having been parties to the suit; it seems to be admitted that, according to the practice of this Court, it is not competent either to the parties to that suit, or to those whose interests may have been affected by it, to call in the probate of it, and to require that it should be repropounded, unless it can be shewn that there has been fraud or collusion practised to their prejudice, or that there has been neglect or mismanagement in the conduct of the suit: and this upon the principle that the executors in the former will represent, and [241] are the protectors of, the legatees under it, being specially entrusted by the deceased with the care and management of her property, and to see her intentions carried into effect; and who must be presumed to have performed their duty with fidelity until the contrary is proved. Cases (a) have been cited, in which this doctrine has been adopted and acted upon by this Court, but to which is hardly necessary to advert in detail, since, as a general proposition, the principle does not seem to be disputed; though it was said that it is not universally true in its full extent; and that the present case was distinguished from any that had preceded it, inasmuch as the same executors were appointed by both wills, and therefore had the same interest under each; so that it was immaterial to them which was pronounced for; but this does not, in my opinion, form any real ground of distinction, for the executors were bound to the best of their ability to defend the interests of the legatees under the first will, of which they stood before the Court praying probate, and which they must be taken to have considered as containing the last will of their testator, and which as such it was their duty to see carried into effect; for it is not the interest of the executors, but the intention of the testator which is to be attended to.

Upon the ground, therefore, that the executors have the same interest under both

(a) *Colvin v. Fraser*, 2 Hagg. Ecc. 292; *Medley v. Wood*, 1 Hagg. Ecc. 645; *Newell v. Weeks*, 2 Phill. 224.

wills, I do not think that the case is distinguished from those which have been adverted to in argument; and the parties praying the revocation of the probate al-[242]-ready granted must shew some other ground to induce the Court to comply with the prayer of their petition.

Now there are two other grounds upon which this petition rests:

First, fraud and collusion between the residuary legatee and the executors in the first will.

Secondly, fraudulent concealment of the existence and of the purport of the draft will, and of the suit that was pending with respect to it, from the parties materially interested in it, to their prejudice.

If either of these grounds is established, it is admitted, as indeed it could not have been denied, that the principle before mentioned, that the executors bind the legatees, fails, and that the Court is bound to give the parties the opportunity of bringing forward their case.

The facts stated in the affidavits have been brought to the notice of the Court with great particularity, and have been fully discussed. The Court has also read them through with great attention, but it does not seem necessary to advert to them again with much minuteness of detail, for the general circumstances are pretty much the same in both sets of affidavits, and many of the facts as to which they differ are not, in the view of the Court, material to the decision of the case.

The parties directly charged with the fraud are Mr. Pierson, one of the executors, and Mr. Newson, the residuary legatee; Mr. Hasted, the other executor, is not implicated in the charge, it being expressly stated in the first affidavit of Mrs. Hayle that "she has no reason to know, or to believe, that the aforesaid Rev. H. Hasted was either party or [243] privy to any such fraud or collusion:" and yet it is rather singular that, of the two executors, he has taken the most active part in the executorship affairs, in consequence of his residing nearer to the spot where they were to be transacted, but it would indeed seem difficult to conceive why he should have been a party to a fraud, not having, apparently at least, any interest one way or the other.

It would have been equally difficult to assign any reason for Mr. Pierson having lent himself to the fraud, as he also has as little interest as his co-executor Mr. Hasted, were it not that he is the brother-in-law of Mr. Newson, and may therefore be presumed, as was suggested, to have had an inclination to support the interest of the latter.

But though Mr. Pierson and Mr. Newson are the only persons expressly charged with fraud and collusion, there are pretty strong averments tending to implicate Mr. Dalton, the drawer of both wills, and who seems also to have been the confidential solicitor of the deceased and her family, or at least of some parts of it, and, as far as appears, to be generally at least of a respectable character, and to have had no reason to espouse the cause of Mr. Newson in preference to that of Mrs. Hinton and Mrs. Hayle, except, as he has been described, as the joint solicitor of Mr. Newson and Mr. Pierson; but, be that as it may, it is from their conduct and acts that the parties are to be judged. What then are the facts upon which reliance is placed to establish this charge of fraud? That immediately after the death of the deceased, a communication was made to Mrs. Hinton and Mrs. Hayle of the benefit which they were to derive under the [244] will of March, 1832. The letter conveying the information is from Mr. Pierson, and is dated 21st December, 1833, a week after the death of the deceased; it is not necessary to read the contents of the letter, inasmuch as it is too clear to admit of a doubt that at this time, and indeed until long after, the writer was not aware that there were any other papers of a testamentary character in existence.

Mr. Dalton had indeed shewn the draft of the will to Mr. Hasted about the 20th December, but it is expressly sworn that Mr. Pierson knew nothing of it until after the 12th March, 1834, when he was furnished with a copy of counsel's opinion, dated on that day.

Mr. Dalton also wrote a letter on the 26th December, 1833, giving similar information to Mrs. Hinton, and which is set out in the affidavit of Mrs. Hayle.

But neither Mr. Dalton nor Mr. Hasted at this time had an idea that the draft will could have any effect whatever; or the executors would hardly have been sworn to the execution of the will of March, 1832, and of the codicil of November, 1833; whatever letters therefore actually passed between the parties at this time could not

have had reference to any other will than that just mentioned, and the Court may therefore lay out of its consideration every thing that passed between the death of the deceased and the 12th March, 1834, as there could not in that interval of time have been any reason whatever for concealment of any kind from Mrs. Hinton or Mrs. Hayle: all were acting under the same impression, that the will of March, 1832, and its codicil, were the only subsisting operative instruments; unless indeed some of the testamentary scraps of paper might possibly be considered as entitled to proof.

The case however may be different after the 12th March, when it became known that the draft will was to be propounded; then the interests of Mrs. Hinton and her daughter Mrs. Hayle were placed in a situation of some jeopardy, and Mr. Newson, the residuary legatee, had an interest to maintain, adverse to that of those ladies; he had therefore a motive for fraud: but that is not sufficient, it must be proved that he acted upon that motive, and sought to obtain his object by fraudulent means: nay, I think the parties must go further, and shew, that not only Mr. Newson had recourse to fraud, but that the executors also were parties to it; as it was to them that Mrs. Hinton and Mrs. Hayle were to look for protection and information, and not to the party setting up an interest adverse to them.

But in what does the alleged fraud consist? why, it is said in the affidavit of Mrs. Hayle that Mr. Newson visited Mrs. Hinton some time in the month of March, 1834, and requested her to permit him to see all the letters which she had received from Mr. Dalton or Mr. Pierson on the subject of, as also any other papers she had in her possession relating to, the will of her late sister; suggesting to her that the same were wanted, in order to the proving of the will of her said sister, which he stated had not then been proved; and that accordingly Mrs. Hinton delivered up to him all the letters she had received from Mr. Dalton or Mr. Pierson, and several other papers (with the exception of the two letters of the 21st and 26th December, 1833), and which papers Mrs. Hayle believes are now in the hands, possession, or control of Mr. Newson.

[246] Now supposing this account to be true, it seems somewhat difficult to conjecture what purpose of fraud was to be answered by withdrawing these papers from observation; neither the contents nor the dates of the letters are stated, but it is said they were of a similar character to those set forth in the affidavit, only containing more minute information, that is, referring more particularly to the interest which Mrs. Hinton and Mrs. Hayle took under the will of 1832, which, for the reason already mentioned, must necessarily have been the case: but there does not seem to be any reason why they should be withheld, if indeed any such letters were written; but the fact is denied: Mr. Newson swears that he neither in the month of March, 1834, nor at any other time, asked Mrs. Hinton to allow him to see all or any of the letters at any time received from Mr. Dalton or Mr. Pierson on the subject, or that he at any time received any such letters or any other papers from Mrs. Hinton, save those afterwards mentioned in the affidavit, and which are not those stated in Mrs. Hayle's affidavit; he also denies having suggested that they were wanted, in order to the proving of the will of Mrs. Newson.

It is true, as has been said, that the affidavit of Mr. Newson is only affidavit against affidavit of parties equally interested in opposition to each other; but Mr. Newson is corroborated by the affidavits of Mr. Dalton and Mr. Pierson. Mr. Dalton deposes that to the best of his belief the only letters he wrote to Mrs. Hinton, besides that set forth in the affidavit of Mrs. Hayle, were one dated the 27th December, 1833, enclosing discharges for legacies under the will of Mary Newson, and another of January, 1834, annexed to the affidavit of Mr. Newson, inquiring the ages [247] of Mrs. Hinton and Mrs. Hayle, for the purpose of ascertaining the duties payable on their life interests under the will of Mrs. Fanny Newson; this letter, with the answer annexed, is exhibited.

Mr. Pierson swears that he verily believes that the only letter which he wrote to Mrs. Hinton respecting the affairs of the deceased was that set forth in the affidavit of Mrs. Hayle, and dated 21st December, 1833. So that against the single affidavit of Mrs. Hayle there is the positive denial of Mr. Newson, and the affidavits of Mr. Dalton and Mr. Pierson, deposing to facts tending to shew that the charge is unfounded, and could not be true, and the Court is unable to discover any room for mental reservation in the affidavits either of Mr. Dalton or Mr. Pierson, as was suggested in

argument: this seems to be the only tangible act of fraud charged against the parties, and has, I think, been satisfactorily refuted.

The other charges seem to resolve themselves into acts rather of omission than of commission; the fraudulent concealment of the existence of the draft will, or the effect it would or might have on the interest of Mrs. Hinton and Mrs. Hayle, as well as of the steps which were taken in order to have the question determined as to which of the papers were to be proved as the will of the deceased; and here the Court may observe that it is not able to collect from these affidavits that Mrs. Hinton or Mrs. Hayle were expressly informed of all these particulars, though they were acquainted generally with the difficulty which existed in proving the will of the deceased, and it would certainly have been more satisfactory if a more precise communication of the situation in which they were placed had been [248] made to them; but still the absence of such communication does not infer necessarily any intention of fraud, or necessarily lead to any prejudice to the interest of the parties.

Mrs. Hale also in her affidavit swears that in the month of September, 1834, she received a communication as to her interest under the deceased's will, differing materially from the information previously communicated to her; that, feeling astonished at such communication, she and her mother, Mrs. Hinton, at the earliest period that they were enabled to do so, under the circumstances stated, caused inquiries to be made at Doctors' Commons, in the final result of which, "to wit, about the middle of January, 1835, her mother and herself for the first time became aware that certain pretended instructions given by the deceased, as pretended to Mr. Dalton for her last will, had been propounded as her will by Mr. Newson, the residuary legatee, and that a sentence in favor of the validity of such instructions pronounced upon, in effect, the sole evidence of Mr. Dalton, acting in concert with, and as the agent or solicitor of, Mr. Pierson and Mr. Newson, in procuring a sentence in favor of the draft will;" and further swearing "that neither she, nor, as she believes, Mrs. Hinton, either knew of or suspected even the existence of the said pretended instructions, much less had any knowledge or suspicion that the same had been propounded as the will of the deceased, or that there was any intention of the executors, or of Mr. Newson, to dispute the will of 1832; and that the existence of the instructions and of the other matters, facts, and circumstances were [249] purposely and wilfully concealed and kept from their knowledge in the fear, and under the apprehension, that they, or some person on their behalf, would have effectually resisted the probate obtained as aforesaid of the pretended instructions."

Here then is a direct charge of a wilful concealment for fraudulent purposes, not only of the pending suit, but even of the existence of the draft will; and a positive averment that neither Mrs. Hayle nor Mrs. Hinton had any knowledge of the existence of the draft will (or, as Mrs. Hayle calls them, instructions) till the month of January, 1835; it being now admitted that a copy of the will, as proved, was delivered to them, certainly not later than the 4th October, possibly before: and that so early as the 5th of that month, the next following day, suspecting some fraud to have been practised upon them, they consulted Mr. Debney, and through him Mr. Crabtree, and Mr. Tumley, as to the best means of investigating the transaction, and this under the impression, as Mrs. Hayle swears, that they had been unfairly dealt with.

This, not to say more, is at the best a very incautious mode of swearing, and ought to have been particularly avoided, when the object was to fix the imputation of most grossly fraudulent conduct on other parties, and undoubtedly would render the Court very careful in receiving the evidence of an individual who had shewn herself so careless in a matter of so much importance, in preference to Mr. Dalton, Mr. Pierson, and Mr. Newson on the subject of the withdrawal of the letters from Mrs. Hinton, or indeed on any other subject when opposed to [250] evidence of a different tendency; and when it is said that this is, morally speaking, to be taken as the joint affidavit of Mrs. Hinton and Mrs. Hayle, Mr. Tumley swearing that he received the instructions for preparing it from both jointly, and that he verily believes the same would have been sworn to by Mrs. Hinton and Mrs. Hayle but for an accident which the former met with, and which terminated in her death—the Court will only observe that it hopes that Mr. Tumley has taken up an erroneous impression upon that point, and that if the attention of Mrs. Hinton had been called to the particular fact stated, she would have paused before she lent the sanction of her oath to a statement now

admitted to be inaccurate; she however did not swear to it, and Mrs. Hayle is alone answerable for the contents of the affidavit.

But, notwithstanding all this, the Court would not preclude the party from any benefit which it thought she might derive from having this paper re-propounded, if there were any reason to suppose that there had been any fraudulent concealment practised, or even if there were any suggestion now made that if she had been aware of the real nature of the question, as affecting her interest, she was in possession of facts which would have led to a different conclusion to that at which the Court had arrived; or that there had been a suppression of any important facts by the executors of Mr. Dalton.

But the Court has looked in vain through these affidavits for any such averments; the particular nature of the facts the Court would not probably require to be stated, but it might reasonably expect that some general averment of suppression or [251] perversion of facts should be made on oath, as laying the foundation for the present application, and that the party should not have contented herself with a mere general allegation.

The Court purposely abstains from going into that part of the case which consists of circumstances which arose after the probate of the draft will had been obtained; from entering into the discussion whether Mr. Cavill was employed by Mr. Pierson, without the direction of Mrs. Hinton; whether Mr. Crabtree was the family solicitor of Mrs. Hinton; whether Mrs. Hayle disavowed the application made by Mr. Debney for 80l. or 100l. in the latter end of October, 1834: or whether the alleged attempts of Mr. Newson to endeavour to prevail upon Mrs. Hayle to repudiate the notice of the motion for a decree calling in the probate, and of the alleged adoption and acquiescence of Mrs. Hayle in the will, by her acts, after she became informed of the probate having been obtained, and after her suspicions and those of her mother had been excited. All these circumstances are outlying, and at a distance from the main question, and can only bear very remotely, if at all, upon it, the Court therefore lays no stress whatever upon them: the real question is, whether fraud has been practised; or if that should not be made out, whether the interests of Mrs. Hayle and Mrs. Hinton have been prejudiced by the course in which the cause was conducted; for one or other of these propositions must be established to the satisfaction of the Court before it will recall what has been done, and revoke the probate already granted after the will had been regularly propounded and proved by witnesses: it will not take [252] such a step upon the bare speculation that a different result may possibly (not probably) be produced.

With respect to the first of these propositions, I am clearly of opinion that there is no ground whatever for imputing fraud to any of these parties in not stating more particularly to Mrs. Hinton and Mrs. Hayle the nature of the difficulties which prevented the probate of the deceased's will passing; and upon the other point, I am also of opinion that there is no reason to apprehend from all that is stated in these proceedings, that any thing has been kept from the knowledge of the Court or of the parties which would have had the effect of altering the sentence already pronounced: had such appeared, whether the concealment were wilful or accidental, the Court would have had no difficulty in putting the party in such a situation as would enable her to avail herself of their full effect; but as it is, I feel myself bound to reject the petition.

I shall give no costs: the interest of the parties was much reduced, and they were probably ignorant of the precise question to be investigated; although I entirely disapprove of the unfounded imputation of fraud which has been brought forward in this case.

[253] THE OFFICE OF THE JUDGE PROMOTED BY WALTER *against* MOUNTAGUE AND LAMPRELL. Consistory Court of London, Hilary Term, 3rd Session, 3rd Feb. 1836.—Articles having been admitted against churchwardens for making a new footpath across a church-yard, &c.—An allegation in reply, pleading facts shewing that the churchwardens acted *bonâ fide* and for the benefit of the parishioners, rejected, as not setting up a legal defence.

[Applied, *Re St. George-in-the-East*, 1876, L. R. 1 P. D. 314; *Vicar of St. John the Baptist, Cardiff v. Parishioners*, [1898] P. 157; *Vicar of St. Nicholas, Leicester v. Langton*, [1899] P. 28; *In re Bideford Parish*, [1900] P. 326. Referred to, *Batten v. Gedge*, 1889, 41 Ch. D. 514.]

On the admission of an allegation.

This was a criminal proceeding instituted by the Rev. Edward Newton Walter, the rector, against David Mountague and Edmund Lamprell, the churchwardens of the parish of Leigh, in Essex. On the 27th of August, 1835, a citation was extracted, calling upon the churchwardens to answer to certain articles, &c., and on a subsequent day articles were admitted to the following effect:—

1. We article, &c., that you, David Montague and Edmund Lamprell, were and are the churchwardens for the said parish of Leigh, in the county of Essex, and were elected and sworn into that office for the year 1834 and 1835.

2. That there hath from time immemorial been a foot-path through the church-yard of the said parish of Leigh, from the rectory or parsonage house of the said parish to the road or highway leading to the town of Prittlewell; and, further, that in the month of March last past you, the said David Mountague and Edmund Lamprell, without the consent and contrary to the remonstrances of the said Rev. Edward Newton Walter, clerk, the rector of the said parish of Leigh, and without any lawful authority whatever in that behalf, made or caused to be made a new foot-path across a part of the church-yard of the said parish leading out of [254] the said old foot-path into the high road; and took down, or caused to be taken down, a part of the fence or boundary of the said church-yard, and erected, or caused to be erected, a gate or gates therein, leading into the said church-yard out of the said high road, and thereby made, or caused to be made, a new entrance into the said church-yard. And, moreover, that in and by so doing you, the said David Mountague and Edmund Lamprell, cut and dug up, or caused to be cut and dug up, a portion of the turf and ground or soil of the said church-yard, over the bodies or corpses of divers there buried, and of some of whom the families or relations were and are still resident in the said parish of Leigh, and who have been aggrieved thereby, and have complained thereof, &c.

3. Also, that repeated applications have been made to you by the said Rev. Edward Newton Walter, the rector, and by several of the parishioners of the said parish of Leigh, concerning the premises in the months of April and May last, or one of them, notwithstanding which you did, and still do persist, in maintaining the said new foot-path, and causing the same to be used as a public foot-path, thereby desecrating so much and such part of the said church-yard, &c.

An allegation was now offered to the Court on behalf of the churchwardens by way of defence, pleading in substance as follows:—

1st. That the map or plan hereto annexed is a correct map or plan of the church-yard, and of the several entrances into and paths within, and of the roads and ways leading to and about the same, and the map was annexed.

[255] 2d. That, until between seven or eight years from the present period, there were three entrances into the said church-yard of Leigh, with the paths leading therefrom; the said entrances being in the map or plan marked by the figures 1, 2, and 5, and the paths being as described: that at the entrances marked 1 and 5 there were gates opening upon the paths leading therefrom, and also swing gates at the sides thereof; and that at the entrance, marked 2, there were steps or a stile through or over the fence of the church-yard; that until the said steps or stile and the swing gates were removed, as hereinafter pleaded, the paths leading from the three aforesaid entrances were used as public paths, and there were thoroughfares by means thereof through the said church-yard, &c.

3d. That about seven or eight years ago some inconvenience having been experienced from the use of the said paths as common thoroughfares, attempts were made, by or under the direction of the Rev. Edward Newton Walter, to close the said paths as common thoroughfares; that such attempts were ineffectually resisted by the parishioners of the parish of Leigh, and the aforesaid steps and swing gates were, but without any lawful authority, removed, and from such time there remained but two entrances into the said church-yard, and which entrances were only opened on the days on which the service of the church was performed, or parish meetings held, &c.

4th. That in or about January, 1835, that part of the high road leading by and close to the church-yard of Leigh, marked in the map by the figure 8, was by the orders of the trustees of the high road considerably lowered, and close to the entrance [256] No. 1, to the extent of two feet, nine inches, or thereabouts, whereby the said entrance was rendered useless, and there remained but one available entrance into the church-yard, by reason whereof the parishioners of the said parish suffered great incon-

venience. That no attempt was made by the said Rev. Edward Newton Walter to remedy the same, nor did he make any application to the said David Mountague and Edmund Lamprell, or either of them, for that purpose, until after that they had, under the directions and with the concurrence of the said parishioners, caused gates to be erected at the entrance to the church-yard, No. 2. That until the said gates were erected the said Rev. Edward Newton Walter did not directly or indirectly forbid, or in any manner object to, the erection thereof.

5th. That the re-opening of the said entrance No. 2, and erecting gates thereat, is a great convenience to the parishioners of the said parish of Leigh, and that the expenses thereof have been allowed in the accounts of the churchwardens, passed at a meeting duly holden in the vestry room of the said church.

6th. That since the erection of the gates at No. 2 the said gates and paths leading therefrom, and the other entrances into, and paths within, the said church-yard of Leigh, have been visited and inspected by the Rev. Sir John Head, the rural dean of the deanery of Rochford, within the precincts of which the parish of Leigh is situated, and that he had approved thereof, and communicated such his approbation to the said Rev. Edward Newton Walter.

7th. That, amongst other things, it is untruly pleaded in the second of the articles exhibited against [257] the said David Mountague and Edmund Lamprell, and admitted in this cause, "That without the consent and contrary to the remonstrances of the said Rev. Edward Newton Walter, and without any lawful authority, they made or caused to be made a new foot-path across the church-yard of the said parish, and made or caused to be made a new entrance into the same;" and that it is untruly pleaded in the third of the said articles "that they have, by maintaining a new foot-path and causing the same to be used, desecrated a part of the said church-yard," for that after the erection of the aforesaid gates at No. 2, James Butler, otherwise Thorowgood, a witness examined on the said articles, was employed to restore the old path leading from the said entrance; that having removed a small portion of the grass or turf thereon, he was directed by John Wade, a parishioner of the said parish, to go to the said Rev. Edward Newton Walter, and receive his directions before he proceeded any farther: that accordingly he, the said James Butler, otherwise Thorowgood, went to the said Rev. Edward Newton Walter, who forbade him to restore the said old path, whereupon the grass or turf which had been removed as aforesaid was immediately replaced, that since such time no turf or grass has been cut or removed from the said path, nor anything whatever done towards restoring the same, &c.

8th. That at the time of the erection of the gates at No. 2 there were marks and signs of the old path leading into the church-yard from such approach, and such old path and no other has been used as the path leading from the said entrance since the erection of the said gates, and that the said Rev. Edward Newton Walter has been upwards [258] of twenty years rector of the said parish of Leigh, and at the time he instituted the present proceedings well knew the said old path, and that the same and no other had been used from the said entrance.

9th. That the said Rev. Edward Newton Walter is now, and has been for many years, negligent of and inattentive to his parochial duties, that he has very rarely attended parochial meetings, but has left the business of the parish to be transacted and managed by the churchwardens thereof without any interference on his part; that shortly previous to the election of churchwardens for the said parish in the year 1833, the said Rev. Edward Newton Walter made application to the aforesaid David Mountague to be his (Walter's) churchwarden, but that the said David Mountague then declined the same; that in the following year, previous to the election of churchwardens, the said Rev. Edward Newton Walter repeated such his application to the said David Mountague, who thereupon consented, upon the express understanding and positive promise given by the said Rev. Edward Newton Walter that he would attend and preside at the parochial meetings, so that he the said David Mountague should have his sanction and countenance for the acts done at the said meetings—that such understanding was well known to the parishioners—that he for some time attended, but afterwards neglected, and that the whole business devolved upon the said churchwardens.

10th. That the said Rev. Edward Newton Walter is not now and has not been for some time past in the receipt of the tithes of the said parish, but that the same are mortgaged, or assigned and received [259] by some other person, and that the

parishioners have received notice not to pay tithe to him, and that the said Rev. Edward Newton Walter is, and is well known to be, in pecuniary difficulties and bad credit.

11th. That John Gillson, a witness, examined in support of the articles, is well known at Leigh and its neighbourhood to be a person of slight credit, and whose bond would not be received as good security for one hundred pounds—that such reputation of the said Gillson is well known to the Rev. Edward Newton Walter, that notwithstanding, he procured the said Gillson to become his surety, and to join in the bond given previously to the commencement of these proceedings.

12th. Annexed the bond, and pleaded the identity of Gillson.

This allegation was opposed by Addams and Nicholl.

Phillimore and Haggard argued in support of it.

Judgment—Dr. Lushington. Before I pronounce my opinion upon the admissibility of this allegation, it is indispensably necessary that I should consider what is the substance of the articles which have been admitted.

Now the substance of the articles is this. The Court here read the articles, and proceeded. I may observe that the important points are—first, the making a new foot-path, and, secondly, erecting a gate where there was not one before.

The allegation before the Court sets forth a variety of facts in reply, and I have been told that, [260] if the churchwardens have acted *bonâ fide*, I ought not to interfere; but supposing it to be true that they have acted with good intentions, and for the benefit of the parishioners, still it is my duty to look to the legal justification.

First, then, as to the church-yard; it is clear that by the common law the rector has the freehold therein, qualified undoubtedly by the rights of the parishioners, but subject thereto he may bring an action for trespass if his right be unjustly invaded. The churchwardens by virtue of their office are bound to see that the foot-paths are kept in proper order and the fences in repair.

Individuals may by prescription have a right of way; and parishioners have the same right for the purpose of attending divine worship, vestries, and other fit occasions. The public may also have a right of way which is not to be infringed upon.

I apprehend that neither the rector nor the churchwardens can make a new path without a faculty from this Court. In strictness that is by law required.

I think the consent of the rector is necessary by reason of his common law right; but I do not say whether or not, if the rector be called upon to shew cause, and he obstinately opposes a faculty, the Court may grant it. That point I consider it is not necessary to decide. The case of *Seager v. Bowle* (1 Add. 541) merely went to this, that you cannot legally erect a monument without a faculty. The case of *Tattersall v. Knight* (1 Phill. 232) approaches much nearer the case before the Court—there a faculty was decreed [261] notwithstanding the opposition of the vicar; but that was for the erection of a gallery inside the church. As to varying the path there is no difficulty, for the statute 59 Geo. 3, c. 134, empowers the church commissioners in that respect.

With regard to the jurisdiction, the church-yard being consecrated ground, this Court has cognizance of the matter, and it is my duty to protect it against any unauthorized or illegal invasion whatever; and supposing the alterations were most convenient, still the court would not sanction them, unless the consent of the rector had been previously given, or at least asked.

If this is an ancient foot-path, it is competent to any individual to proceed at law; and if the question were raised here, this Court might be stopped by prohibition.

How stands the case then in the present allegation? The allegation begins by annexing a plan, and it pleads that seven or eight years ago there were three entrances into the church-yard; that at Nos. 1 and 5 in the plan there were gates, and at No. 2 there were steps, or a stile; it is intended to plead that formerly there were common thoroughfares through each entrance, but that lately the gates were opened only on a Sunday; it comes to this, that seven or eight years ago the rector illegally stopped up these ways; if so, any parishioner might have resisted, might have brought an action at law, or in this Court might have called on the rector to restore the paths. Can I in this suit receive this as an answer? If the churchwardens had not the power to open these gates, can it be said by way of defence that some time before the rector did an illegal act; and it is to be observed that [262] there is no averment that from time immemorial these paths existed. I cannot therefore admit the first, second and

third articles as a defence. The fourth pleads (the Court here read the fourth article)—the short substance is this—that inconvenience arising from stopping one entrance, the churchwardens make another. Now it was competent to them to remedy the defect occasioned by the legal act of the highway trustees, and then, if the rector opposed them, they might have proceeded against him here; but the fact is, that without any authority from the rector, the churchwardens make a new entrance. Where the rector has an undoubted right, and a judgment to exercise, his consent, directly given, ought to be obtained: great inconvenience would arise if from the absence of the rector, his silence or his neglect, his consent in such a matter is to be assumed by implication. It is pleaded that the consent of the parishioners has been given, and that the rural dean has approved of the alterations; these circumstances may tend strongly to shew the propriety of the alterations, but they do not affect the question of law; the seventh article is not brought forward as a main consideration in this case, though I do not say that if great offence were given to many of the parishioners, that it would not be the duty of the Court to bestow upon it very serious attention; the eighth does not appear very relevant; the remainder I will presently advert to.

These proceedings were not authorized by law, and if this allegation were admitted, it would merely cause unnecessary expense; for if every fact were proved, I could not say that these churchwardens had proceeded according to the law of the [263] land; and I cannot think that the counsel would desire proof of this allegation to be taken, and expence incurred, merely to shew that they, the churchwardens, had acted with laudable motives.

They are entitled to the benefit of the presumption that they have so acted, but still their conduct is incapable of legal justification.

The remaining articles could not in any view of the case be admitted; it is not competent so to impugn the conduct of the incumbent; if it were improper the churchwardens might have proceeded against him; but as a matter of defence to a suit of this description the Court cannot receive such averments; with respect to Gillson, if he be the same person who signed the bond he is incompetent as a witness; the eleventh article therefore is unnecessary.

I must reject this allegation, but in so doing I impute no blame to the churchwardens in their having mistaken the law.

The Court having rejected the allegation, the churchwardens withdrew the negative issue heretofore given, and gave an affirmative issue to the libel; whereupon the judge monished them to be more careful in future, and condemned them in the sum of £40, nomine expensarum.

The Court was prayed to direct the old path to be restored, but declined making any order to that effect without having first consulted the bishop.

[264] WATKIN AND BIGH against BRENT. Prerogative Court, Feb. 23rd, 1836.—

A sentence pronounced in a cause on a proxy of consent by the parties interested is conclusive, unless it can be shewn that such proxy had been unduly obtained.

On petition.

Judgment—*Sir Herbert Jenner*. The deceased in this cause, Timothy Brent, died on the 27th of February, 1833, leaving a widow and two cousins-german, Richard and James Bigh, his next of kin, the only persons entitled in the distribution of his personal estate, in case he died intestate.

Shortly after his death three testamentary papers were found, purporting to dispose of real and personal estate, all in his own handwriting.

The parties benefited under them are the deceased's widow, her nephew Mr. William Brent Brent, and Mrs. Jones Burdett, a niece of Mrs. Brent, and Adelina Brent Barrington, a god-daughter of the deceased, and her mother, who had an annuity. Mrs. Brent, the widow, and Mr. William Brent Brent were appointed executors.

These papers being imperfect it became necessary to bring them to the notice of the Court, and accordingly on the 4th of May, 1833, a decree was taken out on the part of Mrs. Brent, the executrix, [265] calling upon the next of kin to see the papers propounded. This decree was personally served on Mr. James Bigh, who lived at Derby, on the 7th of May, on which day another decree of the same tenor was taken out against Mr. Richard Bigh, which, having been personally served upon him on the 10th, was returned on the 13th of May, being the fourth session of Easter Term in that year.

On the first session of Trinity Term, 25th of May, a proctor appeared for Richard and James Bligh, when the scripts were propounded and an allegation brought in.

On the second session the proctor for the next of kin exhibited a proxy from his parties, and the allegation was debated by counsel on both sides, when the Judge (my predecessor in this chair) admitted the allegation; a commission was then decreed for the examination of witnesses, but on the by-day after Trinity Term, 27th of June, the proctor for the next of kin exhibited a further special proxy from his parties, and declared under the authority of that proxy that he proceeded no further in the cause; affidavits were then brought in, which having been read by the Court, and counsel having been heard thereon, probate of the script marked A, as the last will and testament of the deceased, and of the scripts B and C, as containing together a codicil to the will, was decreed, and on the 4th July, 1833, probate passed the seal, the property having been sworn under 12,000l.

So far, then, it appears that the Court, having all proper and necessary parties before it by their proctors duly authorized—the papers having been propounded—the admissibility of the allegation debated—was of opinion that if the facts therein [266] pleaded were established by competent testimony, the papers, however imperfect or informal they might be, would be entitled to probate; and the next of kin upon this enunciation of the opinion of the Court exhibited a proxy consenting to probate being granted (waiving the formality of examining witnesses) upon affidavits of the material facts being exhibited. Upon this consent so given the Court acted, and on affidavits which, with reference to the circumstances of the case it considered to be sufficient, it pronounced for the validity of the papers, and the executrix took probate of them.

This decree of the Court, so pronounced, must, under ordinary circumstances, have been considered to be final and conclusive, not only on all the parties to the suit, but also upon those who claim through them, and it certainly was so considered by the next of kin themselves, who did not attempt to impugn its validity, or take any steps to procure a reversal of it, either by appeal, or by alleging any surprize or fraud practised upon them. In fact, the probate remained unimpeached till the month of February, 1835, when certain affidavits having been exhibited, a motion was made to the Court to direct a decree to issue, calling upon Mrs. Brent, the executrix, and Mr. William Brent Brent, the executor, the former to bring in the probate (such was the form of the motion), and to prove the asserted will in common form of law, or to shew cause why administration to the deceased, as having died intestate, should not be granted according to law (or in such other form as the judge might direct); this motion was made on behalf of Mrs. Loveday Watkin, the niece of Mr. James Bligh, who died in the month of August, 1834, and who had by [267] his will given the residue of his effects to her, and of Mr. Richard Bligh, the son of the other next of kin of the deceased, who had been appointed sole executor of his father, who died in October, 1834; so that both of the next of kin, the parties to the original suit, lived more than twelve months after probate of these papers had been decreed, without suggesting that any fraud had been practised upon them or either of them.

To lead this decree, affidavits of Mrs. Watkin, and of Mr. Richard Bligh, and of another gentleman of the same name, a barrister in Lincoln's Inn, who appears to be the heir at law of the deceased, though not a party in distribution, were exhibited, and upon hearing those affidavits read, the Court felt itself bound, under the circumstances therein stated, to direct a decree to issue, not calling upon the parties in the first instance to bring in the probate (which might have been attended with great inconvenience, though that was the effect of the motion to the Court), but to shew cause why the probate should not be brought in, and declared null and void, as having been unduly obtained.

This decree was personally served and returned into Court on the caveat day after Hilary Term, 17th March, 1835, when an appearance was given for Mrs. Brent, the party cited. An act on petition was entered into and has been concluded. In the course of these proceedings the executrix, Mrs. Brent, having died, it became necessary to take out a decree against Mr. William Brent Brent, the other executor, which necessarily occasioned some delay, and which the court notices as accounting for this case having been so long pending. The act was brought in, concluded on the third ses-[268]-sion of Michaelmas Term, 21st November, when the proctor for Mr. Brent brought in his affidavits, and on the by-day, 8th December, the proctor for the other parties brought in his affidavits.

The case has been very fully and elaborately argued, and it now remains for the Court to pronounce its decision upon the matter submitted to it. It may be proper at the outset to observe that the Court is not at present called upon to express any opinion as to the correctness of the sentence pronounced in the original cause; it is not sitting as a Court of Appeal to correct the judgment of its predecessor, but simply to determine whether that sentence, be it right or wrong, has been obtained by undue means or by imposition, practised either upon the Court or upon the next of kin, for it will hardly be denied that, unless some strong grounds of that or of a similar kind are laid to induce the Court to believe that such has been the case, it will be its duty to reject the present petition, and to refuse to disturb the sentence already pronounced with the consent of those parties who were alone competent to oppose the validity of the papers propounded. If, on the other hand, it should appear that the consent of the next of kin has been obtained by fraud or misrepresentation, by concealment or contrivance, or even by surprise, it will be not only the duty, but the inclination, of this Court, as of all others, to take such measures as may prevent the parties who have been guilty of such improper practices from deriving any advantage from them. But the burthen of proof in such a case clearly lies upon the party who seeks to impeach the validity of the sentence, which, until the contrary is shewn, must be presumed to be well [269] founded, and accordingly the parties now seeking the aid of the Court have commenced by exhibiting affidavits imputing misconduct of so grave and serious a character to the parties concerned in obtaining this probate as to constitute a strong *prima facie* case of fraud against them, and such as left the Court no alternative but that of issuing a decree against the executrix to the tenor already mentioned, calling upon her to clear herself, if she could, from the charges so imputed to her; this she has accordingly attempted to do, whether successfully or not remains to be seen.

Before entering upon the consideration of the facts disclosed in the act on petition and the affidavits, it will be proper to advert to the question of law, as applicable to cases of this nature; the Court has been referred in the course of the argument to a variety of cases determined in the Courts of Equity, for the purpose of shewing that in those Courts parties have been relieved from the effect of deeds or contracts into which they had entered, not simply upon the ground of fraud, but on that of surprise, inadvertence, or of an ignorance of their real legal rights,^{(a)¹} in cases where advantage had been taken of the poverty of a party, by the offer of a sum of money, which, though it might appear large to a person in low circumstances, was greatly inadequate to the value of the property which he transferred, although no actual fraud was proved; ^{(b)¹} and also in cases of compromise, where one party had concealed from the other a fact which might, if communicated to him, have induced him to de-[270]-cline the compromise,^{(a)²} and certainly some of those decisions have gone a very considerable length in setting aside deeds and contracts of long standing, with respect to which no actual fraud appeared to have been practised.

It is not necessary, however, for the Court to travel into the particular circumstances of those cases; indeed they have not been cited so much on account of their circumstances as for the principle to be extracted from them, which I take to be this, that in order to set aside a deed it is not necessary to shew actual fraud, but that Courts of Equity will look at the whole of the transaction for the purpose of satisfying themselves that the transaction is free from all suspicion, and had been duly entered into by both parties with a full knowledge of its effect, or at least that an opportunity had been afforded of knowing the real situation in which they stood, and of the effect which the agreement would produce.

In the soundness of these principles the Court entirely concurs, and it will consider the case now before it with reference to them, and if it shall be brought within the verge of these principles, it will apply the same remedy, as far as is within its power, by "opening that which was concluded, in order that the merits of the case may be brought forward and justice done;" ^{(b)²} for though, as has been stated, this

(a)¹ *Cocking v. Pratt*, 1 Ves. sen. 400. *M'Carthy v. Decaix*, 2 Russ. & Mylne, 614.

(b)¹ *Evans v. Llewellyn*, 1 Cox, 333.

(a)² *Gordon v. Gordon*, 3 Swanst. 400.

(b)² Lord Hardwicke in *Kemp v. Squire*, 1 Ves. sen. 206.

is the first case in which the effect of proxies in these Courts has come to be judicially considered, yet there can be no doubt that, if they have been obtained by undue means, the decree of [271] the Court founded upon an instrument so obtained cannot be considered as final and conclusive.

The first charge is that of an improper delay in acquainting the next of kin with the discovery of these papers, and with the state and condition in which they appeared, for it is said that, these papers having been found on the 28th of February, 1833, no communication with respect to them was made to the next of kin until the 4th of May, and it has been much pressed in argument that this must have been for an improper purpose, but I confess it does not strike me what particular purpose was to be answered by withholding this information from the next of kin, nor do I see that they have been placed in a disadvantageous position by not having had earlier intelligence conveyed to them, or that they could have taken any other measures than those which they adopted when the fact was communicated to them. But at all events it is sworn that as soon as the search amongst the deceased's papers was completed, and it was ascertained that no other testamentary papers were to be found, a case was laid before counsel for opinion (27th of April, 1833), and the result of that opinion being that the case must be brought before the Court on the 4th of May, the executrix, having ascertained who were the next of kin, of which she was before ignorant, the decree to see the papers propounded was extracted, and at the same time a letter from the proctor of the executrix was addressed to each of the next of kin, to the contents of which I must more particularly advert, when I come to consider the proceedings to which it gave rise. That it was proper to institute a careful search amongst the deceased's papers to ascertain whether there was any other [272] will, will hardly be denied, nor can I think there is anything very reprehensible in not having communicated the discovery of these papers until that search was completed; whether it occupied more time than was absolutely necessary the Court has not sufficient means of judging, but not perceiving that the next of kin have been prejudiced by the delay, I think that circumstance may be laid out of consideration.

The second charge is, that the state and condition of the papers were withheld from Mr. Richard Bligh, of Lincoln's Inn, whom the executrix knew to be the heir-at-law of the deceased, and whom she also believed to be his next of kin, and it is alleged and sworn that the facts and circumstances relating to these papers were purposely concealed from that gentleman, from an apprehension that he would have actively interposed in favour of his poor relations, and prevented them from being induced to do anything which might deprive them of the advantage of cross-examining the witnesses produced in support of these papers, or of pleading any thing material against them; and in the act on petition, as well as in the affidavits, circumstances are set forth in great detail, and a conversation said to have passed between Mr. William Brent Brent and Mr. Bligh in the month of November, 1833, is related with great particularity, for the purpose of shewing that concealment was purposely practised with respect to him, that it must have been with an evil intention, and that the court must therefore infer that the same improper motive also operated to cause the delay in communicating with the next of kin. Without going through the contents of the affidavit it may be sufficient to state that the account [273] given by Mr. William Brent Brent differs very materially from that which is to be found in the affidavit of Mr. Richard Bligh, denying the greater part of what is stated by that gentleman to have passed between them; admitting indeed that he said that Mrs. Brent and himself believed him to be the heir-at-law, and at one time thought he might also be the next of kin; but that they had afterwards ascertained that such was not the fact. Mr. Lynde, also, who has been accused of conspiring to keep the state and condition of these papers concealed from Mr. Richard Bligh, and of having been employed by Mrs. Brent to watch proceedings, positively denies that such was the fact, and asserts that, so far from being present at the finding of the papers, as alleged, he never had seen them till called upon to swear to the fact of their being in Mr. Brent's writing; that affidavit bears date 19th June, 1833, nearly four months after the death of the deceased. With respect to the intimacy said to subsist between Mr. Bligh and these gentlemen, which would have made it highly natural that they should have made this communication to him, it turns out that though Mr. William Brent Brent had been at school with him, and for some time there had been an intimacy between them, and that they had on one or two occasions within the last four years dined at the house

of a mutual friend together, when they recognized each other as school-fellows and acquaintances; and with respect to Mr. Lynde, that he and Mr. Bligh used occasionally to meet on business relating to the affairs of a joint stock company, of which they both were members, there was no such intimacy or intercourse between them as to render it probable that any [274] conversation should pass between them relative to the affairs of Mrs. Brent, further than that slight allusion to it which is mentioned by Mr. Lynde in the latter part of his affidavit; and if that gentleman and Mr. William Brent were in communication with Mr. Bligh, he appears to have been very incurious, for to the latter he addresses no enquiries respecting these papers, which, under the circumstances, might have been not unnatural, and to the former those only to which I have just referred.

But in fact how was this concealment purposed, as it is said to have been, to benefit Mrs. Brent and her co-executor? Mr. Brent, the deceased, was a gentleman well known; he was in an official situation, and his death was publicly announced in the papers of the day, so that Mr. Richard Bligh could not have been ignorant of that event; indeed his conversation with Mr. Lynde shews that he was acquainted with it, and that he supposed that he had died rich; it is also sworn that the account of what passed upon the admissibility of the allegation being debated was also given in the public papers, which it was natural for Mrs. Brent and Mr. William Brent to suppose would be seen by Mr. Richard Bligh, when there would have been an end of their hopes of concealing the state of the deceased's testamentary papers from his knowledge, if in fact they ever entertained any, and Mr. Bligh would then have been in ample time to have interposed for the protection of his relatives; but it so happens, from whatever cause, that no steps are taken by him; the proceedings go on without interruption. Whether the account of what passed on this occasion escaped his observation, or whether his attention [275] was not particularly called to the circumstances, is perhaps not very material to inquire, though it is to be observed that Mr. Bligh does not so swear; all he says is, that "he was not acquainted with the real state and condition of the papers till November, 1833," which may still consist with the fact that he might have known what had passed in this Court; but however that may be, the impression on the mind of the other parties must have been that he would see the report of the case in the daily papers, and therefore that all further attempt at concealment must have been hopeless.

But then it is said that Mrs. Brent continued to receive the rent of the freehold house in Burlington Street, which she knew she was not entitled to, as the freehold would not pass under these unexecuted papers; and it is argued that this is again a proof of mala fides on her part. But this part of the transaction has little to do with the question at present before the Court, it seems hardly to bear upon it at all; for what object Mrs. Brent could have had in withholding the knowledge of his rights from Mr. Bligh, after the papers had once been brought forward, is difficult to conceive; she must, as has already been said, have been impressed with the notion that Mr. Bligh would have seen the report of the case in the papers, and that that would have given him sufficient information on the subject to enable him to protect his own interest, which there was no reason to suppose he would be backward in doing; I cannot, therefore, think that this circumstance carries the appearance of fraud any further; Mr. Bligh has also received that portion of rent which was due to him; and from the correspondence on this subject, which passed between [276] him and Mrs. Brent's solicitor, and which is produced, it does not appear that he imputed any fraudulent intentions to Mrs. Brent on this account.

Again, it is said, why not have recourse to Mr. Richard Bligh, for the purpose of ascertaining who were the next of kin, instead of taking the more circuitous mode of applying to Mr. Lynde, who was obliged to seek the information from another person, whereas Mr. Richard Bligh could have furnished it without difficulty; to this I think the circumstances stated in Mr. Richard Bligh's own affidavit furnish a sufficient reply, namely, that no intercourse or communication had for many years subsisted between him and Mrs. Brent or the testator, so that it was not very likely that under those circumstances she would apply to him for information which she could obtain from a gentleman with whom she was upon terms of intimacy, and who was connected with the family of her deceased husband. Upon neither of these grounds, therefore, do I see any reason to impute fraudulent motives to Mrs. Brent or Mr. William Brent in not having communicated with Mr. Richard Bligh;

or for supposing that they were actuated by any apprehension of successful opposition from him or through his means.

Having thus disposed of that part of the case which occupied so much of the argument, I now proceed to the consideration of that which is in fact the only question with which the court has any immediate concern, namely, that communication which passed between the next of kin and their legal adviser which led to the signing of the proxy of consent. Now this I prefer to take from the letters and other [277] documentary evidence, rather than from the representation of any person speaking from recollection of what occurred several years ago.

That Mrs. Brent or Mr. William Brent Brent had kept up any communication with these gentlemen for many years is not averred in any of the affidavits before the Court, indeed the contrary is the fact; and it is sworn that they were ignorant, if not of their existence, yet of their actual condition; and the Court is by no means prepared to say, from anything that appears, that Mr. Richard Bligh, still less Mr. James Bligh, was incapacitated by infirmity of mind or body from understanding the communications made to them, or from taking the necessary measures to protect their own interests; although it certainly is true that neither was in affluent circumstances; but it is of the less consequence to enter into this consideration, when the Court has the means before it of knowing what actually took place.

The first letter is that from the proctor of Mrs. Brent; it is dated the 4th of May, and is addressed to Mr. Richard Bligh.

The letter was as follows:—

“Doctors’ Commons,
“May 4th, 1833.

“Sir,—On serving you with the process with which you will be served at the time this letter is delivered to you, I think it proper to inform you shortly of the circumstances which render such a proceeding necessary.

“Mr. Brent, your relation, died on the 27th of February last, and very soon after his death the [278] testamentary papers of which I send you copies were found in a private box which he was in the habit of carrying about with him wherever he went; a very diligent and careful search for any will or other testamentary paper was afterwards made amongst his papers, and in every place wherein it was probable such papers might be deposited, but without success; no other testamentary paper of any description has been found. You will observe that there is an informality in the appearance of the three testamentary papers, and it is that informality which renders it necessary that you and Mr. James Bligh, as the next of kin of Mr. Brent, should have the legal notice which the service of this process gives you of the proceedings which Mrs. Brent, as the executrix, is taking to obtain probate of the papers.

“The papers themselves will be open to your inspection, and any further information you may desire respecting them will be afforded to you, or to any person coming with your authority.—I am, sir, &c.

“E. W. WADESON.”

The letter seems to be very proper for its intended purpose, which was to explain the nature and object of the proceedings, and the reasons which made them necessary; but it has been since discovered that an expression has been used by the writer of this letter with reference to the condition of these papers, which does not convey an adequate idea of their state: the word informality is found fault with, and it has been said that the papers are essentially defective, and should have been so described, or as imperfect and unfinished; now, [279] admitting for a moment that there has been an unfortunate selection of this term (though I do not altogether agree in the criticism which has been made upon it), to what does it amount? to what consequences does it lead? why, it is said that this is the foundation of all that subsequently occurred: that the parties have been misled by this description of the papers, and that by this misrepresentation they had been induced to depart from their right. But surely this expression could have produced no such effect: copies of the papers accompanied the letter, and Mr. James Bligh had immediate recourse to his confidential legal advisers for his guidance; they therefore had the opportunity of judging for themselves how far this description of the papers was correct; or if they were incapable of forming an opinion upon the subject, the respectable practitioners of this Court, to whom they applied, were fully competent to advise them, and to prevent them from being misled with this information. That there was any intention to mislead on the part of the practitioner employed by Mrs. Brent is not contended;

but it is urged that if the letter had that effect, the parties would be entitled to relief: without, however, acceding entirely to that position, it is sufficient to observe that it was not upon this letter that the parties acted, further than that it led them to consult with their advisers in the country, and through them with their solicitor and proctor in London, and it is impossible to read the letters which passed, without seeing that the greatest care and caution have been used in the whole conduct of the proceedings; and I confess I was quite astonished when I heard it argued that from this correspondence it clearly appeared that [280] the parties had been taken by surprise, and that no time had been allowed for deliberation. This, at least, so far as it relates to Mr. James Bligh, is refuted by the bills of his solicitor, payment of which has been made by the executrix out of the effects of the testator (and I have not yet heard there has been any offer to refund the sum so paid). But whatever may have been the effect of this letter, with it terminates the correspondence on the part of the proctor of the executrix, or rather I should say with the answer to this latter written by Mr. Richard Bligh, the next of kin, which does not convey to my mind the impression of this gentleman's incapacity, at least to the extent to which in the affidavits of Mr. and Mrs. Snell, produced at a late period of the cause, it is represented to have prevailed: and I may as well here observe that in my opinion there is no part of this transaction which is calculated to detract from that high character which the proctor of the executrix has hitherto maintained in his profession; so far from it, he appears to me to have conducted himself with the most perfect propriety throughout; and when it is said that the proxy of consent was signed at his urgent instance, I must say that it is a charge made without any just foundation, and that I place the most implicit credit upon the denial of it by the proctor; I must further add that the documents produced by Mr. Richard Bligh, annexed to his second affidavit, refute the allegation: and ought to have prevented it from being hazarded. The rest of the correspondence passes between the solicitors of Mr. James Bligh, their agent in London, and the proctor employed in their behalf, so that if any misinformation has been given in the latter stages of the [281] proceedings, it is not to be attributed to the executors and their advisers, unless indeed it be contended that they were in league with the advisers of the next of kin, and conspired together with them to mislead and impose upon their employers: the incredibility of such a charge carries with it its own refutation.

Acting then under the directions of Messrs. Radford and Buckston, Mr. James Bligh authorizes an appearance to be given for him; he signs the proxy, which is then forwarded to his brother, who also executes it, and transmits it to Mr. Taylor in London, as appears from an item in this gentleman's account, entered under the date of the 30th of May, "Postage of letter from Mr. Richard Bligh, with proxy executed by his brother and himself;" counsel are then retained on behalf of the next of kin the allegation propounding the papers is brought in, the admissibility of it is debated, no doubt considering the counsel who were employed, with zeal and ability, and the result is that the Court expresses its opinion that if the facts pleaded should be established, the validity of the papers must be pronounced for; that the Court expressed its opinion in pretty decisive terms may be concluded from the proposition made by the proctor of the executors, that the examination of witnesses should be waived, and the probate permitted to pass upon affidavits only; such a proposal it is probable would not have been made if the Court had expressed any doubt upon the subject, and knowing the integrity and ability of the proctors for the next of kin, I may safely conclude that they would not have advised their parties to accede to the proposal if they had seen any prospect of succeeding in their further op [282]-position to the probate of the papers. This proposal, however, is communicated to their employers in their letter of the 3rd of June, in which they also inform them of the admission of the allegation, and the manner in which the judge had expressed himself with respect to it, and the letter concludes with a recommendation that they should accede to the proposal, with an intimation that if further opposition should be offered after the Court had so decidedly expressed its opinion, they thought that the further costs of such opposition would not be allowed by the Court; whether this impression was altogether correct has been made a question, but whether correct or not, it is to be recollected that it came from the professional advisers of the next of kin, and is not chargeable upon the other parties; that it was the honest impression of the practitioner, and that it was expressed to the parties for the purpose of preventing

unnecessary litigation and expense cannot be doubted: together with this letter the allegation as admitted was forwarded, so that the parties had an opportunity of knowing what facts were pleaded, and of judging for themselves what probability there was of being able to rebut them, or to produce an adverse impression on the Court by the cross-examination of the witnesses.

The correspondence however continues, and it appears that conferences take place between Mr. James Bligh and his solicitors, whom he authorises to say that on being furnished with affidavits verifying the allegation or certified copies of them, and being satisfied as to the paper marked D, of which a copy had not been forwarded, he should be disposed to consent to the passing of a pro-[283]-bate, and to recommend his brother to do the same.

In consequence of this letter the affidavits are forwarded, the parties are satisfied, and sign the proxy of consent; Mr. James Bligh still acting under the advice of his solicitors and the information derived from his proctor, this proxy, forwarded by Mr. Taylor to Mr. James Bligh on the 12th of June, was sent to Mr. Richard Bligh on the 14th; when it was received by him does not appear, but it did not return to London until the 24th of June, on which day there is the postage of a letter charged in Mr. Taylor's bill from Mr. Richard Bligh, inclosing the proxy, so that there was an interval of ten days between the dispatch of the proxy from Derby to Mr. Richard Bligh in Devonshire and the receipt of it in London; what may be the time requisite for the transit of a letter from Derby to Devonshire, and from thence to London, the Court has no information, but probably it would not occupy the whole ten days, so that there would have been time for Mr. Richard Bligh to have perused and considered this instrument, and not to have executed it in such a hurry as is represented by the Snells, "in consequence of the peremptory commands of his brother;" neither the letter accompanying the proxy from Mr. James Bligh nor that written by Mr. Richard Bligh to Mr. Taylor is produced, so that the Court has not the means of judging how far they would bear out the statements of the Snells, either as to the peremptoriness of Mr. James Bligh, or the want of capacity of Mr. Richard Bligh, to understand the contents of the instrument or its effect; at all events, Mr. James Bligh, whose letters to his brothers are produced, treated him as [284] a man capable of understanding what was written to him, and, as has been seen, he was equal to answer the letters which he received; the Court therefore is not inclined to take the account of this gentleman's state of capacity from the affidavits of these persons, and if it be true that he did at any time express himself as to lead to the supposition that he misapprehended the effect of the proxy, it probably was at a later period of his life, when Mr. Richard Bligh, of Lincoln's Inn, states that he received an incoherent letter from him on that subject; but it is said that he acted in obedience to the dictation of his brother, as he had been accustomed to do for some time; if so, I incline to agree with Dr. Haggard, that we must look to the means which Mr. James Bligh possessed of satisfying himself, and these appear to have been ample.

But it is again said that this proxy was conditional only, namely, that the parties were to have the protection of the Court; if so, the condition was fulfilled, for the Court read the affidavits and was satisfied, and, though many of the averments contained in the allegation were not mentioned in the affidavits, they in fact proved themselves, for there could be no doubt of the affection which Mr. Brent entertained for Mr. William Brent Brent and his sister, who are represented by Mr. Richard Bligh to have been taken into the deceased's family at an early age; his adoption of them is proved by the royal license for their change of name, and the constant use of it by the testator; by the expressions in one of the testamentary papers, and indeed by the whole contents of them; I cannot, therefore, by any means agree that there was any [285] material deficiency in the proofs adduced, or any substantial ground for supposing that the interests of the next of kin were lost sight of by the Court; but, as I before observed, I am not sitting here to say whether the Court at that time came to a right or wrong conclusion as to the sufficiency of the proofs, my duty being simply to consider whether the proxy consenting to probate on affidavits was obtained by improper means.

Upon this point I am perfectly satisfied, and am clearly of opinion that no imputation whatever rests either upon the memory of the late executrix or upon Mr. William Brent Brent, who is the party now before the Court, or on Mr. Lynde, or upon any person concerned in conducting the proceedings on their behalf; with what motives

or for what purpose the present proceedings have been instituted I will not stop to inquire; I will not even venture to surmise whether the prime mover in the business has been actuated by a sincere desire to protect the interests of his poorer relations, or with a view to a possible advantage to himself; it is sufficient for me to say that the proceedings have in my opinion been improperly instituted, and that there is no pretence whatever for the charges which have been so liberally brought against a number of highly respectable individuals; I therefore reject this petition, and I feel that I should ill discharge my duty to those individuals, or to the public, if, with a view to check such conduct in future, I did not also condemn the other parties in the costs.

[286] IN THE GOODS OF HENRY BINCKES, Deceased. Prerogative Court, Easter Term, 4th Session, May 13th, 1836.—An administratrix becoming a lunatic, administration granted, limited during her lunacy. The letters of administration being first impounded.

[Followed, *In the Goods of Cooke*, [1895] P. 68.]

Henry Binckes, late of Little Newport Street, in the county of Middlesex, died intestate on or about the 19th of October, 1826, leaving his widow and several children him surviving; in the following month of November, letters of administration of the effects of the deceased were granted to the widow, who, in the month of November, 1834, became, and still continued to be, a lunatic. Lushington prayed the Court to revoke the administration granted to the widow, and to grant an administration to Henry Edwin Binckes, one of the children of the deceased, and cited *Phillips, Dec.*, 2 Add. 335, and *Crump, Dec.*, 3 Phill. 497.

The Court declined to revoke the administration; but granted administration of the effects of the deceased to the son, limited during the lunacy of Ann Binckes, the widow, the letters of administration heretofore granted to the widow being first brought into and impounded in the registry, in order to be re-delivered out in case of her recovery.

LEDGARD AND PARR *against* GARLAND. Prerogative Court, May 13th, 1836.—

Probate of the will of a married woman under a power, limited in such manner as will leave questions of construction for the decision of Courts of Equity.

[Distinguished, *Ingman v. Hopkins*, 1842, 4 Man. & G. 400. Followed, *In the Goods of De Pradel*, 1867, L. R. 1 P. & D. 454. Referred to, *In re Lambert's Estate*, 1888, 39 Ch. D. 631.]

On petition.

Sarah Garland died on the 31st October, 1835, leaving Joseph Garland, her husband, surviving. [287] Previously to the marriage of the deceased, certain property was conveyed to trustees in trust, to apply the interest and dividends thereof, for her sole and separate use during her life, and after her decease the principal was to go as she might appoint by will executed by her, in the presence of, and attested by, two witnesses. The deceased duly executed her will, with a codicil thereto, and thereof appointed G. W. Ledgard and R. H. Parr executors.

The deceased, out of the savings of her property, placed in the hands of Messrs. Ledgard, Welch and Co., bankers, to her separate account, certain sums of money, and at the time of her death there was a balance in their hands of £540, 2s. 6d. Lushington on behalf of the husband contended that the balance in the hands of the bankers having been separated from the trust fund, the trustees on the death of the deceased had no interest therein—that the deceased had not disposed thereof, and that as to that sum the deceased was dead, intestate, and he prayed a *cæterorum* grant to the husband.

Phillimore and Nicholl *contra*. Where there has been a complete recital and execution of a power, and the appointment of executors generally, the husband has no right to a *cæterorum* grant—he may sue the executors.

Sir Herbert Jenner. I should have had no difficulty in this case; but considering it to be a matter more peculiarly applying to the learning of another Court, and understanding that an opinion of a learned gentleman, practising in the Court of Chancery, has been given on the question, I shall take time to consider the point.

[288] June 4th.—*Judgment*—Sir H. Jenner. Sarah Garland, the deceased, previously to her marriage had certain property conveyed to trustees, with a power to her

to receive the dividends and interest thereof during life, and to dispose of the principal fund by will, executed in the presence of, and attested by, two witnesses.

The only question before the Court is whether a certain sum remaining at the bankers to her credit is to be included in the probate. The ground upon which it is contended that that does not pass is, not that the deceased did not possess the power of disposing thereof, but that she has not disposed of it. That is a question of construction not for this Court to determine. The Court will grant probate to the executors limited to the settled property, and all accumulations over which the deceased had a disposing power, and which she has disposed of: that is the usual and most convenient mode, in order to give parties an opportunity of making their claims elsewhere.(a)¹

[289] TAGART AND BAKEWELL *against* HOOPER AND HARRIS, AND *against* SQUIRE. Prerogative Court, June 1st, 1836.—A codicil to a will pronounced for, the will itself not being forthcoming.

[Followed, *In the Goods of Coulthard*, 1865, 11 Jur. (N. S.) 184. Considered, *Black v. Jobling*, 1869, L. R. 1 P. & D. 688.]

This was a business of granting letters of administration of the goods, chattels, and credits of Samuel Bourn, deceased, promoted by Helen Tagart (wife of the Rev. Edward Tagart) and Henrietta Bakewell (wife of Frederick Collier Bakewell), alleging themselves to be his lawful cousins german, once removed, and two of his next of kin, and praying administration against Henry Hooper and Elizabeth Harris (wife of Joseph Harris), asserting themselves also to be cousins german once removed, and two of the next of kin of the deceased, and also against Frederick Squire, a legatee named in a pretended codicil to a will of the deceased, which will, if not destroyed, has been so lost or mislaid that it cannot now be found.

The interests of the asserted next of kin were respectively denied by each other, and allegations propounding the same were asserted.(a)²

(a)¹ The prayer on behalf of the executors concluded thus: "And the said Watson prayed probate of the said will and codicil of the said deceased, limited so far only as concerns the said leasehold messuage or dwelling house, and premises, &c., and the rents due, and to grow due thereon, also in and to the aforesaid sum of £29,138, 5s. 4d., three per cent. consolidated bank annuities, and the interests and dividends due and to grow due thereon, and also in and to the aforesaid several Columbian, Spanish, and Chilian bonds, and the monies secured by and payable under the same, and all interest due and to grow due for the same, *and also in, and to the said sum of £540, 2s. 6d., being the said balance of cash in the hands of the said Messrs. Ledgard, Welch and Co., Bankers*, and all accumulations, profit, proceeds, and increase therefrom arising, over which the deceased had a disposing power by virtue of the said indentures of settlement, and which she hath disposed of by her said will and codicil accordingly, and all benefit and advantage to be had, received, and taken therefrom," &c.

The Court granted the probate limited as above, without the clause printed in italics.

(a)² Upon an affidavit by Mr. Horatio Harris, the son of one of the parties, stating "that he had seen in the possession of Messrs. Dunn and Dobie, the solicitors of Messrs. Tagart and Bakewell, a will of Ann Bourn, the mother of the deceased, which appeared to have been made pursuant to a power reserved in a certain deed of settlement, and on Mr. Harris requesting to see such settlement (apprehending that the same might contain material evidence as to the family of the said Ann Bourn), Mr. Dunn acknowledged that he had seen the same, but refused to produce it to him;" a motion was made to the Court by Addams to grant a monition against Messrs. Dunn and Dobie, to bring into the registry the marriage settlement; this motion was opposed by the King's advocate, who submitted that the Court had not the power to compel parties to bring in papers which are not pleaded or proved to relate to the subject matter in issue in the cause, and more especially at the instance of parties whose interest in the cause is denied by the parties against whose solicitors the monition is prayed, and thus to compel them to produce evidence against their own clients, and the case of *Dyer against Caldwell*, 2 Lee's Cases, 17, was referred to.

The Court rejected the motion, intimating that, on an admissible allegation being offered by the parties, the motion might be renewed with perhaps some success.

[290] The parties, however, were admitted by Mr. Squire as contradictors to the will—and an allegation was brought in on his behalf, propounding the testamentary paper; (b) the cause afterwards came on for hearing.

The paper was found in the writing desk of the deceased, but the will which had been delivered into the deceased's possession could not be found; [291] it commenced thus, "This is a codicil to my last will, and to be taken as a part thereof," it was dated the 10th of May, 1834, the deceased died in December, 1834, he had executed a will in 1815, and in 1826 a codicil, which he destroyed in the presence of Ann Skinner, the person benefited under it; she had been a servant of the deceased's since 1821; the deceased had cohabited with her, and had a child by her, for whom, by the codicil propounded, he had provided.

Lushington and Nicholl in support of the codicil. Where a codicil is not dependent on a will the destruction of the will is no revocation of the codicil. Supposing the deceased to have destroyed the will *animo revocandi* (which is the ordinary presumption), why did he not also destroy the codicil if he intended to revoke it?

Supposing another state of facts, that the will was destroyed after the death of the deceased, in that case there can be no doubt that the codicil is valid.

Possibly the will is not forthcoming from some accident.

Although the ordinary presumption of law (the will not being forthcoming) is that the deceased destroyed it *animo revocandi*, where is the authority that a codicil being in existence is also revoked?

The King's advocate and Haggard contra. [292] Where a codicil is shewn not to be dependent upon the will, it is not revoked by the revocation of the will—otherwise the presumption is against the codicil, *Medlycott v. Assheton* (2 Add. 229). This paper is not only described as a codicil to the will, but is said to be part of his will, and the deceased was a professional man. What is there then to repel the presumption?

The deceased applied to Mr. Ellis for his will, the will was delivered into his hands, there is no proof that any one had possession of it afterwards, the law then presumes that the deceased himself destroyed it, and by so doing that he revoked the codicil also.

(b) The other parties were assigned to give in their answers to this allegation.

Tagart and Bakewell gave in their answers, Hooper and Harris did not give in any answers.

Witnesses were examined in support of Squire's allegation, and interrogatories were put to those witnesses on behalf of both parties.

On the fourth session of Hilary Term the proctor for Mr. Squire prayed publication. In consequence of no answers having been given in by Hooper and Harris, and their proctor having notwithstanding administered interrogatories (not to the witnesses who could depose with reference to the codicil, but) to David Black Dobie and John Squire, who were vouched in the allegation as being the persons who searched among the deceased's papers, it was suspected that such interrogatories did not relate to the codicil in question, but merely to the question of interest before the Court; it was therefore submitted on behalf of Tagart and Bakewell that if such were the case it would be to their manifest injury, as they had not had an opportunity of cross-examining such witnesses, if publication passed generally, previously to the allegations propounding the interests were given in, and the witnesses examined thereon—that it would be allowing the disclosure of part of the evidence before the cause (that is, the interest cause) was concluded, contrary to the established practice of the Court.

The Court was therefore prayed not to decree publication of the depositions taken on the interrogatories administered on either side, until the proctor administering such interrogatories declared that they solely related to the codicil in question, or until the interrogatories had been inspected, in order to ascertain whether they related in any manner to the question of interest before the Court, and, if so, that publication of the depositions taken thereon should not pass until the conclusion of the cause.

The judge decreed publication to the proctor of Mr. Squire only, and directed publication to pass generally upon the other parties bringing in their asserted allegations.

The proctor of Tagart and Bakewell subsequently tendered his allegation, and the proctor of Hooper and Harris not being prepared with his, the judge dismissed them, and condemned them in the sum of 30l. *nomine expensarum*.

Sir H. Jenner. The Court has very little doubt in this case. It is admitted that there may be circumstances under which a codicil to a will may be established although the will is destroyed; there never was a case in which there was a stronger moral obligation to provide for the person benefited than in this.

The deceased, Samuel Bourn, died December, 1834, leaving property to the amount of 18,000*l.*; he was eighty-two years old at the time of his death, and he did not know that he had any relations: in 1821 Ann Skinner went to live with him as a servant. He afterwards cohabited with her, and had a child by her. In 1826 he made a codicil, by which he gave all the bank annuities in his name, at the time of his death (about £5000), to trustees, the interest to be paid to her for her life, and afterwards the principal to his issue, lawful or unlawful.

[293] The will to which that was a codicil is not forthcoming. But it appears that in the year 1815 the deceased had executed a will, which he deposited with Mr. Ellis, in whose custody it remained until August, 1834, when it was delivered to the deceased, who said that he intended to make some alterations in it—this is the only will which had been executed by the deceased of which there is any trace; if any other disposition of his property was made by him, it probably was by a codicil: there was, however, another paper in his possession, a draft, or rather a fair copy, of a will prepared for execution; but it was never executed, nor does it appear who the persons intended to be benefited under it were, as the names are cut out.

The paper propounded purports to be a codicil, and I must take it to have been a codicil to the will of 1815. The deceased was a professional man, and he describes it as a codicil: the paper was found in the deceased's possession, in his writing desk, there is no evidence that it was placed there by any one but himself.

It could not be dependent on the will of 1815, that being made long before the deceased knew any thing of Ann Skinner. There are some traces of another paper having been executed by the deceased; if so, that might be a codicil, but that is not forthcoming; it provided for Ann Skinner, and in consequence of a quarrel with her he burned it in her presence; he might by that have given the benefit to Ann Skinner for life of the property left by the codicil propounded. The presumption where a paper in the possession of the deceased is not forthcoming at his death is that he destroyed it: the persons benefited by the will might be dead; [294] and therefore it might not have been applicable to the deceased's then circumstances; but for the child he had a regard, and was under a strong moral obligation to provide for it. In all the cases referred to there were circumstances which shewed that the codicils were dependent upon the wills; there is nothing here to shew that the codicil was contingent upon the existence of the will.

If then I am not bound by any rule, I am inclined to pronounce for this codicil; so far from being bound by any precedent, it is quite otherwise; and whether the will was destroyed by the deceased or by accident, or since his death, I think this codicil was intended by the deceased to have operation, and pronounce for it accordingly.(e)

STARNES *against* MARTEN. Prerogative Court, Trinity Term, 4th Session, June 21st, 1836.—A will pronounced against on the evidence of the attesting witnesses thereto.

Haggard in support of the will.

Nicholl *contra*.

Judgment—Sir H. Jenner. The deceased in this case, Ann Marten, died in December, 1835, the will propounded was executed [295] on 11th of April, 1821, in the presence of three witnesses; *primâ facie* then the will is a good one, but the surviving executor being called upon to prove it in solemn form of law, it lies upon him to establish it; he has examined two of the attesting witnesses, the third being dead, and upon their evidence the Court must rely for proof.

(e) Some difficulty having occurred as to the form of the decree, the judge directed it to be entered as follows:—"Pronounced for the force and validity of the said script, marked A, &c., of Samuel Bourn, deceased, to be and contain, so far as appears from the evidence in the cause, the last will and testament of the said deceased, and decreed letters of administration with the said will annexed," &c. No executor or residuary legatee being named therein.

The contents of the will do not tend to shew that any fraud was practised upon the deceased. The Court must decide the case upon the evidence before it; the third witness being dead, his character is pleaded and spoken to in the usual way; I must therefore consider him to be a person who would not attest an act, knowing that it was fraudulent.

The deceased is proved to have been a person of imbecile mind, not capable of understanding any thing. The first of the attesting witnesses is Thomas Hards. The Court here read the evidence of this witness, and proceeded.(a)¹ Undoubtedly this person [296] is deposing against his act, and if there were any other evidence shewing the deceased to have been of sufficient capacity at the time, the Court would have no difficulty in pronouncing for this will; but the parties have declined to avail themselves of the opportunity offered them of producing further evidence.

The witness gives strong evidence of incapacity; he does not say that he attested the will as knowing that it was a will, and that the deceased was in a state of capacity, but merely that the signature is his, but that he did not know he was attesting the deceased's will; and the other witness speaks much to the same effect.

The Court must act upon the evidence brought before it, and it therefore pronounces against this will.

[297] IN THE GOODS OF JOHN MARSHALL, Deceased. Prerogative Court, June 29th, 1836.—One of two executors having become lunatic, the probate brought in and a fresh one granted.

On motion.

John Marshall, deceased, left a will, in which he appointed Thomas Marshall and Ann Marshall executors; probate was granted to Thomas Marshall, and a power reserved of making the like grant to Ann Marshall.

Thomas Marshall afterwards became a lunatic, and a transfer of the deceased's stock at the bank could not, in consequence, be obtained. A double probate was taken by Ann Marshall, and Lushington prayed the Court to revoke the probate granted to Thomas Marshall, it having become inoperative.

The Court directed both probates to be brought in, and then revoked them, and granted a fresh probate to Miss Marshall, and therein reserved a power of making a like grant to Thomas Marshall, when he should become of sound mind, and apply for the same.(a)²

(a)¹ The deposition of the witness was as follows:—"I was well acquainted with Ann Marten, deceased; I knew her intimately from the year 1819 down to the year 1824, about which time a brother of hers, who used to live with her, died; she always used to live at East Farleigh while I knew her, I used during the period I have mentioned to visit at her house, and see her there of an evening frequently. She never spoke to me on the subject of her will; I do not recollect that I ever witnessed any will of hers." The last will and testament of the said Ann Marten was then shewn to the witness, who further said, "I have particularly inspected the name and addition, 'Thomas Hards, shoemaker, East Farleigh,' appearing set and subscribed to the attestation clause at the foot of the said will, the same are my handwriting undoubtedly; but I have no recollection of having written the same, and I disbelieve that I saw the said deceased sign the said will, or that I wrote my aforesaid name and addition on the said will, knowing at the time when I did so that the same purported to be, and contain, the said deceased's will. The said deceased, during my aforesaid acquaintance with her, was of unsound mind, and in my opinion incapable of making a will; I recollect having witnessed the will of George Marten, the brother of the said deceased, in the year 1821 (as I best recollect), and I suppose that the aforesaid will of the deceased in this cause must have been then placed before me, and my signature obtained to it, without my understanding what it was, or purported to be; for I am sure had I rightly understood that it was a will of the said deceased, I would not have put my name to it as a witness on any account. I believe that the said deceased was in the room when I witnessed the execution of her said brother's will; but to the best of my recollection she took no part in any thing which was done on that occasion, but sat in the corner during the whole of the time in her usual listless manner."

(a)² See *In the Goods of Henry Binckes, Deceased*, page 286

[298] CASTELL *against* TAGG. Prerogative Court, July 7th, 1836.—An allegation pleading the omission of a legacy, by mistake, in a will, perfect on the face of it, admitted, and the legacy pronounced for.

On the admission of an allegation.

Phoebe Tagg, widow, died on the 6th of December, 1835; on the 4th of June preceeding she executed a will, wherein, among other bequests, she gave a legacy of two hundred pounds to her daughter, Anne Tagg.

In the beginning of the following November the deceased being very ill, and being desirous of making a new will, and of adding fifty pounds to the legacy to Anne Tagg, sent to John Malleeson, Esq., her executor, for the purpose of making such new will; Mr. Malleeson, being unable to attend, requested his brother-in-law, Mr. Henry Nisbett, to wait upon the deceased; he accordingly did so, and being alone with her, he read over to her the will of the 4th of June, and in the presence of the deceased and at her dictation increased the legacy to Anne Tagg, by adding in pencil "and fifty," and he also at her request made other alterations in the said will; he afterwards copied the same, but by mistake altogether omitted in such copy the legacy to Anne Tagg.

An original will was afterwards drawn from such copy, in which also the legacy was omitted; this will was executed on the 12th of November, the same was read over to the deceased by Mr. Nisbett, but neither he nor the deceased discovered the omission, nor was it discovered until after the death of the deceased.

[299] The will of the 4th of June, with the alterations therein in pencil, and the copy made therefrom by Mr. Nisbett, were in the registry. An allegation pleading the above circumstances was now offered to the Court, in order to have the legacy of 250l. inserted in the will of the deceased.

Haggard in opposition to the allegation. The object sought by this allegation is that the Court should pronounce for a legacy not mentioned or hinted at in the will of the deceased. If the rules of the Court would permit it, evidence would certainly be brought to establish this legacy; but the Court cannot in this case admit parol evidence, there being no ambiguity on the face of the instrument, that instrument disposing of the whole of the deceased's property.

The cases are too strong against such a principle.

Lady Bath's case (*Fawcett v. Jones and Codrington*, 3 Phill. 434, 490); *Harrison v. Stone* (2 Hagg. 537); *Shadbolt v. Waugh* (3 Hagg. 570).

The principle is this, that the Court will not admit parol evidence unless there is an ambiguity on the face of the paper, and unless that ambiguity can be sufficiently explained by documents.

Court. Can the Court admit parol testimony to raise the ambiguity?

I submit it cannot. The case which comes nearest to this is that of *Blackwood v. Damer* (3 Phill. 458, n.), but there was no residue disposed of.

On this paper there is no ambiguity whatever, it is a perfect instrument.

Lushington in support. The intention of the deceased is manifest: by all her previous wills a legacy was given to the [300] daughter, and that legacy was directed to be increased; the proof will depend not upon one only, but upon a variety of documents; if in this case the allegation is admitted there could not possibly be any doubt of the deceased's intention; the oldest case is that of *Blackwood and Damer*; there, it is said, was an ambiguity on the face of the instrument by reason of there being no residuary clause; but that is not an ambiguity but a deficiency, and if you can allow the deficiency of the most important part to be supplied, a fortiori, you may supply a single deficiency.

What was the ambiguity in *Bayldon v. Bayldon* (3 Add. 232)? There was no ambiguity, it was an omission altogether, and the deficiency was shewn by another instrument; there is no difference in principle between that case and the present.

Harrison and Stone was a case under peculiar circumstances; it was eight years after, and the drawer of the will was dead, but the Court in that case said, "Here is no written document." What then am I to infer? why, that if there had been a written document the decision would have been different. I think that case an authority in my favour.

Lady Bath's was a complicated case, and it could not clearly be ascertained what were the intentions.

Sir H. Jenner. In this case an allegation is offered, for the purpose of having

a legacy of 250l., to one of the daughters of the deceased, inserted in her will, and which from the draft is clear was the deceased's intention.

[301] The allegation pleads—

First. The death of the deceased, and that she left property to the amount of 1200l. or thereabouts, &c.

Second. The execution of a will in June, 1835, and by that paper that a legacy of 200l. was given to the daughter; that the deceased, having an intention to alter that will, directed a letter to be written to Mr. Malleson, the executor, which was accordingly done, that he not being able to go to the deceased, Mr. Nisbett, his brother-in law, attended upon her; it pleads her perfect capacity, and that by her directions an increase of 50l. to the daughter's legacy was put down in pencil.

Third. That Mr. Nisbett, immediately on his return home, reduced into writing the instructions received from the deceased, and that in making a copy therefrom he inadvertently omitted the legacy to Anne Tagg.

Fourth. That Mr. Nisbett directed Samuel Fisher, a clerk of Messrs. Kinsman and Prichard, to make a fair copy for execution, and that he also therein omitted the legacy.

Fifth. The execution of the will on the 12th of November, and that neither Mr. Nisbett nor the deceased discovered the omission.

Sixth. Regard and affection of the deceased for her daughter and declarations of her intentions to benefit her, &c.

Seventh. That the will of the 4th of June remained ever after in Mr. Nisbett's custody, and that it is in the same plight and condition with the various alterations in pencil, &c.

If then the Court is at liberty to receive evidence de hors the instrument, nothing can be clearer than the deceased's intention in this case: all the cir-[302]-cumstances taken together shew the strongest case of intention.

The question then comes to this. Looking at the documents which formed the basis of the will, can the Court admit parol evidence?

Cases have been cited to shew that unless there is an ambiguity on the face of the instrument the Court can in no case admit parol evidence in order to supply an omission.

I agree with Dr. Lushington that the term ambiguity is not properly applied to this case. In *Blackwood v. Damer* there was no ambiguity, the omission of the residue must be considered a deficiency, but no ambiguity. The Court there looked to other documents and discovered the omission; that case then is a precedent for the present, which is stronger in its circumstances.

In *Bayldon v. Bayldon* the will purported to dispose of 50,000l., and 5000l. were omitted; still that was an omission, not an ambiguity, and the Court admitted evidence from written documents which shewed clearly what was intended.

In *Harrison v. Stone*, certainly, the Court would not admit parol evidence; but there oral testimony alone was offered, and the drawer of the will was dead—no documentary evidence at all was offered, but oral testimony only, which has never been received; but then if the drawer had been alive, it did not appear that the Court would not have allowed that.

I think that this is an allegation which ought to be admitted, and, if proved, that it will be sufficient to justify the Court in supplying the deficiency shewn in this will.

[303] The allegation being subsequently fully proved, the Court decreed letters of administration with the will annexed to Sarah Castell, one of the residuary legatees, the executor having renounced the words and names, "To my fourth daughter, Anne Tagg, spinster, I give and bequeath the like sum of two hundred and fifty pounds," being first inserted and forming part thereof.

TORRE AND OTHERS v. CASTLE AND OTHERS. Prerogative Court, July 28th, 1836.

—Probate decreed of a paper commencing "head of instructions," and endorsed "memorandum," but concluding "this is my last will and testament," and signed by the deceased.

[Affirmed, 1837, 2 Moore, P. C. 133; 12 E. R. 954 (with note).]

Judgment—*Sir Herbert Jenner*. (a) The question in this case arises with respect

(a) The facts of this case are sufficiently set forth in the judgment of the Court. The King's advocate and Phillimore argued in support of the paper. Lushington, Addams, and Haggard contra.

to a paper which is propounded as a codicil to the will of the late Earl of Scarbrough, who died upon the 24th of February, 1835, in consequence of a fall from his horse, which immediately produced insensibility, from which he never recovered, and died within a very few hours afterwards. The late earl left a widow, one son, and three daughters: two of these daughters were married, of whom one had become a widow: the third was unmarried. He left personal property to the amount of about 300,000*l*. The testamentary papers which he left behind him were a will of the 13th of October, 1826, and a codicil of the 8th of November, 1832. These [304] papers were drawn by his confidential solicitor, and were executed in the presence of three witnesses, and remained uncanceled and unrevoked at the time of his death. He had executed several other testamentary papers at different periods of his life, from the year 1790, or somewhere about that period, to which it is not very material for the Court particularly to refer.

The paper now propounded, and with reference to which the Court is called upon to deliver its opinion, is all in the handwriting of the deceased, is subscribed by him, and is dated the 11th of October, 1834: the abbreviated words at the head of it signify that it was made or written at Edwinstow, the place at which he was then residing; and it is described at the commencement of it to be "head of instructions to my solicitor, J. Lee, to add to my will the codicil following." It goes on to state what the contents of that codicil were to be. There are initials for several of the legatees with the words "&c. &c." in many parts of it, and it concludes in these words "This is my last will and testament, Scarbrough;" and it is endorsed, "Memorandum to J. Lee: will, October 11, '34:" and the question is whether this instrument so written by the deceased is entitled to the probate of this Court, as a part of his testamentary dispositions; and this will very much, if not almost entirely, depend upon the character which is to be attributed to the paper itself. It may therefore perhaps not be necessary for the Court at any considerable length to go into the evidence which has been taken upon the allegation propounding it; because, if the Court shall be of opinion that this paper is only what at its commencement it purports to be, namely, [305] mere heads of instruction to the solicitor to add a codicil, there would hardly be sufficient evidence to enable the Court to pronounce for its validity; but if, on the other hand, the Court shall be of opinion that something more is to be attributed to this paper than to a document intended to be mere heads of instruction, then the evidence given in support of it will be only in affirmance of that which is the legal character of the paper itself, so far at least as the opinion of this Court goes, and it will not be necessary to examine it with so much minute criticism as in the other case supposed.

It may be necessary, however, to state shortly the history of the deceased, his family, and affairs. He was originally the Honourable John Lumley Savile, the youngest of three brothers, the eldest of whom having died in the year 1807 the next brother succeeded to the title of Scarbrough and the Scarbrough estates, and the deceased came into possession of the Savile estates under the will of Sir George Savile. Under that will he had power of settling or charging those estates with an annuity of 1200*l*. for the benefit of his widow, and with a sum of 10,000*l*. for his younger children; and this power was exercised by him. In 1809 his eldest son, the present Lord Scarbrough, became of age, and recoveries were at that time intended to be suffered with respect to the whole of the deceased's estates, that is, the estates in Durham, Nottinghamshire, and Yorkshire; but that intention was executed in part only. In the year 1812, however, recoveries were suffered of the other estates, when a further annuity of 1200*l*. was settled upon Lady Scarbrough, and a sum of 30,000*l*. charged upon them for the benefit of his three daughters.

[306] In the month of June, 1832, the brother, the then Earl of Scarbrough, died, and the deceased succeeded to the title and estates, and further charges were made upon those estates for the benefit of his wife and children. I think a sum of 1000*l*. a-year, and eventually and contingently an additional sum of 500*l*. a-year, was charged upon those estates. In the year 1833 the present Lord Scarbrough engaged to pay Lady Scarbrough a further sum of 900*l*. a-year during her life, and after her death 300*l*. a-year to each of his sisters, there being three of them; making therefore in the whole 900*l*. a-year to be paid during their lives. But that engagement was conditional, that is, that he should retain the possession of both the Scarbrough and the Savile estates, so that if he were to lose one or the other of them the engagement

would not be binding upon him. There was also a sum of 25,000*l.* for the benefit of the daughters, in addition to the 30,000*l.* charged upon the Savile estates, and the 10,000*l.* settled. In June, 1833, actions of ejectment were brought by the nephew of the late Earl of Scarbrough for the recovery of the Savile estates; and supposing the nephew to be successful in these actions, then the charges upon those estates, to which I have alluded, would have been of no avail, as in that case it is clear the earl could have had no power to charge them as he had done, and the recoveries which had been suffered would be valueless, and these sums would be lost to the children of the deceased. In the year 1834, the particular period does not appear, verdicts were given in three of those actions in favour of the nephew's claim: whatever therefore might have been the earl's apprehension in the [307] earlier part of the time, after these actions were brought by his nephew, as to the result of them, he could not but have been at this time impressed with the idea that there was at least a possibility that his nephew might finally succeed, and that his wife and daughters would lose a considerable portion of the property which he had settled upon them, and charged upon those estates; it was therefore not unnatural that he should contemplate the providing of a remedy for an adverse result. Now the provision made by the deceased by his will for his family was to this effect: By the will of the 13th of October, 1826, which recites the settlement which had been made upon Lady Scarbrough out of the Savile estates, he gives her 1000*l.*: he gives her all his cash, bank notes, and bills of exchange which might be found in his houses at Rufford and Edwinstow at the time of his death; and he directs that plate, linen, china, household goods and furniture, to the amount of 500*l.* in value, shall be given to her absolutely: he also gives the residue of the plate to Lady Scarbrough during her life, and after her death to her daughter Anna Maria Lumley, that is, the unmarried daughter, who he probably thought would continue to live with her mother. He then gives to each trustee and executor 100*l.* and the residue of his personal estate and effects in trust, and directs them to sell the real estates, and to apply the proceeds of the sale to the payment of his debts and legacies. He then gives to his daughter Anna Maria Lumley the sum of 10,000*l.*, to be payable, I think, one year after his decease, with interest, at the rate of 5 per cent. He gives to his daughter Lady Louisa Frances Cator, who had married without his con-[308]-sent, and with whom it does not appear he had at this time, October, 1826, become perfectly reconciled, a sum of 10,000*l.*; that is to say, she is to have the interest of it for her life, for her sole and separate use, and at her death the principal is to be divided between her children; and if she has no children, then as she shall appoint by will; and if she makes no will, then it is to go to her sister Lady Anna Maria Lumley; and in case Lady Anna Maria should die before her, without having left issue, then it is to be divided equally amongst the testator's three nieces, the daughters of his late sister Lady Louisa Hartley: so that under this will the husband of Lady Louisa Frances Cator was to receive no benefit. He then gives to his brothers, the Honourable Savile Henry Lumley, the Honourable Sir William Lumley, and to his sister Lady Sophia Lumley, 10,000*l.* each. He gives to his three nieces, Barbara, Louisa, and Georgiana, daughters of his late sister Lady Louisa Hartley, the sum of 10,000*l.*, to be equally divided amongst them, with benefit of survivorship between them. He also gives to his three nieces, Eleanor, Louisa, and Harriet Milbanke, daughters of his late sister-in-law, Eleanor Milbanke, the sum of 10,000*l.* There was then reference made to a paper which would be found containing a list of servants to whom he gave a year's wages, but that paper, as I understand, has not been found. The testator then desired that the residue of his property should be divided into three equal parts, of which one-third was given to his sister Lady Sophia Lumley, and, in case of her death in his lifetime, between his two brothers, or to the survivor of them; and if they should both [309] die in his lifetime, then it was to go to the daughters of Lady Louisa Hartley; one other third part to the daughters of Lady Louisa Hartley; and the remaining third to Miss Gordon, the niece of his wife. He then directs the sale of an advowson at Winteringham, in the county of Lincoln, and of a real estate purchased by him in the county of York, the proceeds of which were to form part of the residue; and, lastly, he appoints Henry Torre, Francis Swan the younger, William Pym, and Henry Gordon, executors and trustees; and the will is executed on the 13th of October, 1826, in the presence of three witnesses. So that by this will Lady Scarbrough would take only 1000*l.*, and the use of the furniture and of the other articles mentioned, for her life; but at the same time the will recites

the charge which the earl had made upon the Savile estates, and the settlement he had before made upon her. In the month of November, 1832, he executed a codicil to that will, by which he confirms the legacy previously given to Lady Scarbrough, and also gives to certain trustees a sum of 5000*l.*, for the purpose of enabling them to purchase a house and premises for her residence; and the codicil then goes on to explain the testator's intentions as to the bequests which he had made to the daughters of Lady Louisa Hartley, and then ratifies and confirms the will where it is not altered by that codicil, which is dated on the 8th of November, 1832, and is attested by three witnesses.

It therefore does appear, as was argued, that the deceased adhered to the disposition of his property as contained in the will of 1826, and still con-[310]-tinued to do so, except so far as it was altered by this codicil; that he did still intend that the daughters of his sister should take the 10,000*l.* bequeathed to them in the body of the will as a specific legacy, and should also take, in the event of Lady Sophia Lumley and his brothers dying during his lifetime, the one-third part of the residue bequeathed to her, and also the one-third bequeathed to themselves immediately on his death; the Court therefore must take it that at this time the deceased did not intend to make any other provision for his wife and daughters by will than that which is contained in these two papers. But then it is to be recollected that at this period there was no question with respect to the Savile estates, upon which the annuities payable to Lady Scarbrough, and the provision for his daughters of 10,000*l.* and 30,000*l.* had been charged; but when the question did arise between him and his nephew as to his right thus to charge those estates, it might be very necessary and proper that he should provide against a disadvantageous result, by taking care of the persons in whose favour he had made those charges; it was not only natural that he should have done so, but it is shewn by positive evidence that he had contemplated doing it, as well as making a provision for the younger children of Lady Harriet Manners Sutton, who were inadequately provided for by their father's will not having been properly executed. Whether that provision was intended to be made by a codicil, or by charges upon the Scarbrough estates, does not appear; but in the year 1833 these actions were commenced, and, as I have already stated, verdicts were obtained in [311] some of them by the nephew, though the question is not yet finally decided. I believe, indeed, that in one case the judgment has since been reversed; but in the month of February, 1835, at the death of Lord Scarbrough, a verdict had been obtained against him in some of these actions: therefore, however sanguine he might have been in the first instance as to his eventual success, there was at that time a strong presumption that another result might take place; and upon several occasions he appears to have expressed his intention of making an alteration in his testamentary dispositions: he expressed himself to this effect to the Rev. Mr. Thomas Manners Sutton, and he also made use of such expressions to his brother, Sir William Lumley, as led him to believe that he did intend to make that alteration. And though it may be true that a considerable length of time elapsed between the death of Mr. Sutton, the husband of Lady Harriet, one of the circumstances which gave rise to the necessity of making this alteration, and his communication of his intention to provide for the younger children of that daughter to the Rev. Mr. Sutton, and though after the actions were brought a considerable length of time intervened before he set about making these alterations, still he did so express an intention, saying that it was necessary that a different provision should be made for his wife and children from that which he had contemplated by these earlier papers; and however long he may have procrastinated, it is clear that upon the 11th of October, 1834, he did set about doing something with a view to carry his intentions into effect, for on that day the paper now in question before the Court bears date.

[312] It is admitted on all hands that this paper is in the handwriting of the deceased, and I think it is not denied that it was found in the situation in which it is alleged to have been discovered; indeed there can be no doubt of the fact, for there is the evidence of the witness who actually found it in that situation; and there is no reason whatever, from any thing that occurs in the course of the evidence or pleadings in this case, to suppose that this paper was placed there by any other hand than that of Lord Scarbrough himself; and there is no reason to doubt that, having had these natural causes moving him to make an alteration in the disposition of his property—having these calls upon him to provide against the inconvenience which might result

from these actions brought by the nephew being decided against him—and having expressed his intention to make an alteration in the disposition of his property, for that purpose he did proceed to do it by means of this paper; and the question therefore to be decided is, what legal effect that paper is to have.

The Court has been referred to the principles which are applicable to papers which are either unfinished, unexecuted, or imperfect; and the necessity of adhering strictly to the principles laid down in other cases, and of not departing from them, from any feelings of compassion for the situation of the wife and family of the present testator, has been strongly pressed upon the consideration of the Court. The Court has been also told, and very properly told, that its duty is to decide this case in the same manner as if the testator had been a person of inferior rank in life; as if the property, instead of being 300,000*l.* had been 300*l.*; and as [313] if, instead of giving large sums to different individuals to the amount of 50,000*l.*, these legacies had only amounted to 50*l.*, or some comparatively trifling sum; that if the Court is of opinion that this paper is not entitled to proof, it would be better to adhere to the general rules adopted and laid down, and not to depart from them with reference to any particular case. The Court, however, has not hitherto shewn any disposition to depart from those principles, but, on the contrary, has expressed its intention to adhere strictly to them, and to apply them to the particular circumstances of each individual case, for it must be admitted that every case must eventually depend upon its own circumstances.

If then this paper is to be considered merely as “head of instructions,” as a mere initiatory paper, the Court would feel great difficulty in holding it entitled to probate, because it appears by the date of the paper itself that it was written early in the month of October, 1834, whereas the deceased did not die till the 24th of February following. There were therefore four or five months during which he might have carried his intentions into execution, either by sending this paper to his solicitor to be reduced into a more formal shape, or by writing to Mr. Lee to request that he would wait upon him, if he the deceased were unable or not disposed to go to Mr. Lee; or in any other manner he thought proper; and it would not, and could not, upon the principles acted upon by this Court, have been accepted as a sufficient excuse for not having completed his intentions, that he was unwilling to leave home during the hunting season, and that for that reason only he had put off the final execution of [314] this instrument. But, as I have already stated, the question here depends very much, if not entirely, upon the character the Court is to give to the paper itself: (b) Is it to be considered as mere “head of [315] instruc-

(b) The paper was as follows:—

Edw.^r. Oct^r. 11th, 34.—

H^d of Inst^{ts}. to my Solor^r. J. Lee, to add to my Will the Codicil follow^g.—

In addⁿ. to my form^r. beq^{ts}, I leave £

To my Dear Wife L^r. S. ————— 80,000

or Int^{ts}. thereon, at 5 per Cent, out of my diff^t. Investm^{ts}.—& at her Dec^e. 50,000 of that sum to go to my Dau^r, L. F. C. & Childⁿ. for th^r. sole use & ben^t, &c. &c. —————

The rem^s. 30,000, &c. &c. —————

—Also to L^r. S. the Char^{ty}., open Car^e. & Pon^s; all my Books, Plate & fur. &c. &c. as then fo^d. sh^d. she prefer liv^s. at Edwⁿ. ————— £

—To my Dau^r. A. M. L., & L. F. C. each 20,000— 40,000

— D^o. — D^r. H. B. M. S. &c. &c. ————— 10,000

A Mour^g. Ring.

— M^t. est^d. & val^d. f^d. W. W. Pym. Sen^r. — 1,000

— Wor^y. g^d. fr^d. & Neigh^r. Rog^r. Pockⁿ. — 1,000

— var^s. Stew^{ds}, Bai^{ffs} & Serv^{ts}. (inc^d. Newb^{ts}.);

acced^s. to th^r. respt^{ve}. mer^{ts}. as L^r. S. shall dir^t. (exc^d. R. P.) 500

Then & after all my other Legac^s, Just Debts & Law exp^s, dep^d. on the vex^s. & unj^t. (F. L.) suits are disc^{hd}.—

—The resid^e. of my Prop^r. to be divd^d. in three eq^l. p^{ts}. viz.

tions?" Is it to be considered as a mere paper to which the deceased had done nothing finally? Is there at least nothing equivocal in the character of the paper? True it is that it begins as "Head of instructions to my solicitor, J. Lee, to add to my will the codicil following," and that the deceased then proceeds, as in writing instructions he might do, to designate the persons to whom the particular sums mentioned are to be given; but having gone on to make a complete disposition in terms which were at least sufficiently intelligible to himself, and which I suppose would have been equally so to Mr. Lee also, and having disposed of the residue of the property, and appointed the "same executors and trustees, &c. &c.," he concludes by saying, "this is my last will and testament, Scarbrough." If the Court is to be called on to say this is nothing more than head of instructions, not even instructions themselves, then the principles which have been adverted to must be applied to this case as to all others; but if it is something more than heads of instructions, if the deceased has described it as being something more, is the Court to throw aside any part of the description which he has given to it, by concluding it with the words "this is my last will and testament?" Why is the Court to pronounce this to be a mere paper containing heads of instructions, when the deceased himself says at the conclusion, "this is my last will and testament?" The mere signature of his name might not have been sufficient to give it any other character than that attributed to it at the commencement, namely, "head of instructions;" but when he declares under his own handwriting in the concluding words of [316] the instrument, for I take these to be the concluding words of the instrument, "this is my last will and testament," notwithstanding the indorsement which appears upon it, "memorandum to J. Lee—will," the Court can come to no other conclusion than that these words mean that the paper is to be considered as being the last will and testament of the deceased: I confess it does appear to me, looking at the paper itself, and at all the circumstances that had occurred to make in necessary for the deceased to provide against an unsuccessful issue of the actions of ejectment brought by his nephew for the recovery of the Savile estates, and looking to the consequent derangement that would take place in the provision that he had made for his wife and children, that he did mean this as something more than head of instructions; and that when he wrote it he did intend it to be that which he describes it to be, not perhaps strictly, his last will and testament but a part of it, namely, a codicil to it, because the bequest made to Lady Scarbrough is to be in addition to his former bequests: it must therefore be considered as a codicil to a previously existing will, and not strictly the will and testament, which are the words of the instrument.

But it is said that this is written on a scrap of paper; I do not however think that this is a proper description of it. I think the paper on which it is written shews rather more care and deliberation than if it had been a whole sheet of letter or note-paper; the edges are cut so as to be perfectly straight and even, there is no inequality in it, there are no jagged edges, but it appears to have been carefully prepared for this purpose: the manner in [317] which the paper is written also shews that great care has been bestowed upon it, for there does not seem to be in any one part of it any correction, alteration, or interlineation: though it is true that there are abbreviations used, both with respect to the names of the legatees and with respect to certain

— To my D^r. L. F. C. & Chil^a. for th^r. sole use & ben^t. one part.

— — — D^r. H. B. M. S. & her young^r. childⁿ. one part.
& one p^t. between my Bro^{rs}. S. H. L. & Sir W. L^y. for th^r. j^t lives.—

— Then and after th^r. Dec^e., to be div^d. betⁿ the 1st. & 2^d. p^{ts}. viz.
my Daugh^r. L. F. C. &c. &c., & my D^r. H. B. M. S. & her yog^r. Children.

— The same Exors. & Trustees, &c. &c.

— To M^r. & M^{rs}. Gorⁿ. 150 a year for th^r. lives. — — —

This is my last Will and Testament
Scarbrough.

It was folded up and endorsed—

Mem^m. to J. Lee

Will

Oct^r. 11 | 34.

other particulars contained in it; I cannot but think that greater care has been bestowed upon it than if it were to be considered as nothing more than mere heads of instructions to be communicated to his solicitor.

It is true that this paper is very informally drawn, that it has numerous abbreviations in it, that it has these terms "&c. &c.," and initials only to designate the legatees; and it is extremely probable that the Earl of Scarborough did not intend that this should be a final act, that he did not mean that this paper should in its present form be the last act he was to do by which his property was to pass: but I am to look to all the facts and circumstances connected with the case to see whether he did not consider this paper as an operative instrument, until another should be drawn in a more formal shape; and whether he did not refrain from sending it to his solicitor, being satisfied and convinced in his own mind that he had done that which would carry his intentions into effect, provided he should not have an opportunity of giving instructions to Mr. Lee, or of leaving home for that purpose, which he is proved very much to have disliked during the hunting season; being satisfied that he had that by him which would be sufficient for the purpose if a more formal instrument should not be executed by him, but which he intended at some future time, when he had leisure and oppor-[318]-tunity, to have prepared by his confidential solicitor, Mr. Lee, whom he appears to have consulted for a long series of years in the preparation of his testamentary papers.

Notwithstanding the alleged informality of the paper, it will hardly be denied that if the deceased had done with respect to it as he had done to a paper which he had previously executed as instructions for a codicil or will prepared for him, by striking through those words which purported that it was instructions for a codicil, that this informality would not have prevented it from being entitled to probate; and I cannot think that the difficulty of construction which might arise as to some parts of the contents would have induced the Court to have refused probate. If then the Court is correct in that view, namely, that it would have been entitled to probate notwithstanding the legatees' names were merely expressed by initials, and some of the sums themselves not specifically disposed of, particularly the remaining sum of 30,000*l.* out of 80,000*l.*, but falling into the residue, which is specifically given to the two daughters; is that view to be affected or altered by the circumstance of the paper being described at its commencement as "head of instructions?" If not, there is sufficient proof upon the face of the instrument that the deceased did not consider this as a mere paper of instructions, but that he gave to it a character which would entitle it to effect an operation until a new and more formal instrument was prepared from it.

The Court having thus considered the appearance of the paper, and the inferences to be drawn therefrom, will now proceed to consider the effect of the evidence which has been given in support of it. I [319] entirely agree in the propriety of what has been urged, that the manner in which declarations are to be received must depend very much upon the nature of the instrument itself to which they apply, and that in the case of an informal paper there must be strong proof that the deceased did intend it to operate as a will. In the case of *Matthews v. Warner* (4 Ves. 186) the paper propounded was described as the plan of a will, and was signed by the deceased, there being no other description of it; and the conclusion of the paper was to the effect that he must not forget that he had some very good friends, and so on, and it was endorsed, "plan designed for the last will of Mr. William Matthews:" that paper had nothing upon it to shew that the deceased intended it to be any thing more than that which he described it to be, a mere plan of a will: then I say, declarations to establish a paper of that kind must apply with the greatest force to the identical paper, so as to leave no possible doubt that the deceased did consider that in effect it was an operative will. Again, in the case of *Bone and Newsam v. Spear* (1 Phill. 345), the paper was described as heads of a will, or instructions for a will; still, there being proof that it was the intention of the testator that that paper should operate as his will, and the Court being satisfied upon that point, notwithstanding its informality, acted upon it, and carried it into effect. But these cases, and a variety of others that might be cited, shew that, whatever may be the form of the instrument, whatever may be its appearance, whatever may be its construction, in whatever terms it may have been expressed, or on [320] whatever material it may have been written, still the Court has only to inquire, was it the intention of the testator that that document

should operate as his will? However informal or imperfect it may be, if you can be satisfied that the deceased did intend it to operate as his will, this Court is bound to give effect to it. I agree entirely with the observations which have been made, that under certain circumstances you must draw certain conclusions; that if a person describes a paper to be a plan of a will, and there is no evidence to shew that he considered it to be any thing more, you must consider it as such: you must not give it a character different from that ascribed to it by the deceased himself; but although it be described as the plan of a will only, yet if the Court is satisfied that it does contain the last wishes and intentions of the deceased, and that he intended it should operate as a will, then it is bound to give effect to it.

With respect to the paper now propounded, it is said that some parts of it may be difficult of construction; but that would not prevent its operation in those parts where it is clear. That can only be urged against it by way of creating a presumption that the deceased did not mean it to operate as his will, but in my apprehension that presumption does not go to any great extent in this case. Looking at the character of the earl, how unwilling he was to leave his home for business, however urgent, during the hunting season, I see nothing on the face of the paper, in the shape of the paper, or in the difficulty of its construction, which would shew that he did not intend it to have operation so far as it could. The question here undoubtedly is not whether this paper is in all its parts a perfect will, [321] capable of being carried fully into execution; but whether, so far as it is capable of being carried into execution, the deceased did not mean it to have effect. There may be a difficulty in construing the paper as to the bequest to the wife. He says, "I leave to my dear wife, Lady Scarbrough, 80,000*l.* or interest thereon at five per cent. out of my different investments;" and it is said that it is not probable that Lady Scarbrough should hesitate in her choice between the interest of that sum at five per cent. or the whole sum of 80,000*l.* absolutely. That may be so, but there is no reason why he should not say, I will give her the choice. But then he goes on to state that at the decease of his wife 50,000*l.* out of that 80,000*l.* should go to his daughter and her children; and it is said that this shews that the deceased could not have intended to leave it in Lady Scarbrough's power to take the whole 80,000*l.* if she chose. Assuming that this 50,000*l.* is wholly to go to Lady Louisa Cator and her children in the event of Lady Scarbrough choosing the interest of 80,000*l.* at five per cent. instead of 80,000*l.* absolutely, then I see no reason why the deceased should not have expressed himself in this manner. With respect to the remaining 30,000*l.*, part of that 80,000*l.*, that is dependent also on the like contingency; there is no specific distribution made of that sum, but there is of the residue, which is to be divided into three parts. The paper then purports to give to his daughters, Lady Anna Maria Lumley, and Lady Louisa Cator, each 20,000*l.*: these are absolute bequests. To his daughter, Lady Sutton, he also gives 10,000*l.*; and then he goes on to give various other legacies, which it is not necessary for the [322] Court particularly to advert to, and proceeds in this way: "Then and after all my other legacies, just debts, and law expenses depending on the vexatious and unjust (F. L.) suit are discharged, the residue of my property to be divided in three equal parts. To my daughter Louisa Fra^a Cator one part, to my daughter Lady Harriet Manners Sutton and her younger children one part, and one part between my two brothers" (naming them): these names are all expressed by initials: then it goes on to say that "after their decease it is to be divided between the first and second part", that is, my daughter Lady Louisa Cator, and my daughter Lady Sutton and her younger children, the same executors and trustees, &c. &c.; to Mr. and Mrs. Gordon 150*l.* a-year for their lives. This is my last will and testament, Scarbrough." So that it appears to me there is no great difficulty in the construction of this paper: the bequest of 80,000*l.* for Lady Scarbrough, or the interest of that sum for her life at five per cent. and 50,000*l.* of that sum to his daughter and her children for their sole use and benefit, seems to me to present the only difficulty, because when the residue comes to be divided, it is perfectly clear: one part being given to Lady Louisa Cator, another part to his daughter, Lady Sutton, and another part between his brothers for their joint lives, and after their decease to be divided between the first and second parties, namely, his daughter Lady Louisa Cator and Lady Harriet Manners Sutton. In other respects, the construction of this will, as it now stands, does not appear to me to be very difficult, when the intentions of the deceased are to be ascertained; or any great doubt in carrying them into effect; at

least none such, to my [323] mind, as would prevent the Court from giving effect to this paper on that ground. Whether Mr. Cator is to receive any part of the benefit intended for his wife, or what construction is to be put upon that bequest, is not for me to decide: it is sufficient for me to see that there is a mode by which the intentions of the deceased may, with respect to the greater part of the contents of this paper, be effected, provided I should be of opinion that the circumstances under which it was found are such as to induce this Court to grant probate of it.

It remains then to consider the evidence which goes to support either one or other the descriptions given of this instrument—Whether it is to be considered as mere head of instructions, or whether it is to be considered as an addition to the will of 1826 and the codicil of 1832, and intended as a guide to carry the wishes of the deceased into effect until a more formal instrument should be executed by him.

Now, in the first place, this paper is all in the handwriting of the deceased; it was found after his decease, though at a considerable period subsequent to that event, in his bed-room, concealed in a part of the bed to which it was very unlikely any other person would have access. It is admitted that it was found there: when it was placed there, there is no evidence before the Court to shew; because from the condition of the paper, and the dust which had accumulated upon it, it might have been there during a period of four or five months, or it might have been there during two or three only: it might have been placed there the day after the witness Newbart had seen the deceased writing it, when he deposited it in the black portmanteau in [324] his bed-room. The place in which it was found clearly appears, from an inspection of that part of the bed which was brought up to the view of the Court, to have been a place of perfect concealment, but, at the same time, a place to which there was a great facility of access by the deceased. It is said, why was not this paper, if it was intended to have operation, deposited with the other valuable papers belonging to the deceased earl? For this very plain reason, as I apprehended, and as was argued throughout by those who propound it; that it was not intended by the deceased as a final act—that it was not the only act he intended to do; but that it was a provisional act, to have effect only in case he should not execute a more formal instrument; for there is no reason to suppose, as far as the Court is able to judge from the evidence, that at any subsequent period the testator had an intention different from that which is here expressed. The paper being in this situation was within his own control; and it is clear, I think, that it was placed there by himself. The concealment too was perfect, for it was not discovered until the mattresses were taken off, and the lathes of the bed had been removed. It was also a place of security, because it was confined in its place by the pressure of a screw, and there was therefore no fear that it would be removed by the servants in making the bed; and the very circumstance of its being so placed may perhaps suggest a reason why the deceased only put initials for the names, in order that if it should be discovered by accident by the servants of the house, they should be at a loss to know the real persons whom he intended to benefit.

The paper, therefore, I must consider as having [325] been carefully written by the deceased, deliberately considered by him, and deposited in a place of security and concealment, for the purpose of being preserved. It is preserved, and comes now before the Court in the same state as it was when it left the deceased's hands. But, it is said, how can it be possible that the deceased should have deposited this paper in such a place, where the discovery of it was mere matter of accident, and where, but for that accident, the paper might have remained undiscovered down to the present moment? I think there is a very easy solution of that difficulty, if it is considered that the deceased did not necessarily intend that the paper should remain there till the period of his death. There is nothing to satisfy me that if, in the ordinary course of nature, he had been ill for a few days preceding his death, he would not have disclosed where the paper was deposited. If he had had such illness, his mind not being impaired, and had died without making any disclosure of the place where the paper was, that would be a strong argument to be urged against the instrument, for it would shew that he did not pay any attention to it, or that he had placed it there without any particular view; but dying, as he did, in this sudden manner, there is nothing in the circumstances of its remaining so long undiscovered from which the Court can collect that he had in any manner departed from the intentions expressed in it.

Let us see, then, whether the evidence given by the witnesses who have been examined in the cause, more particularly by one of them—and it cannot be denied

that in point of fact the only important witnesses are those who proved declarations of the [326] deceased—whether that is not of such a nature as would satisfy all the Court has a right to demand in support of this paper; whether it would have been sufficient to support it as mere heads of instructions, or even instructions themselves—may be one question; but the question here is whether the declarations spoken to by the witnesses, with respect to the nature of which, and the impressions derived from which, there could be no doubt whatever; whether they are not sufficient to satisfy the Court that this was intended by the deceased to operate as a will. The witness William Newbart, though in an inferior situation of life, was a person to whom the deceased communicated many important particulars relating to his affairs and family. He states that he conversed freely with him on the subject of his daughter Lady Louisa Cator, and the manner in which she had married; that he had been much displeased with her for marrying as she did, but that he had afterwards become reconciled both to her and her husband.

This witness was on terms of confidential intercourse with Lord Scarbrough for several years: with regard to the evidence given by him I have heard no imputations attempted to be cast upon him, nor is it seriously contended that he ought not to be believed in the representation that he has given, whatever may be its effect. It is certainly said that he must be supposed to be acting with a certain degree of bias in support of an instrument by which Lady Scarbrough is to be so much benefited. It is contended that it is not unfair to suppose that he would have some bias in her favour; but it has not been, as I understand it, seriously contended that what this witness says is not to be [327] taken as a true and correct representation of what did occur, so far as he is able to recollect and inform the Court.

He states upon the sixth article of the allegation, "Lord Scarbrough was in the habit of talking familiarly with me on the subject of his family affairs; he employed me in confidential and private matters, and mentioned and confided to me many matters concerning his family." Then, speaking of Lord Scarbrough's dissatisfaction at the marriage of Lady Louisa Cator, he says: "I know from his own statements to me that he was displeased with her on account of her marriage. I know also that he was afterwards quite reconciled to her marriage with Mr. Cator: he told me so; and of presents which he made her when he left Skelbrook, after he had been to see her there, Lord Scarbrough, after his accession to the title, often spoke to me concerning the estates to which he had succeeded, and also frequently complained to me of the law-suits in which he was engaged with his nephew, but not with reference to his will, or any intended alteration of it, or any intended settlement of his affairs. The word 'will' I do not recollect that he ever used in talking to me; and whatever he said to me regarding the settlement of his affairs, or the provision for his wife and family, was what he had done, not what he intended to do. He never mentioned to me that the suits in which he was engaged with his nephew would affect the settlement on his wife and children, nor mentioned to me the circumstance of the younger children of Lady Harriet Manners Sutton being ill-provided for. I recollect his telling me on one [328] occasion that Lady Harriet had been complaining of poverty"—and so on: and then he mentions an observation about job-horses, and he says, "I never heard Lord Scarbrough say that his would be a rich widow." Those declarations are spoken to by other witnesses in the cause, Mrs. Pocklington and other of the witnesses. But he does depose that Lord Scarbrough did upon one occasion tell him "that his widow would be well off after his death; that occasion was the latter end of January or the beginning of February, before he died, at Edwinstow, when I was with him on business; he had been reading a letter from Mr. Harrison, his solicitor in London, indeed he had it in his hand, and he told me that it related to the suit between him and his nephew, and what provision he had made to meet it, and that he had settled his affairs." This was in the month of January after a verdict had been obtained against him in one or more of the actions of ejectment brought against him by his nephew; and it would seem therefore that he had been taking some proper measures to provide against the effect which the adverse result of those suits would have in the arrangements he had before made with a view of providing for his wife and family. Then he says, "Just as he mentioned these words Lady Scarbrough knocked at the door, and his lordship said to me then, what was a very common expression with him, 'Don't notice it.' Lady Scarbrough did not remain in the room more than a minute or two: and when her ladyship had left the room, Lord Scarbrough said, 'Lady Scarbrough will be well

off, and I have made provision for them all.'” These are vague declarations, referring to some paper which at this [329] time had been written by him. They are equivocal in themselves, supposing them to refer to that which has been argued to be heads of instructions only, because we know that persons who have written a paper of this description, intending afterwards to carry into effect what is there expressed, are very apt to talk with reference to such a paper of what they have done. Then he goes on to say, “It is impossible I can tell what he said exactly upon one occasion, or what he said on another, nor can I now give his very exact words; but I believe what I have now stated to be the words Lord Scarbrough used. On other occasions, about the same period, he has told me that they would be all provided for, or that he had taken care of them all. One of the occasions was when he was writing to Lady Harriet, and he told me that he was writing to her, and that he wished her to come and reside at Kelham, and ‘poor Louisa,’ he said, ‘you know that I was very angry with her, but I have quite forgiven her, and I have provided for them all.’” Then in his deposition upon the ninth article of the allegation he deposes, with respect to the deceased’s habits of hiding and concealing papers; but upon the tenth article he goes on to depose rather more specifically as to the writing of this paper than he does in the other articles, for his evidence here relates to what occurred some time after the paper had been written. He says, “I have seen the bedstead in which the paper is said to have been found, that is, the bedstead on which Lord Scarbrough slept for some months before his death. Lord Scarbrough never to me, as I have said before, said that he should alter his will, or make a different dispo-[330]-sition of his affairs. He never said to me that he wanted to see and speak and must go to Mr. Lee, his solicitor at Wakefield, in order formally to settle his affairs. He talked of going to Mr. Lee, and I was to go with him to Rufford, to get some important papers there to take to Mr. Lee; this was not very long before his death. He three times mentioned to me concerning a paper which would be found, or rather twice; for the first time, which was in the second or third week in October before he died, he said that he was writing his wishes; he had a paper before him at the time.” Now it was said that the witness was here adapting his evidence to the date of this will, but I cannot see any reason for supposing that he has not spoken to the best of his recollection. Then he says, “The second time was about Christmas before he died, when he was ill; and, complaining of his illness, he said that a paper would be found: and the third time, which was in January (and I am not certain whether he did not also at the latter end of January or the beginning of February), he said that I was to bear in mind, as he had told me before, that a paper would be found. He did not on either of the two last-mentioned occasions say that the paper would contain his wishes, but I considered that he was alluding to the paper I had seen him writing, and in which he said he was writing his wishes.” The witness could hardly be mistaken as to what Lord Scarbrough did actually say to him. He said a paper would be found: there he was right—a paper was found. In the first instance he says he is writing his wishes; and he afterwards says that, after his death, a paper will be found—he tells [331] the witness to bear in mind that a paper will be found, as he had told him before. He did not say that that paper would be found to contain his wishes, but the witness presumes that was the case, because he had told him before, with reference to a paper which he was writing, that he was writing his wishes.

Upon the thirteenth article he deposes still more specifically. He says, “On the occasion of which I have before deposed, when I was with Lord Scarbrough at Edwinstow, I went to him by previous appointment. I am not certain whether it was in the second or third week in October before he died; but I recollect on going to the door of his dressing-room, which was the room he usually saw me in, I found it fastened on the inside. I do not recollect ever to have found it fastened before. The servant who went to announce me knocked at the door, and informed his lordship I was there; upon which his lordship came and unlocked the door, and I entered the room: upon my entering, he said in his usual way, ‘Good morning, Newbart!’ and then he said, ‘You will wonder at my being locked up, but one person or other comes teasing me so, and that’s the reason.’ That is what he said, as near as possible. I saw he had a paper before him; and when we had conversed a little he said to me, ‘I am writing my wishes, what I wish to be done after my death.’ I am not certain whether he said, ‘after my death,’ or ‘hereafter.’ I answered that ‘I was glad to hear it;’ upon which he said, ‘Don’t notice it, don’t name it to any one:’ he was in the habit of saying to me, when he made any communication to me, [332] ‘But of

course you won't notice it.' He then placed it in the portmanteau which was on the chair by his right hand side, and was used by him to put papers in, which he had in use at the time. I can't say that it was the same paper which I saw at Mr. Buckle's office at York, but it was of the same appearance, and, as far as I can judge, of the same size. He did not fold the paper up, he put it into his portmanteau just as it was lying before him." Then he goes on to say, "About Christmas-time afterwards, Lord Scarbrough was complaining very much of his health; and on one occasion, when I went to him at Edwinstow, I found him leaning back in his chair; and he said when he saw me, 'Good God, Newbart! I don't know what to do with my side' (he placed his hand on his right side as he said it), 'and the back of my neck is so dreadfully bad that I don't know—or God knows—how soon it may take me off.' I said, 'I hope not, my lord;' upon which he said, 'I don't know; what with that and my legs teasing me so, I feel myself getting old; but if anything should happen to me'—he did not say suddenly—"a paper will be found.'" Now, to be sure, nothing could be more strongly indicative of a reference to a paper which was to have effect after his death than these expressions; and this witness naturally concluded that he was referring to the paper which he had seen him write (and which was the same in appearance as that which is now propounded) a few weeks before, when he said he was writing what he wished to be done hereafter, or after his death. It is clear that there can be no mistake in the mind and recollection of the witness as to the substance of what was [333] said by the deceased. He appears then, clearly and decisively, according to the impression of the witness, to be alluding to something which was to have effect upon his death, with reference to the settlement of his affairs. Then he goes on to state, "He did not on that occasion tell me to bear it in mind, nor say that he had told me of it before; it was on another occasion that he told me that he finished, as he usually did, by desiring me not to notice it to any one. I replied, 'Of course, my lord.' I do not recollect that either on this or on the other occasion Lord Scarbrough spoke of his wife or of his daughters; but he frequently, in conversations with me, spoke most affectionately of his daughters, and also of his wife. It was only upon one occasion that Lord Scarbrough said to me that Lady Scarbrough would be well off upon his death, and that was on the occasion I have mentioned before, when he was reading Mr. Harrison's letter; but he twice told me that he had made provision for them all, meaning, as I believe, his wife, children, and grandchildren." That would accord with this paper, and not with the will of 1826 or the codicil of 1832, for those do not make a provision for all these persons. "Once," he says, "when he had been reading that letter of Mr. Harrison, and on an occasion before, when he told me of his being teased with begging letters; that occasion was in the January before he died:" so that we have the earl writing a paper, as to which, he says, he is writing his wishes; and we have at Christmas an intimation given by him to this witness, that a paper will be found after his death if any thing should happen to him; and here we find him in [334] January, before his death, referring to the same thing. The witness says, "He was in his dressing-room, but not writing; there was a letter before him, and he appeared to have been writing. After he had said 'Good morning' to me, as he usually did, he said, 'Here I am, Newbart! busy—you don't know how I am teased with begging letters. I am writing to my daughter Harriet: I want her to come and live at Kelham.' Then he went on to speak of Lady Louisa Cator, whom, after her marriage, he generally called 'Poor Louisa,' and said 'Poor Louisa, she disoblged me very much, you know, but I am quite reconciled to her now.' He then made some further observations to the effect that there would be plenty for them all when he was gone, and that they would have no reason to complain; and on this occasion it was that he reminded me of the paper, and said, 'You will bear in mind, as I told you before, that a paper will be found;' and desired me, in his usual way, not to notice it to any one." This, again, could hardly be with reference to the will of 1826, or the codicil of 1832, for the actions between his nephew and himself respecting the Savile estates would have taken a large portion of what he had intended for his daughters, and which he had charged on those estates as part of the provision he had made for them.

It is impossible for the Court to doubt for one moment, or hesitate in believing, that this witness is really giving the words, as they occur to him, of the deceased himself. It is scarcely possible that words should be more conclusive to shew that the deceased intended by these declarations that the paper which was to be found

should have some [335] effect on the provision he had made for his children after his death ; for so he expressly states in the conversation here detailed, where he says that they will have no cause to complain ; and he reverts to what he had before told the witness, that a paper will be found. Coupling all these circumstances together, it seems quite impossible that the deceased should have referred to any other than a paper, not itself a complete will, but by which he had been desirous of guarding against the effects which might be produced upon the provision he had before made for his family by an unfavourable result of the actions brought against him by his nephew for the Savile estates. I do not know that it is necessary for the Court to go into the history further upon this part of the case : with respect to the declarations spoken to by this witness, every thing appears to me to concur ; and supposing these declarations to have been made, and that the witness is meaning to speak the truth, which I see no reason whatever to doubt, they seem to me to be utterly incapable of being misunderstood by him, nor is there any ground for suggesting that the deceased was not sincere in making them : he makes no discovery to the witness as to the place where the paper is deposited ; he does not state, you will find this paper in such a state, and such a place after my death, but he merely says ; after my death a paper will be found, which must necessarily have reference, coupling it with what he had said before, to the provision to be made for his wife and children. That last conversation with him, he states, followed immediately on what the deceased said about his wife and children, that they would have no reason to complain after he was gone. [336] That expression therefore could have no reference to the will of 1826, or the codicil of 1832 ; as in the event of the nephew succeeding in the actions of ejectment, the more near and immediate relations of the deceased would have an interest very inferior to those who were more distantly related to him. I cannot therefore but think that these declarations are to be received by the Court with some degree of consideration. I think they are very different from those which usually occur in cases where the Court is called upon to pronounce that a paper, originally intended as a plan of a will, or as instructions merely, is to be made operating and subsisting as a will, by the recollection of a witness who speaks to declarations made by the deceased.

This case, I say, differs from those to which I am referring, because I apprehend that this paper is of a different character and description, for it is declared by the deceased to be his will ; and therefore these declarations are only confirmatory of the character which the paper is at least capable of bearing upon the face of it, and of the character which the deceased has given of it himself ; and, therefore, using all that due caution with which declarations of witnesses are to be received upon the several grounds stated in argument, namely, the possibility of insincerity on the part of the person making them, the possibility of misconception by the person to whom they are addressed, and the possibility of misrepresentation, I think that in giving weight to these declarations the Court is not doing any more than the testimony of the witness will fully justify. The declarations are such as appear in themselves to be natural, and there is nothing in the manner in [337] which they are related, or in the occasions upon which they are said to be made, which should lead the Court to suppose that the deceased was insincere in making them. He does not say, "This paper is made to carry my intentions into effect," but he does say, "a paper will be found," which has some reference to the conversation we have referred to, as to the arrangements of the deceased for making provision for his family.

It appears in the course of the evidence of this witness that the deceased was talking of going to see his solicitor Mr. Lee ; it is true that he had an interview with Mr. Lee in the early part of the month of October, 1834, and at that time it was not stated in evidence that any communication passed between them on the subject of this will. It is very possible that there might not be any communication of that kind, but it is not at all unnatural to suppose that when the deceased returned home he might consider what was necessary to be done to guard against an adverse result with respect to these trials of ejectment, and that looking to the whole of his testamentary dispositions, and the provision which he had made for his wife and family before the litigation commenced, he might now, while the result was doubtful, consider it not right to give that large benefit to those for whom he had so handsomely provided at a time when he thought he had made ample provision for his wife and family. By this paper he does not take away the whole of the benefit he had originally intended for them, but he gives a large portion to those for whom by nature he was bound to

provide. Although he did not in the month of October, 1834, communicate to Mr. Lee what his intentions were, [338] or give him any instructions to prepare a will, yet he considered what was proper to be done, and he sat down and wrote this paper in the manner and form which, on the face of it, it purports to bear. It is in evidence in the cause that the deceased was, during the latter part of his life, talking of going to his solicitor Mr. Lee. There is no evidence that it was in reference to the preparation of a testamentary paper; but he was going to take some papers to him, and it is merely conjecture what those papers were. It might very possibly be, and it is not at all improbable, that it was the will and codicil; but that is perfectly immaterial. He did not give this paper as instructions to Mr. Lee, but he kept it in his own bed-room, in the place where it was deposited by him. It appears to me to be perfectly immaterial whether the deceased did or did not go with the intention of giving this paper to Mr. Lee. Had he given it to Mr. Lee as instructions to draw a will from, and then allowed four or five months to pass by without making any inquiry about it, that might have given rise to a question for the Court to consider, whether the deceased had not departed from his intention as expressed in that paper, and whether he did not consider this as mere instructions, as in the case cited of *Munro v. Coutts* (1 Dow. Parl. Cases, 437). There the question arose on a paper drawn out as instructions for a will; and though in some correspondence between the testator and his solicitor it was described as a will, yet clearly from the whole tenor of it, it was delivered to the solicitor as instructions only, and was not considered by him [339] as a perfect will; and in point of fact it was, in consequence of explanations which were required from the deceased, that the paper was in the unfinished state in which it appeared. So in this case, if the deceased had sent this paper to Mr. Lee to draw a will from, there would have been strong ground to consider it as a mere paper of instructions; and if he had left it with Mr. Lee, without making inquiries about it for three or four months, it might have given rise to a question of considerable difficulty as to whether the Court could consider it as a will or not. But in order to try the sincerity of the witness Newbart we must look to his conduct after the death of the deceased, and to the conduct of others also; because, if from Newbart's representation to the persons who came into the house of the deceased immediately after his death, and by whom the search for this paper was conducted, they were impressed with the sincerity of Newbart's communications to them, and with the belief that he was telling them only what he believed to be true, as falling from the deceased himself, that at least affords a criterion by which we may judge what was their opinion as to the veracity and sincerity of the witness. What does he do immediately on the death of the deceased? The will and codicil are found at Rufford in the deceased's depositories there; and when Newbart sees the date of these papers he is satisfied that they cannot be the papers to which the deceased referred; he is satisfied that there must be papers of a later date than those, from what he had seen the deceased doing the second or third week in October, 1834, when he said to him, "I am writing my wishes—[340] what I wish to be done after my death." Newbart says, There must be a paper found somewhere or other, for the deceased had told him that a paper would be found; and accordingly search is made, and that search is conducted with great minuteness and strictness, but still no paper is forthcoming. Newbart does not tell them that he saw the deceased put the paper into this black portmanteau, nor does it appear that this black portmanteau was searched very thoroughly: it is opened to get some keys out of it, and for some other purposes, but Newbart does not say that he had seen the deceased put the paper into that portmanteau.

It is very possible that he might have imagined that the paper would be found where the will itself was deposited, that would be a very natural supposition; and that, although he had seen him put this paper into the portmanteau, it might have been removed from thence. Therefore it is not at all unnatural that Newbart should not have made the disclosure that he had seen the paper put into the box the second or third week of October. But Newbart's strong impression was that a paper would be found, whatever might be its contents. That cannot be denied upon the face of this evidence. It cannot be denied that what he said made a strong impression on the persons conducting the search; and though it is true that he, having declared he was certain a paper would be found, and that if it was not found he should think the paper had been destroyed; when the search was made and the paper was not dis-

covered, a kind of joke was passed upon him, and they appeared to be laughing at his story. But it by no means follows [341] they did not believe the statement made by him as to what had been said to him by the earl; and to shew that they did place reliance upon his statement, the search actually proceeds, and is continued from the 24th February down to the month of May. I believe at that time all hope was given up of discovering the paper; but in the month of July, when the mattresses were removed from it, and the bed taken down for the purpose of being cleaned, this paper was discovered in the place described by the witness who found it; and then it is that it is brought forward. I cannot conceive that any difficulty ought to arise in the mind of the Court as to giving credit to the deposition of Newbart; and there is no doubt as to the sincerity of Lord Scarbrough, in saying that a paper would be found whatever might be the effect of that paper; for the paper is found in his own handwriting, and signed by himself just about the period of time when the first communication passes, which is carried on by subsequent conversations between him and the witness Newbart. Is there any thing improbable in the deceased having put the paper in the place in which it was found? He appears to have been a person of a very suspicious mind: he appears to have been in the habit of hiding papers behind chairs and under mattresses. Papers have been found there. If he was in the habit of so hiding these papers, it is argued that it was extraordinary that these places should not have been searched before, other papers being found concealed in the bed and behind chairs, as is proved by a vast number of witnesses: that is so; but it is to be observed that if the search had been conducted with the greatest minuteness, still this paper would, very probably, [342] have escaped observation; for it could not have been discovered unless the laths under the mattresses were actually removed. It was in a place, therefore, which it was very unlikely that any persons would have thought of searching for the discovery of such a paper. It appears to me that there is nothing in the circumstance of his selecting this place as a place of perfect security and concealment, or in his not communicating to any person where the paper would be found, he having met with this accident, and having died so suddenly in consequence of it as to be deprived of the opportunity of making such communication.

Now Sir William Lumley comes forward in a very honorable manner, and says, "This is what my brother meant: this is as it should be." Sir William Lumley will be a considerable loser by the establishment of this paper: he states his impression, and there can be no doubt of his sincerity in stating that impression to be that it was a paper intended to operate. He says it was a paper which his brother would be likely to leave behind him, to guard against those inconveniences which might arise, and which would prejudice the interest of his wife and daughters in the event of an unsuccessful termination of the law suits between him and his nephew. It does not appear to me necessary to advert to the rest of the evidence. The witnesses all speak to one point, namely, the intention of the deceased to make some alteration in his testamentary arrangements; whether at an earlier or a later period is perfectly immaterial, for, at one time at least, he did not consider this to be a proper distribution of his property.

Whether the Court can say that this paper shews [343] what was his final mind and intention must depend on all the circumstances of the case, he having died in a way which rendered him incapable of declaring more specifically what his intentions were. Looking then at all the circumstances of the case, at the necessity there was for his making the provision which he has made here; looking also to what was done on a former occasion, for that is not altogether immaterial, namely, executing a provisional will, which was originally drawn up as instructions only to have operated till a more formal will was drawn, that paper having alterations and interlineations in it; looking at all these circumstances, I can have no doubt or hesitation in stating it to be my firm conviction that the deceased did intend this paper should have full operation in case anything should happen to him before he had an opportunity of going, or before it was convenient to him to go, to Mr. Lee, for the purpose of having a more formal instrument prepared. Being of that opinion, and seeing nothing in any of the principles laid down and acted upon in this Court at all to militate against the views which I have here stated and expressed, I am of opinion that I must pronounce for the validity of this paper, and decree probate thereof to the executors, with the will of 1826 and the codicil of 1832; and I think that in a case of this description, the costs on all sides should be paid out of the estate.

[345] CHESTERTON AND HUTCHINS *against* FARLAR. Consistory Court of London, Easter Term, 2nd Session, April 28th, 1836.—In answer to a libel for subtraction of church rate, it is competent to a party to plead that the rate was intended to be retrospective, although the rate was not, on the face of it, retrospective.—Under stat. 58 Geo. 3, c. 45, sec. 71, the inhabitants of the district are liable for twenty years to the incidental expenses in the same manner as to the repairs of the Mother Church.—Semble that all rateable property should be assessed to the church, although payment of the rate may not be enforced against those who are in a state of pauperism.—A church rate made on Lady-day to cover expenses from the preceding Lady-day, bad.—Churchwardens (by the general law) cannot borrow money on the security of future church rates.—A church rate not on the face of it retrospective, but intended for retrospective purposes, to more than a third of its amount, invalid.

[Affirmed, 1838, 2 Moore, P. C. 330; 12 E. R. 1031. See further, 2 Curt. 77: in Queen's Bench, 1838, 7 Ad. & Ell. 713. Followed, *Ellis v. Griffin*, 1841, 2 Curt. 677. Distinguished, *Varty v. Nunn*, 1841, 2 Curt. 900.]

On the admission of an allegation.

This was a cause of subtraction of church rate, promoted by Charles Chesterton and Samuel Hutchins, churchwardens of the parish of St. Mary Abbots, Kensington, against William Farlar, a parishioner. On the 13th July, 1835, the libel was admitted, which pleaded in substance,

First. That on or about the 28th June, 1833, the churchwardens and parishioners, rate payers of the parish of St. Mary Abbots, Kensington, met in the vestry room, pursuant to due and legal notice given on that behalf, on the Sunday next preceding, and being so met then and there duly made a rate or assessment of fourpence in the pound on all properties in the said parish, so rateable, or on all the inhabitants of the said parish and others, so rateable, in respect to such properties for and towards the repairing, cleansing, preserving, supporting, and amending the parish church of the said parish, and defraying and indemnifying the churchwardens of the said parish, of and in respect to all incidental costs and expenses to which they might be put, touching or concerning their said office of churchwardens for the year, from Lady-day 1833, to Lady-day 1834. That the said rate was afterwards duly confirmed, and that in compliance therewith and in conformity thereto, by far the great part of the inhabitants and others, rate payers of the said parish, have paid and satisfied [346] the respective sums of money, to, or at which they were rated or assessed, in and by the said rate.

The second article pleaded that the said William Farlar, party in the cause, occupied a messuage, tenement, or dwelling-house, of the annual value of fifty-five pounds in the said parish, for or in respect of which he was rightly, and equally rated and assessed in the rate aforesaid, at the sum of eighteen shillings and fourpence, and that he also held other rateable premises described in the said rate as a stable, of the annual value of eight pounds, for which he was rightly and equally rated at the sum of two shillings and eightpence.

The third, in supply of proof referred to the rate book and annexed a copy thereof.

The fourth, fifth, sixth, seventh, and eighth were formal articles, pleading jurisdiction, &c. and praying a sentence.

Additional article. That the said Charles Chesterton and Samuel Hutchins, the churchwardens aforesaid, by virtue of their said office, caused the said William Farlar (and other defaulters) to be summoned on the twenty-third day of May, one thousand eight hundred and thirty-five, before two of his Majesty's justices of the peace for the county of Middlesex, for the Brompton district, in the said parish of St. Mary Abbots, Kensington, aforesaid, to shew cause why he refused to pay the said sums of eighteen shillings and fourpence, and two shillings and eightpence, so assessed upon him as aforesaid. That the said William Farlar accordingly attended such summons, but refused to pay distinctly on the ground of his objecting to the legality of the said assessment, in consequence whereof the said magistrates [347] declined to proceed for the recovery of the said rate or assessment.

An allegation was brought in on the behalf of Mr. Farlar, by way of defence, to the following effect:—

First. After reciting the first article of the libel and denying the same to be

true, pleaded that, on the contrary, the rate was a partial and unequal rate or assessment on the properties situate within the parish, and on divers persons inhabitants thereof, and owners or occupiers of properties therein. And that divers persons, who by law ought to have been rated and assessed in the said rate, in respect of their properties, and which persons have been and are rated and assessed, in respect thereof to rates made and levied for the relief of the poor of the said parish, for the said year one thousand eight hundred and thirty-three, are not rated and assessed to the said church rate, and thereby the properties and inhabitants rated and assessed therein are charged with the payment of sums of larger amount than they are by law liable to pay.

Second. In supply of proof referred to two lists or schedules, wherein the several inhabitants of the said parish of St. Mary Abbots, Kensington, and the several other persons, and the properties not charged or assessed to the said church rate are specified and set forth and pleaded that the said lists or schedules, entitled "Town lists of persons not charged to the church rates, Lady-day, one thousand eight hundred and thirty-three, to Lady-day, one thousand eight hundred and thirty-four," and "Brompton list of persons not charged to the [348] church rates, Lady-day, one thousand eight hundred and thirty-three, to Lady-day, one thousand eight hundred and thirty-four," were in the custody or control of the vestry clerk of the said parish, and might be produced, if necessary, at the hearing of the cause; and an extract, marked No. 1, from the said lists was exhibited, setting forth about three hundred and sixty names.

Third. That the said church rate was and is a retrospective rate, and was made to reimburse and indemnify the said Charles Chesterton and Samuel Hutchins, the other parties in this cause, for and in respect of payments made by them or one of them previous to the making of the said rate, and to provide for the discharge of several sums of money to a large amount, due or alleged to be due from the said parish of St. Mary Abbots, Kensington, to divers persons, long previous to the making of the said rate. That out of the monies collected by means of the said rate the said Charles Chesterton and Samuel Hutchins have reimbursed themselves divers sums paid and disbursed by them or one of them on account of the said parish, previous to the making the said rate, and have also paid and discharged divers debts and claims due or alleged to be due from the said parish to divers persons long previous to the making the said rate.

Fourth. In supply of proof, referred to the original account of the churchwardens remaining in the custody or controul of the vestry clerk, and annexed a copy thereof, marked No. 2, and pleaded that the following items in the account were payments made by the said Charles Chesterton and Samuel Hutchins, previous to the making the said rate:—

[349]

1833.

FOR THE OLD CHURCH.

March 6.	Paid for 100 bundles of fire-wood	£0	5	0
	Visitation fees for Easter visitation	2	12	0
	Paid the pew-openers, quarter to Midsummer	7	16	0
	The vestry-keeper, ditto	2	12	6
	Ditto, washing church linen, ditto	1	14	6
	Hollis, inspector of graves, quarter to Midsummer	1	11	6
	Ditto, engine-keeper, ditto	1	5	0
	Ditto, steeple-keeper, ditto	0	10	6
	Ditto, bell-ringers, ditto	4	8	0
	Mrs. Parsons, cleansing the church	1	0	0
	Pope, organ-blower, quarter to Midsummer	0	13	0
	Messrs. Starkey and Cripp, for Register Book for Baptisms	5	0	0
	Paid the bearers an extra charge	0	3	0
	Receipt stamps for burial fees	0	5	0
				<hr/>
				£29 16 0

And that the following items on the credit side of the fifth folio of the said account—

UNPAID CLAIMS, OLD CHURCH.

Of Former Debts.

Mr. Shephard, consecrating burial ground	£24	6	6
Ditto, certificate, 1832	1	6	8
Ditto, fees out of pocket, on case, 1832	3	5	6
William Lamb, for grave planks	24	10	11½
<hr/>			
(For 1832)	£53	9	7½
Messrs. Judson, ironmongers	11	13	10
Mr. W. Hawkes, ditto	10	1	3
William Lamb, carpenter	9	7	7
Mr. Bird, repairs to church	28	0	7½
Messrs. Haines, for wine	9	12	0
Mr. Griffiths, linen-draper	2	11	4½
Mr. Benjamin Rowe, glazier	0	19	9
Mr. Gorham, winding clocks, Old Church	8	1	0
Ditto ditto Holy Trinity	1	1	0
Ditto ditto St. Barnabas	1	1	0
Miss Calcott, organist, to Lady-day, 1834	30	0	0
Mr. Calcott, ditto, ditto	25	0	0
[350] Miss Wilkinson, organist, to ditto	30	0	0
Mr. Hall, half-year to ditto	2	12	6
Mr. Lamb, December, 1832	0	5	6
Ditto, candles, ditto	5	5	5
Ditto, coals, coke, and wood, St. Barnabas	5	11	6

—were payments made in discharge of debts due, or alleged to be due, from the said parish to divers persons long previous to the making of the said rate.

Fifth. That in the year 1823 the population of the parish of St. Mary Abbots, Kensington, having greatly increased, a portion thereof was, under the authority of an Act of Parliament passed in the fifty-eighth year of the reign of his Majesty King George the Third, entitled "An Act for Building and promoting the Building of additional Churches in populous Parishes," and other act or acts of Parliament passed subsequent thereto, formed into a district parish for ecclesiastical purposes, and the bounds and limits of such district parish were prescribed and defined as by law directed by the title or description of the Brompton District, that a new church was erected within the limits of such district parish, under the provisions of the said act or acts of Parliament, and on the sixth day of June in the year 1829 such church was duly consecrated by the title of the Church of the Holy Trinity of the said Brompton District Parish. That from and after such consecration of such district church, it became by law a district church for all ecclesiastical purposes, and from such time the persons inhabiting such district parish are liable only to contribute to the repairs of the Old Church of St. Mary Abbots, Kensington, [351] and were not, and are not, liable to contribute to any rate made for payment of expenses incident to the performance of divine worship in the said old church. That notwithstanding the premises the said church rate was made, and the same is in the said first article of the said libel pleaded to have been made as well for the repairing, cleansing, preserving, supporting and maintaining the said church, as for indemnifying the said Charles Chesterton and Samuel Hutchins from all costs and expenses to which they might be put, touching their office of churchwardens, and they the said Charles Chesterton and Samuel Hutchins have, out of the proceeds of the said rate, paid and discharged divers sums of money to a considerable amount incident to the performance of divine worship in the said parish church, &c.

Sixth. That under the authority of an act of Parliament passed in the fifty-third year of the reign of his Majesty King George the Third, entitled "An Act for providing an additional Burial Ground for the Parish of St. Mary Abbots, Kensington in the County of Middlesex," the trustees appointed to carry the said act into execution borrowed a considerable sum of money upon the grant of annuities to divers persons, the payment of which said annuities were charged upon the fees to arise from burials in the said ground, and also upon the church rates of the said parish. That by the 19th section of the said act the churchwardens for the time being are required, until the whole of the principal money so borrowed, and the interest thereof, and the annuities to be granted should cease, yearly upon such day, in the months of June and July, as the trustees should direct, to render to the said trustees an account of the several sums of money which [352] the churchwardens should have received for or on account

of the burial of the dead and the sums of money paid thereon, and to pay to the said trustees the balance remaining in their hands or so much thereof as should be necessary for the purposes of the said act, and the said churchwardens are thereby further required to pay to the said trustees or their treasurer annually, out of the church rates by them to be collected, such a sum of money not exceeding the amount of threepence in the pound upon the annual rental of the said parish, as the trustees should think necessary for the purposes of the said act, and should by writing under their hands order and require by two equal half-yearly payments, until the whole of the principal money so borrowed, with the interest, should be discharged, and until the annuities granted should cease and determine. That the said Charles Chesterton and Samuel Hutchins have not rendered any such account to the said trustees, or paid to them or any of them any sum of money arising from the said burial fees or from the said church rate, and that without lawful authority they have, out of the proceeds of the said church rate pleaded in the said libel, paid and discharged the said annuities, or at least so much thereof as the balance of the said burial fees were insufficient to discharge, &c.

Seventh. In supply of proof referred to the said account marked No. 2.(a)¹

Eighth. That the said William Farlar was at and before the time of making the said rate, and still continues to be, a resident inhabitant within the said Brompton district.

[353] This allegation was opposed by Addams for the churchwardens.

The King's advocate and Haggard were heard in support of it.

The Court inquired whether any further information could be given with respect to the purposes for which the rate in question had been made; and on a subsequent day an additional article was given in, pleading that the following further items in the churchwarden's account—

The trustees of the poor balance of the £500 borrowed from them on the old church account	£265	1	3
James Gorham, winding clocks to Midsummer	8	1	0
James Griffith, linen-draper	6	13	2
Messrs. Judson, ironmongers	21	12	5
Mr. William Hawkes, ditto	8	14	0
Mr. Bird, bricklayer	17	2	4
Mr. Richard Saunders, carpenter	5	6	4
Mr. Samuel Kingston, for coals	13	8	6
Mr. Samuel Kingston, for candles, &c.	10	19	7
Messrs. Haines for wine	20	16	0
Mr. William , stationer and printer	41	10	6
Mr. Hall, three quarters' salary, to Lady-day 1833, at 10 guineas	7	17	6
Mr. Shephard, consecration bill, old debt	42	1	4
Mr. Gorham, winding clocks, to Christmas 1832	1	1	0
Mr. William Collins, for furniture, old debt	42	9	0
Mr. R. Hanham, coals	£4	0	0
Carpenter, ditto	1	6	3
Mr. Kingston, for coals	10	12	0
Messrs. Haines, for wine	9	3	6
Mr. Benjamin Hughes, for lighting lamps	23	2	9
Mr. Shephard, consecration charges, old debt	48	10	4
Richard Saunders, carpenter, old debt	2	2	1

[354]—were payments made in discharge of debts due from the said parish to divers persons, long previous to the making the said rate, and in supply of proof it referred to the vouchers in the possession of the said Charles Chesterton and Samuel Hutchins, or of the vestry clerk of the said parish.(a)²

Hilary Term, 4th Session, Feb. 12th.—Dr. Lushington. The question is whether this allegation sets up a sufficient answer to the libel admitted in this cause for subtraction of church rate.

(a)¹ The articles in italics were rejected by the Court.

(a)² The amount of the rate in question was £1483, 15s. 0½d.

With respect to the first and second articles, there can be no doubt as to their admissibility, they allege the rate to be unequal.

The third and fourth articles allege that the rate is retrospective, and the point is whether I should admit evidence to shew for what purpose the rate was made, it being clear that a rate retrospective on the face of it could not be sustained. If I were to exclude this evidence, the rate might be wholly retrospective, or for a purpose manifestly illegal—it might be for the purpose of paying for the prosecution of a criminal, for repairing a bridge, or making a road; I apprehend the law to be that the majority of the parishioners in vestry may, in making a church rate, bind the minority for a legal, but not for an illegal, purpose; in matters respecting which the law allows a discretion, not as to expenses unconnected with the church.

It was said that an action of account would lie against the churchwardens, but no such action has been prosecuted for two hundred years, and I [355] should not consider myself justified in leaving the parishioners to what is a remedy rather in name than reality, it would be an argument equally good for any church rate whatever.

Another argument has been pressed upon the attention of the Court of greater weight, that in extensive parishes some expenses must remain unpaid, that the bills cannot always be got in and discharged during the current year; it may be so, and then a question would arise whether a rate should be held invalid because of the amount of debt left undischarged, and if a small portion only of the rate was intended to cover such expenses, I should not be inclined to pronounce against it; on the other hand, if the rate be retrospective to a very considerable extent, I am of opinion that the numerous decisions which have taken place in other courts,^(a) pronouncing retrospective rates illegal, would necessarily lead me, under the circumstances stated, to refuse to enforce such a rate. I admit then the four first articles.

The fifth article raises the question whether the inhabitants of the district are liable to the expenses of the churchwardens of the parish: the inhabitants of every part of the parish, howsoever divided, are bound to contribute to the maintenance of the parish church, and all legal expenses incident thereto; but there are exceptions admitted by law, and in the present case, whether such exception exists or not, depends on the Church Building [356] Acts, the 71st section of the 58th Geo. 3rd, c. 45, expressly enacts that “the district shall remain subject for twenty years, to be accounted from the day upon which the district church or chapel shall be consecrated, to the repair of the original parish church, and be deemed part of the original parish, for all purposes of such repairs and the making, and levying of rates for that purpose.” I think that, according to the true construction of this clause, the inhabitants of the district are liable to be assessed to the incidental expenses, precisely in the same manner as to the repairs of the Mother Church, indeed, were it otherwise, the necessary consequences would be great inconvenience and confusion.

I clearly think that what is alleged in the sixth and seventh articles would not invalidate this rate; I therefore reject the fifth, sixth, and seventh articles, and admit the rest of the allegation and the additional article.

An allegation was afterwards brought in on behalf of the churchwardens, in reply to that of Mr. Farlar, which now stood for admission, pleading,

First. That in virtue of an act of Parliament, made and passed in the seventeenth year of his late Majesty King George the Third, for the better relief and employment of the poor of the parish of Saint Mary Abbotts, Kensington, and also of an act made and passed in the seventh year of his late Majesty King George the Fourth, for (among other purposes therein mentioned) amending and [357] enlarging the powers of such acts aforesaid, and for better regulating the said parish, the landlords of all houses, of which the annual value does not exceed twenty pounds (and not the occupiers or tenants thereof), are made liable to be assessed to the relief of the poor of the said parish. And whereas in the first article of the allegation admitted in this cause on the part and behalf of the said William Farlar it is alleged and pleaded “that divers persons, who by law ought to have been rated and assessed in the said rate in respect

(a) See *Rex v. Chapelwardens of Bradford*, 12 East, 556. *Dawson v. Wilkinson*, Cases temp. Hard. 381; Andrews' Rep. 11. *Lanchester v. Tricker*, 1 Bing. 201; 8 Moore, 20. *Lanchester v. Frewer*, 9 Moore, 688; 2 Bing. 361. *Lanchester v. Thomson and Others*, 5 Madd. Rep. 4, and the observations of Lord Denman in *Rex v. Dursley*, 5 Adol. & Ellis, 15.

of their properties, and which persons have been and are rated and assessed in respect thereof to rates made and levied for the relief of the poor of the said parish for the said year one thousand eight hundred and thirty-three, are not rated and assessed to the said church rate, and thereby the properties and inhabitants rated and assessed therein are charged with the payment of sums of larger amount than they are by law liable to pay." And whereas in proof of the premises are annexed to the second article of the said allegation certain exhibits, purporting to set out the names of parishioners, in number about three hundred and sixty (being the names of persons rated to the poor of the said parish in the sums set opposite to each name, but), omitted to be rated in or to the church in the rate sued in this cause. Now the party proponent doth expressly allege and propound that of such parishioners two hundred and seventy are landlords, rateable to the poor, under the acts herein-before referred to, as landlords, but not rateable to the church, as not themselves occupying the houses of which they [358] are such landlords. And the party proponent doth further expressly allege and propound that it is not, nor ever hath been, the practice in the said parish to rate the tenants of such houses, whereof the landlords are rated to the poor under, and in virtue of, the acts hereinbefore referred to, to the church, by reason that such persons, if not actual paupers, are in such indigent circumstances that no recovery from such persons of such church rates could reasonably be expected, very many, and by far the greater part, of such houses being let out in apartments or lodgings to different families or individuals. And the party proponent doth further expressly allege and propound that upwards of seventy other parishioners (both landlords and tenants) whose names appear in the said list as rated to the poor, and who therefore might seem liable in virtue of their occupation to be also rated to the church, have not been so rated, by reason that they are in circumstances of the greatest exigency, many of them receiving even parochial relief, and from whom no poor rates have been demanded, or, if demanded, could have been recovered, though rated to the poor in the said list.

Second. That for many years previous to and down to the year one thousand eight hundred and thirty-two it had been customary in the said parish of Saint Mary Abbots, Kensington, that the church rate made on or about Lady-day in each year should cover the expenditure of the year from the Lady-day preceding, so that such rates were to that extent retrospective rates as to occupation, though the party proponent doth expressly [359] allege and propound that the same were then, and had all along been, prospective as to expenditure. That in the said year, one thousand eight hundred and thirty-two, on objections raised by certain (though not objected to by the great body) of the parishioners of the said parish, it was deemed prudent, under the advice of counsel, to desist from such custom, and that in future the church rate should be prospective altogether, that is, with respect to occupation as well as to expenditure. That accordingly the churchwardens in that year, commencing to act upon such new system, and to defray the current expenses of such year out of the rates raised at the Lady-day preceding, were unable out of such rate also to liquidate altogether the outstanding demands of the next previous year (including some trifling sums due from the parish for the years preceding that, on current accounts, but which it was agreed on all hands were a charge upon, and proper to be defrayed from or out of, the church rates of the said parish), and the party proponent doth further expressly allege and propound that in the said year one thousand eight hundred and thirty-two, William Farlar, party in this cause, being at such time one of the guardians or trustees of the poor of the said parish, himself induced the said trustees to lend and advance to the churchwardens five hundred pounds, then in their hands, as such guardians or trustees, on the credit, and to be repaid out of the then future church rate and church rates, to assist in the part immediate liquidation of such outstanding demands; that of the said sum of five hundred pounds, two hundred and thirty-four pounds [360] eighteen shillings and ninepence was repaid to the said trustees by the then churchwardens out of the church rate for the then current year, leaving the sum of two hundred and sixty-five pounds one shilling and threepence due from the church rates at the time of the making of the church rate sued in this cause.

Third. That in consequence of the premises in the next preceding article pleaded, as also of the said parish having been lately involved in much difficulty and expense, consequent upon the then recent erection of two additional places of worship within the said parish, under the several Acts of Parliament, known generally as the Church Building Acts, at the time of the making of the rate sued in this cause, in addition to

the sum of two hundred and sixty-five pounds, one shilling, and threepence, due to the said William Farlar, or to the trustees of the poor of the said parish as before set forth, there were arrears to be provided for (consisting principally of tradesmen's current accounts, or accounts running on from year to year, together with a few bills omitted to be sent in within the year in which the work charged for in such bills was done or articles supplied), amounting to about the sum of from three hundred and fifty to four hundred pounds, and no more, less the sum of one hundred and twenty-seven pounds four shillings and tenpence, due to the churchwardens, from the assessment for the preceding year, and of which the greater part was afterwards collected and got in, as applicable to the payment of such outstanding demands.

Fourth. That the vestry of the parish of Saint [361] Mary Abbots, Kensington, is not a select but an open vestry; that the vestry at which the church rate sued in this cause was agreed to was numerously attended (to wit), at one time by upwards of seventy parishioners, the said William Farlar, party in this cause, inclusive; that at such meeting the report of a committee, previously appointed by the parish, to investigate as well the whole subject of, as the then outstanding claims upon, the church rates of the said parish, and in which report such outstanding claims were erroneously represented at the sum of four hundred and seventy-one pounds four shillings and fourpence, in addition to the aforesaid sum of two hundred and sixty-five pounds one shilling and threepence, was considered *seriatim*; after which consideration, and with a full knowledge on the part of each and every such parishioner, that such rate was to be applied to the liquidation of such outstanding demands, as well as to the expenditure of the current year, it was moved and carried by a great majority of such parishioners, thirty-one being for and five against it (the rest of the parishioners having then either left the vestry or declined voting on the said motion either way) that the said rate should be raised, the said William Farlar continuing to be, and being present, at and in such vestry when it was so moved and so carried.

Fifth. That the ordinary expenditure of the three places of worship, in the said parish of Saint Mary Abbots, Kensington, to wit: the Old Church, the Church of the Holy Trinity, and that of Saint Barnabas (exclusive of charges for repairs and other [362] extras, to be provided for extra, from time to time, as occasion may require), payable out of the church rates of the said parish, is five hundred and eighty pounds, less, by burial fees, about one hundred and sixty pounds, but plus the sum of four hundred pounds (at present) payable from the church rates in annuities to certain persons, who in the year one thousand eight hundred and thirteen lent or advanced to the said parish the sum of five thousand pounds on such annuities, for the purpose of providing an additional burial ground for the said parish, in virtue and under the authority of a special act of parliament made and passed in the thirty-third year of his late Majesty King George the Third; and the party proponent doth further expressly allege and propound that, taking the rental of the said parish at ninety-two thousand six hundred pounds (but which it considerably exceeds), every penny rate will produce (even after allowing for defaulters and charges of collection) a net sum of three hundred and forty-seven pounds five shillings, being much more than sufficient to discharge all outstanding demands against the said parish at the time when the rate sued for in this cause was raised, with the exception of the sum of two hundred and sixty pounds one shilling and threepence, due from the church rates to the trustees of the poor of the parish as aforesaid.

Sixth. That all and singular the premises were and are true, public, and notorious, and so forth.

[363] Dr. Lushington. The present question is one of great importance, but the subject having been of late years much discussed, and being familiar to us all, I will not delay giving my opinion.

I am aware of the difficulties which exist in regard to church rates; if, however, I am satisfied as to the law which would be applied to the case in the Courts at Westminster, it is my duty to submit to that law.

The churchwardens, before expending any money, should make an estimate of the expenses intended to be incurred, and then propose a rate; this unquestionably is the legal, most safe, and most convenient mode, although I do not mean to say that it is the only one.

Two objections were taken by Mr. Farlar to the rate in this case; first, that it was an unequal rate, and, secondly, that it was retrospective.

First. The first objection is attempted to be met by the first article of the allegation now before the Court; that article recites the defendant's plea, "That about three hundred and sixty persons who have been rated to the poor are omitted to be rated in this church rate," and in reply to that it states that by local acts of 17 Geo. 3, and 7 Geo. 4, the landlords of all houses, of which the annual value does not exceed twenty pounds (and not the occupiers) are made liable to be assessed to the poor rate, and that two hundred and seventy of the persons so omitted are landlords rateable to the poor under those acts.

There is no reason, certainly, why the landlords should be assessed; the act of parliament being [364] silent as to church rates, the occupiers, and not the landlords, are rateable. The article goes on to plead that a custom exists in this parish not to assess the occupiers of those houses of which the landlords are rated to the poor under the above acts, by reason from their indigence, no payment could reasonably be expected. So that houses of the annual value of twenty pounds are not rated at all, and, consequently, property to the extent of three or four thousand pounds per annum is entirely exempted from the payment of church rate. No case, or authority, or principle has been stated in support of such a system. I am of opinion that it is not the duty of churchwardens to exact payment from those who are actually in a state of pauperism, and that other parishioners could not on that ground refuse to pay their rates: it is further stated that about seventy others are omitted to be rated on account of their exigency, some of them receiving parochial relief; but the law requires that all the property should be rated; it is with reluctance that I make these observations, as usage becomes in some degree consecrated by time, but sitting here as a judge it is my duty to state my opinion of the illegality of such a practice.

Second. The Court read the second article (a) and proceeded, "This custom is altogether illegal, and the churchwardens had no right to borrow the money."

Third and Fourth. The third article states in substance that at the time of making the rate, in round numbers, five hundred out of fourteen [365] hundred pounds were for purposes retrospective: the fourth pleads that the vestry was an open vestry, and that the whole matter was fully discussed. But it is admitted that the rate is a retrospective rate, to the extent of more than one-third of the whole amount, though not on the face of it, and the question is whether or not such a rate, under the explanations given in this allegation, can or cannot be enforced by the authority of this Court. If I entertained any reasonable doubt as to what the law is, I should certainly consider it my duty to give the churchwardens the benefit of that doubt, and, by admitting the allegation, leave them to proceed as they might be advised. But if, on the other hand, the law is clear, and laid down by high authorities who have decided the point, I apprehend I am bound in duty to bow to those authorities, and to pronounce against the admission of this allegation. It is not disputed that a rate, on the face of it retrospective, is vicious; it has been settled by repeated decisions in the Court of King's Bench, and the Court of Chancery (page 355, note (a)), that such a rate cannot be enforced. I am aware that my predecessor, Sir Christopher Robinson, in 1812, in the *Spitalfield's case*, on the authority of a case before Sir George Hay in 1770, rejected an allegation of a defendant resisting a church rate, on the ground that it was retrospective for one year: but the parties in that case, in consequence of the difficulties which occurred, declined proceeding further in the cause. Had the sums in the present case been of small amount I should have [366] felt myself justified in leaving them entirely out of consideration; but it cannot be said that the sums admitted to be retrospective are trivial or unimportant. How stands the case then? I cannot say that any case has yet been decided which expressly and directly governs the present case; but I cannot, on principle, comprehend that there is any real distinction between the case of a rate, on the face of it retrospective, and a rate intended to cover debts, or parts of a debt previously incurred. It appears to me to be a distinction without any foundation, and that the cases are without any real difference. Can it be maintained that this Court is bound to set aside a church rate, where the party making it had avowed an illegal object on the face of it, and to give force and effect to a rate where the object, though not avowed, was equally clear and illegal? I am very clearly of opinion that if such distinction were attempted in a court of law it would not be admitted. For the

(a) See the second article, page 358.

consequence would be absurd; it would be in the power of any vestry, by shaping the heading of the rate, to suit their own purposes, to violate the law at their own pleasure, and to any extent. I think that all the principles laid down by the Court of King's Bench (see note (a), page 355), and by the Vice Chancellor, in the case of *Lanchester* against *Thompson* (5 Madd. 4), are equally applicable to rates admitted to be retrospective and those which are retrospective on the face of them.

The Court rejected the allegation.

[367] From this decision an appeal was presented to the Arches Court of Canterbury, and on the 30th May, 1837, judgment was given in the Court.(a)

Sir Herbert Jenner. The question is whether this allegation contains matter proper to be brought to the notice of the Court, for its information, before it pronounces its opinion upon the points submitted for its decision. In my opinion this allegation does contain matter of that description; for unless it has been already decided that under no possible circumstances a rate retrospective in its character can be sustained, the Court ought not to determine the point of law until it is in possession of all the facts and circumstances of the case.

The libel admitted in the Court below pleaded the due making of the rate in June, 1833. An allegation by way of defence was also admitted on behalf of Mr. Farlar, setting up two grounds of objection to the validity of the rate: first, that it was partial and unequal, persons having been omitted to be rated to the repair of the church who had been assessed to the poor rate; and, secondly, that the rate was intended to be applied to the discharge of arrears of debt, as well as to current expenses, and that it was to that extent retrospective.

The allegation now offered is in reply to Mr. Farlar's plea.

On the first ground of objection to the rate, [368] that it was partial and unequal, explanations are given and reasons assigned why names had been omitted in the assessment for the repair of the church, which had been inserted in that for the relief of the poor, namely, that by a special Act of Parliament the poor rates of houses under a certain rental are paid, not by the occupiers, but by the landlords; in other instances, that the parties were approaching to, or actually in, a state of pauperism, receiving parochial relief; can it be said that these are not fair explanations fit to be proved in order to enable the Court to decide on the validity of the grounds assigned for omitting the names?

With respect to the second objection, that the rate was intended to be applied to the discharge of arrears of debt incurred by former churchwardens, and to current expenses, and that it is to that extent retrospective, circumstances are also pleaded in this allegation, explanatory and contradictory of Mr. Farlar's plea; and the sole question now before the Court is, whether the facts and circumstances stated in this allegation are such as, if proved, might have an effect upon the judgment of the Court: this not being an abstract question, whether a rate on the face of it retrospective be invalid, but whether this rate, under all the circumstances stated, might be supported and enforced.

It has been argued that under no circumstances can an expenditure incurred in a preceding year be defrayed out of a rate for the current year.

Now if the Court had referred to any case in which such a rule had been expressly decided [369] in a court of law I should have been inclined to bow to such decision, although matters of church rate being undoubtedly of ecclesiastical cognizance, this Court might possibly consider itself at liberty in a question of this kind, where not restrained by actual prohibition, to govern itself according to the ecclesiastical law as administered in these Courts; but the Court has been referred to no such decision. The cases cited from the common law reports were attempts to enforce by mandamus or otherwise the making of rates to reimburse churchwardens.

In the case cited of *The King v. The Chapelwardens of Bradford* (12 East, 566) Lord Ellenborough indeed observed, that the difficulty of making the rate before incurring the expenditure had been got over sometimes by an "evasion;" but the only point decided in that case was that a mandamus would not lie to compel the making of a rate to reimburse churchwardens.

(a) This case in the Arches Court, and the following cases of *Veley and Joslin v. Burder*, and *Gaudern v. Selby*, are here reported, although out of order as to date, as being more convenient for reference.

So in the cases growing out of the *Bury St. Edmund's case* there has been no direct decision on this point, although it cannot be denied that the learned judges in those cases strongly inclined to hold the law to be that no retrospective rate could be good.

It has been argued that in all cases an estimate of the expenditure should be made before the rate is applied for, but this cannot always be done; suppose the church was broken open, and the articles necessary for the performance of divine service—the Bible and Prayer Books—should be [370] stolen, how could divine service be performed if the churchwardens could not advance money out of their own funds? Unless they have such power, the church must be closed, as they cannot get a rate without a legal notice. I purposely put this as an extreme case, because it was argued as one of the grounds of the objection to this rate that there was a charge for faggots (for warming the church) which had been purchased before the rate was granted.

In the absence then of direct decisions on the point in courts of law and equity, it will be proper to see what has been done in these Courts, and it should seem that in former times it was not held here that a church rate was bad because it covered some items of expenditure which were incurred in a preceding year. In the case referred to by the King's advocate (2 Lee's Cases, 549) the rate, though in part retrospective, had not been objected to on that ground, either in the Consistory Court or in the Court of Arches, although there were eminent counsel in those Courts who would have taken the objection had it been considered a tenable one; nor did either of the judges of those Courts deem it an objection to the rate that it was made in 1758 to meet expenses incurred in 1757.

In the present case, whatever was done was done with the full knowledge of the vestry, not a select but an open vestry, duly assembled, at which seventy persons attended: the whole accounts were laid before them, and the rate granted with the full knowledge of all the facts, and of the purposes to which the rate was intended to be applied.

[371] Without, then, taking upon myself to decide at the present moment whether this rate can eventually be supported or not, I am of opinion that the facts are proper to be laid before the Court for its information, and therefore that the allegation ought to be admitted; I accordingly pronounce for the appeal, reverse the sentence of the Court below, and admit the allegation.

From this decision Mr. Farlar appealed to the Privy Council, and on the 30th of June, 1838, the judgment of the Arches Court was reversed by the Judicial Committee, by the rejection of all the articles except the first.

Present—The Right Hon. Mr. Baron Parke; Mr. Justice Bosanquet; Sir John Nicholl, Judge of the High Court of Admiralty; Thomas Erskine, Chief Judge in Bankruptcy.

Their Lordships were of opinion that that part of the allegation (the first article) which states the reasons for omitting the names of certain parishioners in the assessment was admissible; they therefore directed that part of the allegation to be admitted; but they were of opinion that the remainder of the allegation was properly rejected by the Consistory Court on the other ground; they therefore so far reversed the sentence of the Arches Court and remitted the cause.

[372] VELEY AND JOSLIN *against* BURDER. Consistory Court of London, Michaelmas Term, 2nd Session, Nov. 15th, 1837.—The parishioners in vestry assembled, having refused to make a church rate for necessary repairs, the churchwardens may of their own authority make such rate.

[See in Queen's Bench, 1840, 12 Ad. & Ell. 233, 265.]

On admission of the libel.

This was a question as to the admissibility of a libel in a suit for subtraction of church rate promoted by Augustus Charles Velej and Thomas Joslin, the churchwardens of the parish of Braintree, in Essex, against Joseph Davey Burder, a parishioner.

The libel pleaded in substance. That the church being in need of necessary repairs, not having been substantially or sufficiently repaired for several years, the parishioners assembled in vestry on the 2nd of June, 1837, pursuant to public notice duly given, for the purpose of making a rate for the repairs of the church; that an estimate of the necessary repairs was produced; that the necessity for such repairs was

not disputed nor any objection taken to the amount of the estimate ; that a rate of three shillings in the pound was then proposed ; but that an amendment was put and carried, that the consideration of a church rate be postponed to that day twelve months.

That after the said amendment had been carried, and the parishioners and inhabitants had thereby refused to make or grant a rate, the said churchwardens did, on the 10th day of the said month of June, rate and tax all and every the inhabitants and parishioners [373] of the parish aforesaid, for and towards the necessary repairs of the church of the said parish, and the other expenses necessarily and legally incident to the office of the churchwardens of the same parish for the remainder of their year of office, at the rate of three shillings in the pound, on the annual value of all messuages, lands, and tenements occupied within the said parish, &c.

This libel was opposed.

Addams, on behalf of Mrs. Burder, did not object to the form of the libel. He admitted, for the sake of argument, that the church was out of repair, and that the inhabitants had refused a rate ; the question for the Court was, whether the step which the churchwardens had taken in consequence was a legal step.

The heading of the rate set forth, that at a meeting of the parishioners on the 2d of June, 1837, continued by adjournment to the 5th of September, assembled in pursuance of a notice duly given, for the purpose of granting a rate for the necessary repairs of the church, and for other expenses incidental to the office of churchwarden, the majority of the parishioners refused to make or grant a rate, by postponing its consideration for twelve months, and that Messrs. Veley and Joslin did, on the 10th of June, make and levy a rate of three shillings in the pound. So that it appeared on the face of the paper that the churchwardens had made this rate on their own authority, and they now called upon the Court to enforce it.

Two theories had been proposed in discussing this subject ; and, according as one or the other was adopted, different views were to be taken of the [374] question. One theory was this, that it is absolutely imperative on the parishioners to repair the parish church. The other was, that it was not absolutely imperative, but imperative sub modo ; viz. if the parishioners chose to assemble and make a rate, in which case it was binding on dissentients, and could be enforced under the statute *circumspecte agatis*. In support of the last doctrine it was said that a parish was a corporation for this purpose ; and if the majority were willing that a rate should be raised, it would be enforced against dissentients, but not otherwise.

In arguing this case, he should assume that it was absolutely imperative on a parish to repair the church. It was obvious that unless it was absolutely imperative, and a parish was bound to repair the church *volens volens*, the present suit could not be maintained. In arguing the case on this assumption, he made no concession ; he did not admit or deny the proposition, he had nothing to do with it ; but, on the assumption that it was absolutely imperative, he should contend that the present rate was insupportable.

The obligation of a parish to repair the church being assumed, how was it to be enforced ? Suppose a parish to be refractory and unwilling to rate themselves, how were the repairs of the church to be enforced ? It was said that the proceedings in the Ecclesiastical Courts were of two kinds : first, civil, by monition ; second, criminal, by articles. This was a distinction, as it appeared to him, without a difference : the civil proceeding resolved itself into a criminal one, for the monition brought the party within the criminal jurisdiction. So that it [375] was a criminal proceeding, the Court being limited to spiritual censures only.

First, then, these Courts had no compulsory process to enforce a church rate other than by spiritual censure. He had looked into the books, and could find no case which had the slightest reference to any means of enforcement which these Courts possessed other than by mere spiritual censures. This was the doctrine held by the earliest text writers of any authority. Lindwood cites Archbishop Reynolds : " We enjoin the archdeacons and their officials, that in the visitation of churches they have a diligent regard to the fabric of the church, and especially of the chancel, to see if they want repair ; and if they find any defects of that kind, they shall limit a certain time, under a penalty, within which they shall be repaired." Under the word " penalty," Lindwood says, " Where the penalty is not limited, the same is arbitrary ; but this cannot intend here the penalty of excommunication, inasmuch as it concerneth the parishioners *ut universos*, as a body or whole society, who are bound to the fabric

of the body of the church. Yet the archdeacon, if the defect be enormous, may enjoin a penalty, that after the limited time shall be expired, divine service shall not be performed in the church until competent reparation be made; so that the parishioners may be punished by suspension or interdict of the place. But if there are any particular persons who are bound to contribute towards the repair, and although they are able, are not willing, or do neglect the same, such persons may be compelled by a monition to such contribution under pain of excommunication; [376] that so the church may not continue for a long time unrepaired through their default." Lindwood, therefore, mentions no other compulsory process than spiritual censures in order to enforce the repairs; and the statute itself of *circumspecte agatis* seems to limit the Court to ecclesiastical censures. This doctrine has been recognised and referred to in cases in courts of common law.(a)

In any of the text-writers (Gibson, Watson, and others) he (Dr. Addams) could not find that the repairs of a church could be enforced otherwise than by ecclesiastical censures; in what way he did not trouble himself with. It might be said that the remedy was highly inconvenient, and he admitted it might be so; it might be impracticable, though he was not called upon to say so, or that it was obsolete, for he found that within the last year or two it had been held, in the Court of Delegates, not to be obsolete. In *Greenwood v. Greaves* (4 Hagg. Ecc. 77), instituted in the Consistory Court of York, and appealed to the Court of Delegates, it had been said by the Court, that "if the parishioners were contumacious and obstinate, and pertinaciously refused to make a rate collusively, it might be a ground for proceeding against them, though such a state of things was not alleged in that case." But admitting that the remedy was even impracticable, it was the only legal remedy; and though a legal remedy might be inconvenient, that did not justify parties in resorting to an illegal remedy, or the Court in allowing it.

[377] Perhaps, however, it might be said in this case that the Court was not asked to enforce the repairs of the church; all that it was asked to do was to compel a dissenting parishioner to pay a church rate; now, if the Court was of opinion that this was a church rate, the libel was admissible and the proceedings must go on. But the question was, Is this a church rate or not? He (Dr. Addams) denied that it was a church rate on the face of it. What was the definition of a church rate? A church rate was a rate made not by the churchwardens only, but by the churchwardens and parishioners. That could not be quarrelled with as a definition of a church rate. This was the first instance of a church rate (excepting a supposed case in the Court of Arches, in 1799) in the present form. The heading always ran—"We, the churchwardens and other parishioners;" so that the consent of the other parishioners was necessary to the validity of a church rate, at least under ordinary circumstances. Unless the consent of the majority of the parishioners be obtained, how could a rate be called a church rate? Then the only question was, Is this a rule which admits of no exception?

It had been suggested that there were two exceptions: one, where the parishioners, being duly summoned, shall refuse or neglect to meet for the purpose of making a rate; then the churchwardens, according to reason, to principle, and to recorded cases, are competent to make a rate themselves. That he (Dr. Addams) allowed. But the other exception contended for was where the parishioners did not refuse or neglect to meet, but did meet, and when met refused to make a rate; and if it be [378] maintained that in that case the churchwardens were competent to make a rate, he denied the proposition in toto. That was the present case. This was not a case where the parishioners set up that there had not been due and legal notice, or that the church did not stand in need of repair, but that they pertinaciously, wilfully, and of malice aforethought, refused a rate; he admitted this for the sake of argument; and the question was whether, under these circumstances, it was competent for the churchwardens to make a rate themselves, and for the Court to enforce it?

Was it not obvious that the whole current of cases in which there was a trace of church rate went to negative the churchwardens having such power? He had admitted that the remedy, which he contended to be the only legal remedy, was inconvenient. A century and a half ago the bishops and the Ecclesiastical Court had

(a) *Rogers v. Davenant*, 1 Mod. Rep. 195, 236. 2 Mod. Rep. 8. *Blank v. Newcomb*, Holt, 594.

attempted to obviate it in this way: the bishops and the chancellors of their Courts issued a commission empowering commissioners to tax parishes. But there were several cases in the books in which such a mode was held to be illegal—*Rogers v. Davenant*, already cited, in which the Court of King's Bench granted a prohibition. Could it be supposed, when the inconvenience of the remedy was felt, and the mode of obviating it was tried, that if the churchwardens alone had the power to make a rate, this experiment would not have been resorted to? The better way would be to proceed against the churchwardens; and the churchwardens might return that the parish would not raise the funds for the repairs of the church. The Court would then absolve them, or not absolve [379] them, by saying they might make a rate themselves. Would not the courts of common law grant a prohibition in the latter case? Lindwood, in the passage already cited, had considered this very case, and how did he lay down the law? "If the churchwardens came in and shewed that they were not to blame, they would be exonerated." If churchwardens could raise a fund by their own authority, it must be their own particular personal fault that a church was not repaired.

Was there any case the other way that was an authority? He did not refer to *Viner and Bacon*. The single case, or supposed case, to contravene the doctrine was an *Anonymous case*, 1 Ventris, 367, in 1684. That was a motion for a prohibition to the Ecclesiastical Court in respect to a rate which it was suggested had not been made with the consent of the parishioners; and the Court said that "if the churchwardens duly summoned the parishioners, and they refused to meet or make a rate, the churchwardens might make one alone for the repairs of the church, if needful, because the churchwardens would be the parties liable to be cited." The whole difficulty of the case arose from an error in a single letter, because if, instead of "or" make a rate, we read "to" make a rate, it would be perfectly reconcileable with the doctrine laid down in other cases; and the text writers who followed that case so understood it, and cited it as an authority.

It has been said that Bishop Gibson had adopted the case of Ventris as it stood; but this was an error. The only passage in Gibson which referred to this point was p. 1196, where he laid it down that the [380] parishioners are to be summoned, and if none appear, the churchwardens alone may make a rate, because they are to be cited and punished for neglect of repairing the church; and amongst the authorities cited for this is 1 Ventris, 367. Gibson therefore did not say that if the parishioners, being summoned shall meet and refuse a rate, it is competent to the churchwardens to make one. One of the greatest and most learned men ever known in this country, Prideaux, whose book, published in 1701, and which is a model for all such works, contains express directions for churchwardens to prevent the inconveniences resulting from their errors and ignorance, and which refers expressly to the repairs of the church and church rates, states (sect. 52, p. 55) that the churchwardens are to survey the repairs, and levy an equal rate on the parish to defray them; and that the rate must be made "with the consent of the major part of the parishioners;" that the churchwardens are to call a meeting of the parishioners, when whatever rate is made with the consent of the major part who come to the meeting will be a good and legal rate; or the rate may be made by the churchwardens alone, if, on calling a meeting, the parishioners shall not come. Amongst the cases cited here again as authorities for this is 1 Ventris, 367.

But there was one case, supposed to be decided by Sir W. Wynne in 1799, in the Arches Court, which excited his astonishment. If there was no mistake in that case, he (Dr. Addams) was sorry it had been brought forward; for a case of a more startling description he never met with. The case which had been taken from a manuscript note by [381] Dr. Arnold was *Gaudern v. Selby*, brought by appeal from the Court of Peterborough. A churchwarden had expended money on his own credit, and called on the vestry for a rate to reimburse him, and they refused it, and he thereupon levied a rate on his own authority; the judge in the Court below pronounced the rate a valid one, and Sir W. Wynne affirmed the judgment and condemned the defendant in the costs.

The Court—Dr. Lushington. In the Court below there was no allegation given in at all. On being brought up by appeal an allegation was given in, which was signed by Lord Stowell (then Sir W. Scott); it passed without debate, and on that plea and the evidence of four witnesses Sir W. Wynne decided the case.

Addams. The church had been repaired out of the churchwardens' own funds; the libel was false in that case. Yet the judge affirmed the sentence and condemned the party in the costs. Sir W. Wynne, according to the note of Dr. Arnold, laid it down broadly and distinctly that, where a parish refused to make a rate, the churchwardens were entitled to make one on their own authority. Nobody had ever heard of this case before. The report of the Ecclesiastical Commissioners shewed that they did not know of the case, or had forgotten it.

Dr. Lushington. A most extraordinary circumstance attending that case is that the citation is dated before the rate was made: and it was a citation to appear both in the Archdeacon's Court and in the Bishop's Court.

Addams. If the Court feels itself bound by that case, it must of course admit the libel; but for that [382] case the Court could have no hesitation in holding that, however inconvenient the remedy of the compulsory process of the Court may be, and whatever advantage might attend the investing churchwardens with this power, the Court cannot recognize it, and the rate in this case, so called, is only a pretended rate. In conclusion, he submitted to the Court that, even if it were a matter of obligation on a parish to repair the church, this was not an admissible libel and the suit must be stopped in limine.

The Queen's advocate, in support of the libel, said he should not enter into the question of the policy or impolicy of church rates; the Court had to determine only a mere question of law, namely, had churchwardens, where parishioners had met and refused to make a rate for the necessary repairs of the church, a right to make a rate, or had they not? Dr. Addams had said that the question branched out into two separate points—first, as to the liability of a parish to repair the body of the church, which he did not admit there was any obligation upon them to do, though he did not argue that point; but his learned friend would find it difficult to support the contrary proposition. At whatever time this obligation was adopted in England, certain it is that, by the law and custom of the realm, which are synonymous and convertible terms, a parish was bound to support the fabric of the church, that is, the body of the church, though not the chancel, the repairs of which devolved upon the parson. The case in Lord Holt proved this, and it was so laid down by Lord Coke. Then, as to the manner of making the rate, that is, the power of the churchwardens to do [383] so, in case the parish refused. Dr. Addams said that no text-writer, except Viner and Bacon, laid it down that churchwardens had the power of making a rate in such circumstances, and that there was no other authority than the case in Ventris. Degge in his *Parson's Counsellor*, a book of considerable authority, and cited as an authority of the highest order, in p. 204 (ed. 1820), said that if the parishioners who came to a meeting duly summoned to make a rate, refused or neglected to agree to such an assessment, or refused to meet, "I conceive," he said, "that the churchwardens, shewing just cause, may make the assessment alone." Now it was admitted that this was such a case. The church was out of repair, and the churchwardens were in want of funds to pay for the repairs. Degge does, indeed, intimate that others had doubts on the point, "but some are of opinion," he says, "that the churchwardens cannot proceed alone, but must compel the parishioners by ecclesiastical censure;" and he refers to *Mod. Rep.* and the case in Ventris. The conclusion, however, to which he arrived is, that churchwardens have a right to make a rate if the parish refused to do so. The passage in *Rogers v. Davenant* was a mere obiter dictum: nothing was done upon the case, and it did not negative the right of the churchwardens. That case went merely to say, that a bishop cannot appoint a commission to levy a rate to "re-edify" the church. It was said, in that case, that the Spiritual Court may proceed against such parishes as are obstinate and refuse to repair the church, by excommunication; "but they may be also liable to pay the rate set by the churchwardens," not the [384] churchwardens and other parishioners. The fair construction of this was, that if the parish refuse to make a rate the churchwardens may, and libel for it in the Spiritual Court. Of the case of *Pense or Pierce v. Prowse* there are three reports; Lord Raymond's is the fullest. The prohibition in that case went on the ground that the rate was a mixed rate, for the chancel as well as the church, so that the proportion for which the parishioners were legally liable could not be ascertained. The case in Ventris was the most important on the question, and Dr. Addams could not get out of it but by altering the text. It was a motion for a prohibition, on the ground that the rate had been made without consent of the parishioners. The Court

said that the churchwardens, if the parishioners were summoned and refused to meet "or" to make a rate, might make one alone for the repairs of the church, if needful; because, if the repairs were neglected, they would be cited, and not the parishioners; and a day was given to shew cause why the Court should grant a prohibition. But nothing followed. This case had never been upset, and all the other cases were consistent with it. If a parish duly meet and refuse a rate, or if they refuse to meet, the evil is the same, and the remedy ought to be the same. Viner says, "If the parishioners be summoned and refuse to meet 'or' to make a rate for the repairs of the church, the churchwardens may make a rate alone, if needful; because if the repairs are neglected, the churchwardens are cited, and not the parishioners;" and a reference is made to 1 Ventris, 367. Bacon says, "But if the churchwardens give the parishioners due notice, and they refuse to [385] come, 'or,' being assembled, refuse to make any rate, the churchwardens may make a rate without their concurrence." With respect to the case of *Gaudern v. Selby*, there certainly appeared to be anomalies in that case, it being a rate to reimburse, for example. But in 1799 the strictness introduced by the courts of common law on this point was not known. If the learned judge was wrong on that point, it did not follow that he was wrong on another. He was one of the most eminent judges in the Ecclesiastical Courts, whose decisions were looked up to with great respect; and, whatever irregularity there might be in that case in the Court below, he did decide on principle that churchwardens were bound to see to the necessary repairs of the church; and if the parishioners would not make a rate, the churchwardens alone had a right to do it. The Court of Arches, therefore, had decided the question on appeal, and this Court was bound to follow the law as laid down by the superior Court, whatever its own private opinion might be. In conformity, therefore, with the decision of the Court of Arches, this Court was bound to admit the libel.

Nicholl on the same side. The adjournment of a rate for a twelvemonth (which a former vestry had also done) is in the eye of the law a positive refusal of a rate; and the churchwardens, being bound by law to keep the church in repair, had made a rate themselves. It may be assumed that a parish is under a legal liability to repair the church. Then, if the parish neglected this duty, what was the remedy? The Court would bear in mind the object to be attained—namely, the sustentation [386] of the fabric of the church, not the punishment of an individual for not doing it. If it was obligatory on a parish to repair the church, and if the Court could only order a parish to meet and make a rate, they might defeat the object by their obstinacy. When it was doubtful what the law was, one had a right to argue from the inconvenience which would arise, if such and such were the state of the law; where the question then is, whether it is the law that churchwardens can make a rate upon the refusal of the vestry, it may be argued, that from reason it may be supposed that such right does exist, because great inconvenience would result from the contrary proposition. We do not deny that, in the first instance, the churchwardens are bound to summon the vestry, and the vestry have a right to consider the estimates laid before them, and whether the amount to be raised ought to be raised immediately, or in one or more sums, and if they fairly go into the question, and exercise a proper discretion on the subject, they may reject the rate. But in a case of necessity, where a rate for the repairs of the church is refused by the vestry, the churchwardens are justified in making a rate, and this Court would sustain it. The power of churchwardens is limited within the narrowest bounds; they must establish the necessity of the expenses before the Court. It was admitted that churchwardens were not bound to expend their own money; if so, and if they are liable to punishment for not repairing the church (as held by Lord Stowell in the [387] *Thaxted case*), (a) they must have some means of raising the money, and that was given to them by the power contended for. The opinion of Degge was favourable to this doctrine; Watson, Bacon, and Viner laid down the law as in the case reported in Ventris, and the very point had been expressly decided by Sir William Wynne in the case of *Gaudern v. Selby*.

Judgment—*Dr. Lushington*. The question which is submitted to the consideration of the Court is one of very great importance, and I should undoubtedly take time to consider the determination which I ought to come to were it not for the intervention

(a) *Maynard v. Brand and Philpot*, 3 Phill. 501.

of circumstances in this case which appear to me to render such delay unnecessary, and, being unnecessary, the sooner I deliver my judgment the better.

It is not necessary to enter into the details of the proceedings which have taken place; a very few words will explain sufficiently the point of law that arises.

It appears that the churchwardens of the parish of Braintree summoned a vestry meeting for the purpose of having a church rate made, that the parishioners met, and that a large majority of the vestry did not make the church rate, but, on the contrary, postponed the consideration of it for twelve months. I have no hesitation in saying that, in my judgment, the postponement of a church rate for twelve months was, under the [388] circumstances of the present case, equivalent to a total rejection. In consequence of this refusal the churchwardens thought fit to make a rate upon their own authority, and to rate and tax the parishioners of the parish "towards the necessary repairs of the church of the said parish, and the other expences necessarily and legally incident to the office of churchwardens of the said parish for the remainder of their year of office, the several sums of money hereunder mentioned, being a rate or assessment of three shillings in the pound on the annual value of all messuages, lands, and tenements occupied within the said parish." Some of the parishioners having refused to pay the rate, proceedings have been instituted in the Court which has properly jurisdiction over the subject, in order to enforce payment, and as all the facts and circumstances are fully stated in the libel, it is unnecessary for me to enter into further detail. Upon these facts a great and important question of law arises, namely, whether the churchwardens have the power and authority to make an assessment upon the parish in the nature of a church rate, and for the purposes mentioned, a vestry having assembled in pursuance of due notice and refused to make such a rate?

It is not a little singular that a question of this very great importance should come to be decided in the year 1837. One would naturally have supposed that in the lapse of so many years since the Reformation there would have been some instance in which church rates had been refused by the parish, and made and enforced by the churchwardens, if they had the power to do so, [389] and some decisions upon the point. But, with the exception of a case hereafter to be noticed, it does not appear that in these courts that point has ever been directly put in issue, or directly determined. In the first instance, then, it becomes my duty to inquire whether or not that case of *Gaudern and Selby* is a binding authority, because, if it be a stringent authority, the jurisdiction of the Court in which it was pronounced, will certainly make me consider it to be no part of my duty to enter into an examination of the merits of the case; for whatever might be the conclusion to which I might in my own mind come, I should feel myself bound by authority to pronounce one and only one judgment.

This leads me, before I examine the particular merits of the present case, to inquire a little into the rules and principles on which precedents are binding. I apprehend that where Courts have co-ordinate jurisdiction, that is to say, where decisions are pronounced by Judges professing the same degree of jurisdiction, a single precedent might or might not be binding, according to the peculiar circumstances of the case; it ought to be binding where it was acquiesced in for a series of years, and where it was considered as a good and valid authority by other Judges, whose opinions were entitled to weight; on the other hand, I apprehend that a single decision, if unknown, and unsanctioned from the time of its being pronounced, is open to be considered upon principle by a co-ordinate Court, whether it be a right or wrong decision, not to be hastily overruled, but to be considered whether or not it is consistent with that which [390] has been laid down by other Judges. But in the case of a precedent laid down by a superior court, other considerations necessarily arise. I apprehend that an inferior court cannot, of its own authority, reject the precedents repeatedly laid down by a superior court. There might indeed be some very peculiar circumstances under which an inferior court would feel it a part of its duty to investigate the question with considerable care; looking, for instance, at the very highest authority, the House of Lords, that had not on all occasions been held as altogether binding, but that was under circumstances so totally different that it is not necessary to advert to them, but without some very peculiar circumstances such precedents would undoubtedly be binding.

I apprehend that obedience to a superior court is one of the first duties that an inferior Judge has to perform, as the presumption of law is that the Judge of the superior court is not only superior in rank and station, but in judgment also and

ability; and the evil which would arise from uncertainty, if any Judge were to allow himself to be let loose from precedents, and to give his judgment according to his own impression of each individual case, would overwhelm and be destructive of the best interests of the people, for the great interest of the people is that the law should be certain, and that all should know by what rules they should govern themselves. Upon these principles I have always endeavoured to regulate my conduct, even under circumstances where my own private opinion might have led me to a different result.

The first question, then, which I have to deter-[391]-mine, is whether there is a precedent here or not, and this is a very important question. To form a precedent certain things must unite: in the first place, the actual point must have arisen, and if it is to govern the present case it must stand with it (to use a common expression) on all-fours. The point must have been directly decided, and that decision must not have been overruled by any subsequent decision. These, I apprehend, are the rules and principles which should render precedents binding. The present question then is whether the case of *Gaudern v. Selby* is a precedent or not. That case came with the appearance of surprise upon the whole profession. It was not known to the Ecclesiastical Commissioners, or at least it was not recollected by any of the members of the commission; and during the thirty years that I have been in this Court I never heard the case adverted to, nor was I aware that there was such a case in existence till very lately. But it is obvious that this does not destroy its force, if upon examination it be found clothed with the other qualities which constitute a precedent. The case was decided by a very learned and accurate judge, Sir William Wynne, on the 25th of February, 1799, he being then dean of the Arches Court. There were no reports of ecclesiastical cases published in those days, but there were two notes taken of the case by Dr. Arnold and Sir Christopher Robinson, both accurate note takers, and the notes of both are substantially alike. As to the case itself, it is certainly one in which, not to use too strong a term, there appears to be a great deal of eccentricity. The citation was dated [392] the 17th of April,^(a) 1794, the party appeared on the 28th of May, and the rate was stated to have been made on the 11th of May. There must, therefore, have been some mistake either in the month or the year, but which it was I cannot undertake to say. The libel alleged that due notice had been given, and that the rate had been made with consent of the majority of the parishioners; but it was proved in the evidence that, so far from this being the case, the majority had disallowed the rate. Upon this state of the case the judgment was pronounced. The learned judge did not advert to any authorities: he said he was of opinion that the repairs were necessary, and that as the vestry had been called upon to make an assessment for defraying the expence of these repairs, and had refused to do so, the churchwardens had a right to make a rate for the purpose, themselves. This was the result of the case. The point was there distinctly put in issue, and evidence was taken of the facts, so that Sir William Wynne had not only the point of law before him, but all the facts as proved in evidence. But the point there decided was the very point upon which I have now to decide. I do not hesitate to say that if I were a co-ordinate judge the total absence of all authorities and precedents would have formed a matter of weighty consideration in my mind, as to whether I should have allowed my opinion to be governed by the judgment in that case. But that judgment had been [393] deliberately pronounced by the dean of the Arches, a superior court to that in which I am now sitting. As my judgments are liable to be submitted by appeal to the dean of the Arches, and to be overruled by him, whose decisions constitute the law which I am bound to administer; looking at these circumstances, and at the principles I have myself laid down, I feel myself bound by the judgment pronounced in the case of *Gaudern and Selby*, and in obedience to that judgment to admit the present libel. Whether this be good law or not, or what ought to be the law of the case, is a question upon which I do not consider myself called upon to pronounce any opinion. I may, however, observe that there are other reasons for not entering into the merits of the case, though those I have stated are satisfactory. I think that, upon a question of such great importance, and which, I suppose, from what fell in the course of the

(a) This appears to have been a clerical error, the citation it seems, although dated April, issued on the 17th of May, as the party is called upon by it to appear on the 28th day of this instant May.

argument, will be carried to another tribunal, it would be better that it should go there in no way affected by my judgment, in one way or the other.

The Court then admitted the libel.

[394] GAUDERN v. SELBY. (a) Arches Court, Feb. 25th, 1799.—A churchwarden may of his own authority make a church rate.

Appeal from Peterborough.

Court. This is a case commenced by citation, April, 1794, by Selby, churchwarden for 1793-4, in the parish of Eastern Maudit, for church repairs.

The rate amounts to 31l. 6s.; at the head of that rate Mr. Gaudern charged 9l. 6s. 0½d.

The libel pleads, vestry, May, 1793, and resolution of vestry for rate of 9½d. in the pound, and that Gaudern, at time of making this rate, occupied lands at rent of 200l. per annum. Suit before the surrogate of the archdeacon and chancellor of Peterborough.

Decree against Gaudern, with costs of suit; from that sentence this appeal brought.

Allegation, that the repairs that were necessary might have been done for less than 31l.

That no notice was given in the church of vestry.

That the article stating general concurrence untrue.

Rate generally disallowed.

Not denied that church in want of repairs.

No fraud or improper practice alleged against churchwardens.

[395] No inequality or unfairness alleged against the rate.

Admitted by Gaudern that he occupied the sum mentioned, and the rate fair.

But ground that is taken, two objections—

Repairs not such as to require 31l.; and rate not made by parishioners in vestry.

With respect to first, I take that law which has been laid down, that churchwarden, from office, bound to keep the old edifice in repair. He cannot buy a new bell, or build gallery, or make any addition, and that he does not want authority of parishioners for those repairs any further than by their election of him to office, nor can parishioners object the repairs improvident; if they are injured, it is by the indiscretion of their own choice. They may indeed remove the churchwarden by proper application to the Court, but they cannot refuse to indemnify him for sums actually expended in repairs, other articles of expence, wine for sacrament, sweeping of the church, attendance on visitation.

But it is said these ought to be specified. But I think the gentlemen who say so confound two things: the minutiae of this rate, and the items of expence, which a churchwarden must give an account of; for every sum beyond 40 shillings a churchwarden must produce vouchers, for forty shillings I believe his own oath is sufficient. If, therefore, it could be proved that, after passing all his accounts and necessary deductions, the sum required might be under 31l.; yet what of that? the rest would not be lost to the parish, it would remain to be transferred to his successor. No [396] objection, therefore, could lie on that ground. But I think the evidence of the case shews the church was in want of the repairs done; commandments obliterated: these necessary to be renewed, enjoined by canons; King's arms, though these are not by canons, yet by King's proclamation after the Restoration to acknowledge the King's supremacy: where these had been hung up before, extremely proper they should be continued.

As to assessment, not necessary that it should appear by assessment that it was an equal assessment. But that not before the Court, as that makes no part of Mr. Gaudern's objection. The objection that no notice was given in the church is utterly unfounded. They seem to have confounded two circumstances.

Vestry, to authorize churchwardens to make repairs not necessary. That vestry was called for purpose of making assessment is positively sworn. Mr. Byerly says he was at the vestry, and that Gaudern was there; that they offered Selby a rate of 6d. per pound, but he would not accept it. Other witnesses, Manning and Clayson, they

(a) This is a verbatim report from the MS. notes of the late Sir Christopher Robinson, furnished me by my friend Dr. Robinson, his son.

say, they and other landholders objected to repairs as improvidently and extravagantly made. Offer of payment of part; refusal of Selby. In my opinion, churchwarden perfectly justified in doing that. If repairs such as he was authorized to make, the offer of less than repayment oppressive and unfair.

What is the case then? Vestry refused to make the rate. What the law? I do apprehend the churchwarden has a right to make such a rate himself. He cannot do it without calling on them, [397] undoubtedly; but if they refuse, if they object improvidence, no matter. If repairs have actually been made, on the refusal of parishioners to make rate I am of opinion he may by law do it himself. It is said that churchwardens might have proceeded against parishioners by ecclesiastical censures to make a rate. But how is that to be done? Is the parish to be put under interdict? The churchwarden, indeed, is sworn to his discharge of his office, and if he neglects he may be proceeded against by ecclesiastical censure. But that would be no remedy for him against the parishioners.

On the whole, as I think the churchwardens have been justified in what they did, and there has been a combination against them by some individuals, for I cannot call it a parish act, I shall confirm the decree of the judge below, and condemn the appellant in the costs of the appeal.

SANKEY against LILLEY AND THE KING'S PROCTOR.(a)¹ Prerogative Court, Trinity Term, 1st Session, May 27th, 1836.—A will pronounced against, the attesting witnesses only having been examined. The deceased being of advanced age and very infirm, and the instrument having been drawn up from directions given by the executor, and no instructions being proved to have been given by the deceased.

This was a cause of proving, in solemn form of law, the alleged last will and testament of Mary Decaufour, late of Grove Lane, Canterbury, spinster, deceased, bearing date the 14th November, 1834. The will was opposed by Mary Lilley (wife of Isaac Lilley), the sole legatee, in a will of the deceased, dated the 26th June, 1826.

[398] The deceased died on the 8th June, 1835, aged above eighty years; she left no property except a few articles of furniture, and what she might be entitled to, on the result of a suit in Chancery, on the construction of the will of Mrs. Mary Braddon (her niece of the half-blood), to whom she was next of kin and heiress at law.

By the will now before the Court the deceased left two hundred pounds to the Kent and Canterbury Hospital; fifty pounds to the Lying in Charity, Canterbury; five hundred pounds to Mr. Charles Miette, and of the residue, both real and personal, she gave two-thirds to Ann Woollett, her nurse, and the remaining third to Mr. Robert Sankey, solicitor, Canterbury, and she appointed him sole executor, and the will proceeded, "And I particularly direct that in addition to the benefit he may derive under this my will, he shall be allowed to retain all costs, charges, and expences, which he has already, or may hereafter incur, in establishing and prosecuting my claim, as the next of kin, and heiress at law of the said Mary Braddon, deceased, or otherwise as my attorney; and also, all monies which he may have paid, or shall pay to me, or for my use and benefit, and I declare that, notwithstanding his appointment as executor of this my will, he shall be entitled to make all usual and customary charges, as an attorney and solicitor, for any business done by him relative to my affairs, and that in the same manner as if he had not been appointed an executor, but as acting in the character of attorney, or solicitor to the executor of this my will." This will was propounded in [399] a conditit, on which W. P. Beecham,(a)² James Clarke, and

(a)¹ On this cause coming on for hearing on a former day the Court thought that notice should be given to the King's proctor, as it appeared that the deceased left no known relations, and the residue under the will of the 26th June, 1826, being undisposed of, in consequence of which an appearance was given for the Crown.

(a)² The evidence of Beecham, which is virtually the same with that of the other subscribing witnesses, was to the following effect:—William Pain Beecham of Hawkhurst, in the county of Kent, attorney-at-law and solicitor, aged thirty-six years, a witness, produced and sworn on his oath, deposes and says as follows:—

To the conditit and the paper writing therein propounded, I did not know Mary Decaufour, the deceased, in this cause, and never saw her till I went to her to receive instructions for the will in question. On the 14th of November in the last year, the same day as that on which the will bears date, I went to the deceased by the desire

William Wood, the subscribing wit-[400]-nesses, had been examined—they were cross-examined on behalf of Mrs. Lilley, but no plea was given in on her part.

[401] Lushington and Nicholl for Mr. Sankey.

Addams for Mrs. Lilley.

The King's advocate for the Crown.

of Mr. Sankey, who is an attorney at Canterbury, and one of the devisees named in the will in question, of which he is also sole executor. I have long known Mr. Sankey—we are great friends. He sent a messenger for me, who arrived at an early hour of the 14th of November at my house at Hawkhurst, bringing a letter which I have with me, begging to see me at Canterbury, and saying that the messenger he had sent would bring me back. The communication between Canterbury and Hawkhurst is difficult; I reached Mr. Sankey's house that afternoon. I think that on my seeing him he told me at once that he wished me to make the deceased's (the old lady's as he called her) will for her. I knew pretty well that this was his object of my visit, for being on terms of strict intimacy with him, Mr. Sankey had told me that it was probable he should be benefited by her will; and I had then begged of him, if it were so, that he would not make it himself, but send for me and I would do it; this occurred a few months or weeks, but my recollection fails me as to how long, before. Mr. Sankey produced to me a paper which he said he presumed would be the old lady's instructions for her will; they were in fact in the form of a draft will, and in the handwriting of Mr. Sankey. I think that that paper has been destroyed, but I am not sure; I slightly looked at it, and seeing that he was to be benefited, I told him that I had better not attend to them, but receive the instructions from the lady herself; I then, as I now best recollect, sat down at Mr. Sankey's house, and began preparing the draft of a will for the deceased agreeably to what I thought, from what I had heard Mr. Sankey say, would be the old lady's will. I am not quite clear upon that, but I think I did; I began the draft will there certainly before I went to her. I then accompanied Mr. Sankey to the deceased, whom I found a bedridden old lady, in a lodging, a mere hovel in Grove's Lane, in a wretched state of pauperism to all appearance. A nurse and the nurse's husband were with her, in a room up one flight of stairs and a portion of another; it was no better than a sort of den. Mr. Sankey introduced me as the person who attended to make her will; the nurse then said to her of me, this is the gentleman; the deceased said very well. The nurse told me that the deceased was deaf, and I went and seated myself on the bed. I sat by her for about a quarter of an hour, entering into general conversation with her, previous to mentioning the subject of her will. I saw that she was of great age and very infirm; the object of that conversation was to ascertain the state of her mind; and the result of it was to satisfy me that she was competent to undertake and explain what her wishes were. I commenced it by inquiring as to the state of her health, and how long she had been confined. I then asked her as to her relations, and questioned her particularly as to Mrs. Braddon, through whom she became entitled to the property. She told me that Mrs. Braddon was her aunt, and that she (the deceased) was the only surviving branch of her family. I asked her if there were any persons living who were her relations, such as we should term next of kin, or heirs at law; she told me not that she knew of, she could answer for the most part only in monosyllables. I therefore put the question to her thus again; When you are gone will all your family be gone? She answered, Yes. I questioned her as to her age and the place of her birth. I think she said as to her age, about eighty; I forget the answer as to the place of her birth, but she named it. I then questioned her as to her property. I asked her if she was aware that she would be entitled to a considerable sum as the nearest relation of Mrs. Braddon? She answered, Yes. I said to her then, I am now going to make your will to give that property away. What do you wish to do with it? I think that she paused, and I then put the questions to her in a leading form—Do you wish to give your nurse the greater portion of it? The deceased replied, Oh, yes, she has been very kind to me. I asked to whom else will you give anything? I think her answer was the nurse, whom I think she called Mrs. Woollett, and Mr. Sankey. I then asked her from the paper, which I now have in my hand, questions as to the specific legacies. Did she wish to give 200l. to the Kent and Canterbury Hospital. She said, Yes. I questioned her in the same way as to each of the other specific legacies as they now stand in the will, and she answered in the same

[402] Sir H. Jenner. Mary Decaufour, spinster, the deceased in this case, died on the 8th of June, 1835. The will [403] before the Court bears date the 14th November, 1834; it is propounded by Mr. Robert Sankey, [404] solicitor, the sole executor named therein, and is opposed by Mrs. Mary Lilley, the sole legatee in a former will, dated the 26th June, 1826.

The Court here stated the contents of the will, and proceeded: Mr. Sankey was

manner. I had in my hand the rough draft of her will, from which I asked her these questions; the legacies were the same in that as they now are in the will, and I must have so written them at Mr. Sankey's house, gathering her intentions from Mr. Sankey's paper. I then asked her as to the rest of the property, to whom would she give that—she said, The nurse and Mr. Sankey. I then asked her as to the proportions in which she would so give it. She said more to the nurse. I then tried to ascertain in what proportions, and I asked her how much, and then would she like to give two-thirds to the nurse and one-third to Mr. Sankey? She said that would do. I then asked her again as to relations, and whether there were any to whom she wished to leave anything, and she said there were not. I then put some questions to her, in order to ascertain why she left any portion of her property to Mr. Sankey. I asked her who told her that she was entitled to the property of Mrs. Braddon? She said Mr. Sankey. I asked her, Who is endeavouring to recover this property for you? She said Mr. Sankey. I said, If he fails, have you any means of paying him? She said, No. I said, And therefore if he recovers it, you wish him to have this portion of it, and you wish the nurse to have the other portion of it, because she has been kind to you? She answered, Yes; and I said, You have no relations or other friends to whom you wish to give it? She replied, No. That terminated the instructions. All this passed without interference from any other person, except that the nurse now and then took the question out of my mouth to make her hear more distinctly. Mr. Sankey and the nurse's husband were present. The nurse then at my desire talked to the deceased for my satisfaction, that I might be assured of her having understood me; and after a few minutes so occupied I went away with Mr. Sankey to his house where we separated; and I, without interference from him, revised and completed the draft. I then read it over to Mr. Sankey, who at my request gave it to his clerk to be fair copied. The draft will now depose of is that which I delivered in to be annexed to my deposition. On looking it over I am unable to point out very particularly what was altered after I left the deceased; in substance it is the same as far as relates to the disposition of her property; it was completed before I left Mr. Sankey's house to go to her; no alteration was made in it in that respect; whatever was done afterwards, and in consequence of my interview with her, was merely formal. In the evening of the same day, about seven or eight o'clock, I went again to the deceased; I was then accompanied by William Wood, Mr. Sankey's clerk. We took the will with us; Mr. Sankey in the mean time went to procure another witness. Mr. Wood and I were at the deceased's dwelling, and with her for some time before the others arrived. I again entered into conversation with her, but merely on indifferent subjects; whether she was comfortable or was suffering pain, and the like; the nurse and her husband were also present. Before Mr. Sankey and the other witness came, I sat on her bed and read the will to her twice. I paused at the end of every bequest, and asked her if she understood it, and whether that was her intention? to each of which questions she replied, Yes. Mr. Sankey having arrived with the other witness, I went again to the bedside, asked her if I had read that paper over to her, whether she understood that it was her will; and whether she wished her property to go as stated in that paper; she answered Yes to each inquiry. I asked her if she could write; she said, No, adding, I think, I never did write, or to that effect: I then told her that she must make her mark. I got pen and ink, put the pen into her hand, the nurse supported her a little with a pillow behind. I held her hand containing the pen, and thus having compressed it, so as that she could hold the pen, her hand being in some degree at least paralysed, she with my assistance just drew the pen so as to make the mark to the will. I repeated the usual words of publication, at the end of which she said, I do. I believe that I said to her, Say, I do, and she said it. I, and the two other witnesses, then attested the execution of the will in the usual manner in her presence, and in that of each other. Mr. Clarke, one of the witnesses, entered a little into conversation with her as I recollect; then

introduced to the deceased about a year before her death; what the value of the property was, to which she was entitled under the will of Mrs. Braddon, does not appear, nor of what that property consists, but it is said to be considerable. The deceased had no property whatever in possession at the time of her death, she was indeed in a state of actual pauperism.

I came away with Mr. Sankey and the two other witnesses: I returned to Mr. Sankey's house, where I sealed up the will, and gave it to Mr. Sankey. I should think that I was with the deceased for about three quarters of an hour the first time, and nearly as long the second. I do not remember that any thing else passed besides what I have deposed, I do not know that the deceased was capable of expressing what her wishes were without the assistance of questions; because, I believe that she could not hold conversation, or speak at such a length as would be requisite for that; but I do believe, and I have no doubt, that she was quite capable of forming proper wishes as to the disposal of her property, and of expressing them with the kind of assistance of which I have deposed. I am perfectly satisfied that she was competent to understand any question that was put to her, and of refusing assent to any proposal which might have been submitted to her. The will, as executed, contains what were, as I have no doubt, her testamentary intentions; I believe her to be of sound mind, memory, and understanding, and capable in the way and to the extent of which I have deposed, of giving instructions for, and of making and executing, her last will and testament, and of doing any other serious or rational act of that, or the like nature, requiring thought, judgment, and reflection. The paper writing now shewn to me, marked (A), as propounded in this cause, is the will of which I have deposed. From what I have before deposed, and from my having used the words "considerable property," it would appear, but not otherwise, that she was aware of the nature or amount of the property of which she was disposing by her will, what it may amount to is, I believe, uncertain.

(Signed) W. P. BEECHAM.

The same witness on interrogatories.

Eighth. I believe that the producent and the deceased did not stand in any other relation towards each other than solicitor and client.

Tenth. I was not present when any other instructions were given for the will in question than those of which I have deposed. I cannot more particularly than I have done depose to the way in which those instructions were given. No person gave any advice, directions, or instructions to the deceased in my presence, or to my knowledge; neither was my advice offered to her by any one excepting, as I did myself suggest the proportions in which she might wish to leave the residue of her property between the nurse and Mr. Sankey. I have no written instructions for the will in question but the draft will which I have produced. I never saw any other instructions for it, except that paper of Mr. Sankey's, of which I have deposed, I cannot positively say that the paper is not yet in existence, but I believe it to have been destroyed.

Thirteenth. I cannot further answer the matters inquired of than as I have deposed on my examination in chief, save that I do not know, and I have no reason to believe, that there was any secrecy or clandestinity in the transaction of the will in question, so that the fact thereof should not come to the knowledge of either of the deceased's relations (of whom she had none, as I believe), or of the executors and trustees of the will of the aforesaid Mary Braddon or of their solicitor.

Fourteenth. The deceased did publish and declare the will in question, as I have before deposed. The deceased did what she did of her own accord and free will, decidedly so, not at the dictation of any one, or suggestion, excepting as I have before deposed and assisted, as I have said. To the precise words that passed, as far as I could remember them, I have already deposed. The deceased did not request me or the other witnesses to sign our names, as such otherwise than as that request formed a part of the publication of her will.

Sixteenth. I do undertake positively to swear, positively to my belief, that the deceased was capable of knowing, and that she did know and understand, the full nature, contents, and effect of the will propounded in this cause, and that she fully approved of the same.

Seventeenth. I do undertake positively to swear that I do not know, and that I have not any reason to believe, that there was any control or undue influence or importunity, or fraud, contrivance, or circumvention, used or practised upon the

The will has been propounded in a condidit, upon which the three attesting witnesses have been examined, and the question is whether the deceased is proved to have been a capable testatrix, perfectly understanding what she did, when this will was executed—she was upwards of eighty years of age, and very infirm; she was deaf and almost blind, had been bedridden some years, and was living in a place described by one of the witnesses as little better than a den. Mr. Beecham, who drew the will, had never seen the deceased until the day on which the will was executed. He is an intimate friend of Mr. Sankey's, and was employed [405] by him to prepare the will; it would have been more proper if Mr. Sankey had selected a person with whom he was not upon quite such intimate terms. Mr. Beecham says, Mr. Sankey gave him a paper which he, Sankey, presumed would be the instructions of the deceased; upon the production of that paper Mr. Beecham observed, "I had better not look at this;" and it certainly would have been better had he not looked at it at all, for he then prepared a draft of what he was told by Mr. Sankey would be the deceased's will. The Court then, after reading Mr. Beecham's evidence, said, there is nothing, then, to connect the paper drawn up by Mr. Sankey with the deceased; the witness says that he is satisfied that the deceased was of sound mind; that may be his impression, but the question is, are there facts enough to satisfy the Court that the deceased was fully capable, and that this was her will? The evidence of Mr. Clarke and Mr. Wood, the other witnesses, does not differ from that of Mr. Beecham.

Looking then at the advanced age of the deceased, the manner in which this will was drawn up, and its contents, and seeing that no instructions are shewn to have been given by the deceased, the Court requires more to satisfy it that this was her act; she is not proved to have been capable of originating such a disposition of her property.

The instructions are taken from a paper of Mr. Sankey's, he being the deceased's solicitor, and appointed the executor of the will, and the draft of the will is prepared by Mr. Beecham before he saw the deceased.

The Court does not suppose that any fraud was [406] practised upon the deceased, it therefore does not condemn Mr. Sankey in costs, but pronounces against the validity of the will, on the ground of failure of proof.

The costs of Mrs. Lilley were allowed out of the estate.

TREVANION *against* TREVANION. Consistory Court of London, Michaelmas Term, 2nd Session, Nov. 17th, 1836.

[Affirmed, p. 493, post.]

On the admission of an exceptive allegation.

This was a question as to the admissibility of an exceptive allegation in a cause of divorce by reason of adultery, promoted by John Charles Bettsworth Trevanion, Esq., against Charlotte Trevanion, his wife. Various pleas had been admitted in the cause, and publication of the evidence had passed. After publication a further plea (a)

deceased in the making, framing or procuring from the deceased the execution of the will in question.

(a) This allegation pleaded, 1st. That in the month of August, in the year 1835, Charlotte Trevanion, party in this cause, accompanied her mother, Mrs. Mary Tre-lawny Brereton, to Dover in the county of Kent, where they lived together till about the end of the month of October in the said year. That about the latter end of September, or the beginning of October, a tall gentleman, with very dark whiskers, passing under the name of Hopkinson, was observed to walk up and down past the house of the said Mrs. Brereton, while the said Charlotte Trevanion was observed to be sitting at the window of the drawing-room of the said house. That about the same time the said Charlotte Trevanion rode out on horseback, accompanied only by her groom, for several days together along the Old Folkestone Road, which is less frequented than the other roads in the neighbourhood of Dover, and the said gentleman was observed to be stationed in a particular part of the said road. That in the course of a few days the said Charlotte Trevanion, having contrived to make acquaintance with the said gentleman by means of dropping her whip as she passed him on the aforesaid Old Folkestone Road, he on that and on other occasions afterwards walked by the side of her horse and conversed with her.

2nd. That having discovered the name and address of the said gentleman through her said groom, whom she ordered to make inquiries for that purpose, the said

was admitted [407] on the part of the husband charging the wife with adultery at Dover, and its vicinity; on this allegation [408] six witnesses had been examined. The present allegation (a) exceptive to the testimony of Thomas [409] Shepard, one of those witnesses, was offered to the Court on behalf of Mrs. Trevanion.

[410] Phillimore and Nicholl opposed the allegation.

The King's advocate and Addams argued in support of it.

[411] *Judgment*—*Dr. Lushington*. I am now to deliver my opinion upon the

Charlotte Trevanion commenced and carried on a secret and adulterous intercourse with him. That she on several occasions went alone to a stable where he kept his horse, and was there met by the said gentleman, who accompanied her therefrom. That on one occasion she waited at the said stable a considerable time until the arrival of the said gentleman thereat, and then they went away together. That the said gentleman was also observed loitering near Mrs. Brereton's aforesaid house late in the evening, and at an hour when Mrs. Trevanion was in the habit of walking out alone. That the said Charlotte Trevanion and the said gentleman were afterwards seen walking together late in the evening in unfrequented places in or near Dover.

3rd. That on one occasion the said Charlotte Trevanion rode on horseback, followed by her said groom, for four or five miles along the London Road, to a place called Lydden, where she dismounted and went into a small inn, called the Bell Inn, at that place, and inquired for the said gentleman, who had arrived there previously. That on another occasion, shortly afterwards, she again met the said gentleman at the said inn by appointment. That whilst thus at the said inn the said Charlotte Trevanion and the said gentleman remained together by themselves in an apartment up stairs for a considerable period of time on each occasion, and on one of such occasions the waiter at the said inn, on taking some refreshment to the room in which they were, found the door thereof locked; and that on the occasions of the said Charlotte Trevanion and the said gentleman walking together as aforesaid after dusk, and on the occasions of their resorting to the said inn as aforesaid, divers great and indecent familiarities passed between them, and they had the carnal use and knowledge of each other's bodies, and committed adultery together; and that the gentleman, with whom the said Charlotte Trevanion became acquainted, and with whom she was seen walking late in the evening, and with whom she so had carnal intercourse as hereinbefore pleaded, was not John Charles Bettesworth Trevanion, Esq., the party promoting this cause.

4th. Was the usual concluding article.

(a) The exceptive allegation was as follows:—

1st. That no faith or credit, at least sufficient in law, is or ought to be given to the sayings and depositions of Thomas Shepard, a pretended witness, produced, sworn, and examined on a certain allegation bearing date the second session of Easter Term, to wit, Thursday, the twenty-eighth day of April, one thousand eight hundred and thirty-six, given in and admitted in this cause on the part and behalf of the said John Charles Bettesworth Trevanion, one of the parties therein. For the party proponent doth allege and propound that the said Thomas Shepard hath in his deposition made and given in this cause, and in his answers to certain interrogatories administered to him on the part and behalf of the said Charlotte Trevanion, knowingly and wilfully deposed and answered falsely and corruptly, as hereinafter is more particularly pleaded and set forth.

2nd. Whereas the said Thomas Shepard hath in his deposition on the first article of the said allegation deposed, amongst other things, in the words or to the effect following, namely: "I visited Dover last autumn, and was there about three weeks. I went on the twenty-fourth September, and returned about the middle of October. I can't state the exact date of my leaving, but I can fix the date of my going there, because I had to meet a person there on that date. During the whole time I was there I lodged at the London Inn, situate in Council-Hall-street. It is in consequence of such my visit to Dover that I came to know anything of Mr. and Mrs. Trevanion, whom I believe to be the respective parties in this cause." And whereas the said Thomas Shepard hath, in his answer to the fourteenth general interrogatory administered to him on the part and behalf of the said Charlotte Trevanion, on his examination as a witness on the aforesaid allegation, deposed and answered, amongst other things as follows, to wit: "The precise cause of my visiting Dover in September, one thousand eight hundred and thirty-five, was to look after a fellow who owed me a sum of two

admissibility of this allegation offered by Mrs. Tre-[412]-vanion, and which is exceptive to the evidence of Thomas Shepard, a witness who had been examined [413] on a plea charging her with adultery at Dover and its vicinity, in the autumn of 1835.

[414] In opposition to the admission of the allegation, it has been suggested that the Court may, without [415] injury to the party, suspend this allegation, and it is said that other witnesses have been examined on [416] the same plea, and that the

hundred and twenty-four pounds on a bill. His name was Webb. I heard he was there, and was expected to be going to France, but I did not fall in with him. He was said to be at the London Inn, where I went and staid in hope of meeting him. I am not related to or connected with any resident at that place. I was the whole time at the London Inn. I did not keep a horse there or use one on hire. The precise time I went was the twenty-fourth September, but I cannot tell the precise time of my leaving. I know the one by my appointment to meet Webb or fall in with him, but I can only speak to the period of my departure by its being about three weeks after. I staid at Dover that length of time, I did not leave the place and return, but remained there, except going out for a walk. I returned to London when I left." Now the party proponent doth allege and propound that the said Thomas Shepard hath in his said recited deposition, and also in his said recited answer to the said interrogatory, knowingly and wilfully deposed, and answered falsely and corruptly. For that the truth and fact was and is, and the party proponent doth allege and propound, that the said Thomas Shepard did not go to the London Inn, situate in Council-Hall-street, in Dover aforesaid, on the said twenty-fourth day of September in the year one thousand eight hundred and thirty-five, nor at any other period in the said month of September, nor did he lodge at the said inn for about three weeks from such period, nor until about the middle of the said month of October, nor during any part of the said period, and that no person whosoever lodged or resided at the said inn during any part of the three weeks which followed the twenty-fourth day of September in the said year one thousand eight hundred and thirty-five for any longer period than the space of four or five days continuously. And the party proponent doth further allege and propound that the said Thomas Shepard, in or about the latter end of the month of February now last passed, did in fact go to the said London Inn, situate in Council-Hall-street, Dover, aforesaid, for the first time, and then and there introduced himself as an entire stranger. That he was at such time accompanied to the said inn by a person of the name of Clark, and that he, the said Thomas Shepard, and the said Clark at such time passed, at the said inn, by assumed names or titles, the said Clark designating himself and being designated by the said Thomas Shepard as "Lord Rodney," and the said Thomas Shepard being designated by the said Clark as "the Colonel," but that the true and correct names of the said Thomas Shepard and of the said Clark were afterwards discovered by the persons belonging to the said inn, as in the next subsequent article is set forth. And that the said Thomas Shepard and the said Clarke upon such occasions remained at the said London Inn for the space of two days, and then quitted the same.

3rd. Whereas the said Thomas Shepard hath, in his answer to the thirty-third general interrogatory administered to him when examined as aforesaid, deposed and answered, amongst other things, as follows:—"For myself I answer that I was at the Bell Inn at Lydden on two occasions," and also, "Both occasions were in the month of October" (meaning and intending the month of October in the year one thousand eight hundred and thirty-five), "but the precise dates I cannot fix more exactly:" and also, "I will swear that I was at the said inn at Lydden on those two occasions in October last;" and also, "I walked to and from the inn on both occasions." And whereas the said Thomas Shepard hath also, in his answer to the forty-second general interrogatory administered to him when examined as aforesaid, deposed and answered as follows:—"I have never been at the Bell Inn at Lydden since the occasion I deposed of, nor have I ever conversed with any of the people belonging to it." Now the party proponent doth allege and propound that the said Thomas Shepard hath, in his said recited answers to the said interrogatories, knowingly and wilfully deposed, and answered falsely and untruly. For the truth and fact was and is, and the party proponent doth allege and propound, that about a week or ten days after the said Thomas Shepard and the said Clark had quitted the London Inn at Dover aforesaid,

testimony of this witness may ultimately turn out not to be important; of [417] this it is impossible for me to form an adequate judgment, for if I were to read the whole of the [418] depositions in the cause, it would not be competent for me to come to a conclusion whether or not the [419] testimony of this witness would be important to the disposal of the cause. It is true that there are [420] cases in which the Court may usefully and without danger suspend the admission of an exceptive alle-[421]-gation. But they are cases very different from the present. Cases where, according

as pleaded in the next preceding article, to wit, on the ninth day of March in the present year, one thousand eight hundred and thirty-six, they returned thereto, and again assumed the said pretended titles of "Lord Rodney" and "the Colonel." That their true and proper names became known at such time to the persons at the said inn, and were entered in the books thereof accordingly from their frequently addressing each other inadvertently as Shepard and Clark respectively. And the party proponent doth further expressly allege and propound that on the following morning (to wit), on the tenth day of the said month of March now last passed, the said Thomas Shepard and the said Clark left the said London Inn in a post-chaise; ordered at and belonging to the same, and proceeded in company together to Lydden aforesaid, where they the said Thomas Shepard and the said Clark got out of the said chaise, and went into the said Bell Inn, at which they had ordered the postillion or chaise-driver to stop, and where they remained for a considerable time, after which they took the said chaise on and discharged the same at Canterbury.

4th. Whereas the said Thomas Shepard hath, at the commencement of his aforesaid deposition made and given by him when examined as a witness in this cause, described himself as of "No. 26 Tavistock-street, Covent Garden, in the county of Middlesex, Esquire." And whereas the said Thomas Shepard hath, at the beginning of his deposition on the first article of the aforesaid allegation, deposed, amongst other things, in the words or to the effect following, namely: "I have no house in town, but when in London I lodge at the house above mentioned: I have no residence in the country, but not following any profession, but living on my own resources, I travel about and reside at hotels;" and hath also, in his answer to the thirteenth general interrogatory administered to him on his examination as a witness on the aforesaid allegation, deposed and answered, amongst other things, as follows, to wit: "I have not any fixed residence; when in town I live in Tavistock-street, as I deposed. And whereas the said Thomas Shepard hath, in his answer to the second special interrogatory administered to him when examined as aforesaid, deposed and answered, amongst other things, in the words or to the effect following, namely: "I never did in my life reside in Frederick-street, Hampstead-road, nor occupy any lodging there, nor did I ever reside at Shaftesbury-place, Pimlico. I never kept the Wheatsheaf public-house in Marylebone-street; I deny it all. And hath also, in his answer to the eighth special interrogatory administered to him when examined as aforesaid, deposed and answered in the words or to the effect following, namely: "I deny that I ever lived in Shaftesbury-terrace, Pimlico, or in any house in the Edgeware-road." Now the party proponent doth allege and propound that the said Thomas Shepard hath, in his said recited deposition, and also in his said recited answers to the said interrogatories, knowingly and wilfully deposed and answered falsely and corruptly; for the truth and fact was and is, and the party proponent doth allege and propound, that the said Thomas Shepard did, in fact, keep the aforesaid Wheatsheaf public-house in Marylebone-street, in the county of Middlesex, from in or about the latter end of the year one thousand eight hundred and twenty-nine until in or about the year one thousand eight hundred and thirty-one. That the said Thomas Shepard did afterwards for some time live and reside in Shaftesbury-terrace, Pimlico, in the same county, and did, subsequently thereto, live and reside in Frederick-street, Hampstead-road, in the same county, and did also upon one occasion live and reside at No. 70, in the Edgeware-road, in the same county. And that he, the said Thomas Shepard, did, in fact, so live and reside, or occupy and hold, a house or lodging in Frederick-street, Hampstead-road, at the very time of his production and examination in chief, and upon interrogatories as a witness in this cause. And the party proponent doth further allege and propound that Thomas Shepard, who so kept the Wheatsheaf public-house in Marylebone-street as aforesaid; and Thomas Shepard, who so lived and resided in Shaftesbury-terrace, Pimlico, as aforesaid; and Thomas Shepard, who so

to the plea and the [422] evidence of the witness himself, the testimony may probably not be of great importance, and where the contradictions pleaded in the exceptive allegation are of a less stringent kind than in the present case. The witness in this case expressly deposes to seeing Mrs. Trevanion at the Bell Inn at Lydden in company with a gentleman, and it is here, and on this occasion, that the adultery is pleaded to have occurred.

It is not sufficient in such a case for the parties producing the witness to say that

lived and resided in Frederick-street, Hampstead-road, as aforesaid; and Thomas Shepard, who lived and resided at No. 70, in the Edgeware-road, as aforesaid; and Thomas Shepard, the pretended witness produced and examined on the aforesaid allegation given in and admitted in this cause, and therein describing himself as residing at No. 26 Tavistock-street, Covent-garden, in the county of Middlesex, Esquire, was and is one and the same, and not divers.

5th. Whereas the said Thomas Shepard hath in his answer to the fifth general interrogatory administered to him on his examination as a witness on the aforesaid allegation, deposed and answered, amongst other things, as follows, to wit: "The first person to whom I ever mentioned the circumstances, of which I have deposed on my examination, was a friend of mine of the name of Pook; he lives at No. 14 Princes-street, Cavendish-square; it is about three months ago;" and also, "In about a fortnight after my friend Pook recalled to my recollection what I had told him, and asked me if I should have any objection to state it again before a solicitor; I said it was a devilish disagreeable thing and I had rather not, but he said I might be compelled, and so I consented, and my friend Pook then took me to the office of Mr. Dignam, in Gerrard-street, Soho, and he questioned me as to what I had seen of Miss Brereton at Dover, and I told him the outlines of it." And whereas the said Thomas Shepard hath also, in his answer to the fifteenth general interrogatory administered to him when examined as aforesaid, deposed and answered, amongst other things, as follows, to wit: "I certainly will swear that my said visit to Dover was not made designedly or expressly for any purposes connected with the suit;" and also, "I will and do swear that at that time I had not ever had any interview or consultation with or instruction from the producent, or any person on his behalf, concerning this suit or evidence to be sought or adduced against her; I was an entire stranger to all the parties." And whereas the said Thomas Shepard hath also, in his answer to the sixteenth general interrogatory administered to him when examined as aforesaid, deposed and answered, amongst other things, as follows, to wit: "The only acquaintance I have with Mr. Dignam is through this business; it was my friend Mr. Pook who introduced me to him;" and also, "I do understand Mr. Dignam to be Mr. Trevanion's attorney, but I don't know how long he has been so, nor of his being one of many agents employed by him;" and also, "I am not aware what steps Mr. Dignam has taken to obtain other evidence in the business. I know nothing of his being at Dover to beat up for evidence." Now the party proponent doth allege and propound that the said Thomas Shepard hath, in his said recited answers to the said interrogatories, knowingly and wilfully deposed and answered falsely and untruly: for the truth and fact was and is, and the party proponent doth allege and propound, that the said Thomas Shepard had, long previously to the periods deposed of by him as aforesaid, well known the said James Dignam, who was and is an attorney now residing and carrying on his business at No. 26 in Gerrard-street, Soho, in the county of Middlesex, and who previously thereto resided and carried on his said business at No. 2 in Bride-court, Fleet-street, afterwards at No. 1 in Wornford-court, Throgmorton-street, afterwards at No. 20 in Throgmorton-street, respectively in the city of London, afterwards at No. 69 in Newman-street, Oxford-street, afterwards at No. 26 in Tavistock-street, Covent-garden aforesaid, and afterwards at No. 6 in King-street, Holborn, respectively in the said county of Middlesex, and had employed the said Dignam as his attorney in various matters of business. And the party proponent doth further allege and propound that the said James Dignam accompanied the said Thomas Shepard and the said Clark to the London Inn, in Dover aforesaid, upon the occasion of their going to the said inn on the ninth day of March last, as pleaded in the third article of this allegation, and was upon such occasion in company and in communication with them at the said inn.

6th. That on or about the

day of

, one thousand eight hundred

they will not rely on the evidence of the witness after publication. The other party has a right if she can produce an admissible exceptive allegation to have it admitted.

The proving such exceptive allegation may leave the case in a very different position than if the witness had not been examined at all. The producing a witness clearly perjured is not an unimportant ingredient in any cause: its effect may be more or less prejudicial to the party, according to the circumstances of the case.

With regard to the expenses falling on the husband: the length of the cause, and

and thirty-six, a rule was obtained out of his Majesty's Court of King's Bench, calling upon the editor or proprietors of the *Satirist* newspaper to shew cause why a criminal information should not be filed against him, her, or them for publishing in the said newspaper, of the twenty-ninth day of May, one thousand eight hundred and thirty-six, a libellous attack on the character of one Simon Digby, Esquire, therein represented or held out as a common gambler, and of that description usually denominated "legs," or "blacklegs." And the party proponent doth expressly allege and propound that for the purpose of obtaining or assisting in obtaining the discharge of such rule, one Thomas Shepard did on or about the eleventh day of the month of June, one thousand eight hundred and thirty-six, make and swear to a certain affidavit exhibited in the said court on behalf of the said editor or proprietors of the said newspaper, wherein he described himself as of "Frederick-street, Hampstead-road, in the county of Middlesex, gentleman," and in which affidavit he, the said Thomas Shepard, amongst other things, swore that about four years ago he, the said Thomas Shepard, being at Brighton, was there introduced to the said Simon Digby, who, he in his said affidavit stated, was commonly known by the name of "King Digby," and that he the said Thomas Shepard became intimately acquainted with the said Simon Digby. That some time after this introduction the said Simon Digby called upon him, the said Thomas Shepard, at his then residence in Shaftesbury-terrace, Pimlico, in the county of Middlesex, and that upon his, the said Thomas Shepard's, invitation, the said Simon Digby dined with him, and that after dinner the said Simon Digby proposed to him to have a game at cards, at the same time observing to him, the said Thomas Shepard, that he, the said Simon Digby, would give him his revenge for the few pounds which he, the said Simon Digby, had, at Brighton aforesaid, won of him, the said Thomas Shepard. That they accordingly commenced playing at cards at a game called écarté, and that the said Simon Digby won of him, the said Thomas Shepard, from eighty to eighty-five pounds. That he the said Thomas Shepard being surprised at this, watched the movements of the said Simon Digby, and detected him slipping the king, commonly called "palming," for the purpose of cheating and defrauding him, the said Thomas Shepard. That upon making this discovery he, the said Thomas Shepard, seized the wrist of the said Simon Digby, and that upon so doing the said Simon Digby became greatly alarmed and acknowledged that he had slipped the king, and that, an altercation ensuing between them, the said Simon Digby, in dread of an exposure, returned to him, the said Thomas Shepard, the money he had so won as last aforesaid, and confessed to him that he had so palmed the king for the purpose before-mentioned. As in and by the original affidavit so made and sworn to by the said Thomas Shepard, now remaining filed of record in his Majesty's Crown Office in the Temple, London, and to be produced at the hearing of this cause, will more fully appear.

7th. That in supply of proof of the premises pleaded and set forth in the next preceding article, and to all other intents and purposes in the law whatsoever, the party proponent doth exhibit and hereto annex and prays may be here read and inserted, and taken as part and parcel hereof, a certain paper writing marked with the letter (A), and doth allege and propound the same to be and contain a true and official copy of the aforesaid affidavit made and sworn to by the said Thomas Shepard, as in the next preceding article is set forth. That the same hath been duly extracted from the records of His Majesty's Court of King's Bench, kept at the Crown Office aforesaid, and hath been carefully collated and examined with the original affidavit of the said Thomas Shepard now remaining filed of record therein, and hath been found to agree therewith. And the party proponent doth expressly allege and propound that Thomas Shepard, who made and swore to the said affidavit, and Thomas Shepard, a witness produced, sworn, and examined in this cause on behalf of John

the consequences in respect to the husband's pecuniary resources may be much to be deplored, but it is wholly impossible, almost at the conclusion of a cause where the husband has brought in a new plea after publication, alleging a fresh act of adultery, that I should, on that ground alone, exclude an exceptive allegation.

I will now proceed to consider the contents of the allegation, to see what parts are in substance clearly admissible on principles not controverted, and what [423] parts depend on the solution of questions disputed by the counsel.

Charles Bettesworth Trevanion, Esquire, party in this cause, and the witness whose evidence is now excepted to, was and is one and the same person, and not divers.

8th. That after the examination in chief of the said Thomas Shepard as a witness in this cause, to wit, on or about the sixteenth day of June now last passed, certain special interrogatories were administered to him on the part and behalf of Charlotte Trevanion, wife of the said John Charles Bettesworth Trevanion, and four of which said special interrogatories were in the terms following, to wit: "Fourth, Do you not know or have you not heard, and do you not believe, that on or about the thirteenth day of June, in the present year, a question came before the Court of King's Bench relative to a rule obtained against the editor, or proprietor, or proprietors of the aforesaid *Satirist* newspaper, to shew cause why a criminal information should not be filed against him or them for publishing a libel in the said newspaper of the twenty-ninth day of May last, reflecting on the character of a person named Simon Digby? Did not such libel, as you know, or have heard and believe, state that the said Simon Digby was more generally called King Digby from his skill in palming that card at the game of *écarté*, and that he had long enjoyed an enviable notoriety amongst the 'legs,' and was then living in obscurity in Devonshire, but that he had been at the last Epsom Races sharply on the look-out for flats, or to such or the like effect? Did you not, for the purpose of meeting the said question, make and swear to an affidavit on behalf of the said editor, or proprietors, or proprietor of the said *Satirist* newspaper, and was not such affidavit, as you know, or have heard and believe, made use of upon the said occasion on his or their behalf? Did you not swear, amongst other things, in such affidavit, that the said Simon Digby had in fact been guilty of practising what is termed 'palming' at the game of *écarté*, and that he was known amongst the 'legs' at Brighton by the name or title of 'King Digby' in consequence thereof, and that you were introduced to him at Brighton, or to such very effect? Did you not also therein swear that, after such your introduction to him, the said Simon Digby called upon you at your then residence at Shaftesbury-place, Pimlico, and that on your invitation he dined with you, or that on his invitation you dined with him, and which, and that after dinner the said Simon Digby proposed to have a game at cards, saying he would give you your revenge for the few pounds he had won of you at Brighton? That you accordingly commenced playing at cards, and that the said Simon Digby won eighty-five pounds, or some and what other sum: that you were surprised at this, and that you watched the movements of the said Simon Digby, and detected him palming a card for the purpose of cheating you: that upon your making this discovery you seized the wrist of the said Simon Digby, who then became alarmed, and acknowledged that he had slipped the king, and returned to you all the money, and confessed he had palmed the king, or to such or the like effect? Will you swear that you did not in the said affidavit swear to the very same effect as now interrogate? If yea, in what respect will you now swear that you did not in the said affidavit swear to the effect interrogate, and how otherwise will you now swear that you swore in the said affidavit in respect to any or either of the matters interrogate? Fifth. At or by whose instigation, solicitation, or procurement did you make and swear to the affidavit inquired after by the next preceding interrogatory, and for what motive or inducement did you make and swear to the same? Who drew up and prepared the said affidavit, and from whose instructions? Will you swear that the same was not directly or indirectly drawn up or prepared by or from the direction or instructions of Dignam, the agent or attorney of the proponent in this cause? Will you swear that the said Dignam was not in any manner, either directly or indirectly, concerned in or connected with the preparation of or swearing to the said affidavit by you? Will you swear that the said Dignam was not, either directly or indirectly, and in what manner, and on whose behalf connected with the said proceedings? Sixth. When, where, and by whom were you introduced to the

The first article is merely formal, and requires no observation.

II. The second article appears to me to bear directly on the issue in the cause, and I ought to guard myself here against mistake or misapprehension. I consider that it has a bearing on the issue, yet is not the issue itself; nor pleadable before publication, for the witness has deposed to seeing Mrs. Trevanion at Dover and Lydden in September and October, 1835, and to circumstances leading to adultery; his absence during the whole period is a fact most material to the decision of the cause, and the

said Simon Digby, and who was or were present at the time? To what 'legs' at Brighton was the said Simon Digby, to your knowledge, known by the name or title of 'King Digby?' How soon after any such introduction did the said Simon Digby call upon you at your then residence in Shaftesbury-place, Pimlico; at what precise time did he so call upon you, and who was or were present at such time? When precisely, and where, did the said Simon Digby dine with you, as you stated in the said affidavit, and who was or were present at the time? Was he at such time known to you by the said name or title of 'King Digby?' When precisely, and where, did you and the said Simon Digby play at cards after such dinner, and who was or were present at the time? Was it at your own house or at a gaming-house; and if the latter, by what name is the same usually known? Who, by name, was or were present when you detected (if you did detect) the said Simon Digby in palming a card, and when you seized (if you did seize) the wrist of the said Simon Digby; and where do such persons respectively or where does such person reside? Upon your oath, did not your aforesaid affidavit omit all mention of time, place, or the presence of any other person or persons? Will you swear that you were ever at any time in the company of the said Simon Digby in the presence of any third persons or any third person known to the said Simon Digby? If yea, who by name and where do such persons or does such person reside? Seventh. Let the paper writing, hereto annexed and marked No. 1, be produced and shewn to the said Thomas Shepard; and let him be further asked: Upon your oath, is not the same, as you know or believe, a true copy of the affidavit made and sworn to by you as before interrogate? Will you swear that the same is not so? In what respect will you swear that the same differs therefrom?" And the party proponent doth expressly allege and propound that, notwithstanding the premises in the fourth, sixth, and seventh preceding articles of this allegation pleaded, he, the said Thomas Shepard, in answer to the said special interrogatories severally and respectively, hath sworn and deposed in the terms following, to wit: To the said fourth interrogatory, "I have no knowledge of the matter inquired after in this interrogatory, except from reading it in the newspaper. I think it was in the *Morning Herald*, in one of the eating-houses in the city, that I read it: I read, as far as I recollect, that one Thomas Sheppard had applied for a rule in the Court of King's Bench, in June of this present month, last Tuesday I think, for a criminal information against the editor of the *Satirist* newspaper for a libel on one Simon Digby. I read it, having my attention drawn to it on account of the similarity in the name, but it was not my name; it was spelt with two 'p's,' mine is with one, and I was not the person. I deny all knowledge of the transaction. I made no affidavit in the matter. I do not know the interrogate Simon Digby or King Digby, or by whatever name he is called." To the said fifth interrogatory, "I know nothing of the affidavit nor of Mr. Dignam preparing it, if made by any one. I was in no way connected with the matter." To the said sixth interrogatory, "I have no knowledge of the said Simon Digby. I never played at cards with him. I never dined in his company at Brighton or Shaftesbury-place, or any place, or any where. I never was in his company at all." And to the said seventh interrogatory (after the copy of the affidavit or exhibit annexed to and described in the interrogatory had been referred to the said witness and perused by him), "I solemnly deny all knowledge of the transaction therein-mentioned, except from reading the account of it in the public paper. That affidavit was not made by me. In the paper I am positive the name was with two 'p's,' and I observe there is an erasure in the name as spelt in the affidavit, as if it was copied differently and with a second 'p' at first; but it does not relate to me." And the party proponent doth further expressly allege and propound that, by reason of the premises, the said Thomas Shepard hath, in such his answers to the said special interrogatories, knowingly and wilfully sworn and deposed falsely and corruptly.

whole credit of the witness is involved in the question whether he has told a falsehood of this sort; this article is in substance admissible. I think the latter averments as to this person's arrival for the first time in February, 1836, and the names by which he and his companion passed, are fairly pleaded, to bring out more clearly and prominently the leading contradiction. I admit the second article.

III. On the same principles I think the third article in substance admissible, but that it must be reformed; as it now stands it does not directly contradict the principal

9th. That the names "Thomas Shepard," several times set and subscribed to the original deposition made and sworn to by Thomas Shepard, the witness produced, sworn, and examined in this cause, and whose evidence is now excepted to, were and are of the own proper handwriting, and subscription of Thomas Shepard who kept the Wheatsheaf public-house in Marylebone-street, and who afterwards lived and resided in Shaftesbury-terrace, Pimlico, and after that in Frederick-street, Hampstead-road, and who also at one time lived and resided at No. 70 in the Edgeware-road, severally in the county of Middlesex, all as in the fourth preceding article of this allegation pleaded, and are so well known or believed to be by divers persons of good character, credit, and reputation, who knew and were well acquainted with the said Thomas Shepard whilst living and residing in the aforesaid several places, all, some, or one of them, and who have frequently seen the said Thomas Shepard write and subscribe his name to writings, and who have thereby or by other means become well acquainted with his manner and character of handwriting and subscription. Also that the names "Thomas Shepard" set and subscribed to the original affidavit, now remaining filed of record in his Majesty's Crown Office in the Temple, London, as in the sixth and seventh preceding articles of this allegation is pleaded, were and are of the own proper handwriting and subscription of Thomas Shepard who kept the Wheatsheaf public-house in Marylebone-street, and who afterwards lived and resided in Shaftesbury-terrace, Pimlico, and after that in Frederick-street, Hampstead-road, and who also at one time lived and resided at No. 70, in the Edgeware-road, severally in the county of Middlesex, all as in the fourth preceding article of this allegation pleaded as aforesaid, and are so well known or believed to be by divers persons of good character, credit, and reputation, who knew and were well acquainted with the said Thomas Shepard whilst living and residing in the aforesaid several places, all, some, or one of them, and who have frequently seen the said Thomas Shepard write and subscribe his name to writings, and who have thereby or by other means become well acquainted with his manner and character of handwriting and subscription. Also that the names "Thomas Shepard" several times set and subscribed to the aforesaid original depositions, and the names "Thomas Shepard" set and subscribed to the aforesaid original affidavit, were and are of the proper handwriting and subscription of one and the same person and not of divers, and are so well known or fully believed to be by divers persons of good character, credit, and reputation, accustomed to examine the formation of the letters of different handwritings and subscriptions, and from their general occupations, and otherwise well skilled in handwriting.

10th. Whereas the said Thomas Shepard hath in his answer to the twelfth general interrogatory, administered to him on his examination, as a witness on the aforesaid allegation, deposed and answered, amongst other things, as follows, to wit: "The amount of my annual income is about three hundred pounds per year. It is derived partly from leasehold estate and partly from cash. The leasehold brings me about £94 a-year. It is situate at Somer's-town; in Back-lane there. It consists of four small houses let to working people: plasterers and such persons. One, a Mr. Henry Brown, who pays me £24 a-year, another named Johnson, who pays £26 a-year; this is No. 18, the other No. 17; a third, named William Stone, pays £24, and the fourth, named Hemmings, pays £20. There is a small ground-rent of £5 to be deducted, so that the net income is £89." Now the party proponent doth allege and propound that the said Thomas Shepard hath in his said recited answer to the said interrogatory knowingly and wilfully deposed and answered falsely and untruly. For that the truth and fact was and is, and the party proponent doth allege and propound, that there is not and was not at the time at which the said Thomas Shepard deposed and answered as aforesaid, to wit, in the month of June in the year one thousand eight hundred and thirty-six, any place in Somer's-town aforesaid called or known by the name of Back-lane, nor are there at this present time; nor were there

point, namely, that the witness was not at Lydden during September and October, 1835, it does contradict his statement that he never had been there since; if this were the only contradiction it might be subject to different considerations, but, coupled with the leading one, I think it admissible; it should recite other parts [424] of the evidence of the witness and contradict them—to be reformed.

IV. The contradiction in this article is as to the residences of the witness—this is not pertinent to the issue. I shall reserve the consideration of this article until I come to observe upon some of the subsequent articles.

V. The contradiction in this article does not come out in a very clear and direct point of view. In substance it is this, that the facts were accidentally mentioned by the witness to Pook, that by him he was taken to Dignam. That witness did not go to Dover for the purposes of this suit—that his only acquaintance with Dignam was through this suit; that he knew nothing of the steps taken by him to obtain other evidence, or of his visit at Dover to beat up for evidence. The contradiction is that he had been long previously acquainted with Dignam, and had employed him as an attorney. That Dignam accompanied the witness and Clark when they went to Dover, March 9.

Now this contradiction is partly direct and partly inferential—direct as to the acquaintance; inferential as to his knowledge of Dignam proceeding to obtain other evidence.

I think, however, that it is so strongly inferential that, coupled with the preceding contradiction, which is quite direct, it would be straining too much to reject it on that ground only. The main point is whether the contradiction is relevant to the issue in the cause or collateral. It may not always be easy to draw a precise line, and if doubt fairly arises, I think the Court should lean rather to ad-[425]-mission than rejection. The issue is adultery at Dover and Lydden. The witness represents his evidence as given by mere accident as to such adultery, without previous acquaintance with the attorney, or knowledge on his part that evidence was being collected by him. I feel it very difficult to say that the contrary of such averment is wholly immaterial to the decision of the issue I have to try, especially in conjunction with the articles previously admitted. I cannot say that proof of a previous acquaintance with the attorney and having accompanied him on the 9th of March, when he went to collect evidence, might not influence the mind of the Court in determining the direct issue in the cause. I act more safely by holding this contradiction to be within the

during the month of June aforesaid any persons known by the names of Henry Brown, Johnson, William Stone, or Hemmings, and agreeing with the descriptions of such alleged persons so deposed of as aforesaid by the said Thomas Shepard, residing in any lane, street, or place in Somer's-town aforesaid.

11th. Whereas the said Thomas Shepard hath also in his deposition on the first article of the said allegation deposed, amongst other things, in the words or to the effect following, namely:—"Nor did I at Dover know Mrs. Trevanion by that name, but considered her to be a Miss Brereton, and heard her spoken of by that name. The first time, as well as I recollect it to have been, that I saw her was about four days after I had gone to Dover. I was at the Ship Hotel in the afternoon, about four or five o'clock, taking wine with a friend, a young man named Hendry, who is since gone to Spain in some situation in General Evans's service, I think as commissariat, and whilst sitting with him at one of the boxes in the coffee-room, a person in the room, whom I had heard addressed as Mr. Wright, but did not know, said to his friend, who was a stranger to me, in allusion as I supposed to some female then passing, 'There goes Miss Brereton,' adding, 'a damned nice piece;' being close to him I heard his words, and I peeped through the window, which is a bow, and saw two ladies coming up, walking arm in arm, both rather tall, and the one within or nearest to the window I understood him to point out to his friend as Miss Brereton." Now the party proponent doth allege and propound that the said Thomas Shepard hath in his said recited deposition knowingly and wilfully deposed falsely and untruly. For the party proponent doth allege and propound that there is not, and was not in the month of September or October, one thousand eight hundred and thirty-five, any coffee-room in the Ship Hotel in Dover aforesaid containing any boxes or other divisions whatever.

12th. That all and singular the premises were and are true, &c.

acknowledged limits, even if I have some doubt. The article must be reformed, by striking out the residence of Dignam, as leading to superfluous matter; and adding, at the conclusion, that Dignam was then and there employed in collecting evidence in this cause.

The sixth, seventh, eighth, and ninth articles plead in substance:

VI. The sixth, that witness made an affidavit in the Court of King's Bench when a rule had been moved for against the proprietors of the *Satirist*.

VII. The seventh sets forth the contents of that affidavit, and exhibits a copy.

The eighth at great length recites all the inquiries into all the proceedings in the Court of King's Bench upon interrogatories administered to the witness; in the answers to which the witness denies that he made any such affidavit, and ignores the whole transaction. The contradiction is that [426] all such answers are false and that he did make such affidavit.

There can be no doubt that the whole of this matter is foreign to the issue in the cause; and, therefore, subject to such determination as the Court may deem it its duty to apply to such exceptive articles presently, when the principles applicable to them have been discussed.

IX. The ninth is merely as to the handwriting of the witness.

X. The tenth article is a contradiction of the witness's statement as to his property, and is also an issue foreign to that in the cause.

XI. The eleventh article I reject on the ground that the contradiction is on too trivial a point, and such as, if proved, could not destroy the credit of the witness.

There remain then the fourth, sixth, seventh, eighth, ninth, and tenth to be disposed of. I consider these articles, and especially the sixth, seventh, eighth, and ninth, to raise questions wholly foreign to the issue in the cause, viz. adultery at Dover and its vicinity.

On the other hand, if this their character be not a fatal objection to them, the contradictions are direct and positive, such as if proved would establish wilful false swearing. The question of law now arises in a clear and strong point of view.

THE EXHIBIT MARKED (A).

In the King's Bench.

Thomas Shepard, of Frederick-street, Hampstead-road, in the county of Middlesex, gentleman, maketh oath and saith that about four years ago, being at Brighton, he this deponent was there introduced to Simon Digby, who this deponent saith is commonly known by the name of "King Digby," and who is the person who hath made an affidavit in support of an application to this Honourable Court for a criminal information against John Prichard Eve and Sophia Sylvester Parlbay, and this deponent became intimately acquainted with the said Simon Digby: that some time after this introduction the said Simon Digby called upon this deponent, at his this deponent's then residence in Shaftesbury-terrace, Pimlico, in the county of Middlesex; and upon this deponent's invitation the said Simon Digby dined with this deponent; and that after dinner the said Simon Digby proposed to this deponent to have a game at cards, at the same time observing to this deponent that he the said Simon Digby would give this deponent his revenge for the few pounds which the said Simon Digby had, at Brighton aforesaid, won of this deponent: and deponent saith that the said Simon Digby and this deponent accordingly then and there commenced playing at cards at a game called "écarté," and the said Simon Digby won of this deponent from eighty to eighty-five pounds; and that this deponent, being surprised at this, watched the movements of the said Simon Digby, and detected the said Simon Digby slipping the king, commonly called "palming," for the purpose of cheating and defrauding this deponent: that upon deponent making this discovery, he this deponent seized the wrist of the said Simon Digby, and upon so doing he the said Simon Digby became greatly alarmed, and acknowledged that he had slipped the king; and an altercation ensued between him and this deponent, the said Simon Digby, in dread of an exposure, returned this deponent the money he had so won as last aforesaid, and confessed to this deponent that he had so palmed the king for the purpose before mentioned.

Sworn in open Court
the 11th day of June, 1836,
by the Court.

THOMAS SHEPARD.

These articles are not equivocal—they are foreign to the issue; they are direct contradictions; if admissible and proved, the credit of the witness must be seriously affected, and the issue may depend on that evidence.

No one, morally speaking, can doubt that if a [427] witness is proved to have corruptly forsworn himself in a matter however distinct from the question before the Court, his evidence as to other points must be deserving of little credit; it is indeed on this principle that a conviction for perjury disqualifies a witness. The truth must not be disguised; if Mrs. Trevanion be at liberty to prove this witness perjured in another and different transaction, though totally unconnected with this issue, she may by such means discredit him in this issue, and the result of the cause might possibly turn upon it; I admit therefore fully the importance and value of these articles to her.

The question is whether the law of this Court allows of such a mode of discrediting a witness, or whether for reasons of general public utility, however important in an individual case, it is not prohibited.

I am anxious to examine this question in all its bearings, and fairly to apply to it every test by which it can be elucidated. I admit that by this mode of proceeding, by proving contradictions of this kind, the truth may sometimes be attained, when the exclusion might lead to error, and possibly injustice; but though the object of all tribunals is to ascertain the truth—the only basis of justice—all Courts, for various reasons, have been accustomed to exclude various modes of investigating it.

In these Courts there is no re-examination of a witness, nor viva voce examination, because the expense would be enormous, and the ends of justice can generally be attained without.

So, in the courts of law, certain rules of proceed-[428]-ing are adopted: so as to appeals, and the number of them. It is not sufficient therefore to solve this question to acknowledge that the admission of such plea might elucidate the truth.

The end of all systems of jurisprudence is to establish a course of proceeding and of investigation, by which justice may be generally attained at an expense, and with a degree of expedition, best suited to the interests of mankind; in so doing many modes of proof, as I have said, are excluded, not because they are wholly useless, but because to adopt them, however beneficial in an individual case, would, by delay and expense, defeat the great purpose for which Courts are established. In these, as in all other human institutions, the good of the many is consulted, though in a few possible cases individuals may suffer.

It remains therefore to be considered, whatever may be the intrinsic value of this species of evidence, whether according to the doctrine and practice of English tribunals it is admitted or rejected from the ill consequences to which its admission might lead.

For the sake then of illustrating the rules generally applied to such matters, it is expedient to inquire what is the course pursued in other Courts? at the same time, though I have prosecuted this inquiry with much care, I feel very great diffidence in expressing my opinion as to the result, and it is very probable that I may in some respects draw erroneous conclusions from the want of that practical knowledge which is the best safeguard against misunderstanding authorities.

And it is right also to observe that this is a [429] question not so much of principle as of rule for the convenient administration of justice. Principle applies to the rejection of hearsay evidence—of the evidence of persons interested—and questions of that kind; on such matters it is most desirable that all Courts should agree. In this question the convenience or inconvenience form a main consideration, for that the evidence might have effect, if received, I think cannot be doubted, and though the practice of other Courts would be entitled to due consideration, yet, looking at the difference in the modes of proceeding, a rule of practice would not have the same binding effect on my judgment as a doctrine established on principle.

With respect to the rule of common law.

I have looked at the cases, and especially the decisions of the judges pronounced Oct. 20th, 1820, in the trial of Queen Caroline, and I have sought information from those best able to correct the infirmities of my own judgment. The result I conceive to be this—That if upon cross-examination (in chief it could hardly arise) a question be put to a witness touching a fact or a declaration, verbal or written, foreign to the issue to be tried, the party so putting the question must abide by the answer, and

cannot be permitted to contradict it by other testimony for the purpose of discrediting the witness.

The reasons for such rule are several.

First, as relates to the witness, that he cannot be prepared to defend all the actions of his life.

Secondly, that such inquiries could not be conducted without an expense and delay which would render the administration of justice so [430] grievously burdensome to the suitors as to defeat the ends for which all Courts are established.

The next inquiry to which I have deemed it my duty to resort is as to the rule prevailing in our Courts of Equity, and I have certainly experienced greater difficulty in this branch of examination, though much assisted: I must repeat again, therefore, the extreme diffidence I entertain as to the correctness of my own conclusions, nor would I have ventured on this path had it not appeared to me that the investigation of the whole subject would have been incomplete without it, and also that the practice in Courts of Equity being by written evidence, might bear upon these Courts as more proximately analogous.

Before I proceed further, there is one point which I must endeavour to clear up, or some confusion may arise; I mean of what is or is not pertinent or material to the issue. That expression I apprehend to be used with greater strictness than we are sometimes wont to do; for instance, a declaration of a witness relative to the issue in the cause is not deemed as pertinent to the issue in the cause; such expression is confined to evidence direct and material to the issue, and does not extend to what concerns the credit of a witness.

It appears to be decided by the case of *Mill v. Mill* (12 Vesey, 407) that it is not competent to the defendant to examine his witnesses in chief to the character and credit of the plaintiff's witnesses.

By the same case as well as other cases it is ruled [431] that examination to the credit cannot be done without special application to the Court.

It being thus determined (and it is the result of all the cases) how it cannot be done, and in what form it may be done; the next inquiry is under what limitations those Courts will permit such applications.

The authorities are stated in *Gresley on Evidence in Courts of Equity* (p. 140), and in *Maddock's Practice* (2 Madd. Chan. Pract. 555), and it results from these authorities that those Courts are exceedingly careful not to encourage applications of this description.

It also appears that the custom is to except after publication to the general credit of a witness: it is done in the form of articles, but to what extent such articles may go is the question of difficulty.

The first case to which I shall refer is that of *Gill v. Watson* (3 Atk. 521). In that case interrogatories were exhibited by the defendant for examining to the credit of one of the plaintiff's witnesses, after publication had passed some time, and the cause was set down. The first question was as to an affidavit, but the dictum of Lord Hardwicke it is right to notice. "The Lord Chancellor thought an affidavit necessary, and said that though at law you can examine only to the general credit, yet it is otherwise at equity; for at law the witness cannot be prepared to defend every particular act of his life, as he does not at all know to what they intend to examine him; but upon an examination in this Court he may be able to answer [432] any particular charge, as he has time enough to recollect it." Now I think if this had been the whole, and nothing had been done to shake the force and effect of this dictum, it would go this length: that in respect to a particular charge against a witness's credit you may except to a witness's testimony. But it goes on thus: "Quære, it is difficult to ascertain whether this is a part of the judgment of the Lord Chancellor, or merely the remark of the reporter. Quære, if there is any such distinction between the examination here and at law with regard to the credit of witnesses; because Mr. Capper, a very eminent and experienced practitioner, told me that examinations to the credit are general here as well as at law, and the form of the interrogating articles are so in this case; first, that the witness is a person of ill-fame and not to be credited; secondly, that he pays no regard to the nature of an oath: and in the same manner through the several items;" that is the whole of the report in that case.

The case which next follows is that of *Callaghan v. Rochfort* (3 Atk. 643). That was a motion for a commission to examine witnesses to the credit and competency,

of a person who had given evidence in the cause, and against whose competency the party moving had exhibited articles after publication passed. I need not discuss the question of competency—as to the commission to examine in support of the articles which went to the credit of the witness, Lord Hardwicke said, “The Court will allow such articles to credit after publication, because the matters examined to in such cases were not [433] material to the merits of the cause, but only relative to the character of the witnesses.” It is added, “As these applications are most frequently made for delay merely, his lordship said he should be extremely cautious how he grants them, and as there was no absolute necessity in this case he denied the motion.”

I now proceed to later times (but I believe I have not omitted any case of importance), and I come now to the case of *Purcell v. Macnamara* (8 Vesey, 324). This is the authority of Lord Eldon, and it is impossible that a higher authority can be cited. It is necessary to look at the whole. A motion was made after publication that the plaintiff might be allowed to exhibit articles as to the credit of a witness, interrogating as to particular facts, viz. whether he had not been a woollen-draper, and was insolvent, which upon his cross-examination he had answered in the negative. Sir Samuel Romilly supported the motion, which was opposed by other learned persons, and Sir Samuel Romilly repeatedly referred to the authority of the Courts of common law, and said “That there were two modes of impeaching evidence there—one by producing witnesses to swear that the person was not to be believed on his oath, the other by putting questions to him, and getting witnesses to prove that his answers were not true.” The Lord Chancellor said, “It is necessary to see what these articles and interrogatories have been in particular cases. It is clear you may discredit a witness by examining other witnesses as to the proposition he has sworn. In this Court it is [434] very possible a man might be examined, who is not a competent or a credible witness, and though it is true notice is given who the witnesses are, it may be impossible to discover the fact that he is incompetent or does not deserve credit till after his examination;” again, “As to the other examination, whether you may examine either generally or particularly, or to shake his credit, whether you are to examine as to the particular facts to which he has deposed, that may depend upon the different nature of the facts: if, for instance, the fact is material to the merits of the cause”—material to the merits is the expression—“and the witness has sworn to it, there is great danger of bringing other witnesses, under colour of discrediting that witness, to prove or disprove such fact. It would also be endless, if you can justly require that the person deprived of that testimony should have an opportunity of examining others to the truth of those facts to set up that witness again. The dictum of Lord Hardwicke seems to be that the utmost you can do, under colour of examining to the credit, is to examine as to the truth of facts not material, as in the case of *Chevers v. Baz*; though in a tithe cause that might be material as to the mode of tithing milk, which had fallen under the observation of that person.” In that way it may be important in other cases. “But suppose it immaterial to the merits, and therefore less danger in permitting the examination, still there is a good deal of danger upon that, and it is better that the observation of the Court should be thrown upon the particular circumstance before the [435] examination is permitted; for you may know it at the time of the cross-examination, and take your chance of the substance of the examination, and if it makes for you, the objection is sunk; if against you, then you come forward, having known the fact before;” again, “Upon all that I can find you are at liberty to examine by general interrogatories as to credit, and as to such particular facts only as are not material to what is in issue in the cause.”

Then I find it determined, in this case of *Purcell v. Macnamara*, that a witness might be examined as to whether he was a woollen-draper and an insolvent. According to this decision of Lord Eldon (for I have great difficulty in denying it to be so) a witness may be examined to prove the contrary of facts sworn to by a witness examined in the cause, not only not material to the issue in the cause, but facts totally foreign to the issue; for it was only an act of misconduct committed by the witness himself.

I cannot help observing that the argument of Sir Samuel Romilly was much founded upon the rule of law; but the decision seems to go much further.

The next case is that of *Wood v. Hamerton* (9 Ves. 145), which follows *Purcell v. Macnamara*, but it contains no definition as to what facts fall within the denomination “not material to the issue in the cause.” I need not advert to this case more particularly; the plaintiff was allowed to examine witnesses on a commission by general

interrogatories as to credit, and "as to such particular facts as only are not material to what is in issue in the cause."

[436] The next case is *Carlos v. Brook* (10 Ves. 49), and though the point at issue to be decided by the Lord Chancellor was a different point, yet the expressions which fell from Lord Eldon are entitled to the greatest possible respect. It was a motion to suppress, after publication, the deposition of a witness; the Lord Chancellor said, I think my opinion in *Purcell v. Macnamara* was right. My opinion was this: "That the Court, attending with great caution to an application to permit any witness to be examined, after publication, has held, where the proposition was to examine a witness to credit, that the examination is either to be confined to general credit, that is, by producing witnesses to swear that the person is not to be believed on his oath"—mark the words—"or if you find him swearing to a matter not in issue in the cause, and therefore not thought material to the merits in that case, as the witness is not produced to vary the case in evidence, by testimony that relates to the matters in issue, but is to speak only to the truth or want of veracity with which a witness had spoken to a fact not in issue, there is no danger in permitting him to state that such fact not put in issue is false; and for the purpose of discrediting a witness the Court has not considered itself at liberty to sanction such a proceeding as an examination, to destroy the credit of another witness who had deposed only to points put in issue. In *Purcell v. Macnamara* it was agreed that, after publication, it was competent to examine any witness to the point whether he would believe that man upon his [437] oath. It is not competent, even at law, to ask the ground of that opinion, but the general question only is permitted. In *Purcell v. Macnamara* the witness went into the history of his whole life; and as to his solvency, &c. It was not at all put in issue whether he had been insolvent, or had compounded with his creditors; but having sworn the contrary, they proved by witnesses that he who had sworn to a matter not in issue had sworn falsely in that fact; and that he had been insolvent, and had compounded with his creditors; and it would be lamentable if the Court could not find means of getting at it; for he could not be indicted for perjury, though swearing falsely; the fact not being material. The rule is that, in general cases, the cause is heard upon evidence given before publication, but that you may examine after publication, provided you examine to credit only, and do not go to matters in issue in the cause, or in contradiction of them, under pretence of examining to credit only. These depositions appear to me to be material to what is in issue in the cause, and therefore must be suppressed."

Now I must say I feel it impossible to deny that the expressions of the Lord Chancellor, unless they are in some degree qualified by the general understanding of that Court—and it is not expressed whether they are so or not in the report—would support an argument that if a witness in cross-examination had deposed to a fact wholly foreign to the issue he might be contradicted thereon.

To proceed in my inquiry—the next case is [438] that of *White v. Fussell* (1 Ves. & Beames, 153), but that goes no further than to shew that applications for examination to credit must be confined to facts affecting credit and character only, and such as are not material to the issue. This throws no light upon the subject.

Wakmore v. Dickinson (2 Ves. & Beames, 267) only shews that an affidavit is not necessary to support such a motion. I do not rely on a casual expression, that is, that the only proper question is whether the witness is to be believed on his oath, and it would be doing injustice to the learned judge who decided that case to rule so important a point by a casual expression.

Then comes a case which is anonymous in 3 Ves. & Beames (p. 93). It was a petition presented praying that an affidavit made for the purpose of discrediting the testimony of the petitioner, who had made an affidavit under a petition in bankruptcy, might be taken off the file for scandal; or that the scandalous charges might be expunged, viz. that the petitioner had been discharged from his employment by one attorney for a fraud, and by another for communicating a brief to the hostile solicitor; and that the petitioner was a hedge-solicitor and affidavit-man. The Lord Chancellor said, "The rule of the Court of Chancery in a cause never permitted an examination as to such charges as these; though you may ask whether the witness is to be believed upon his oath; which is the course at law not going to [439] particular facts. If the proceedings in this Court are open to the defect that has been mentioned, that does not make it fit to introduce all this scandal."

The attempt to reconcile this with the decision in *Purcell v. Macnamara* is somewhat difficult: I do not say they cannot be reconciled, but it is a matter of some difficulty.

There have been two other cases since. The case of *Vaughan v. Worrell* (2 Madd. 326), which was as to putting an interrogatory before publication, but after examination, as to interest, and which throws no light on the point in question; and the case of *Piggott v. Croxhall* (1 Sim. & Stu. 467), which affirms that the interrogatories must be to facts not material to the issue. I observe that in *Gresley on Evidence*, p. 140, the form is this: it alleges that the witness has since his examination admitted that he had received or expected a reward, recompence, gratuity, or allowance from the defendant in case the defendant recovers in the cause, and it alleges (being the same terms as in ours) the general bad character of the witness excepted to, and that is the whole of it.

What then is the fair result of the whole? I feel compelled to say that all these authorities do not negative the proposition that witnesses may be brought to contradict a statement made by a witness on his cross-examination as to matter which is foreign to the issue. On the contrary, so far as I can judge, especially from the case of [440] *Purcell v. Macnamara*, where the issue was whether certain deeds should be set aside, and where the witness was examined as to his solvency, articles imputing false swearing on a point so foreign were admitted. I feel that it is no part of my duty to decide this matter. I should feel it extremely difficult to draw nice distinctions between one case and another; but I ought to say that, however the point may stand upon authority, having had the benefit of the opinion of persons whose experience and station in those Courts entitle them to great respect, who agree that a party is not at liberty in those Courts to put interrogatories wholly foreign to the issue for the purpose of contradicting the witness after publication. It is not for me, under these circumstances, to pronounce any decision as to what the real state of the rule is in Courts of Equity. I find that considerable doubt, at least, presents itself, and that the point is not so clear, one way or the other, as will enable me to pronounce upon it with any degree of certainty, or to pay that attention which I should do if the point had been determined by authority in those Courts, deciding one way or the other.

Having disposed of the previous parts of this inquiry by examining the decisions in other Courts, I now come to the concluding part, and that which if there were sufficient materials would have superseded all others. I mean the decisions and proceedings and practice of our own Courts; for sitting as a Judge of an inferior tribunal, if I found that this point had been determined and settled by a superior ecclesiastical authority, I should not have [441] hesitated one moment to obey that decision, nor considered myself bound to inquire what were the grounds on which it stood. Nothing I was more solicitous for than to find a decision upon the subject in these Courts. One of the learned counsel has relied on the practice of these Courts and has alleged that for a long period of time exceptions of this nature have been admitted; but I confess I am not aware that a practice without any authority whatever is such as would govern a decision on a question like this; and I think, where an objection to the admission of an allegation is made on this ground, it is better to take a decided case than to consider the allegation as admissible according to the practice of the Court in cases of this description. I look then to the decisions. I have looked into the whole of the different instances of allegations objected to in the reports of cases in these Courts.

The subject is adverted to in a note to the case of *Evans v. Evans* (1 Hagg. Con. 95), and it was argued on other points, but not on this.

The only other case in which the question was mooted is the case of *Whish and Woollatt* against *Hesse* (3 Hagg. Ecc. 680), which has been alluded to by the learned counsel, I believe, on both sides. It has been said that this case does not decide the point at issue; I must say that this proposition is subject to considerable doubt; I do conceive this to be a direct authority of the superior Court to which I am bound to defer. But I have felt unwilling to rule and decide this question on a single authority, however high, lest, by possibility I might strain it beyond [442] its just bearing and true intention, and further than was meant by the learned Judge who pronounced the decision. His words are (3 Hagg. Ecc. 682): "The rule is, that you cannot cross-examine to matter not bearing on the issue and then contradict it by

other evidence in order to discredit the witness; nor if a witness answers such irrelevant question before it is disallowed or withdrawn, can evidence afterwards be admitted to contradict his testimony on the collateral matter." This is the very doctrine which is held in the Courts of Common Law. In my judgment the rule laid down by the learned Judge is supported not only by his high authority, but rests on the same foundation, and on all the reasons on which it is maintained in the Courts of Common Law. On the evil consequences which must ensue from allowing a party to frame interrogatories wholly foreign to the matter at issue, and to be decided—to ransack the whole life of a witness—to inquire into transactions of any date or complexity (for if once permitted, and an allegation admitted, I do not see how these consequences could be averted)—and it follows too that these courts must enter into an entire new issue when witnesses must be examined on both sides; and similar objections may be raised to the credit of these witnesses, and the whole repeated; I am of opinion that the evils arising from the expense, the delay, and the inconvenience must surpass any possible benefit in individual cases. The evils here would be infinitely greater than at common law; the evil mentioned by Sir John Nicholl of loading a cause with interrogatories wholly irrelevant to the issue in the cause [443] could not be guarded against: an evil, in my judgment, of the greatest magnitude, and which, if such exceptive allegations were admitted, it would be utterly impossible for proctors or counsel to counteract. I must again declare my conviction that the rules of these Courts, equally with those of all other Courts of Justice, ought to be framed so as to administer justice with reasonable expedition, and at a reasonable expense in the great majority of cases, without attempting that minute investigation which, even if it conduces to the discovery of truth, in individual cases, by increasing the expense and delay in all, denies real justice to the great bulk of those whom necessity or circumstances call to judicial tribunals.

Perhaps it may be thought that I have entered too minutely into this investigation, and have referred unnecessarily to the proceedings in other Courts. I have done so in accordance with the practice of all who have preceded me, and with the example of Sir John Nicholl in *Whish and Woollatt* against *Hesse*; I have done so from an anxious desire that if this my judgment be questioned by superior authority, the whole grounds of my opinion may be distinctly known, and the error, if it be erroneous, more clearly and easily detected. I reject therefore these articles, considering that in the situation in which I am placed, in so doing I act in obedience to authority I am bound to respect, and that I do so in accordance with that sound rule which I conceive has regulated the practice of these and other tribunals.

I reject therefore the fourth, sixth, seventh, eighth, ninth, tenth, and eleventh articles.

[444] *BELCHER* against *BELCHER*. Arches Court, Michaelmas Term, 3rd Session, Nov. 21st, 1836.—The husband liable to the costs of the wife, unless she has a separate income sufficient both for her own support and for the payment of her costs.

On taxation of costs.

This was an appeal from a sentence of the commissary of the Court of the Dean and Chapter of St. Pauls, in a cause of divorce.

The question now before the Court was whether the costs of the wife should be taxed against the husband; the wife having a separate income of 236l. per annum, the husband being a captain in the Navy, with an income averaging when employed 510l. a-year.

Sir Herbert Jenner. Upon general principle the costs of the wife must be defrayed by the husband, who is presumed to possess the whole of the property.

In this case the husband is a captain in the Royal Navy, receiving pay as such, together with extra pay allowed to him for the survey in which he has been employed.

He is occasionally on half-pay, but when employed his income may be taken at 510l. per annum; the wife has a separate income of 236l. per annum, which is settled and permanent, that of the husband's being subject to variations; under these circumstances the Court would be willing to [445] afford relief to the husband, if it could do so consistently with established principles. But what are the exceptions to the rule that the husband must pay the wife's costs?

In the case of *Wilson* against *Wilson* (2 Hagg. Con. 203) Lord Stowell said,

"It must appear that the wife has an income correspondent to her own expenses, and the necessary expenses of the suit, for both must appear," and the case of *Davis* against *Davis* (ibid. 204, n.) was referred to by him as an authority.

In this case the wife, from the time of her marriage, has never been assisted by her husband, but has entirely supported herself; she then has sufficient for her own subsistence. But has she enough also for the payment of her costs?

It was stated in the argument that in this case there has been a sentence against the wife in the Court below, and that she is the appellant. The Court, however, cannot take that into its consideration. If she were to pay the expenses, how could she maintain herself?

Again, it was urged that she ought to pay her own costs because she is living with her mother; but, as was observed by Sir John Nicholl in the case of *Beever* against *Beever* (3 Phill. 264), "That she (the wife) lives with her mother does not alter the case: her mother is not bound to maintain her."

It was stated that the costs had been waived in the Court below, but from whatever cause that arose, the husband has not been pressed by the payment of those costs. It was also said that in certain [446] cases the question of costs has been reserved until the hearing of the cause, the circumstances of those cases were not, however, mentioned; the Court cannot, therefore, say how they apply to the present case.

Another argument that was pressed upon the Court was that the husband's pay is appropriated to the service of his country—that it cannot be assigned.

But supposing the wife had had no income at all, in that case the husband must have paid both alimony and costs; the fact then of the wife having sufficient money to support herself has caused no hardship to the husband: he has thereby been relieved from the payment of alimony.

But the simple question is, is there any precedent to shew that where the wife has an income of 236l. and the husband has 510l. per annum, he has been exonerated from the payment of her costs? No such case can be found. I am, therefore, under the necessity of directing the costs to be taxed against him.

It would have been much to the satisfaction of the Court if it could have found any cases in which the costs have been apportioned between husband and wife, where the incomes of both parties have been small; but I have never met with a case of the kind, nor am I aware that any such a rule ever existed.

[447] *ADEY against THEOBALD*. Court of the Archdeacon of London, Michaelmas Term, Nov. 25th, 1836.—A Quaker having been elected churchwarden, the Court under the circumstances declined to compel him to take upon himself the functions of the office.

This was a proceeding instituted by Mr. Thomas Adey, one of the churchwardens of the parish of Allhallows, London Wall, on the part of the parish, against Mr. Samuel Theobald, of Bishopsgate-street, a member of the Society of Friends (commonly called Quakers), to compel him to take upon himself the office of churchwarden, to which he had been duly chosen.

A citation having been served upon Mr. Theobald, calling upon him to appear, and take upon himself the office of churchwarden, he appeared and objected thereto: he was then assigned to set forth his objections in an act on petition.

Mr. Theobald stated in the act that he was a member of the religious Society of Friends—that he could not, consistently with his religious scruples, take upon himself the discharge of the office of churchwarden, whereby he should be called upon to take care of the goods, repairs, and ornaments of the church; to present offenders to the Ecclesiastical Court; to levy the church-rate, and to see that the parishioners duly attended to divine service—that his objections were increased by the extent of the declaration which he would have to make, "That he would truly and faithfully execute the office of a churchwarden, and, according to the best of his skill and knowledge, present such things and per-[448]sons as to his knowledge are presentable by the laws ecclesiastical of the realm"—that the Society of Friends never voluntarily make the payment of church-rates, and that he could not, consistently with his principles, make the above declaration—that although the act of 1st William and Mary, commonly called the Toleration Act, permitted persons who scrupled to undertake the office to execute it by a sufficient deputy, yet that he felt that that statute

afforded him no relief—that it was a maxim, no less of Christian morals than of English law, that the principal is responsible for the act of his agent, that *qui facit per alium facit per se*. That he was the only member of the religious Society of Friends resident within the parish; and he submitted that, by reason of his religious principles and scruples, he was entitled to claim relief from discharging the duties of the said office.

It was alleged in reply to this, on behalf of Mr. Adey, that Mr. Theobald had been elected to the office in due rotation—that the parish, although extensive, contains but few inhabitants who are eligible to the office, of whom the greatest proportion have already served—that Mr. Theobald has been an inhabitant of the said parish for thirteen years, and has never before been elected—that if the scruples of Mr. Theobald prevent him from serving the office personally, or by a substitute, he was at liberty, agreeably to the custom usual on such occasions in the said parish, to pay the sum of thirty pounds in aid of the poor rates; a custom which has never before been objected to—that although Mr. Theobald is the only actually admitted member of the religious Society of Friends called [449] Quakers, resident in the said parish, there is another inhabitant thereof calling himself a Quaker, who will, in rotation, shortly be elected to the said office; and also several dissenters of various denominations, all of whom allege their scruples to be equally strong with those of the said Mr. Theobald, and have stated their intention, should he be excused, of refusing to take upon themselves the office whenever elected thereto—that Mr. Theobald, as a member of the Society of Friends, commonly called Quakers, is not exempt by law from executing the office, and that he cannot be excused from performing the same, without manifest injustice towards others of the inhabitants of the parish who have already served, or may hereafter be required to serve, the said office.

Mr. Theobald submitted that upon the grounds set forth in his petition he was entitled to be relieved from serving the office.

Burnaby for Mr. Adey contended that the duty of the Court was merely ministerial—that it must assign Mr. Theobald to take upon himself the office—that he had been duly chosen churchwarden, and had no right in law to be exempted—that the exemptions are set forth by Prideaux, and that a Quaker was not among those who are excused—that the provisions of the Toleration Act, the 1st William and Mary, would be nugatory if the person who has scruples is to be excused altogether from serving; but that act was imperative. In its terms it enacted that “if any person dissenting from the Church of England shall be chosen or appointed to bear the office of churchwarden, and such person shall scruple to take upon him such [450] office, in regard of the oaths, or any other matter or thing required by the law to be taken or done in respect of such office, he shall and may execute the same by a sufficient deputy, by him to be provided that shall comply with the laws in that behalf”—the terms “shall and may” are imperative; and if the Court were to excuse this gentleman, it would in effect be dispensing with an act of Parliament—that the maxim, *qui facit per alium facit per se*, had no application to the case, for that the deputy, when approved of, was *de facto et de jure* the churchwarden; as in the case of the ballot for the militia, the substitute was really the person serving; to which no objection was made by the Quakers, although the maxim that the principal was answerable for the acts of his agent would apply more strongly than in the present case. But, supposing this gentleman’s scruples extended so far, still the other alternative was left, and to which no reference whatever was made by him in the act on petition, namely, to pay thirty pounds in relief of the poor rate, and which other parishioners had paid. If Mr. Theobald were altogether excused, it would be unfair and unjust to the rest of the parish.

Judgment—Dr. Phillimore. The present question arises with respect to the eligibility of a person to serve as churchwarden in the parish of Allhallows, London Wall. It is an application on the part of the churchwarden, regularly chosen, and who has taken upon himself the exercise of the office, in the name and on the behalf of the parish, to compel the other person, who has been chosen a church-[451]-warden, who is a member of the Society of Friends, to take upon himself the functions of the office. There is no question as to the competency of the vestry, or as to the mode in which the churchwardens were elected. The sole point at issue is whether I shall compel the party thus brought before the Court to take upon himself the discharge of the office.

When the question first came to the view of the Court, and I was called upon to assign the party to take upon himself the office, I confess I felt startled at the proposition. I felt that not only the person proceeded against, but that an ecclesiastical judge, might justly entertain scruples with respect to such a proceeding; and with that view I was willing to give the parish an opportunity of reconsidering the question, and of reflecting whether the choice they had made was a judicious choice. I am disposed to hold a strong opinion, from my experience, which has been pretty long, of the churchwardens of the metropolis, that the duties of this office are least adequately performed where they are exacted from persons of different religious persuasions from the Established Church; persons so circumstanced do not perform these functions with the same spirit and zeal as those who are members of the Established Church. The parish have reconsidered the question, and persist in calling upon me to compel this person to take upon himself the office of churchwarden. Mr. Theobald has stated his objections in an act on petition, the parish have replied to them, and Mr. Theobald has put in a rejoinder; an affidavit has been made by the vestry-clerk confirming the allegation that this gentleman [452] was duly elected and has refused to assume the office of churchwarden, and this is the evidence on which I am to decide the question.

In the first place, it seems to me extremely injudicious in members of the Established Church to compel persons, whose religious principles are so well known as this gentleman's are, to discharge duties, which all who take upon themselves the office of churchwardens are bound to do; and for this reason I have been anxious to look out any authority on the point—any authority, that is, in which any Court, in a contested suit, has compelled a Quaker to take upon himself the execution of such an office. I am not aware of any such authority, and I must therefore take the case as one *primæ impressionis*. I have been reminded that several persons of this gentleman's persuasion have taken upon themselves this office, and undoubtedly my own recollection furnishes me with several examples to that effect. But it has always appeared to me an extraordinary anomaly that dissenters should be constituted "the guardians and keepers" of our Established Church (for thus they are termed by high authority) (1 Blackstone, 394), and take upon them an office like this, with the functions belonging to it, so closely and intimately connected with our Church. There are various duties of the office of a churchwarden pointed out and enjoined by the ecclesiastical law which this person could not perform. Many of the Canons of 1603; the 19th, 50th, 52d, 80th, 83d, 84th, 85th, 109th, 110th, 111th, 112th, prescribe duties to a churchwarden which it would be incompetent for a Quaker to perform: such, for [453] instance, as the preserving order during divine service; and there are duties also prescribed by the rubric as attached to the office of churchwarden, and implying even the necessity of their presence at the administration of the Sacrament itself, which it is utterly impossible for this person, with a strict adherence to conscience, to perform. There is an old case in 1st Levinz, 196, *Hill v. Fleurer*, in which a churchwarden was tried for an assault, for pulling off the hat of a person during divine service. In the report of the case it is said that the justification was, that the party proceeded against was a guardian of the church, and that was held to be good, that a churchwarden was justified in preserving decorum during divine service, for the reporter says, how could he act as guardian of the church, and bound to present offenders to the Ecclesiastical Court, if he permitted any one to be guilty of this irreverence and indecency during divine service. But a churchwarden of the sect in question would not only not take off the hat of another person, but it would be part of the formal discipline of his caste to wear his own. But looking to Prideaux, who has been cited for another purpose at the bar, he thus details the duties of a churchwarden. "By the duties of his office, he is obliged to be present in the parish church, of which he is churchwarden, on all Sundays and holidays, to take notice of the absence of such parishioners as do not come to the said church, in order to present them for the same; and also to take care that no disorder be committed in the said church or churchyard during divine ser-[454]-vice and sermon, and that all things be kept in order and quiet."

In my search for cases I find a case decided by Sir William Scott, in 1789, the case of *Anthony v. Seger* (1 Hagg. Con. 9), in which the question was not the same as this, but the question was whether an alien-born could be compelled to serve the office of churchwarden. Sir William Scott there held that offices the most ministerial

left a discretion to the judge not to join in an illegal act; and he illustrated this by saying, "that if a parish were to return a Papist, or a Jew, or a child of ten years old, or a person convicted of felony, he conceived the ordinary would be bound to reject such a person." Now, what do I collect from this case? that in the judgment of Sir William Scott, if the person presented by a parish should be a Papist or a Jew, the ordinary would not compel that person to perform the duties of the office, and I should like to know the distinction between a Roman Catholic and a Quaker, or why even a Jew might not be liable, if it were a matter of course that he might serve by deputy?

It has been said that I am bound by the Toleration Act to compel any dissenter who may be chosen by the parish to serve this office. It is true that the statute referred to allows dissenters to act by deputy, but I am yet to learn how such a permission is to be construed as compulsory upon the ecclesiastical judge, to admit all dissenters, of every description, to the discharge of this office. [455] Such a construction would be totally irreconcilable with the dictum of Lord Stowell, with respect to Papists and Jews, in the case of *Anthony v. Seger*.

Again; it has been argued that Prideaux has not inserted Quakers in the list of those persons who are not liable to fill this office: but in the enumeration given by Prideaux we do not find an alien, a Jew, or a Papist. What then do I infer from this? That there may be cases in which there is a discretion in the Court whether it shall feel itself called upon to enforce the performance of these duties. The obligation is not compulsory on all. I must not be understood to say that all dissenters are exempted, or to specify whether any, and if any, what, class may be exempted. If that question comes before me, it will then be time to distinguish between the cases, according to circumstances and facts. Far be it from me to allow any assumption of a religious cloak to prevent persons from discharging a legal obligation; but the Society of Friends are known; they are a marked and peculiar caste—are privileged even as to their exemption from the forms of marriage, enjoined by the legislature—their tenets, doctrines, and habits are recognised to be such as to make it impossible to consider that they can discharge the duties of churchwarden. Having the means of knowing the conscientious scruples of this sect, a judge of an Ecclesiastical Court ought seriously to pause, not only before he attempts to violate the religious scruples of this class of persons, but also for the purpose of asking himself whether he can conscientiously admit into the bosom of our Church persons who are disqualified from obeying her [456] sanctions and giving full force and effect to her institutions and ordinances.

Upon the whole, from the best consideration I can apply to the case, I have come to the determination that the parish must proceed to the election of some other person, as I will not compel this individual to serve the office. And consequently I dismiss Samuel Theobald from further observance of justice in this case.

CROWLEY AND SHARMAN *against* CHIPP AND TUBB. Prerogative Court, Michaelmas Term, 3rd Session, Nov. 24th, 1836.

On petition.

In this case John Chipp and Daniel Tubb, the sureties in the administration bond of Catherine Tubb, the widow and administratrix of Charles Tubb, deceased, were cited to shew cause why the bond should not be attended with, and produced as might be requisite or necessary in certain proceedings alleged to have been commenced in the Court of Common Pleas by Crowley and Sharman, creditors of the deceased against them, for an inventory and account of the personal estate and effects of the said Charles Tubb. It was alleged in the decree that the said Charles Tubb was at the time of his death indebted to Crowley and Sharman in the sum of £403, 7s. 1d., and that in the month of November, 1832, they, on behalf of themselves, [457] and the rest of the creditors of the deceased, filed their bill of complaint against the administratrix for an equal distribution of the effects of the said deceased, and that the usual process of subpoena issued against her to appear and put in her answer to the said bill, but that she had quitted her residence and could not be discovered, so that the subpoena could not be served, and that in consequence thereof the action was brought in the Common Pleas against the said sureties.

An appearance was given to this decree by Chipp and Tubb, and an act on petition was entered into, in which they denied that the widow had evaded the

service of the subpoena; and they set forth her residences and places of abode since her husband's decease, and submitted that it was contrary to the law and practice of the Court to permit the bond entered into by them to be put in suit against them, and for such purpose to be attended with in any Court, until proceedings had been first taken against the administratrix to exhibit an inventory of the goods, chattels, and credits of the deceased, which had come to her hands, possession, or knowledge, and to render a just and true account of her faithful administration thereof; as by the production of such inventory and account it would probably appear that no breach of the bond had been committed.

In reply to this it was submitted, on behalf of Crowley and Sharman, that as the administratrix had not exhibited an inventory and account within the time assigned by the bond entered into by her at the time of granting the administration of the goods of the deceased, a breach of the said bond had actually been committed, and that they were en-[458]-titled to have the bond attended with in any action for such a breach. On a former day (the 6th of May),

Sir Herbert Jenner, after reading the act on petition, and stating that it appeared to him that, if due diligence had been used, the widow might have been found, proceeded: The question then is whether, as the administratrix has not given in an inventory at the time assigned her, no proceedings having been instituted against her for the purpose of calling for that inventory—the Court will, without entering at all into the merits of the case, direct the bond to be attended with for the purpose of being sued upon at law. It has been contended that it is the duty of the Court so to deliver out the bond, and the case of *The Archbishop of Canterbury against House* (Cowp. 140) was relied upon to shew that a creditor has a right to sue upon the bond, and that the Court ought *ex debito justitiæ* to permit the bond to be attended with for the purpose of its being put in suit; but I do not think that such is the result of that case; there a motion was made to stay the proceedings in an action upon an administration bond, so that the bond had been delivered out, and the grounds for staying the proceedings were that the creditor (the party suing in that cause) had no authority from the archbishop; and, secondly, that it was not competent to the archbishop to depute such authority to a creditor.

As to the first point, the fact was disproved, and Lord Mansfield commenced his observations with [459] saying, "What the object of the administratrix was in this case is very manifest upon the affidavits that have been read: namely, to sell the administration to the creditors. But failing of that purpose, after having obtained the administration she makes use of all sort of chicane, delay, and false pleas, to defeat the creditors, and at length absconds." So that there never was a stronger case than that against the administratrix, and the application was made on her behalf to stay the proceedings. Lord Mansfield went on to say, "that he knew of no authority which says that the ordinary cannot empower a creditor to put the bond in suit. On the contrary, he says it is *ex debito justitiæ* that he ought to do so." Certainly where a case is made out. What I apprehend to be decided by this case is that the archbishop has the power to allow an administration bond to be sued upon in his name, and that a creditor has as much right to put the bond in suit as a next of kin; that was the case which was principally relied on, and it occurred in 1774, but the authority of that case is somewhat shaken by the case of *Thomas against The Archbishop of Canterbury* (1 Cox, 399), which was decided in 1787. The marginal abstract, which appears to be correct in that case, was this: "An administratrix entered into the usual bond in the Prerogative Court to exhibit an inventory within a limited time. The time having elapsed without an inventory being exhibited, a creditor put the bond in suit in the name of the archbishop. The administratrix filed her bill for an injunction, which [460] was granted, on the terms of her giving judgment in the action, which was to stand as a security for the costs at law and in equity (but not for the debt), and amending the bill by submitting to account." The impression of Lord Thurlow clearly was that the Spiritual Court had a discretion in the matter, and that it would not permit the action to be brought if the executor could shew that he was not culpable; but he said the Temporal Courts had interfered. I am not, however, aware of any case in which a mandamus has been granted from the Court of King's Bench. The whole of the cases on this point were discussed in the case of *The Archbishop of Canterbury against Robertson* (1 Cr. & M. 390; 3 Tyr. 390, in which case the bond had been attended with, and nominal damages

recovered as to the non-delivery of an inventory. Mr. Baron Bayley, in that case, seemed to be of opinion that the Ecclesiastical Court might limit the breaches to be assigned (3 Tyr. S. C. in notis, p. 419), but not finding it stated in any of those cases that the power of this Court is limited, it is material to see what has been the practice here.

In all cases, before the bond has been delivered out, the party has been called upon to shew cause.

Lushington. I put it that the Court would see whether there had been any breach of the bond, and, if so, that it would then order the bond to be delivered out without considering what might be the consequences in a court of law.

[461] Sir Herbert Jenner. But in many cases the Court has refused to deliver out the bond where no inventory had been exhibited. I should be extremely unwilling in any case upon the mere non-delivery of an inventory to allow the bond to be attended with, and in the present case strong grounds existed for not calling for the inventory, as proceedings had been instituted in the Court of Chancery.

The Court declined to make any order until the parties should have cited the administratrix to bring in an inventory.

The widow afterwards brought in an inventory, and this day

Addams submitted that there were no grounds whatever for the proceedings in this case, that the widow in effect had given an inventory by passing her account at Somerset House; that the other parties knew that the estate was insolvent; and when the act on petition was gone into on a former day, the Court said that the parties ought to have called upon the widow to exhibit an inventory, which they have not done; but the widow, of her own accord, has since brought in the inventory, and he prayed that his parties might be dismissed with their costs.

Lushington *contra*. When the proceedings commenced, the widow had not exhibited an inventory which the sureties engaged that she should do; upon the admitted facts then of the case there was sufficient ground for coming to the Court, no inventory had been exhibited, and the [462] parties were not dismissed, but were held before the Court, in order that the widow might bring in the inventory, and the effect of that inventory might be seen.

Sir Herbert Jenner. Courts of common law having been of opinion that the non-delivery of an inventory constitutes a breach of the administration bond, creditors of the deceased have a right to see the inventory exhibited. I cannot, therefore, say that the parties shall not come here for the purpose of calling for the inventory. No inventory had been exhibited in this case in the first instance, but that has since been done; I cannot hold that the parties in this case, therefore, had no grounds for instituting these proceedings. I shall dismiss the parties, but make no order as to costs.

GREENHILL against GREENHILL. Consistory Court of London, Dec. 19th, 1836.—

The Court will not withhold the enforcement of its order, by reason that the party obtaining such order, is in contempt of the Court of King's Bench, and is resident out of the country, in order to evade the process of that Court.

On petition.

In this case a sentence of separation had been pronounced in favour of Henrietta Lavinia Greenhill against Benjamin Cuff Greenhill, her husband, by reason of his adultery, and alimony had been allotted. A monition having been taken out against the husband to compel payment of that alimony, an appearance was given to the monition under protest by the husband, and an act on petition [463] was entered into. It was alleged on the part of the husband that he had three children, all of whom were in their infancy; that shortly before the institution of this suit, the children were removed from Weymouth, where they had been residing with their mother, the said Henrietta Lavinia Greenhill, to the residence of Mrs. Macdonald, her mother; that they had been so removed by Mrs. Greenhill without the knowledge and consent of the husband, and contrary to his intentions with respect to the custody of the said children; that he thereupon applied to the Hon. Mr. Justice Patteson, one of the judges of the Court of King's Bench, for, and obtained, a writ of habeas corpus for the delivering up of the said children to him. That the writ having been served on Mrs. Greenhill, she appeared thereto, and that an order was made that she should deliver up the children to her husband. That pending the said application for the

habeas corpus a bill was filed on behalf of the children, and a petition was presented to the Vice-Chancellor, praying that a fit and proper person should be appointed guardian of the children, but that the Vice-Chancellor, after hearing counsel upon such petition, decided that there was no ground for the interference of a Court of Equity with respect to the custody of the said children, and refused to grant the prayer of the petition for the appointment of a guardian to them.

That the order made by Mr. Justice Patteson for the delivering up of the children was made a rule of the Court of King's Bench, and the same having been duly served on the said Henrietta Lavinia Greenhill, she refused to obey the same, and applied [464] to the Court of King's Bench, and obtained a rule to shew cause why that order should not be rescinded; that on the refusal of Mrs. Greenhill to comply with the said order, Mr. Greenhill, the husband, obtained a rule from the Court, calling upon her to shew cause why an attachment should not issue against her for a contempt of Court; that attempts were made to serve her with the said rule, but that she, having previously taken the children from the custody of Mrs. Macdonald into her own custody, secreted herself and kept out of the way, for the purpose of avoiding the service upon her of the said rules, and that same could not be served. That, a special application having been made to the the Court of King's Bench for the purpose, the rule for the attachment was brought under the consideration of the Court without a personal service, and at the same time also the rule obtained by Mrs. Greenhill, to shew cause why the order made by Mr. Justice Patteson should not be rescinded, was considered by the Court, that while the same were pending, and before they could be heard, the utmost endeavours were made by Mr. Greenhill and his solicitor and agents to ascertain to what place Mrs. Greenhill had removed herself and her children, and offers were made by the husband (which reached the wife) to make such arrangement respecting the custody of the said children as should leave Mrs. Greenhill ample opportunities of free access to them, which offers were absolutely rejected. That in January last she left this country, and took with her the said children, for the purpose of avoiding the attachment against her for contempt. That the questions arising upon the aforesaid [465] rule of Court were argued, and the rule for the attachment against her was made absolute, but the attachment was to remain in the office one month, in order to afford her an opportunity of complying with the same, or of making some arrangement. That the said order has not been complied with; that Mrs. Greenhill and the children are now abroad, but at what place is unknown to the said Mr. Greenhill. That the order for attachment issued, but in consequence of her absence from the country cannot be served upon her; and it was submitted on behalf of the husband that, under the circumstances stated, Mrs. Greenhill was not entitled to have the payment of the alimony allotted to her in this Court enforced against him.

Addams and Nicholl submitted that sufficient was set forth to justify the Court in not enforcing the monition; the wife has illegally taken possession of the children, and contumaciously refuses to comply with the order of the Court of King's Bench, and is in contempt. She now comes to this Court to ask for funds to enable her to evade the laws of the country; would not the Court, by complying with her prayer, be accessory to a fraud upon the other Courts.

The King's advocate and Daubeney contra.

Dr. Lushington. In this case a suit was originally brought by Mrs. Greenhill against her husband for a separation, by reason of his adultery, and the Court was of opinion that the charges were proved against him, [466] and pronounced a sentence of separation, and alimony was allotted to the wife. The proctor of the wife has endeavoured to enforce payment of that alimony, and an act on petition has been entered into on behalf of Mr. Greenhill, alleging facts said to be sufficient to induce the Court to withhold the exercise of its power to compel the payment of the alimony. Under ordinary circumstances, it is the usual course of the Court, *ex debito justitiæ*, to enforce obedience to decrees already made. As a ground for departing from the accustomed practice, it is alleged that these parties have three children, that Mrs. Greenhill has taken possession of them, and has removed them out of the country; that the right to the possession of the children is in the husband, that he has obtained an order from the Court of King's Bench, directing her to deliver up the children to him; that Mrs. Greenhill petitioned the Court of Chancery to appoint a guardian to the children, and that her application was rejected; that she has removed out of the

jurisdiction of the Courts of this country, and contumaciously refuses to obey the order of the Court of King's Bench; and it is said that I ought under these circumstances to decline to enforce the monition.

I am not aware that such an attempt as this was ever before made, and the counsel for Mr. Greenhill, when I asked for some precedent, were unable to state any authority in support of the application. The absence of all authority of anything approaching to a precedent would alone make it the duty of the Court to pause before it took upon itself to stay the ordinary course of its judicial process, and to introduce a new principle to govern its proceedings. [467] I must at least be satisfied that if, no such case has occurred, the subject matter falls properly within the cognizance of ecclesiastical tribunals. But is this so? Does the conduct of the husband or the wife, with respect to the children, in any degree belong to this Court? I apprehend not; all that I am to determine is between the husband and wife, with respect to each other, the allotment of alimony is incidental, and necessarily incidental, to such jurisdiction. It is no part of my duty to consider, and I have not a shadow of authority to determine, whether the wife is or is not to have the custody of the children: the whole matter as to the care and custody of children belongs to another jurisdiction. In a case before the late Judge of the Arches Court he refused to make any deduction in the amount of alimony, on account of there being a child in arms under the wife's care; his reason being that, so far as his authority extended, he would not aid the husband in taking so young a child from an innocent wife; and in this case I am at a loss to know why I should, by starving an innocent wife, compel obedience to the orders of other tribunals to render up to the guilty husband the offspring of that union, the obligations of which he has grossly violated. Suppose this lady had a separate income, it is not maintained that the Court of Chancery would stop the payment of that money to her for the purpose of compelling obedience to an order of the Court of King's Bench, and why should alimony stand on a less favourable foundation? I shall not go into the question whether the husband has offered a proper asylum for the children, the question is foreign to the duties of my office, I shall, [468] therefore, overrule the protest and direct the money to be paid, and make an order under the recent act of Parliament (2 & 3 Wm. 4, c. 93), but before I make that order I should wish to be informed whether counsel have sufficiently considered the provisions of the act. Before I make my order under the act there must be an attempt to enforce an order of the Court, a contempt, and an exemplification, and it forms a consideration with me in deciding this case that, if this be the result, the Court of Chancery may refuse to enforce the sequestration, and so exercise a jurisdiction if it think fit.

The return of the officer who served the monition was read, stating that he had attended at Aberdeen Place, Marylebone, on the 1st of June, to serve the monition, that he found the house was to let furnished; that upon inquiry of a female in the service of Mr. Greenhill he was informed he was out of town and would not return for six months, and that she did not know his place of abode in the country; that he read the monition to her and left a copy; that he proceeded to Mr. Greenhill's solicitors, who told him he was not there, but declined to give any information as to where he was, and that he (the officer) left with him a copy of the monition.

The King's advocate referred to the 2nd sect. of 2 & 3 Wm. 4, c. 93, and contended that there had been a sufficient service to justify the Court in signifying the contempt of the party. The only [469] case that has occurred since the passing of the act was that of *Hinxman* against *Hinxman*, in which there had not been a personal service but by ways and means; that was a proceeding to enforce the payment of alimony pendente lite; the party could not be personally served, the instrument was stuck up at the Royal Exchange, and on the chapel where Mr. Hinxman was in the habit of officiating, and the Court, considering that Mr. Hinxman must have had cognizance of the proceeding, pronounced him contumacious, and a significavit issued.

In this case now before the Court the party had not been personally served, but the monition had been served at the house, and a proctor had appeared for him.

Dr. Lushington. If I could see that the service had been really evaded I should have no hesitation in pronouncing the party in contempt and signifying it. I now overrule the protest and direct that the money shall be paid; but as the party had appeared to the monition I shall let the matter stand over until the next Court day: in the mean time another monition might be taken out if the party thought proper.

Another monition was accordingly prayed, and on the first session of Hil. Term

(17th Jan.) 1837, the return having been read, the Court, after stating that it appeared by the return that every attempt had been made to serve the monition, pronounced Mr. Greenhill in contempt, and directed the exemplification to issue to the Court of Chancery agreeably to the act of Parliament.

[470] THE OFFICE OF THE JUDGE PROMOTED BY TAYLOR *against* MORLEY, Arches Court, Hilary Term, 2nd Session, Jan. 19th, 1837.—Articles against a clergyman for quarrelling and brawling, and for insulting, disrespectful, and disobedient conduct in the church, being only in part proved, the Court monished him to be more careful, and condemned him in 75l. nomine expensarum.—Letters of request from the commissary of Buckingham go to the Court of Arches and not to the chancellor of Lincoln.—The Ecclesiastical Court has jurisdiction in offences of brawling independently of the statute 5 & 6 Ed. 6th, c. 4.—In criminal suits the articles should state the whole transaction, in order that the defendant may give an affirmative issue.

[Referred to, *Wilson v. Wilson*, 1871, L. R. 2 P. & D. 344; *Martin v. Mackonochie*, 1879, 4 Q. B. D. 769; *Read v. Bishop of Lincoln*, 1889, 14 P. D. 127; *Girt v. Fillingham*, [1901] P. 176.]

In this case the Rev. George Morley, the vicar of Newport Pagnell, was cited, by letters of request from the commissary of the archdeaconry of Buckingham, at the instance of William Taylor, one of the churchwardens of the said parish, to answer to certain articles, &c., “and more especially for quarrelling and brawling in the parish church of Newport Pagnell aforesaid, and for insulting, disrespectful, and disobedient conduct towards the archdeacon and commissary of Buckingham in the said church; and for preaching a sermon in the parish church aforesaid, in which sermon the conduct of the said archdeacon was improperly animadverted upon; and for writing and sending a letter abusive of his behaviour and conduct.”

An appearance having been given for Mr. Morley, the articles were brought in, pleading,

The first, Mr. Morley's institution to the vicarage of Newport Pagnell on the 28th of June, 1832, and his induction subsequently.

The second exhibited a copy of the act of institution made in the muniment book kept in the registry of the Bishop of Lincoln.

The third, that at a visitation held by the [471] Venerable and Reverend Justly Hill, clerk, Master of Arts, archdeacon of the archdeaconry of Buckingham, and commissary of the Bishop of Lincoln, in the parish church of Newport Pagnell aforesaid, on Saturday, the 30th of May, 1835, &c.; the clergy of the said archdeaconry were first called, and having severally answered to their respective names, the greater number of them then left the Court; but that the said George Morley, the vicar, remained in his gown and bands, and stationed himself close to the rails of the communion table in the chancel of the church, and as near as possible to the archdeacon; that the churchwardens of the said archdeaconry were then called and sworn; and upon the churchwardens of the said parish of Newport Pagnell being called, an inhabitant of the said parish preferred to the archdeacon a complaint against them, concerning a pew or seat in the said parish church; that the archdeacon having received and heard such complaint proceeded to state the nature of the law relative to church seats to the said complainant; and that in the course of his so doing the said George Morley many times interrupted him by observations and remarks impertinent and improper, although repeatedly requested by the archdeacon not to interfere in the proceedings; that the archdeacon at length stated to Mr. Morley that after he should have explained the law of the case to the said complainant, he would willingly hear anything he might wish to say, and that, accordingly, having concluded explaining the law as aforesaid, he informed the said George Morley that he was ready and willing to hear him; that thereupon the said [472] George Morley, in a violent, disrespectful, and insulting manner, proceeded to address the archdeacon upon the subject of the said complaint and his aforesaid explanation of the law of the case, and declared to the archdeacon, amongst other things, that he knew nothing of the matter and that he would enlighten him; and that the said George Morley then and there, without regard to the sanctity of the place, made use of many other improper and offensive expressions derogatory to the dignity of the said Court; that the archdeacon at length, in consequence of the impropriety of Mr. Morley's manner and

language, admonished him, upon his canonical obedience, to refrain from continuing such his interruption, and informed him that if he refused to do so he must leave the Court; that Mr. Morley thereupon put himself into an outrageous and violent passion, and exclaimed, "If there is not justice to be done, I shall leave the Court; this man has been most unjustly dealt by," or used words to the very same effect, and then departed from the said Court.

The fourth, that within a very short time after Mr. Morley had quitted the said Court he returned into the same without his gown and bands, and was approaching the rails of the communion table with much insolence in his manner and bearing, when the archdeacon addressed him, and stated that he could not allow him to remain there unless he would apologize for his conduct and language, and promise that he would not further interrupt the proceedings of the said Court, but that Mr. Morley, then addressing himself to the archdeacon, exclaimed in a violent and passionate manner, "If I [473] have been guilty of contempt of the Court, I will apologize, but I deny your authority, or that of any man, to remove me from my own church, and I defy you to do so," or used words to the very same effect, and several times repeated the said words, "I defy you;" and also used many other expressions of defiance, and accompanied the same with violent and offensive gesticulations and manner, insomuch that the archdeacon was induced, for the decorous despatch of business, and with a view to maintain the dignity of the said Court and preserve the sanctity of the place, to order, and did accordingly order, the officers of the said Court and the churchwardens to remove him from the said Court, and that Mr. Morley was accordingly, but quietly and without violence, removed by them from the said Court.

The fifth, that on the day next following the visitation aforesaid, Mr. Morley, in a sermon preached by him, after the morning service in the parish church of Newport Pagnell aforesaid, taking for his text the 25th, 26th, and 27th verses of the 29th chapter of Proverbs, namely, "The fear of man bringeth a snare; but who so putteth his trust in the Lord shall be safe.

"Many seek the ruler's favour, but every man's judgment cometh from the Lord.

"An unjust man is an abomination to the just; and he that is upright in the way is an abomination to the wicked."

Did, amongst other matters, in an excited and unbecoming manner, inveigh against the conduct of the said archdeacon, and make remarks and observations [474] with evident allusion to the transactions mentioned and set forth in the two next preceding articles.

The sixth, that the archdeacon having in consequence of such, the conduct on the part of Mr. Morley, as hereinbefore set forth, considered him unfit to hold the office of one of his surrogates, and having withdrawn his appointment as such accordingly, Mr. Morley did, on or about the 29th of June, 1835, write, address, and send a letter to Edward Prickett, of Aylesbury, the register of the Archdeaconry Court of Buckingham, and which was duly received by him, wherein Mr. Morley did express himself in ironical, and highly disrespectful, and unbecoming terms of the archdeacon, his lawful canonical superior.

The seventh exhibited the letter and pleaded it to be in Mr. Morley's handwriting. (a)

(a) The letter was as follows :—

Vicarage, Newport Pagnell, June 9th, 1835.

Sir,—The venerable, the archdeacon of Bucks, is at full liberty to wreak his vengeance on me, in any way that he may judge will most redound to his dignity and glory, and best promote that subservient respect to his person which he so anxiously and strenuously demands.

The archdeacon is remarkable for exhibiting every courteous and Christianlike grace, becoming a minister of the "meek and lowly" Jesus, and is a pattern to the clergy of the county of Buckingham, of rendering good for evil, and of doing unto all men as we would they should do unto us.

I return you six blank licenses with the certificates, and you will be so good as to pay the cost of them into Messrs. Rickford and Sons' bank, to my account.—I am, your obedient servant,

GEORGE MORLEY.

(Superscribed)

Edward Prickett, Esq., Aylesbury.

[475] The others were the usual formal articles.

The admission of the articles was opposed, and the judge rejected the fifth, sixth, and seventh articles. A negative issue was given by Mr. Morley, and witnesses were examined to prove the articles; and subsequently a defensive allegation was brought in on behalf of Mr. Morley, pleading,

First. That sometime previous to the visitation, Daniel Goodman, a respectable parishioner of the parish, was ejected by the then churchwardens from a pew in the church, to the possession of which he conceived that he had a just and legal claim or title. That the wife of the said Goodman, by his direction, wrote to the archdeacon, complaining of the conduct of the said churchwardens. That the archdeacon wrote in reply to Mr. Goodman, promising to investigate in person the subject of such complaint at his next visitation, and in the meantime recommending Goodman to apply for advice and assistance to Mr. Morley, the vicar; that Goodman did accordingly apply to Mr. Morley, and requested him on the day previous to the visitation to state on his (Goodman's) behalf the grounds on which he conceived himself entitled to the use of the pew, he, Daniel Goodman, being distrustful of his own power to explain his case intelligibly at the visitation.

The second exhibited the archdeacon's letter.

The third denied the third and fourth articles of the libel to be true, and pleaded, in contradiction, that the visitation having been held, and the clergy dismissed, Mr. Morley continued sitting on the bench outside the communion rails, where he and others of the clergy had been sitting up to the time of their dismissal, being the same seat which he had [476] occupied on previous visitations since his induction. That on the churchwardens of Newport Pagnell being called, the archdeacon (producing at the same time a letter from his pocket) said, "I have received a letter about a pew from some man or other, it is a long letter, and I can't make much of it;" and added, "Can you tell me anything about it?" appealing to William White, one of the said churchwardens; that the said White replied that "the pew was empty, and that they (meaning himself and his co-churchwarden) had given possession of it to another parishioner." That the archdeacon then said, "I see, I see; I dare say it's all right, but it is as well to have this man, Goodman (I think is his name), up, and hear what he has to say." That Mr. Morley upon this stood up, and addressing the archdeacon, was about to state that Goodman had requested him to explain the circumstances under which he conceived the pew was not a vacant one, but that Goodman had a claim of right to the use or possession of it; but was immediately ordered by the archdeacon to sit down and not interrupt the Court. That Goodman was then questioned, but soon became so confused as to be unable to explain the circumstances connected with the said pew. That there being a momentary pause, Mr. Morley again rose and requested permission to state the said Goodman's case, but was again desired by the archdeacon, with much austerity of tone and manner, to sit down, and was told that if he again interrupted the proceedings of the Court, he (the archdeacon) would have him removed. That Morley having, though provoked at such the annoyance of the archdeacon, resumed his seat, the [477] archdeacon proceeded to lay down the law on the subject of pews, in churches generally, incidentally whilst so doing deciding the point at issue against Goodman, and concluded by stating that it was "all right," and that the churchwardens had done their duty. That whilst so incidentally deciding the case Morley did not interrupt the said archdeacon with any remarks whatever, nor up to such time did he at all interfere, save as aforesaid. That the tone and manner of Morley in requesting to be heard on behalf of Goodman was perfectly proper and respectful, and that when told to sit down a second time and not interrupt the Court, on pain of being turned out of his own church, he, however provoked, sat down without making a single remark.

The fourth pleaded that after the archdeacon had concluded his statement (and during which he received no interruption from any one), he added, in a sneering and sarcastic tone and manner, "and now we will hear what Mr. Morley has to say." That upon this Mr. Morley arose, and by way of prefacing what he was about to observe, said, "If you will condescend, Mr. Archdeacon, to be enlightened by me on the subject." That no sooner had the term enlighten fallen from him than the archdeacon broke forth, "Enlighten your ordinary, sir!" That Mr. Morley replied, "I have no intention to offend you, sir, or the Court, my object is simply to throw a light upon the case," or to that very effect. That the archdeacon immediately upon

this called upon the churchwardens and his apparitors to turn Mr. Morley out of Court. That upon this order being given, Mr. Morley rose and left [478] the church, merely saying as he left, though extremely provoked, "I shall leave the Court, Mr. Archdeacon, without troubling these persons to turn me out of it; but I must say that Mr. Goodman has not had justice done him," or to that effect. It denied that Morley ever said that the archdeacon knew nothing of the matter, and that he would enlighten him, or anything to that effect, or that he made use of any expressions derogatory to the dignity of the Court; and it pleaded that, in saying what he last said, his manner was not violent, disrespectful, or insulting, nor, making allowance for some natural warmth occasioned by the archdeacon's ordering him to be turned out of his own church as aforesaid, in any respect different from his usual and ordinary manner.

The fifth. That about a quarter of an hour after Morley left the church he returned thereto, without his gown and bands, as pleaded in the articles, the clergy having been long previously dismissed, and there being at such time several other of the clergy without their gowns and bands in the church; and it pleaded that while Mr. Morley was proceeding up the aisle, walking in his ordinary gait and manner, when ten or twelve yards from the communion table, the archdeacon called out in a loud tone of voice, "I will not suffer you to remain there unless you make an apology." That Mr. Morley replied, "I am sorry that you should imagine I have shewn any disrespect to you, Mr. Archdeacon, as that was not my intention." That the archdeacon immediately rejoined in a sharp and angry tone of voice, "Then make an apology, sir, or I shall have you removed." When Mr. Morley [479] said, addressing himself to the archdeacon, "I apologize to you, Mr. Archdeacon, for any words that I may have used derogatory to you in your official capacity, or to your Court, though I must be permitted to say that I have not been civilly treated;" that the archdeacon immediately called upon his apparitors and officers to turn that person (thereby meaning Mr. Morley) out of the church; that Mr. Morley then further said, addressing the archdeacon, but not in a violent and passionate manner, or with greater warmth than such conduct and language would naturally provoke in any one, "I am not prepared to say decidedly, but I think I might defy you to turn me out of my own church;" that the archdeacon upon this immediately repeated his orders to turn that person out of the church, whereupon Mr. Morley was not removed as pleaded, but at the solicitation of his friends and others was induced to leave, and did leave, the church quietly of his own accord; and it pleaded that Mr. Morley did not use the words "I defy you" more than once, or at any other time, or in any other manner than as aforesaid; that he did not make use of any other words of defiance; that what he said was not accompanied by violent and offensive gesticulations as pleaded.

This allegation was admitted without opposition, and witnesses having been examined in support of it, the cause came on for hearing, and was argued in Mich. Term, 1836.

Lushington and Curteis were heard in support of the articles. Addams and Lee contra, and on this day judgment was delivered.

[480] Sir Herbert Jenner. After stating that considerable delay had occurred in the proceedings of the cause, and which, he understood, had been occasioned by a desire that the matter might be compromised, and that he regretted that such had not been the result, proceeded. In the first place, then, I will consider what was the substance of the charge as originally brought. The citation called upon the defendant to answer to certain articles, more especially "for quarrelling and brawling, and for insulting, disrespectful, and disobedient conduct in the church; and for preaching a sermon in which the conduct of the archdeacon was improperly animadverted upon; and for writing and sending a letter abusive of the archdeacon's conduct;" upon the return of this citation an absolute appearance was given for Mr. Morley, so that the offence charged appeared to him, and to his legal advisers, to be one cognizable by this Court; the articles were afterwards brought in, and considerable discussion took place as to their admissibility, and the Court rejected the fifth, sixth, and seventh articles, being of opinion that the charge of preaching a sermon animadverting on the archdeacon's conduct, contained in the fifth article, was not admissible, no part of the sermon being set forth, it being therefore impossible for the Court to judge what the real nature of the sermon was; and the sixth and seventh articles were rejected, on

the ground that the Court had no jurisdiction to inquire into the matters set forth, the letter written by the defendant, relating to a subject which might be purely of a civil nature.

[481] The charges that remain then to be considered are for brawling, and for disobedient and disrespectful words, addressed to the archdeacon by Mr. Morley, and the Court cannot read the articles without feeling that the charge is of a very grave description; and, if proved to the extent as laid, that it would be the duty of the ordinary to prevent, by adequate punishment, the recurrence of such conduct in future, more particularly looking to the relative situation of the parties: and when the admission of the articles was debated the Court expressed itself to be of such opinion.

The party proceeded against gave a negative issue, denying the facts, but admitting the jurisdiction of the Court; but two objections have been now taken to the jurisdiction of the Court, which it will be necessary to notice, because if either those objections are good, it would be useless to go at all into the questions as to the proofs in the cause.

An objection to the jurisdiction of the Court may certainly be taken at any time, but it is more usual, and undoubtedly more convenient, that such objection should be taken in the commencement of the proceedings.

The first objection was that the letters of request (from the commissary of Buckingham) ought to have been addressed to the chancellor of the diocese of Lincoln and not to this Court, but I consider that objection entirely disposed of by the case of *Burgoyne against Free*.^(a)

The other objection was a novel one, and, if good, [482] would dispose almost of all cases of brawling, but I always thought it the duty of the ordinary to protect the sanctity of the church, and this, not only under the statute of Edward the Sixth, but by the general law also; the objection was that the Ecclesiastical Court has no jurisdiction in such matters, except under the statute, and then only when the offence amounts to a constructive breach of the peace, and in support of this position the case of *Wenmouth against Collins* (2 Lord Raym. 850) was cited as an authority. In that case a prohibition was moved for to stay a suit in the Ecclesiastical Court against Wenmouth for brawling in the belfry of the church, and striking a man there, upon the suggestion of the statute 5 & 6 Ed. 6, c. 4, and alleging that all statutes are construable by the common law, and that Wenmouth came there, as mayor, to suppress a riot; but the Court denied a prohibition, because the offence was cognizable in the Ecclesiastical Court, before the statute *ratione loci*; and though the statute provided a penalty, it did not alter the jurisdiction; surely then the Court is not prohibited from proceeding under the general law, and proceedings have frequently been taken both under the statute and the general law; and, in many cases, it is advisable to proceed under the general law, because the statute requires two witnesses in proof of the charge, while under the general law, one witness to certain words, and one to circumstances, is sufficient, and it may not always be in the power of a party to produce two witnesses in support of the specific charge: and the case of *Hutchins against [483] Denziloe* (1 Hagg. Con. 181) is precisely in point to shew that proceedings may be taken under the statute or the general law, and it would have been an extraordinary state of the law if any quarrelling and brawling might take place in a church unless amounting to a constructive breach of the peace, and any indecent or indecorous language might be used with impunity.

Now as the words, in this case, are charged to have occurred at a visitation, it is urged that they ought to be considered in the same way as if passing at a vestry meeting, and as was said by Lord Stowell (1 Hagg. Con. 185) "that may be chiding or brawling in the church, which would not be so in the vestry," but I cannot look upon a visitation in the same manner as a common vestry meeting; a visitation is a much more solemn meeting, it is preceded by prayers (and in this case Mr. Morley himself read those prayers), and great decorum is required, although it is of common occurrence that questions of a civil nature do arise; those relating to rates, repairs, or church seats, and undoubtedly some degree of earnestness of manner is allowable, and the present question is whether, under the circumstances of this case, Mr. Morley's conduct was such as to render him liable to ecclesiastical censures.

(a) 2 Add. Rep. 405. See also *Hillyer against Milligan*, p. 8. Cases before Sir G. Lee.

Much has been said as to the churchwarden being the party who prosecutes this suit, but he is the fit and proper person to keep order and decency in the church, and in this case the archdeacon could not himself promote the suit; therefore, I [484] think, if the churchwarden is proceeding of his own accord, that there is nothing objectionable in his so doing; but it has been much pressed upon the Court that the archdeacon is the real promoter in this case, and evidence has been adduced on the point, and it is impossible on the whole *res gestæ* not to be satisfied that such is the fact: but this would make but little difference, if the offence charged in the articles be proved against Mr. Morley; although, it is possible, that the conduct of the archdeacon may have considerable bearing as to the question of costs, and in cases of this kind the question of costs is one of material consequence. I will now proceed to consider the facts of the case; I am sorry to see that the evidence in the cause runs to a very great length, and from the length of time which has elapsed from the date of the transaction to the time when the witnesses were examined, they speak with great looseness as to the circumstances, and great variation occurs in the accounts given by the different witnesses. It is proper that I should observe that in cases of this description the articles ought to state fairly and candidly the whole transaction; not only is this due to the Court, but it is just to the defendant also, as he might at once admit the facts to be true; but I must say, looking at these articles, that they set forth, from the very commencement, a very aggravated and inflamed account, and which, if true, would be indecent in the extreme; but, upon looking at the evidence of the witnesses on one side and the other, it is quite clear that Mr. Morley was not actuated with any desire to insult the archdeacon.

[485] The Court then stated the substance of the articles and Mr. Morley's allegation, and after having most minutely discussed the evidence of the witnesses on both sides, concluded. The Court, therefore, thinks that Mr. Morley was guilty of brawling and disrespectful and disobedient conduct towards the archdeacon. Had this been a proceeding under the statute of Edward the Sixth the Court would have had no alternative, but must have suspended Mr. Morley from the discharge of his duties; but under the general law a milder course is open to the Court, and it may admonish him to be more careful in future, and I do admonish Mr. Morley accordingly. But another question arises here, which is one of considerable difficulty, the question as to costs, which, considering the length of the proceedings, will be heavy on one side or the other; under general circumstances, where articles are proved, costs follow as a matter of course; but in the present case the articles are not borne out anything like to the extent to which they go; it was not until the archdeacon said he must remove Mr. Morley that he used the words proved to have been uttered by him, and had the charge been confined to what is now proved in evidence the defendant might have given an affirmative issue to the articles; but looking to what is proved against Mr. Morley, he could not have been expected to give an affirmative issue to the articles admitted in this case; on the other hand, he has been guilty of an offence. Upon the whole of the case then, with reference to the length of the proceedings, and the [486] bulk of evidence, I think it will meet the justice of the case if I condemn Mr. Morley in the sum of seventy-five pounds, *nomine expensarum*.

TREVANION against TREVANION. March 21st, 1837.—Held, affirming the decision of the Consistory Court of London, that facts and circumstances having no bearing on the issue in the cause cannot be pleaded in order to discredit a witness.

On appeal.

This was an appeal from the decision of the Judge of the Consistory Court of London, rejecting certain articles of an exceptive allegation and directing others to be reformed (see *ante*, p. 406).

Sir Herbert Jenner, after stating the nature of the case and the contents of the exceptive allegation, proceeded:

The question for the consideration of the Court is whether the Judge of the Consistory Court of London did right in rejecting the fourth, sixth, seventh, eighth, ninth, tenth, and eleventh articles of this allegation, and directing the third and fifth to be reformed. I may here observe that I entertain no doubt as to the propriety of the direction given by the learned Judge of the Court below, rejecting the eleventh article, and for the reformation of the third and fifth articles, and the admission of the first and second, and I have, [487] therefore, no hesitation in affirming that part of the sentence.

The question as to which the argument has been mainly pressed ; and which, indeed, is the only part with respect to which any real difficulty arises, relates to the fourth, sixth, seventh, eighth, ninth, and tenth articles ; the objections to which may be all classed under one general head, namely, that they are all of them entirely irrelevant and foreign to the issue in the cause, introducing a number of collateral facts which, if proved, would have no bearing upon the principal question, however they might affect the credit of the particular witness against whose testimony they are pleaded.

It may not, however, be improper here also to observe that I consider the contradictions pleaded in these articles to be precise and positive, and going directly to shew that the witness has sworn falsely, and not only so, but that he has also so sworn, knowingly and wilfully, for the falsehood must have been within his own knowledge ; there can, therefore, be no doubt that if these articles should be admitted and proved, the evidence of this witness could have no effect whatever in the ultimate determination of this cause.

Under these circumstances it is that the Court is called upon to give its opinion upon the admissibility of this allegation, and in so doing it will not think it necessary to go at any great length into the question, because the learned Judge of the Court from which the appeal is brought has taken the trouble of going through all the cases, both in the Courts of Common Law and Equity, and has [488] stated the result of his investigations in the judgment in this cause, with a copy of which I have been furnished ; and, because, in examining those cases for myself, I see no reason for arriving at a different conclusion, so far as the general result, from that which he has expressed.

With respect to the Courts of Common Law, it is admitted that the rule of practice has now been settled for nearly thirty years that you cannot ask a witness a question totally irrelevant to the matter in issue, for the purpose of contradicting the witness if he should depose contrary to the truth.

With respect to the Courts of Equity there seems to be more doubt. The case of *Purcell and Macnamara* (8 Ves. 324) seems to affirm the principle that after publication it is competent to a party under the special direction and permission of the Court, for that is necessary, to examine on articles to the credit of a witness, whether general or particular, with reference to facts to which he had deposed, those facts not being material to the merits of the cause, and in several cases of a late date Lord Eldon (see *Carlos and Brooke*, 10 Ves. 49) seems to have upheld the same doctrine, and to have expressed himself in strong terms upon the propriety of the practice, and I do not find that any of the late cases, as reported, militate against this doctrine ; whether, as the Judge of the Court below intimated, in delivering his judgment, from information which he had received from persons certainly sufficiently competent to give an opinion, such practice has been departed from in later days, I am not prepared to say ; but supposing [489] the practice to continue as it was at the time when the case of *Purcell and Macnamara* occurred, I do not think that it necessarily forms a precedent for these Courts whose practice in many respects differs from that which is stated to prevail in the Courts of Equity ; for, in the first place, these Courts do not, and will not, permit an examination into the general character and credit of a witness after publication, all such objections must be taken before the evidence of the witness is seen ; whereas in this respect a different practice seems to be followed in Chancery.

In another respect also we differ from them, namely, in permitting a witness to be contradicted after publication, as to facts to which he has deposed, those facts being pertinent to the issue to be tried ; and the only exception to this rule is that the facts so deposed to shall not have been pleaded in such a manner as to have enabled the party to contradict them before publication ; and I may state it as the general rule here prevailing that the facts contradicted in an exceptive allegation must have some, though not, perhaps, a very strong, bearing upon the principal question ; and that if facts wholly irrelevant to the issue are allowed to be pleaded after publication in contradiction to a witness, that is an exception to the general rule in these Courts, whereas in the Court of Chancery it appears to be an indispensable condition, the very foundation of the rule, and that without which the permission would not be given to examine to ; I do not, therefore, think that our practice can be made to depend upon that of the Court of [490] Chancery ; but that we must look to ourselves,

and to our own records. There are certainly very few reported cases on questions of this nature, and they are very far indeed from furnishing any thing like a rule of practice. It is only of late years that reports of decisions in these Courts have been published, which may, perhaps, account for this deficiency; but, still, many of us have been here long enough to have been engaged in cases in which the question has been mooted, and I fear I may say with different results; the admission or rejection of such allegations seeming rather to have been made to depend upon the presumed importance of the testimony given by the witness upon points connected with the issue to be tried, rather than upon the irrelevancy of the contested facts. The two cases, which were alluded to in argument, of *Evans against Knight and Moore* (1 Add. 138), and of *Westwood against Burke* (1831, not reported), may, perhaps, be taken as examples. In the former of those cases nothing could be more irrelevant to the issue to be tried than the facts to which the witness had deposed, which were sought to be contradicted, and yet the learned Judge of the Prerogative Court did not reject the allegation, but suspended the admission of it until the hearing of the cause, for the purpose of seeing whether the case would depend in any material degree upon the credit to be given to that witness; the fair inference, therefore, would be that, if it had been found so to depend, the allegation would have been admitted; and in [491] *Westwood and Burke* the allegation was actually admitted, although the facts deposed to were not connected with the issue.

In the face, then, of these two cases, had nothing further occurred, the Court might have found some difficulty in coming to the conclusion that such allegations were under no circumstances to be admitted. But I think that the case of *Whish and Woollatt against Hesse* (3 Hagg. Ecc. 680) has set this question, as far at least as this Court is concerned, at rest, and has been since that time considered as having established the rule that it is not competent to parties to put irrelevant questions to witnesses for the purpose of excepting to their testimony after publication. It is true that that was a criminal proceeding, but I am not aware that that furnishes any important distinction, and I apprehend that in Courts of Common Law the same principle applies in civil and criminal proceedings, and I do not understand the learned Judge in that case to have stated this rule as supported by a series of adjudged cases in these Courts, but as one proper to be followed in future, as being founded upon just principles.

Since that case was decided I am not aware that any has occurred in which an exceptive allegation, founded on irrelevant matter, has been admitted, I do not recollect that any such was cited in argument; on the other hand, some few others have occurred in which such allegations have been rejected in this Court, but upon which I do not rely, further than as shewing that the practice has [492] since been in conformity with the case of *Whish and Woollatt against Hesse*, and the Court would be inconsistent with itself if it were now to hold that such allegations were generally admissible.

The only doubt which suggested itself to the mind of the Court was, whether there might not be some exceptions to the general rule, whether it might not be entrusted with some degree of discretion to be exercised according to the particular circumstances of each case, and I am free to confess that I should not have been sorry to have been able to satisfy myself that such was the case, with reference to the peculiar nature of the present proceedings; but having weighed carefully in my mind the conveniences and inconveniences to which such a laxity of proceeding would give rise, I am inclined to think that it is better, upon the whole, to adhere to one settled rule, whatever prejudice it may produce in a particular case, and I think the more wholesome rule is that which is adopted in the Courts of Common Law, "that you cannot contradict a witness on facts impertinent to the issue;" the consideration which weighs greatly with me is the difficulty of drawing the line within which such exceptions should be allowed; if, for instance, in the present case the witness had been asked whether he had not made such an affidavit as that produced, in some Court in the West or East Indies, and he had made the same answer as he has given upon his present examination, it would have been equally important to Mrs. Trevanion to have contradicted him as now, and yet it could hardly have been contended that the Court was to issue a requisition for the examination of wit-[493]-nesses to prove the facts, and to hold its hand until that was done, yet the cases, in principle at least, are the same. I again, therefore, state that if the rule is once relaxed it is impossible to

say to what extent it may not be carried, and what expense and delay might not be created by it, to say nothing of the encouragement which, as suggested in argument, it would afford to the practice of administering long and numerous interrogatories upon wholly irrelevant points, a practice which is not even now so sparingly exercised as to require to be further extended by the fostering hand of the Court; and, upon the whole, I am of opinion that the Judge of the Consistory Court of London was right in his decision upon this case, and I, therefore, pronounce against the appeal, and remit the cause.

A further appeal was prosecuted in this case to the judicial committee of the Privy Council, where the cause is still pending.

[494] FOX *against* MARSTON AND HORDERN. Prerogative Court, March 21st, 1837.—An allegation, pleading parol declarations of a testator, to rebut the implied revocation of a will from marriage, and the birth of a child, admitted.

On the admission of an allegation.

The question at issue in this case was whether or not the will of John Fox, deceased, was revoked by his subsequent marriage and the birth of a posthumous child. The will bore date the 17th January, 1835. The marriage of the deceased took place on the 21st February, 1835. He died on the 13th of May, and the child was born on the 16th of October, 1835.

The will was propounded by the executors in a condidit. It was opposed by Ann Fox, the widow of the deceased. The due execution of the will was admitted by her, but an allegation in opposition to the validity of the will was given in on her behalf, pleading, in substance:

First. That John Fox, the party deceased, died on the 12th of May, 1835, aged about fifty-nine years, that he was possessed of or entitled to personal estate and effects of the value of about £10,500, and of real estate of the value of about £50,000, and that he was indebted to various persons to the amount of about £11,000.

Second. That at the time of the execution of [495] the will in question (January, 1835) the deceased was a bachelor, that on the 21st of February in the same year he and Ann Fox, then Bakewell, were married.

Third. Pleaded a copy of the entry of the marriage in the parish register.

Fourth. The death of the deceased on the 13th of May, 1835.

Fifth. That the said deceased left his wife, the said Ann Fox, the party in this cause, enceinte with child, and that in due time afterwards, to wit, on the 16th of October, 1835, she gave birth to a male child, the issue of her marriage with the said deceased.

This allegation was opposed. It was submitted that the facts pleaded were not sufficient to raise the presumption that the will was revoked; that in no case had it been held that a will was revoked by marriage and the birth of a child, except where the widow and child were wholly unprovided for: (a) There might be in this case an after purchased estate, or marriage settlement, and upon the face of the will itself it appears that the deceased left certain property to the wife during life, or so long as she should remain sole and unmarried, (b) and [496] it might well be doubted whether the deceased himself, having afterwards married her, could be held to be an ademption of that legacy.

But the Court admitted the allegation, without giving any opinion, until the whole of the facts and circumstances of the case should be before it.

In reply to this, a further allegation was given in on behalf of the executors, pleading circumstances shewing the deceased's adherence to his will notwithstanding

(a) Williams's Law of Executors, vol. 1, p. 108 (2nd edition).

(b) The deceased by his will gave and devised the rents and profits of certain freehold estates, amounting to the annual sum of about one hundred and sixty-seven pounds, to Ann Bakewell, spinster, and her assigns for and during the term of her natural life, or so long thereof as she should remain sole and unmarried, subject, nevertheless, to impeachment of waste, and from and after the decease or marriage of the said Ann Bakewell, which shall first happen, he devised the said estates to his relation, William Marston and his heirs and assigns for ever; and after a few legacies the residue, both real and personal, was given to William Marston, and he and John Horderm were appointed executors.

his marriage, and various declarations of the deceased for the purpose of repelling the presumptive revocation of the will in question.

As the argument against the admission of this allegation was directed almost entirely to the point whether parol declarations of a testator are admissible, for the purpose of rebutting the implied revocation of a will arising from marriage and the birth of a child, it has not been thought necessary to set forth the contents of the allegation.

Lushington and Addams opposed the admission of the allegation.

The King's advocate and Nicholl contra.

Sir Herbert Jenner. This case comes before the Court upon an objection made to the admission of an allegation, pleading facts and circumstances and declarations of the deceased, in reply to an allegation which had been admitted, setting up the revocation of the will of John Fox, the deceased, by reason of his subsequent marriage and the birth of a child.

[497] The will in question bears date the 17th of January, 1835. The deceased was married on the 21st of February, died on the 12th of May, and the child was born on the 16th of October in the same year.

The principal question which the Court has to determine is whether the parties who oppose the presumptive revocation of this will are at liberty to plead the parol declarations of the deceased, in order to support the validity of that will against the presumption of law.

In the course of the argument several cases were referred to which have been determined in the Courts of Common Law and Equity, to shew that, with respect to real property, the declarations of the deceased could not be pleaded, and it was contended that such evidence, on principle, ought not to be received here; at the same time, it was not denied that in the Ecclesiastical Courts parol declarations have been constantly admitted.

Now, the questions with regard to real and personal property differ very materially, and the considerations applicable to each description of property are in themselves very distinct. In the first place, a will of personal property requires no publication; it does not require to be attested by witnesses; it does not even require the signature of the deceased: all that is necessary for its validity is, that it should be reduced into writing during the lifetime of the testator; no other formality whatever is necessary to give it effect and operation: whereas, with respect to a will of real property, the Statute of Frauds requires that it should be executed in the presence of three witnesses, and [498] attested by them, and that statute goes on to provide that such will shall not be revoked, except in certain particular modes, which are pointed out by the statute, and that it shall stand good—for there are affirmative and negative words in the statute—until it shall be revoked by one of the modes pointed out. There is also another distinction between the two species of property, which is very important to be borne in mind, namely, that the disposition of the property is different in itself. In the case of intestacy the personal property will be divided among all those who are in the same degree of relationship. If there is a widow and children, the widow will take one-third, and the rest will be divided among the children equally, whether of an original or of a second marriage; whereas, with respect to real estate, the whole would devolve upon the son, or if there should be one of the first marriage, without any benefit being derived by the sons of the second marriage, or either of the daughters; it is impossible, therefore, that the two species of property could stand in a more distinct and different situation with respect to distribution in case of intestacy.

As the question as to the admissibility of parol evidence with regard to the real estate remains to be argued before the Judges, Mr. Baron Alderson having rejected the evidence on the trial before him, and a bill of exceptions having been tendered to his decision, this Court, it is said, is called upon to state upon what principle it is that this presumed revocation rests, whether on a total alteration of circumstances, from which it may be presumed that the deceased would not wish his will to remain; or, upon [499] a tacit condition annexed to the will itself at the time of making it, that if there should be such an alteration that the will should not stand. But I do not know that I am called upon to determine that question at the present time any more than my predecessors in this chair have been at an earlier period, for the question is left in precisely the same state.

The point remains doubtful as to real property (that is the utmost extent to which

it can be put); although with respect even to real property, I am not aware of, nor have I been referred to, any case in which parol evidence has been rejected, where it was offered for the purpose of repelling the presumption of law; and in these Courts the decisions are all in one uniform current, admitting such evidence in all cases of presumed intention.

Now the principal cases referred to by the learned counsel on one side and the other were, first, that of *Brady and Cubitt* (Doug. 31). In that case Lord Mansfield considered that the marriage and birth of a child afforded a mere presumption that the deceased did not intend that his will, under those circumstances, should stand; and he said, "I am clear that this presumption, like all others, may be rebutted by every sort of evidence;" and parol evidence was admitted in that case; in this opinion the other Judges, Willes, Ashurst, and Buller, concurred; here, therefore, is a clear and explicit decision of the Court of King's Bench, consisting of the learned persons I have mentioned, that parol evidence was admissible, for the purpose of repelling that which is described as a mere presumption, and I am not [500] aware of any case in which such decision has been reversed.

The next case referred to was that of *Lancashire and Lancashire*, decided in 1792 (5 Durnford & East, 49), (*Brady and Cubitt* being in 1775), the great point in that case was whether a posthumous child stood in the same situation as one already born. The decision in this case does not interfere with that of *Brady and Cubitt*, the parol evidence being offered to support the revocation of the will, and not to repel the presumption. Lord Kenyon said, "I disclaim paying any attention to the declarations of the husband, because letting in that kind of evidence would be in direct opposition to the Statute of Frauds;" that is to revoke a will of lands; and Mr. Justice Buller said, "Marriage, and the birth of a child produce a revocation of a will of lands, such revocation is by presumption of law, and implied revocations are not affected by the Statute of Frauds." He said, "I entirely concur with my Lord that no attention is to be paid to the declaration stated in the verdict. If there is any revocation at all it is so by presumption of law, independently of express declarations."

In *Brady and Cubitt* he was of opinion that declarations were admissible to rebut the presumption, so that this is only a decision that they are not admissible to revoke, and may well consist with the case of *Brady and Cubitt*.

In *Goodtitle and Otway* (2 H. Blacks. 516) the Court of Common Pleas refused to admit parol evidence to shew that the testator meant the will to remain in force, unrevoked by a subsequent conveyance by lease and [501] release to trustees, to other uses than those in the will. Chief Justice Eyre said, "Revocations by operation of law are, on the ground of *presumptio juris et de jure*, that the party did intend to revoke, and that *presumptio juris* is so violent that it does not admit of any evidence to repel it, and this makes it difficult," he said, "to understand the case in Douglas (*Brady and Cubitt*), supposing that to be a case of revocation by operation of law, and not within the Statute of Frauds."

Buller, Justice, who was also one of the Judges in *Brady and Cubitt* and in *Lancashire and Lancashire*, distinguished the case of *Brady and Cubitt* from that, saying, "There was a great difference between cases which depend on circumstances, and those which depend on the solemn acts done by the party himself, and that distinction supports the case of *Brady and Cubitt*. There was no act in that case done by the testator importing that he meant to revoke his will or to change it in any respect, but changes having happened in his family by marriage and the birth of a child, there was a presumption of revocation, and therefore it was to answer that presumption that the Court received parol evidence. But," he adds, "I cannot find from any one case quoted at the bar that the Court has received parol evidence in the case of a deed executed by the party himself, with a view of altering the construction of the instrument. I think the cases on the other side prove that it cannot be done." He then refers to *Parsons and Freeman* (3 Atk. 741), cited in argument, as directly in point, and as the strongest that could be put, because it appeared that [502] the intention of the testator was to confirm and not revoke his will. He concludes, "I, therefore, think that this is a *presumptio juris et de jure*, and that the case must stand or fall by the rule of law, without being explained by parol evidence." Heath, Justice, agreeing, said, "A will may be construed according to the intention of the party, not always observing the strict rules of law; but a deed must take effect according to its legal operation, and it is impossible to admit evidence to explain it."

And Rooke, Justice, says, "This being a question of mere law"—whether the deeds did revoke the will or not—"I think we ought not to admit any evidence, because it cannot possibly affect the question."

This then was the case of an absolute revocation by operation of law, by the execution of the deeds depending upon technical rules affecting real property; and Mr. Justice Buller, although agreeing in this judgment, adheres to and reconciles his opinion in *Brady and Cubitt* with it, also thereby shewing that the decision in *Lancashire and Lancashire* did not clash with that in *Brady and Cubitt*, as it is clear it did not. It also shews that the revocation of a will by marriage and the birth of a child is merely a presumption, and not an absolute revocation, otherwise, as in *Goodtitle and Otway*, no evidence could be received against it, and it is admitted that facts and circumstances may be received against this presumption, although it is contended that parol evidence cannot.

In *Gibbins and Caunt* (4 Ves. 840) Lord Alvanley certainly expresses an opinion that parol evidence [503] ought not to be received, and that the circumstances ought to be held an ademption, without reference to any particular knowledge the testator might have; but he seems to admit the practice to be otherwise; his words are, "We all know now that a will is revoked by a subsequent marriage and the birth of a child; I believe they do go the length of permitting evidence to be received against that; I do not like that; and Lord Kenyon, in the last case, *Lancashire and Lancashire*, did not form his opinion upon it. The circumstances themselves should be held to be an ademption, independent of any particular knowledge the testator might have. I think that the very circumstance of a wife and child infer a presumption that the will shall not stand." This was Lord Alvanley's opinion, but the case did not require him to decide the point, and he did not do so.

In *Kenebel and Scrafton* (5 Ves. 663) Lord Loughborough said the parol declarations weighed nothing, because they did not amount to a republication; this is a strong expression of his Lordship's opinion that the revocation was absolute, which is not contended for; and in the same case, in the Court of King's Bench, on an issue directed from the Court of Chancery (2 East, 530), Lord Ellenborough decides the case in favour of the will, neither rejecting nor admitting the parol evidence; so that his Lordship did not think the rule was clear either for or against receiving such evidence, though on the trial in which the special verdict was found, parol evidence had been received and was set forth in the verdict. He also declined to decide whether the doctrine of implied revocation rested on [504] change of intention or on tacit condition, although he said the latter was the better foundation of reason.

In *Sheath v. York* (1 Ves. & B. 390) the will was revoked in the Ecclesiastical Court as to the personalty, and not revoked as to the realty, on the ground that the children of the second marriage would derive no benefit from the revocation, the effect of it being to give the whole of the real estate to the son of the former marriage, which by the will was directed to be sold, and the proceeds divided between the son and two daughters of that marriage.

Sir William Grant, speaking of the revocation of the personal estate, says, "The revocation as to personal estate had an effect which might, perhaps, have been intended by the testator, that of letting in the after-born children with those of the first marriage; but the principle of the decision has no bearing whatsoever on the devise of the real estate, which, according to my opinion, stands unrevoked."

This shews that there is nothing very absurd in drawing a distinction between wills of real and personal property, from the different principles applicable to one and altogether inapplicable to the other description of property, and forms a precedent for a different determination with respect to each kind, though disposed of by the same will.

With respect then even to a will of lands, there is one case, that of *Brady and Cubitt*, which decides that parol evidence is admissible to rebut the presumption of the revocation of the will of a man who, after the date of the will, should have married and had children. But none have been cited in which such evidence has been rejected; although [505] there are some opinions of learned Judges strongly expressed that it ought not to be admitted, and that the revocation should be absolute, requiring a republication with all requisite formalities to revive its effect.

But whatever doubts may exist as to the propriety of adopting this rule as to wills of land, it does not follow that the same rule should apply to wills of personalty. I

have already said that they depend upon different principles, require no formality in the execution, no publication, no attesting by witnesses; all that is required is that they shall be in writing, and the statute only enacts as to the revocation of them that they shall not be revoked by words, or by will by word of mouth, only. It is admitted that parol evidence has been always received in these Courts, and there are numerous cases which might be cited to that effect, if the admission of the fact did not supersede the necessity of so doing. The Court, therefore, has nothing to do but to follow the course which has been pursued by its predecessors in this chair, and to hold, until otherwise instructed by a superior Court, that parol evidence may be received. I cannot see any difference between admitting parol evidence in such a case as the present and in that class of cases relating to the revival of a will, by the cancellation of one of a later date, in which declarations have always been received to shew the intention of the testator.

A further objection was taken to the declarations of the deceased of his doubts of the chastity of his wife and of his disbelief that the child was his; and the observations of Lord Mansfield in *Goodright* against [506] *Moss* (2 Cowp. 591) were cited, that the declarations of a father or mother cannot be admitted to bastardize the issue born after marriage. And that "it is a rule founded in decency, morality, and policy, that the father and mother shall not be permitted to say, after marriage, that they have had no connection, and that, therefore, the offspring is spurious." But these declarations are not pleaded for the purpose of bastardizing the issue; if so, I should be of opinion that they are not admissible, but the object is to shew the motive upon which the deceased acted, and in that view, I think, they may be pleaded.

The Court then, after some slight alterations, admitted the allegation.

The decision in this case was appealed from to the Privy Council, but the will being held to be revoked at law, the case in this Court was compromised, and the widow took out administration to the deceased as dead intestate.

[507] *BAKER AND DOWNING* against *WOOD*. Arches Court, Hilary Term, By-Day, Feb. 11th, 1837.—Notice having been given of a meeting in vestry for the purpose of granting a church rate, and that if a poll should be demanded, that the meeting would be immediately adjourned to the town hall. The meeting being held and a poll demanded, the chairman immediately adjourned the meeting to the town hall, where the poll was taken: Held, that the proceeding was regular, no business having been interrupted by it, and the adjournment being part of the original appointment.—The town hall held not to be an improper place to take the poll, by reason of its being private property, no person having been prevented from voting on that account.—The time for taking the poll being limited to eleven hours: such time held to be sufficient if due diligence had been used. Seven hundred and eighty-five persons being the greatest number proved to have voted on any occasion.—Rate pronounced for.

This was a cause of subtraction of church rate brought by letters of request from the Consistory Court of Worcester, and was promoted by William Rose Baker and Francis Downing, the churchwardens of the parish of Dudley, in the county and diocese of Worcester, against Thomas Wood, a parishioner and inhabitant of the said parish.

After the usual proceedings the libel was admitted, pleading:

First. That on the 25th of September, 1834, the churchwardens, &c. met in vestry, in the vestry room, pursuant to notice, in order, amongst other things, to grant a rate of tenpence in the pound for the repairs of the parish church, and of the chapels of St. Edmund and St. Andrew belonging thereto, and the expenses of the churchwardens incidental to their office. That the said rate was proposed and seconded, and a shew of hands taken, but a poll being demanded and acceded to, the meeting was adjourned to the town hall, and the poll was immediately proceeded in, and continued till four o'clock in the afternoon of the said twenty-fifth of September, and was resumed at ten o'clock in the forenoon of the following day, and continued until four o'clock in the afternoon, and was again resumed at ten o'clock on the following day (the twenty-seventh), in the forenoon, and continued till twelve o'clock of that day, and then closed. That the votes were then ascertained, and it was found and declared by the chairman that a great majority were in favour of the rate, and thereby it was determined that a rate should be made, and [508] that every parishioner or person rateable

be taxed at the rate of tenpence in the pound, in order to raise the sum of £931, the estimated amount of such repairs and expenses, &c.

Second. That Thomas Wood, at the time of making such rate, resided and occupied a certain messuage or dwelling house in the parish of Dudley, of the yearly rent or value of fifty pounds, at the least, but which was rated at twenty-one pounds only, and that he was accordingly legally assessed at the sum of seventeen shillings and sixpence.

Third. Exhibited the original rate, and pleaded that, in compliance with the said rate, several of the inhabitants of Dudley have paid the rates so made upon them, amounting to the sum of £540, and upwards.

Fourth. That Baker and Downing were at the time of making the said rate, and now are, the churchwardens of the parish of Dudley, and that the said sum of seventeen shillings and sixpence assessed upon the said Thomas Wood is now due to them.

Fifth. That Wood had been several times requested to pay the said sum, but still refused to pay the same.

Sixth. That in consequence of such refusal, Baker and Downing caused Wood to be summoned to appear on the third of August, before two justices of the peace for the county of Worcester. That he appeared and refused to pay such rate, and informed them that he objected to the validity of the same and to his liability to pay it, and that in consequence they had no authority to enforce payment. The seventh, eighth, and ninth were the usual articles.

In answer to this, an allegation was brought in on behalf of Mr. Wood, pleading :

First. That on the 7th August, 1834, a meeting was held in the vestry room, at which a church rate was required by the churchwardens, when it was moved and carried by a large majority, "That this meeting do adjourn to this day six months," and such resolution was then entered in the minute book of the proceedings in vestry, and signed by seventeen of the inhabitants then present. That at the meeting held in the vestry room of Dudley, on the twenty-fifth of September, 1834, in the libel referred to, the Rev. Luke Booker, the vicar of the parish, being in the chair, a motion was made and seconded to the following effect:—"That the irregular entry made in the vestry order-book on the seventh day of August last, that the meeting held on the said seventh day of August should be adjourned to that day six months, be expunged, and that a rate of tenpence in the pound be granted to the churchwardens." That the entry so termed irregular was the entry in this article previously mentioned; that the motion so comprehending the said two subjects was thereupon put by the chairman, and a shew of hands having taken place, the [509] chairman declared that the same was apparently so equal that he could not decide on which side was a majority; that a poll having been demanded and acceded to by the chairman, he assumed the authority of adjourning, and did adjourn, the meeting to the town hall, without the consent of the meeting, and without any motion having been put to them, and quitted the chair for the purpose of presiding at such adjourned meeting; notwithstanding many of the rate payers openly dissented from, and protested against, such adjournment, before the same took place, and before the chairman had quitted the chair. That no motion whatever (save as aforesaid) was submitted to the said meeting before the chairman so quitted the chair and the said adjournment took place, which did not embrace the said question of expunging the entry of the 7th of August. That the town hall is not the property of the parish, nor is the same public property, but is the property of a private individual, on which account objections were then and at previous times taken to the adjourning thither, lest the parishioners might be obstructed in the exercise of their rights.

Second. Pleaded copies of the entries made in the vestry order-book of the proceedings on the 7th August and twenty-fifth September, 1834—the original entries to be produced, if necessary, at the hearing of the cause.

Third. That after the Rev. Mr. Booker had quitted the chair, a motion was submitted to the meeting in the vestry room, and carried by a great majority of rate payers, that Thomas Lester (who was then a parishioner and inhabitant of the parish) should be the chairman of the meeting; that he having accordingly taken the chair, a resolution was proposed and carried by a large majority of the rate payers then present that the question of granting a church rate for the year then ensuing should be adjourned for nine months; that such resolution having been reduced into writing was signed by the chairman and a large number of the rate payers, but that no entry was made in the vestry order-book—and the paper on which the said resolution was written was annexed.

Fourth. That after the pretended adjournment to the town hall, the polling commenced at about one o'clock, on the twenty-fifth September, Mr. Booker being in the chair, notwithstanding one of the rate payers, before the commencement thereof, formally protested at the said town hall, as well against the said adjournment as against the subsequent polling, that the polling continued until four o'clock of the said day, being resumed at ten o'clock on the following day, and was continued until four o'clock of that day, and being again resumed on the following day, the twenty-seventh, was continued until twelve o'clock of the said day, when the chairman arbitrarily declared the same to be closed, without any consent or authority whatsoever and without any motion to that effect having been submitted to the said meeting, and notwithstanding many of the rate payers then and there [510] present, who were entitled and willing to vote and were waiting at the town hall for that purpose, and were thereby prevented from voting, and notwithstanding many of such persons applied to the chairman to continue the poll open, in order that they might vote, and that the poll was in fact (however illegally) closed accordingly. That the time, to wit, eleven hours, allowed and occupied during the said three days for taking the votes before the poll finally closed was less than usual, and insufficient for the rate payers who were qualified, and who wished to vote on the occasion of the said adjourned meeting, the rate payers so qualified being at that time sixteen hundred and upwards in number, and it not being practicable for ninety persons at the most to record their votes per hour. That the motion as originally submitted in the vestry room, prior to the said pretended adjournment, including both the rate proposed, and the question as to expunging the entry of the seventh of August preceding, was not put to many of the rate payers, who voted at the town hall on the said days, but that many of such rate payers were merely asked whether they voted for or against the rate, and gave their votes accordingly, without any reference to the question of expunging the said entry, and in utter ignorance that the same formed part of the original motion. That although it was found and declared by the chairman that a great majority of votes were in favour of the rate, yet that such majority included the votes of many persons who had not been present in the vestry room prior to the adjournment, when the motion with respect to such adjournment was originally put to the meeting. That at such time, namely, before the adjournment, the whole number of persons present in vestry did not exceed ninety. That the votes on the said 25th, 26th, and 27th days of September were taken according to the provisions of the Vestry Act, according to value and not numerically, the numbers being, to wit, in value 474 for the motion, and 390 against it, but that in fact a great majority of the rate payers who voted on the said three days were against the said rate, 385 having voted against, and 363 for, the said rate.

Fifth. That two several protests in writing, each signed by a rate payer, present at the said pretended adjourned meeting, and who were at such time respectively entitled to vote, were publicly read at the said meeting (copies thereof having been first taken), and were presented to the chairman on the twenty-seventh September, previously to his declaring the poll to be closed, the one thereof protesting against the arbitrary close of the poll before sufficient time had been allowed, and as being contrary to the sense of the meeting, particularly of numbers who had not time to record their votes; the other protesting against the expunging the proceedings recorded in the vestry order-book on the 7th August preceding, by reason that the question as to expunging the same had not been put to the voters. That no entry [511] of such protests or either of them was made in the vestry order-book, and that the original protests have been since lost or mislaid.

Sixth. Exhibited copies of the said protests.

Seventh. The usual concluding article.

In reply to this, a further allegation was admitted on behalf of the churchwardens, pleading:

First. That the Rev. Luke Booker, the chairman, did not, after the polling had continued until twelve o'clock of the said twenty-seventh September, arbitrarily declare the same to be closed, &c. for that the time and place of the said polling and the duration thereof were fixed and published in the notice by which the meeting was convened. That such notice stated that if a poll should be demanded, the meeting would be immediately adjourned to the town hall, and that the polling would forthwith commence, and be kept open till four o'clock in the afternoon of the said twenty-

fifth day of September, and be continued at the town hall aforesaid, from the hour of ten in the forenoon of the twenty-sixth day of September, to the hour of four in the afternoon of the said day; and again at the same place, from the hour of ten in the forenoon, till the hour of twelve at noon, of Saturday, the twenty-seventh, when the poll would be finally closed. That the Rev. Luke Booker, as such chairman, informed the said meeting that he had not any power or authority to continue or permit the continuance of the polling after the time mentioned in the said notice for closing the same.

Second. Exhibited a copy of the notice, and pleaded that the original, if necessary, may be produced at the hearing of the cause.

Third. That the town hall is the property of the trustees of the late Earl of Dudley, and during the last forty years has been, and still is, commonly used for town meetings and public business, and that therein the magistrates hold their petty sessions, and the revising barristers their Court. That it was the most eligible place for such adjournment, that no objection was then, or had on any previous occasion been, made by any person to an adjournment, on the ground set forth in the said allegation (Wood's), namely, lest the parishioners might be obstructed in the exercise of their rights; nor was any protest made against the use of the said town hall on that occasion. That the number of rate-payers qualified to vote did not amount to 1600, for that the number of rate-payers who at the time and during the progress of the polling were qualified, and were entitled to vote, did not exceed 1222, or thereabouts, and that the time allowed was ample and sufficient to have enabled all the rate-payers who were qualified and entitled to vote to have so done. That of the rate-payers present at the town hall during the first day of the polling, those who were favourable to the rate voted for the same, but that many rate-payers who were adverse to the same were also present, and that they were applied to in order to give their [512] votes, and that they declined so to do, insomuch that on the said 25th of September no vote hostile to the rate was polled, or even tendered. That during each of the times mentioned in the said notice there were considerable intervals during which no persons gave or attempted to give their votes.

Fourth. The usual concluding article.

Several witnesses were examined on these pleas, and the cause came on for hearing on the by-day after Hilary Term the 11th February, 1837.

Lushington and Addams argued against the validity of the rate, and cited the cases referred to in the judgment of the Court.

Phillimore and Haggard in support of the rate; and on the fourth session of Easter Term judgment was given.

Easter Term, 4th Session, May 9th—Sir Herbert Jenner. This is a cause of subtraction of church rate, promoted by Messrs. Baker and Downing, churchwardens of the parish of Dudley, in the diocese of Worcester, against Mr. Thomas Wood, a parishioner, and it is brought by letters of request from the chancellor of that diocese. A considerable body of evidence has been taken on the several pleas which have been brought in, but the questions for the Court to determine have been reduced to a narrow compass, and the decision must turn on one or two points of law, which have been fully and ably stated by the counsel in opposition to the validity of this rate.

On the facts of the case there is very little difference between the parties; it will, therefore, be unnecessary for the Court to enter into the details of the evidence which has been produced.

[513] The question has been represented by both sides as one of considerable importance, and undoubtedly it is so; and the Court regrets that so long a period should have been suffered to elapse without its being brought to a conclusion. The rate was granted in the month of September, 1834, but it was not until the month of November, 1835, fourteen months afterwards, that the letters of request were presented to this Court, and the decree was not returned till the first session of Hilary Term, on the 11th of January, 1836: so that the proceedings for the recovery of this rate were not set on foot till the whole of the rate ought to have been collected and applied to the purposes for which it was granted. I mention this to prevent any imputation of delay being attributed to this Court: the blame rests on the parties alone; and I should be inclined in future, in cases of church rate, not to accept letters of request where the parties have not used due diligence to bring the question to a speedy adjudication, as through such delay it may happen that many persons may be called

upon to pay a rate which may ultimately turn out to be illegal. In this particular case, when there was no doubt that the validity of the rate was intended to be opposed, the question should have been brought before this Court at as early a period as possible.

Having made these preliminary observations, I proceed to give my opinion of the case as it comes before the Court.

The history of the case is shortly this :

On the 7th of August, 1834, a vestry meeting was held in pursuance of a notice given for that purpose, to make a grant of a church rate at ten-[514]-pence in the pound. A considerable number of persons assembled in the vestry room of the parish, so many as to fill the room, which was not of large dimensions, when a motion was proposed, and seconded, that instead of granting the rate the subject should be postponed for six months. The door of the vestry room was closed, and a great number of parishioners who were in the churchyard adjoining the vestry room were unable to make their way into the room; and the vicar, who was in the chair, observing that there were many parishioners who had come to attend the vestry meeting, and who, as such, were entitled to give their opinion on the question by a shew of hands, but who were unable to work their way into the vestry room, refused to put the question, and quitted the chair. Some of the opponents of the rate remained in the vestry room, and there appeared an entry in the vestry book that the consideration of the question, as to the making of a rate, was adjourned for six months. On the 21st of September following (the Sunday), a notice was read in the parish church of St. Thomas that a vestry would be held on the 25th of the month, in the vestry room, for the purpose of making a rate of tenpence in the pound for the churchwardens, and it may be necessary to read the notice itself, in order to shew the purpose for which the meeting was to be held, and to see whether proper information was communicated and made known throughout the parish. The notice is to this effect—I read it from the copy annexed to the deposition of Mr. Allen, the parish clerk: “Notice is hereby given, that a meeting of the inhabitants in vestry of and for this parish will be holden in the vestry [515] of St. Thomas’s Church at 11 o’clock in the forenoon of Thursday the 25th September, instant, for the purpose of expunging an irregular and improper entry made in the vestry order-book at a meeting held on the 7th day of August last, and for the purpose of granting the churchwardens a levy of tenpence in the pound.” The entry referred to as “irregular and improper” is that to which I have already adverted, which had been entered in the vestry book after the vicar quitted the chair at the meeting of the 7th of August. The notice goes on to state: “If a poll be demanded, the meeting will be immediately adjourned to the town hall, and the poll will commence forthwith, and be kept open till four o’clock in the afternoon of the said 25th day of September, and the polling will be continued at the town hall aforesaid from the hour of ten in the forenoon of Friday the 26th of September to the hour of four in the afternoon of the same day, and again at the same place from the hour of ten in the forenoon till the hour of twelve at noon on Saturday the 27th day of September, when the poll will finally close.” Full notice was, therefore, given of everything intended to be done—as full and explicit a notice as could be; and it is clear, from all the evidence, that the effect of the notice was promulgated immediately after its publication throughout the parish in every place where there was any probability of the information being expected.

It appears that a meeting was accordingly held in the vestry room of the parish on the 25th of September, the vicar, the Rev. Dr. Booker, in the chair; that the assembly of parishioners filled the [516] vestry room, and that there were numbers in the churchyard adjoining, and at the commencement of the proceedings the vicar read the notice by which the vestry had been called, and which contained full information to the parties assembled of the particular subjects for discussion. On a motion of Mr. Badger, a shew of hands was called for, when the numbers for and against the question were so nearly equal that the chairman declared he was unable to say on which side the majority was, upon which a poll was demanded by Mr. Wainwright, the curate of the parish, which was seconded by some other individual, and was immediately granted.

On the poll being granted, the chairman quitted the chair, and proceeded to the town hall, where the polling immediately commenced and continued according to the notice till four o’clock of the afternoon of that day, when it was adjourned to ten

o'clock the following morning; when it recommenced and continued till four in the afternoon, was resumed the following morning at ten, and finally closed at twelve o'clock on that day, having been open for eleven hours, or eleven hours and a half. There is some difference between the parties as to the time when the adjournment took place on the morning of the first day, but it is not very material whether it was half-past twelve or one o'clock. But it closed on the third day in conformity with the notice which had been given.

It appeared, on casting up the numbers on the final close of the poll, that there was a majority of votes in favour of the rate: calculating the votes according to the value of the property held by the [517] persons who voted, there being 472 in favour of the rate and 395 against it, making a total of 867 votes, shewing a majority of 77 in favour of the rate. The number of voters, however, was 748, of which 385 voted against the rate and 363 for it, shewing a majority in numbers of 22 against the rate.

The question is whether the majority thus obtained is a legal one, or whether all that has been done is to go for nothing. In entering upon the consideration of this question, I have nothing to do with what took place on the former occasion, after the chairman quitted the chair; that is, whether it was regular or proper that the remaining persons should record a vote that the consideration of the question of a church rate should be postponed for six months; that is not a question which the Court can entertain. The only question for the Court to decide is this, whether the rate made on this occasion was in pursuance of a legal vote of the vestry under the circumstances I have stated.

The validity of the rate is not questioned on the usual grounds of objection to church rates, it is not alleged that the rate required was not necessary; nor that there is any excess in the amount of the rate, although the sum to be collected was considerable, being upwards of nine hundred pounds; it is not stated that there is any inequality of assessment, nor that the purposes for which the rate was made were those to which a church rate cannot properly be applied, and no objection is taken as to a want of due specification of the purpose for which the meeting was called: indeed, it was contended in the argument that the notice was too specific that the churchwardens had no right to [518] fix tenpence in the pound as the amount of the rate; that all they had to do was to call a meeting, and to leave the parishioners to determine the amount of the rate. But this is an objection which cannot be insisted on, for it was nothing more than an intimation of the churchwardens of the amount of rate which would be required, leaving it to the vestry to determine whether the amount should be reduced to sevenpence or any smaller sum. So with regard to the objection as to that part of the notice for expunging the entry irregularly and improperly made in the vestry book; if the impression on their minds was that the proceeding was irregular and improper, it might be necessary that notice should be given in the church; and considering the circumstances of the case, the room being filled, and there being individuals in the churchyard who could not get access to the room to express their sentiments by a shew of hands, my opinion is that they justified the chairman in the course he took on that occasion.

Having stated that the objections to the validity of this rate are not the usual objections in questions of this description, that no objection has been made on the grounds I have stated, the Court may assume that the rate was proper in itself, in its amount, in the manner in which it was proposed, and as to the persons from whom it was to be collected. Under these circumstances, undoubtedly the rate comes before the Court under circumstances peculiarly favourable to it, and it would be the wish of the Court, not less than its duty, to support it, unless the party opposing it can shew such grounds of opposition as should render it impossible for the [519] Court to do so: and it is admitted that the party opposing the rate stands on his strict right of law, and that he is not entitled to any favourable consideration.

What then are the grounds on which the rate is impugned? The grounds which I collect from the argument which has been addressed to the Court are these: First, that the chairman adjourned the poll without any legal authority; secondly, that the place to which it was adjourned was private property, to which the parishioners and inhabitants of the town of Dudley had no legal right of access, and was, therefore, an improper place; and, thirdly, that the time fixed for the duration of the poll was insufficient with reference to the number of persons entitled to vote; and on all or some of these grounds it is contended that the rate is invalid.

Before the case was ripe for determination before the Court other objections had been urged, both in plea and in argument, in this Court. It was stated as a ground of objection to the rate that only those persons were entitled to vote who were present in the vestry room when the shew of hands was called for; that the voting should not be according to the value of the property, but according to numbers; these and other minor objections, the whole of which were abandoned subsequently (being disposed of during the progress of the cause, by the decision in *Maund against Campbell*,^(a) referred to [520] in the argument), it is not necessary for the Court particularly to notice.

The first objection, then, is to the adjournment of the poll, which, it is admitted, took place without the opinion of the vestry having been taken upon it; and the case of *Stoughton v. Reynolds*,^(a) reported in Fortescue and Strange's Reports, and in Cases temp. Lord Hardwicke, has been relied on, as shewing directly that the power of adjourning a vestry meeting is not in the chairman of the meeting, but in the whole body of the vestry; and it appears from what was said by Lord Hardwicke and the other Judges that the Court of King's Bench was of opinion, under the circumstances of the case, that the chairman had no such right as he had assumed on that occasion. But in order to see the full effect of that decision, the circumstances of that case must be considered; and it will appear that they are as far removed from the circumstances of the present case as can be well conceived.

I will refer to the case as reported by Fortescue, because it has been stated that Lord Hardwicke's opinion was more strongly expressed in that report than in Strange, and in the report of cases in the time of Lord Hardwicke.

The declaration set forth that the plaintiff, being an inhabitant of the parish of All Souls, Northampton, was chosen churchwarden, and offered himself to Dr. Reynolds, chancellor of the diocese, to be admitted to the office, and the chancellor refused to admit him. Mr. Stoughton thereupon moved for a mandamus to the chancellor to admit [521] him to the office, and the chancellor returned to the mandamus that he considered the plaintiff was not chosen churchwarden, but another person. The action was brought for a false return, and a special verdict was found to this effect: That in the parish of All Souls the vicar has immemorially had the nomination of one of the churchwardens; that the time appointed for choosing churchwardens was a day in Easter week, 1734, when the vicar nominated Mr. Lowlk, and the parishioners the plaintiff; that in the Easter week following, in the year 1735, the vicar chose the same person, and upon a dispute arising, whether the parishioners could choose the plaintiff Stoughton a second time, the vicar adjourned the assembly till the next morning, but that part of the parish, who were for the plaintiff, staid behind and elected him; and the other party assembling next day, elected another person, and the question was whether the vicar, who presided, was at liberty, ex mero motu, to adjourn the election of churchwardens without any previous notice or the consent of the meeting, and after the persons present at the meeting had elected a churchwarden, to proceed without notice to elect another churchwarden the next morning.

Most undoubtedly, in such circumstances, there is no authority for the power assumed and exercised by the chairman in that case; it was calculated to put an end to the privilege possessed by the parishioners, of electing a person for churchwarden, and to put a stop to all discussion at a meeting called for the purpose of election.

In deciding the question in that case Lord Hardwicke delivered an opinion very strongly; that, [522] even supposing the vicar had a power of presiding (that point has been settled since),^(a) it did not follow that he had a power of adjourning the meeting, and that the adjournment was void. And the other Judges, Mr. Justice Page and Mr. Justice Lee, delivered the same opinion as Lord Hardwicke. Mr. Justice Lee said, "The parson has a right of sitting from his freehold in the church; but I do not think that can any ways give him a greater right or authority than any of the other members of the assembly; and it is a rule in law that the major part in all elections have the right of determining for themselves." So that the decision in

(a)¹ Judgment was delivered in the Exchequer Chamber in this case on the 26th of November, 1836, on a writ of error from the King's Bench by Lord Chief Justice Tindal; but no report of the case has been published that the editor is aware of.

(a)² Fortescue, 168; 2 Strange, 1045; Cas. temp. Hard. 274.

(a)³ *Wilson v. M'Math*, 3 Phill. 67; 3 B. & Ald. 244, note.

that case comes to this, that the chairman or vicar has no right, under the circumstances which have been stated, *ex mero motu*, to adjourn a vestry meeting whilst the business of the vestry meeting is in progress.

The King v. The Commissary of the Bishop of Winchester (7 East, 573) is an authority for shewing (for that is the effect of the case) that where there is no regular presiding officer, the regulation of the meeting devolves on the whole body, and that in the absence of the vicar the churchwarden is not entitled to preside. To the extent to which this case goes it supports the authority of the case of *Stoughton and Reynolds*; that the chairman as such has not the power to adjourn the vestry at any time and under any circumstances he may think proper. Another effect of this case the Court will refer to by and bye; but one effect of the case is to shew that, where there is no regular presiding officer, the [523] adjournment devolves on the meeting, and not on the chairman.

Considering the nature of these decisions, and the circumstances of the cases, the question is whether they are applicable to the present, and whether there are not many material distinctions between these cases and that which the Court has under its consideration.

Without relying on my own judgment in this particular, it does seem to me that the question has already been decided by the Court of King's Bench in a case which has been cited in the argument, as the *Manchester case*,^(a) which seems to me to run on all-fours with the present case.

In the case now before the Court the notice for calling the vestry in the parish of Dudley, on the 25th of September, was (I believe it has been stated in the argument) copied from the notice in that case, and considering the decision in that case as a precedent for their direction, the churchwardens and vicar of Dudley governed themselves according to that case, and followed its provisions as exactly as the nature of the circumstances would permit; and in all the subsequent proceedings conformed with what had been there decided; and the only distinction I find between that case and the present is, that the former was for the election of a churchwarden, whereas the present was for the making of a church rate. But this does not make any real difference between the two cases; the principles which it is proper to follow in respect to making a church rate will be found to be the same as those [524] which apply to the election of churchwardens; and all the conditions in respect to the conduct of the poll, and the course of the proceedings in election of a churchwarden are equally applicable to a poll in the question of a church rate.

What then were the circumstances of the case? A rule had been obtained, calling on the archdeacon of Chester to shew cause why a mandamus should not issue, calling upon him to swear in certain persons as churchwardens of Manchester, on the grounds that they were duly elected; that the meeting at which their election took place was illegally adjourned, and that a poll subsequently taken was not duly taken.

No case can be more clear and direct in its application to the present case than this.

It appeared by the affidavits that a meeting of the rate-payers was held on Easter Tuesday, the 9th of April, 1833, in the collegiate or parish church of Manchester, for the election of churchwardens. The Rev. Cecil Daniel Wray, one of the fellows of the church, took the chair. The meeting was usually held without any notice; but on this occasion, a contest being expected, the churchwardens, as it was stated, to avoid unseemly behaviour in the church, had the following notice given in church on the 31st of March preceding the election:—"Notice is hereby given that a meeting of the inhabitants in vestry of and for the parish of Manchester will be held in the parish church of Manchester, on, &c., at eleven in the forenoon, for the appointment of churchwardens and sidesmen for the parish of Manchester, for the year ensuing; and if a poll should be demanded the meeting will be [525] immediately adjourned to the town hall in Manchester, and the polling will commence and be kept open till four o'clock in the afternoon of the said 9th of April, and the polling will be continued from day to day at the town hall aforesaid, from the hour of ten in the forenoon to the hour of four in the afternoon of each day (Sunday excepted) up to and including Tuesday the 16th day of April." (Signed by the churchwardens.) It goes on to state: "The chairman, on taking his seat upon the day of election, stated the sub-

(a) *The King against The Archdeacon of Chester*, 1 Adol. & Ell. 342.

stance of the notice, after which one of the outgoing churchwardens proposed a list of persons to serve the office for the ensuing year. The list having been moved and seconded, a considerable clamour and difference of opinion arose; other lists were proposed, and, among them, one containing the names of Messrs. Barbour, Rostron, and Grime; and this list being put to the vote was, on the shew of hands, carried by a large majority. A poll was then demanded; and the chairman, without any motion having been made or vote taken on this subject, adjourned the election to the town hall. Several persons (stated on affidavit to have been ley-payers) objected to the adjournment, both at this time and during the poll. Many who had not been at the meeting in the church polled in the town hall; and the churchwardens' list was carried by a majority of 2059 to 28. The archdeacon swore in the parties so selected, and refused to swear in the others. It was further stated, in the affidavits against the rule, that the number of persons entitled to vote at the election was 25,000: and that many persons not qualified to vote were at the meeting in the church, and active in the proceedings." It is [526] impossible to read this case and not see how exactly applicable the whole statement is to the present. There the meeting was to be held in the church; here it was to be held in the vestry room of the parish. There, if a poll was demanded, the meeting was to adjourn to the town hall; so here, if a poll was demanded, the adjournment was to be to the town hall. The time for the commencement and termination of the poll was fixed, as in this case, and the chairman, without a motion to that effect, adjourned to the town hall; and so here in conformity with the notice, when a poll was demanded the chairman proceeded at once to the town hall. And notwithstanding what took place in that case, notwithstanding no motion for adjournment was put, and notwithstanding the case of *Stoughton and Reynolds*, which was cited in the argument by the counsel, the Court of King's Bench held that the proceedings in that case had been regular, and that (as was expressed by Lord Denman) it was necessary "to lay down some order for the proceedings;" he says, "I think it is competent to them to say that the meeting shall be held in one place, and in a certain event which may require it, shall be removed to another." Neither of the learned Judges denied the authority of the case of *Stoughton and Reynolds*, but held that it did not apply to the case before them. They do not recognize a discretionary power in the chairman to adjourn the meeting arbitrarily; but the adjournment of the poll was a part of the original proceeding; and so there was no inconsistency between that decision and the decision in the case of *Stoughton and Reynolds*. So in this case it was competent for [527] the chairman to pursue the course expressly pointed out in the notice. That could not be legal at Manchester which is illegal at Dudley. In the former case the adjournment was from the church to the town hall; in the present case it was from the vestry-room to the town hall of Dudley. There was no surprise in this case, for the notice expressly stated that such would be the course adopted. The notice was given in pursuance of the Vestry Act, four days before the vestry was held, and there is every reason to believe, from what appears in the evidence, that it was known immediately after publication throughout the whole town of Dudley.

I cannot, therefore, on this first point see any distinction between the two cases, and having this, as I consider it, direct authority and precedent on this point, I am of opinion that the adjournment from the vestry-room to the town hall, for the purpose of the poll, was a legal adjournment.

The second objection is this, that the town hall is private property. And this is true; for it appears that the town hall belongs to the trustees of Lord Ward, and the parishioners have, therefore, no right of admission there; and it is stated by Mr. Slocombe, one of the witnesses, that on an occasion some years before, a conversation took place between him and Mr. Downing, one of the parties in this cause, who was one of the agents of Lord Dudley, and is a trustee of the present Lord Ward, as to the right of the parishioners to assemble there; when Mr. Downing asserted that the parishioners had no strict right to the use of the room; but it does not appear that on any occasion there was an instance of a parishioner [528] being prevented from attending on this ground. It is admitted that on this occasion there was no obstruction; and it is not suggested that any person kept away from an apprehension of not being able to get access to the place. Had either of these circumstances occurred, the case might have been different; but the objection exists in idea only. It is stated by Mr. Shorthouse, a clerk of the board of guardians, and collector of the rates in

Dudley, that the hall is resorted to for public meetings of different descriptions, and that vestry meetings have been held there previously, when rates have been made; and it does not appear that any objection has been made to the validity of a rate on this ground. The vestry-room is stated to be a very inconvenient place for a poll, and it must be so as the room seems to be small, though it was indeed stated in the argument that the poll might have been taken there, though it is admitted that the room could not contain more than ninety persons at the utmost, and the difficulty of going and returning would be almost insurmountable. And I cannot but think that it would have been highly improper to have adjourned the poll to the church, considering the great excitement which prevailed in the town of Dudley at the time on the subject of church rates.

But it is not improper for me to state shortly, some parts of the evidence as to the convenience of this place for taking the poll; and the first witness is Mr. Twamley, on the sixth interrogatory. He is a witness for the opposers of the rate, and I take this opportunity of observing, that notwithstanding the excitement in Dudley on the subject of this rate, and the opposition to the rate, all the [529] witnesses on one side and on the other, the Court has great satisfaction in saying, have given their evidence with the greatest fairness. It is only on matters of opinion on minor points that there is any material difference between the evidence of the witnesses on one side and on the other.

Mr. Twamley says that the town hall is a convenient and eligible place for such meetings; that the vestry meetings have on some occasions been adjourned to the town hall, and occasionally to other places: "I have known them adjourned to the market place, and also to the large room at the Bush Inn, and on other occasions to the infant school room; I do not know or believe that they have ever been held in the body of the church." The vicar, it appears, always resisted the adjournment of the meetings, which are attended with clamour and confusion, to the church; and very properly, as such a place is set apart for divine worship, and is to be held sacred.

Mr. Wood, the brother of the party, proceeded against, on the sixth interrogatory, states that he recollects a vestry meeting adjourned to the town hall for the taking of the poll on the election of churchwarden, in the year 1832; that the hall being found too small, the meeting was further adjourned to the market place below the town hall, and that he never recollects any vestry meeting being held in the body of the church; that there have been frequent motions made to adjourn thither, but the chairman never would permit it; that in some cases the town hall is a commodious and eligible place; in others it is not sufficiently large, and that on such occasions the market place below has been used.

[530] With respect to its being private property, no person, as I before said, appears to have been prevented from entering the room, nor is it suggested that any parishioner was deterred from proceeding there by an apprehension that he would be excluded. In *The Manchester case* the town hall was equally private property; no person could be admitted into the town hall of Manchester, of right and without leave of the corporation; yet there was no objection raised in that case on the ground that the hall was private property, and that any parishioner had not a perfect right of access to the town hall. It has been said that a parishioner could not have a right of action against Lord Ward for any obstruction in entering the vestry room. It is sufficient for me to say that in the case of *The King v. the Archdeacon of Chester*, the adjournment to the town hall, which was also private property, was held not to be an illegal adjournment. It is proper to fix on a convenient place, and the town hall was as convenient a place as could be selected; there was no reason why any person should have stayed away; there was not any appearance of obstruction or of any one having been prevented from recording his vote, and no party made any demur at first as to the town hall; they seemed to have acquiesced, and tendered their votes for acceptance there.

There is this observation of Lord Denman (interposed during the argument in that case): "This is not properly an adjournment. May not the chairman appoint a convenient place for taking the poll? Suppose the whole proceedings had been originally appointed to take place in the church, [531] and the meeting had been so tumultuous that it became necessary to remove into the churchyard; would it have been irregular to do so?" And the case seems to affirm the principle of there being a full right to adjourn in a certain event to another place, and no objection was made to the adjourn-

ment to the town hall. In the present case, the consent of the trustees of Lord Dudley (one of the trustees being Mr. Downing, the party in the cause) may be presumed to have been signified, and the other party at all events acquiesced, for they proceeded there to record their votes.

These two points being disposed of, the only question is whether the time allowed for the poll was sufficient; and I confess this is the only part of the case on which I have felt any real difficulty. It is not very easy to determine what time should be allowed so as to give every person entitled to vote an opportunity of recording his vote; and all that can be said is, that where no custom exists a reasonable time should be given, and which I consider is the result of *The Winchester case* (7 East, 573), which I have adverted to already. But it can hardly be said that it was decided that the time allowed in that case was only a reasonable time for polling one hundred and eighty voters. One hundred and eighty persons only were entitled to vote, and it cannot be contended that the result of that case is that the whole of the time was necessary for them to record their votes. The question was not as to the time solely, and it was decided that that was a question of custom. Mr. Justice le Blanc says: "If there had been no custom, there would have [532] been a difficulty in the case; but if there be a custom to conclude the poll at a certain time, that being a reasonable time, the voters must tender their votes within it: and this is fit to be tried." And Lord Ellenborough, after stating that the custom was a sufficient foundation for the Court to go upon, observes that, if there were no custom, there must be some limit, if the limit were assigned by a competent authority, and were in itself reasonable. "Now, putting out of question the resolution of the vestry on the first day to determine the election at four o'clock on the evening of the second day, it still appears that for two hundred years past there has been no instance of an election of churchwardens continuing beyond four o'clock on the second day: I see nothing unreasonable in that limit." There, then, the time of the determination of the poll was previously fixed at four o'clock of the second day, and it appeared that in no instance had the election continued beyond that period for two hundred years past, and this was held to be a reasonable time, not with reference, I apprehend, to the number of voters, one hundred and eighty; but, altogether with reference to the custom, and a mandamus was directed to issue in that case. I cannot, therefore, consider that this case determines anything more than that where a custom prevails the custom shall rule; but where there is no custom that a reasonable time should be allowed for persons to give their votes.

In Dudley there was no particular usage on the subject. The time varied on some occasions from fourteen, twenty-four, to twenty-nine hours, which it is stated have been allowed on one occasion; so [533] that there was no guide as to any particular time to be fixed which could avoid all cavil; here eleven hours or eleven hours and a half are allowed.

The Court has looked to see the number of the parishioners, in order to determine whether the time was sufficient in this case. It has been stated that the number of rate payers (the number entitled to vote) amounted to between one thousand five hundred and one thousand six hundred: some have calculated the number at one thousand six hundred, and Mr. Shorthouse, who had the best means of forming an accurate judgment of the number, estimates it at one thousand five hundred and fifty. But, on his second examination, his attention having been called to the circumstances, and speaking from the means he possessed, and after the poll had been taken, he states the number of parishioners qualified to vote at no more than one thousand two hundred and twenty-two.

At the commencement of the poll (according to this gentleman's evidence) there was a considerable number of persons not qualified to vote; but during the pendency of the poll one hundred and fifty persons paid their rates and were thereby qualified to vote; and it has been suggested that if one hundred and fifty qualified during eleven hours or eleven hours and a half, had the time allowed for the poll been double what was actually allowed, the effect might have been to double the number of votes, that is, to qualify three hundred instead of one hundred and fifty, which would have made a majority against the rate. But this, I think, is assuming too much in such a place as Dudley; I do not think that the number of voters could have been much greater, or [534] that Mr. Shorthouse would have found the productiveness of his "harvest" materially increased if the poll had been kept open for a longer time.

It has been urged that time ought to be allowed for every person to qualify himself, to pay his rate and tender his vote. It is true that if a person qualified himself at the very last moment and tendered his vote, it ought to be accepted. But I do not accede to the proposition that the time allowed for the poll should be calculated with reference to such a principle. I apprehend that the time need only be fixed so as to allow every person qualified to tender and record his vote without any reference to what may be done by persons not already qualified. It is no part of the purpose for which a poll is demanded that it should give time for the payment of the rates, but only to allow persons already qualified sufficient time to tender and record their votes. The question is, Was the time sufficient to allow all persons qualified to vote? I think this may, in some measure, depend upon the numbers proved to have voted on former occasions. It is not necessary for the Court to go very minutely into an examination of this point; it is sufficient for the Court to take from the statements of the witnesses what had been the usage in Dudley on former occasions.

Mr. Twamley, in answer to the tenth interrogatory, states that the greatest number of voters on any previous occasion within his recollection was in the year 1832, when seven hundred and eighty-five persons voted; and the number of votes in the present instance, in the year 1834, was eight hundred and sixty-seven, the number of voters [535] being seven hundred and forty-eight; in 1832 the number of votes was nine hundred and twenty, and the time allowed was twenty-four hours. Now, assuming the probability that the number of voters would be nine hundred and twenty on this occasion, would not the time have been sufficient to allow every one of these persons to vote if they availed themselves of the opportunity and used due diligence and had attended on the first day? It is to be recollected that there was no surprise, for the commencement and final close of the poll were fixed beforehand. I do not find in any part of the evidence that there was any protest against the sufficiency of the time before the conclusion of the poll on the third day, when the vicar was called upon to extend the time for the poll, and which he declined to do, conceiving that he was bound by the previous notice, and I consider that he was justified in that determination. I think that all depended upon the notice, and that the chairman was bound to abide by it, supposing that the time was a reasonable time.

The number then of qualified voters who recorded their votes on the present occasion was seven hundred and forty-eight, and the number of votes recorded was eight hundred and sixty-seven; one hundred and eighty of these votes were given on the first day of the polling, which makes an average of sixty votes for the hour in the three hours of that day.

Mr. Twamley, a witness produced by the parties opposing the rate, says, on the fourth article of the allegation, that at an election of churchwardens in 1833 four hundred and seventy-four votes were [536] taken in six hours, being an average of seventy-nine per hour. The one hundred and eighty votes on the first day were all in favour of the rate, there not having been a single vote tendered against the rate, although several of the opponents of the rate were in the town hall, but declined voting on that occasion.

Now if seventy-nine or eighty voters could poll in an hour, as stated by Mr. Twamley that they did on a former occasion, it is clear that during the three hours of the first day, sixty more could have voted, which would have made the votes on that day two hundred and forty, taking the votes according to numbers, and perhaps an allowance should be made for an additional number of votes, calculating them according to the value of property, which would make the aggregate number at the close of the poll upwards of nine hundred.

Now it is admitted and proved that on the first day considerable intervals occurred without any body coming to vote: that a quarter of an hour occurred on several occasions; and it is stated by Mr. Twamley that ninety votes in an hour is the utmost that could have been taken; but others state that a great number could have voted—some say one hundred and fifty in an hour. It is not necessary for the Court to accede to this latter calculation. But Mr. Twamley's calculation that ninety might have polled in an hour, if due diligence had been used, would give nine hundred and ninety votes during eleven hours, or, taking the period allowed as eleven hours and a half, more than a thousand persons might have given their votes, which is a number considerably greater than had polled on any previous occasion. That the [537] opponents of the rate declined to vote on the first day, when this time was lost, and

that it was the effect of concert is evident, for it is admitted that on the evening of that day a meeting took place of the opponents of the rate, and that it was then resolved to tender their votes on the next day. So that I see no reason, as was urged in the argument, why all these persons might not have kept back their votes till the last day, and have come down to vote on the 27th of September, when there was not time to poll them, and why the same reason might not be brought forward against the validity of the rate on behalf of the persons now complaining of the shortness of the time.

I think, under the circumstances, that the opposers of the rate have not any great reason to complain. Why did they not, before adjourning to the town hall, move for an extension of the time? It is not stated that any amendment to such effect was moved, nor that any objection was made as to the shortness of the time at which it was proposed to close the poll. There seems to have been a protest as to the manner in which the question was put, that on some occasions the question asked of the voters was, whether they voted for the rate or against it? And on some occasions, whether they voted for the motion of Mr. Badger? which included the expunging of the irregular entry recorded in the vestry book. The Court, however, has nothing to do with anything but whether the parties voted for or against the church rate.

But it has been stated that parties were prevented from giving their votes, and two gentlemen have been produced as witnesses on that point; but [538] under what circumstances were they prevented from voting? Mr. Hodnett is a schoolmaster; he attended to poll on the third day, and he states that he was prevented by the crowd before the town hall; that though he got into the hall he could not get up to the poll; but he deferred it till the last day, and he says that he should not have gone at all if it had not happened that his boys had no school on Saturday; so that he did not shew any great zeal on the subject. And Mr. Granger, another person who has been examined as a witness on this point, says that he went to the town hall between ten and eleven o'clock, and that he could not get up to the poll on account of the crowd, and he says there were other persons in the same situation; but had these persons attended at an earlier period they might have voted without any difficulty.

There is not, therefore, sufficient evidence to satisfy me that all the parishioners qualified to vote, and desirous of voting, might not, if due diligence had been used, have recorded their votes before the time when it was understood the poll was to cease. To poll ninety in an hour is no great number; some, indeed, think that one hundred and fifty might be polled in an hour; but even if only one hundred were polled in an hour, there was sufficient time for all persons desirous of voting to attend for that purpose. I must say that it would have been more satisfactory if the poll had been kept open till four o'clock of the last day. I see no reason why twelve o'clock should have been fixed for the close of the poll on that day; although something has been thrown out as to its being desirable to close it early on that day, as it was market [539] day; but I confess it would have been more satisfactory to my mind if the time had been extended to four o'clock in the afternoon of the third day, during which three hours two hundred or three hundred more voters (if required) might have given their votes.

But under all the circumstances of the case I am not prepared to say that this ground of objection, as to the shortness of the time, is sufficient to invalidate the rate made by a majority of the parishioners, no party appearing to have been taken by surprise. Being of opinion, therefore, that the adjournment was legal, that there is nothing with regard to the place to which the meeting was adjourned which renders the rate illegal; and, on the other ground, that there was time enough allowed for recording the votes, if the parties had availed themselves of the opportunity and had used due diligence; it is the duty of the Court to pronounce for the validity of the rate, and, as a matter of course in these cases, to condemn Mr. Wood in the costs of these proceedings.

[540] THE OFFICE OF THE JUDGE PROMOTED BY MILLAR AND SIMES *against* PALMER AND KILBY.—Consistory Court of London, Hilary Term, 1st Session, Jan. 17th, 1837.—Criminal proceedings against churchwardens for “not repairing or keeping in proper order the parish church,” and “for neglecting and disobeying the lawful orders and directions of the archdeacon.” The church being still out of repair, and the archdeacon having ordered the same to be repaired, not

sustained, there being no proof that the churchwardens had personally neglected their duty, or that they had wilfully disobeyed the order of the archdeacon.—Quære, whether a civil proceeding might not have been resorted to.

[Referred to, *Fagg v. Lee*, 1873, L. R. 1 Adm. & Ecc. 141.]

This was a criminal proceeding, instituted by Robert James Millar and James Simes, as churchwardens of the parish of St. Alban, Wood Street, in the city of London (which parish is united with the parish of St. Olave, Silver Street), against Richard Palmer and William Killby, as churchwardens of the parish of St. Olave, Silver Street, for not repairing or keeping in proper order, or for not causing to be repaired and kept in proper order, the church of the said united parishes of St. Alban, Wood Street, and St. Olave, Silver Street; and for neglecting and disobeying the lawful orders and directions of the Venerable Joseph Holden Pott, clerk, archdeacon of the archdeaconry of London, for and in respect of the repairs of the said church of the said united parishes.

The articles set forth :

First. That by the laws, canons, and constitutions ecclesiastical of this realm, and more especially by the 85th canon, “the churchwardens are, and ought, to take care and provide that their parish churches be from time to time well and sufficiently repaired, maintained, and kept; that the windows be well glazed, the floors kept plain [541] and even, and all things there in such an orderly and decent manner, without dust or any thing else that may be either noisome or unseemly, as best becomes the house of God,” &c.

Second. That in and by an act of Parliament of the 22nd of Charles the 2nd, intituled, “An additional act for the rebuilding of the city of London, uniting of parishes and rebuilding of the Cathedral and parochial Churches within the said city,” it is enacted, “that the parishes of St. Alban, Wood Street, and St. Olave, Silver Street, shall be united into one parish, and the church heretofore belonging to the said parish of St. Alban, Wood Street, shall be the parish church of the said parishes so united;” and it is further enacted and declared “that, notwithstanding such union as aforesaid, each and every of the parishes so united as to all rates, taxes, parochial rights, charges, and duties, and all other privileges, liberties, and respects whatsoever, other than what are in the said act before mentioned and specified, shall continue and remain distinct, and as they were before the making of the said act.”

Third. That the church of the said united parishes was, in and throughout the year 1835, and in the months of January and February in the present year, 1836, and now is, very much out of repair, that the masonry of the said church, and the tower thereof, is very defective; that the timbers on the north side of the said church over the north side thereof are much decayed; that the windows and frames thereof require considerable repair, and that within the said church the floor requires to be relaid, and that a great part of the [542] pews and internal woodwork is in a very decayed state, &c.

Fourth. That at a joint vestry duly holden of the inhabitants of the said united parishes in the vestry-room of St. Alban, Wood Street, on the 30th of July, 1835, it was resolved that it was the opinion of the said vestry that the said parish church should be immediately repaired, and that a committee be appointed to superintend the repairs thereof and all matters relating thereto, and that of the said committee be nominated the said Robert James Millar and James Symes, the churchwardens, and four other inhabitants of the said parish of St. Alban, Wood Street, and the said Richard Palmer and William Killby, the churchwardens, and one other inhabitant of the parish of St. Olave, Silver Street; that entries of the said resolutions were made in the vestry book, and were signed by Millar and Simes, and by other inhabitants of the parish of St. Alban, Wood Street, and also by the said Palmer and Killby, and other inhabitants of St. Olave, Silver Street.

Fifth. Pleaded a copy of the said entries.

Sixth. Also, that at another vestry holden in the vestry-room of St. Alban, Wood Street, on the 1st of October, 1835, the report of the committee aforesaid was received and agreed to, and an entry made in the vestry book, and was signed by Simes and other inhabitants of St. Alban, Wood Street; that Palmer and Killby were then and there present, and refused to sign such entry.

Seventh. Pleaded a copy of the said entry.

Eighth. That Palmer and Killby were sworn into the office of churchwardens for

the parish of [543] St. Olave, Silver Street, in the month of May, 1838, for the year thence next ensuing, and that at the parochial visitation on the 21st of October, 1835, the Venerable Joseph Holden Pott, the archdeacon, in consequence of a presentment then made by Palmer and Killby that the church was not in good and substantial repair, &c., and after a personal inspection of the said church by the said archdeacon, ordered that the repairs should be undertaken without further delay, and monished and directed the said Palmer and Killby, as well as the said Robert James Millar and James Simes, to carry the said order into effect, and to certify the performance thereof at the then next visitation, and that an entry of such order was duly made in the visitation book kept in the registry of the said archdeaconry.

Ninth. Pleaded a copy of the presentment and of the act entered in the visitation book.

Tenth. That the committee appointed to superintend the repairs of the said church, at a joint vestry of the united parishes on the 30th of July, 1835, having approved of and accepted the estimate and proposal of Ebenezer Simes for the repairs of the said church, Millar and Simes gave directions that a contract between Ebenezer Simes and themselves, on behalf of St. Alban, Wood Street, and the said Palmer and Killby, on behalf of St. Olave, Silver Street, for the purpose of proceeding with the necessary repairs of the said church, should be prepared.

Eleventh. That William Hull, the vestry clerk of St. Alban, Wood Street, wrote and addressed a letter to Palmer and Killby on the 12th of February, 1836, by desire of Millar and Simes, stating [544] that the proposal of Ebenezer Simes for the repairs of the said church had been accepted by the committee, and that he was desired by the churchwardens to say that they were ready, on the part of their parish, to enter into the requisite contract with him for the purpose of proceeding with such repairs; and, further to request their (Palmer and Killby's) concurrence, as churchwardens of St. Olave's parish, in carrying the same into effect, by their becoming parties to such contract; and that, in reply thereto, Palmer and Killby addressed a letter on the 18th of the said month to the churchwardens of St. Alban, Wood Street (and which was by them duly received), declining to sign such contract.

Twelfth. In supply of proof, annexed Messrs. Palmer and Killby's letter.

Thirteenth. That by reason of the premises and their refusal to sign the contract, and to concur and co-operate with the said Millar and Simes in carrying the repairs of the said church into effect, the same still continues in want of the said hereinbefore recited repairs, and daily suffers great damage, and if not timely provided against will grow much more ruinous and decayed, and that such their neglect was in manifest violation of the laws, canons, and constitutions of this realm, &c.

Phillimore and Haggard in support of the articles.

Addams and Curteis contra.

Judgment—*Dr. Lushington*.—In this case the office of the Judge is promoted by the churchwardens of the parish of St. Alban, Wood Street, against those who [545] were the churchwardens of St. Olave, Silver Street, in the year ending at Easter, 1836. The decree bears date the 22nd of March, and was returned into Court on the 28th of April, 1836.

The præsertim of the decree is for "not repairing or keeping in proper order the church of the united parishes of St. Alban, Wood Street, and St. Olave, Silver Street, and for neglecting and disobeying the lawful orders and directions of the archdeacon."

The prayer is that the Court will pronounce it to be proved that the church was and is out of repair, and that the parties proceeded against had neglected the orders of the archdeacon; that they, or, in the alternative, the present churchwardens, may be monished to repair the church. Part of this prayer may at once be disposed of, so much as relates to admonishing these parties to repair the church; one of them, it is admitted, is no longer churchwarden; against him, therefore, I conceive it to be impossible there could be any such monition; when a monition issues against a person to do an act, the act required to be done must not only be lawful in itself, but such as he has power and authority to do. The office of churchwarden having ceased, the power of one at least is at end; and not only has he now no power to act, but it would be illegal in him to interfere otherwise than as an ordinary parishioner.

It does not appear before the Court that the other party proceeded against has again been elected churchwarden, but if it did, I should greatly doubt, and indeed

think, I could not direct such a monition against him as a party prosecuted, by reason of being churchwarden the preceding year.

[546] What may be done with respect to the existing churchwardens I will consider presently.

The remainder of this suit, then, involves the trial of the following issue :—Whether the churchwardens proceeded against have neglected their duty by not repairing, and by wilfully disobeying the orders of the archdeacon. This is not a civil question, nor is it brought before the Court in that shape ; there is no civil question to try ; true that a doubt may exist as to the proper application of funds left to the parish of St. Alban, but as to that point this Court has no jurisdiction ; the Court of Chancery alone is competent to decide such questions ; nor have I any authority to compel churchwardens to repay a sum of money. The question, therefore, appears to me to narrow itself to this, whether the churchwardens are guilty or not guilty of a breach of duty cognizable by this Court.

It may here be well to state my notion of the authority and power committed to this Court, both as to churchwardens and the repair of the church, so far at least as I can safely do so with adequate light from authorities to be depended upon.

The present case is somewhat complicated from there being an union of two parishes, but to take the case of an ordinary parish. If the church be out of repair, and a fortiori, if the archdeacon order the repairs, I apprehend that, according to circumstances, there are two modes of proceeding open, according to circumstances ; for I am of opinion that the two modes of proceeding cannot be resorted to indiscriminately. First. If the churchwardens are wilfully disobedient and neglect to take all the clearly legal means in their power to have the church re-[547]-paired, a criminal proceeding may properly be instituted against them. I conceive this Court has adequate authority to punish any neglect of duty committed to their charge.

Secondly. I apprehend that if no fault is ascribed personally to the churchwardens, but a question arises as to the propriety of the repairs, or if the churchwardens do, or are willing to do, their duty, but obstacles out of their power intervene, then the proper mode of proceeding is in the civil form ; I have come to this opinion partly from precedent and partly on principle. In the case cited, of *Lord Maynard v. Brand* (3 Phill. 501), Dr. Swabey stated in his argument that proceedings might have been taken in the civil form, which was not denied by the Court. For instance, if to a monition, calling upon the churchwardens to repair the church, they should return that they had called a vestry, and that such vestry refused a rate ; so far, I think, the churchwardens would be exculpated, for nothing is more clear than that they are not bound, and that it is illegal in them to expend their own money or to incur debt (*Northwaite v. Bennett*, 4 Tyr. 236). The question would then arise whether by law churchwardens are enabled, and this Court can compel them, to make a rate against the vote of vestry by their own authority, or whether, if matters came to that pass, the more proper course would not be to resort to the superior authority of the Court of King's Bench. This, which is one of the most important and difficult questions which has ever come before the Court, has not been attempted to be argued on the present occasion, and I shall give no opinion upon it ; indeed it would [548] be impossible for the Court to express any opinion upon it, until it had been most deliberately and maturely considered.

To come back, then, to the only question I have to determine : Have the churchwardens been guilty of a dereliction of duty ? It must not be forgotten that it is one of the first principles of criminal justice that the accuser must prove his charge. Now the whole substance of the articles is this :

First. That the church is out of repair, and

Secondly. That in October, 1835, the archdeacon ordered the repairs to be done.

What is the delictum charged ? that the churchwardens refused to agree to the report of the committee appointed to consider what repairs were necessary, and that they refused to sign a contract.

These are the special breaches of duty alleged, but I am not prepared to say that they were bound to do either one or the other. I do not know that it has even been contended that the churchwardens are bound to do these acts. I think it could not be contended with effect.

I am of opinion, therefore, that these two special charges fall to the ground.

What then remains ? Can I, because the church is out of repair, and the arch-

deacon has made an order to repair, infer wilful disobedience? it appears to me that every principle of justice militates against such an inference. The special charges of delinquency are no charges at all. If the churchwardens have failed in their duty, why were not the particulars stated; for instance, if they refused to call a vestry to make a rate, or having money in hand refused to repair, that would have been a sub-[549]-stantive charge, it would have been a neglect of that which was in their power, and was a part of their duty.

There is no such charge made, but it does appear, though not very distinctly, from the exhibits numbers two and four (the only exhibits proved in the cause) that a vestry was called to make a rate; what was done at that vestry does not clearly appear; even, therefore, were it possible to presume, in the absence of evidence, that the churchwardens had been guilty of neglect of duty in not calling a vestry to make a rate, here such presumption would be against the evidence.

It is not alleged that the churchwardens had money in hand. I am, then, of opinion that unless the mere fact of a church being out of repair would justify this Court in punishing churchwardens, there is no delictum proved in this case, and therefore I must dismiss the defendants.

I think also I am bound to give them their costs. I think it would be injustice to persons compelled to perform public duties, and whom the law, as in the case of magistrates and constables, protects, to allow them to be sufferers where no criminality attaches, or at least is proved to attach upon them, and I do not conceive that this prosecution could, from the time at which it commenced, ever have answered any purpose. The decree being returned on the 28th of April, and the new churchwardens having been chosen on the 30th of April, and sworn on the 15th of May, it was manifestly impossible the monition could be enforced against them.

As to the alternative, to decree a monition against the present churchwardens, I cannot en-[550]-graft such an order on these proceedings, but on an affidavit, stating that the church is out of repair, and the order of the archdeacon, I will grant a monition against them to shew cause.

Arches Court, Easter Term, 3rd Session, May 1st, 1837.—In criminal suits an appeal is allowed to the party prosecuting as well as to the defendant.—Held, that in order to justify criminal proceedings against churchwardens for neglecting to repair their parish church, it must be shewn that they have been guilty of personal and wilful neglect, affirming the sentence of the Consistory Court of London.

From the above decision an appeal was prosecuted to the Arches Court, and an inhibition and citation were taken out, to which an appearance was given on behalf of Messrs. Palmer and Killby, under protest; and their proctor alleged, in an act on petition, "that a certain cause or business was lately depending in judgment in the Consistorial and Episcopal Court of London, of the office of the judge promoted by Robert James Millar and James Simes, as the churchwardens of the parish of St. Alban, Wood Street, in the city of London, against Richard Palmer and William Killby, as churchwardens of the parish of St. Olave, Silver Street, in the said city of London, to answer to certain articles, heads, positions, or interrogatories, touching and concerning their souls' health, &c.; and more especially for not repairing and keeping in proper order the church of the united parishes of St. Alban, Wood Street, and St. Olave, Silver Street, and for neglecting and disobeying the lawful orders and [551] directions of the Venerable Joseph Holden Pott, clerk, archdeacon of the archdeaconry of London, for and in respect of the repairs of the said church, &c.; and that the Worshipful Stephen Lushington, &c., did, on the first session of Hilary Term, to wit, Tuesday, the 17th day of January, in the present year, 1837, having theretofore heard advocates and proctors on both sides, and having deliberated thereon, at the petition of the proctor of the said Richard Palmer and William Killby by his interlocutory decree, dismiss the said Richard Palmer and William Killby from the said suit, and from all further observance of justice therein; and did also, at the further petition of the said proctor, condemn the said Robert James Millar and James Simes in the costs of the said suit, and the said proctor humbly submitted that such interlocutory decree was final and conclusive of such proceedings, and that it was not, and is not, competent to the said Millar and Simes, or their proctor, to appeal therefrom, and that the inhibition and citation issued under seal of this Court have been so issued in error, and unduly, wherefore he prayed," &c.

Addams and Curteis, on behalf of the parties proceeded against, contended that in criminal proceedings no appeal was allowed to the prosecutor; that the present protest was analogous to the plea of autrefois acquit (4 Blackst. 335) at common law; that to be twice tried for the same offence was contrary to the spirit and practice of the law of England; and they referred to the case of *Hiatt against Hinckes* [552] and *Greenbank* in the Delegates in 1726,^(a) where the judge of the court below (the chancellor of Worcester) said "he should act more discreetly in giving sentence against than in dismissing him (the defendant), as it being a business of office should I err in dismissing him he may escape the justice of the law, for my superiors there cannot reach him, whereas, if I err in giving sentence against him, an appeal to them may relieve him."

Phillimore and Haggard contra.

Sir Herbert Jenner. I accede entirely to the maxim stated by the counsel that a party shall not, for the same offence, be put on a second trial; but it appears to me that this is not a second trial, but a continuance of the same trial, and I am of opinion that an appeal is allowed equally to a promoter as to a defendant. With regard to the case referred to in the Court of Delegates, it certainly appears to have been the impression of the judge of the court at Worcester in that case that there was no appeal to a prosecutor in a criminal proceeding; that was the only case cited, and the Court may observe that it forms no binding authority on this Court; and several cases in the Court of Delegates were cited in which the original promoters were the appellants.

The Court then, after referring to the cases of *Daw and Nockolds* against *Williams*,^(b) *Foote* [553] against *Richards and Bartlett* (Cases temp. Lee, 265), and *Austen* against *Dugger* (3 Phill. 120), observing that the latter was a direct precedent, overruled the protest, assigned the parties to appear absolutely, and condemned them in costs.

The cause then proceeded in the usual way, and on the 29th of June, 1837, judgment was given.

Trinity Term, By-day, June 29th—Sir Herbert Jenner. After stating the proceedings, and that the learned judge of the court below had dismissed the parties, proceeded. I understand that the learned judge was of opinion that churchwardens are not liable to be proceeded against criminally, unless for personal and wilful neglect; and this is agreeable to a passage in *Lyndwood*, which it is proper to state at length, as it is a principle on which this Court is inclined to act; it is in the note under the words *sub poenâ*, in page 53, the first book, title 10, under the head, "*Ecclesiarum reparationi debitè Archidiaconus invigilet*;" the words are these: "*Sed nunquid guardiani ecclesiæ ad hujusmodi reparationem faciendam, et alias ad bona ecclesiæ disponenda electi, possunt per poenam hujusmodi sc. excommunicationis vel suspensionis aut per poenam aliam, compelli ad reparationem, de quâ hic dicit, æstimo quod si sufficienter habere possunt unde fiat reparatio hujusmodi, tunc si circa hoc negligentes extiterint, possunt per censuram ad hoc compelli. Alioquin si per eos non steterit, non esset contra eos sic procedendum*;" and to [554] the word *sufficienter* there is this note in the margin, "*Habeant in manus vel eorum diligentia sufficienter habere possint unde*," &c. (*Lyndwood's Provinciale*, lib. 1, tit. 10, p. 53). This clearly shews that churchwardens may be compelled by ecclesiastical censures to perform the repairs for the necessary sustentation of the church, if they have the means of defraying the expense, and that such proceeding against them is for a wilful neglect of their duty; now the facts proved in this case are, first, that the church is out of repair; secondly, that the archdeacon had ordered the repairs to be done and certified; and thirdly, that the churchwardens of St. Olave, the parties proceeded against, had declined to sign the contract entered into by the churchwardens of St. Alban for doing the repairs; *primâ facie*, therefore, a reasonable case is made out against them; it is necessary then to see whether this is rebutted by anything which appears in the proceedings, as there may still exist no real imputation of wilful neglect and disobedience against them. The estimate of the cost for the repairs for which the contract was made was £3000, of which the parish of St. Olave was to pay one-third; the proportion payable by St. Alban parish it appears was not to be raised by rate, but from funds left by the will of a Mr. Savage; St. Olave's proportion, however, was to be

(a) No. 927, in the Catalogue of the Processes in the High Court of Delegates.

(b) 2 Add. 130, and *Ex parte Williams*, 4 B. & C. 313.

raised by rate; it appears that a great part of the parishioners of the latter parish are in indigent circumstances, the rate would therefore fall very heavily on them, and it seems that they thought that they had a right to participate in the funds under Mr. Savage's will, which were bequeathed [555] for the repair of the church; now this Court is not competent to determine that point; and if it were it could not do so upon the evidence now before it; the only purpose for which the Court refers to this is to see whether it affords any reasonable ground for the parish not immediately ordering the repairs, and for the churchwardens not making themselves personally liable to the payment of £1000, by signing the contract; the churchwardens were not bound to expend their own money, nor to undertake the repairs until the funds were provided; and if they called a vestry, as it appears they did, I cannot say that they have been guilty of wilful neglect; they attended the vestry, and they refused to confirm the report, and to sign the minute; and I do not think that they were bound to do so, being dissentients, although they were of course concluded by the act of the majority, the only step which they could have taken was to do that which it might be a matter of great doubt whether they could legally do, namely, make a rate of themselves, without the parishioners.

The Court has not that question before it, and will give no opinion upon it: but even supposing the churchwardens had the power to make a rate, if the vestry refused, still, before the Court would punish them for neglecting to do so, it would require that the repairs should be shewn to be absolutely necessary; it appears, however, in this case, that the church has been surveyed by another skilful professional gentleman who estimated the necessary repairs at £900; and this great difference between the estimates might naturally induce some [556] hesitation before entering upon such an expensive undertaking.

Looking then at all the circumstances of the case, and agreeing in the view taken by the learned judge of the Court below, I cannot say that the churchwardens have been guilty of any wilful disobedience, or culpable neglect.

Sentence of the Court below affirmed, with costs.

LITTLE HALLINGBURY, ESSEX. Consistory Court of London, Hilary Term, 1st Session, Jan. 17th, 1837.—The balance of a sequestrator's account remaining in the registry, upon the death of the incumbent, who had been discharged under the Insolvent Debtors' Act, and an assignee appointed, directed to be paid to the assignee, although no personal representative was before the Court; the balance being vested in the assignee under the Insolvent Act.

This was an application to the Court for the payment of the balance of a sequestrator's account of the sequestration of the rectory of Little Hallingbury, to be paid out of the registry to Mr. Samuel Fiske, the assignee, under the Insolvent Act, of the estate and effects of the Rev. John Stewart, the late rector, now deceased, and who was an insolvent debtor discharged under that act.

On the 24th of December, 1834, sequestration of the profits of the living issued to satisfy a debt of £1006, 18s., which had been recovered in an action against the late rector. The sequestrator, at [557] the time of the late rector's death, had a balance in hand amounting to £81, 11s. 6d., which he paid into the registry.

The late incumbent was discharged under the Insolvent Debtors' Act (a) on the 11th of March, 1835, and died on the 14th of that month; at his discharge Mr. Fiske became his assignee, in trust for the benefit of his creditors. Mr. Fiske, as assignee, now claimed the balance in the registry. Mr. Burton, a builder, claimed £26 for repairs done by him to the rectory house previously to the deceased's death; these repairs he stated to have been done in obedience to the orders of the bishop of London.

And the present rector had a claim for upwards of £300 for dilapidations.

Haggard moved the Court to pay the balance in the registry to Mr. Fiske, the assignee, under the Insolvent Debtors' Act.

Dr. Lushington. This sum is the surplus of the proceeds of the living, after satisfying a sequestration, and would be payable to the deceased had there been no insolvency.

The only question is, to whom can this money be legally paid? With regard to

the claim of the present incumbent for dilapidations, he can only come in like any other creditor. There is one sum stated to have been laid out in the lifetime of the [558] deceased, by order of the bishop; if that was ordered by the sequestrator it would be his debt.

I at first entertained some doubt whether this money could be paid to any other person than the personal representative of the deceased, or at least whether there must not be a personal representative before the Court; but on a careful view of the Insolvent Debtors' Act I am of opinion that it belongs to the assignee, and that no necessity exists that there should be a personal representative. I therefore direct it to be paid to him.

CARDEN against CARDEN. Consistory Court of London, Easter Term, 1st Session, April 22nd, 1837.—Before the Court will pronounce a party in contempt, for the purpose of proceeding in a cause, the residence of the party must be fixed within the jurisdiction of the Court, at or before the issuing of the citation.

[Referred to, *Niboyet v. Niboyet*, 1878, 4 P. D. 24.]

This was a cause of divorce brought by Sarah Carden against Henry Carnegie Carden, her husband, by reason of adultery and cruelty. On the bye-day after Michaelmas Term, 17th December, 1836, the proctor for the wife returned the citation; the officer not having been able to serve the same personally, a decree by ways and means issued at his prayer; this decree was served at No. 11 Carey Street, the last known residence of the husband, and also on the parish church, a copy being likewise left at the residence of the brother of the husband, and was returned into Court on the first session of Hilary Term. The wife having, while at Boulogne, received a letter from Mr. Carden, in which he stated his address [559] to be at Mrs. Bate's, No. 18 Paddington Street, Marylebone, London, a further decree by ways and means was extracted and served at her house, and also on the parish church of Marylebone, and returned into Court.

On the first session of Easter Term, 22nd of April, 1837, the proctor for the wife prayed the Judge to pronounce the husband in contempt, for the purpose of carrying on the proceedings against him in *pœnam contumaciæ*.

The Court. There is nothing here to shew that the party proceeded against ever had any residence in the diocese. If you once fix the residence before the citation issues, the Court will presume a continuance of it until the contrary be shewn. Upon an affidavit being brought in, that the party had his residence in London before the service of the citation, the Court may proceed with the cause.

The Court, on a subsequent day, upon such an affidavit (a) being brought in, pronounced the husband in contempt, and the cause was carried on in *pœnam*.

[560] *WALKER against WALKER.* Consistory Court of London, Easter Term, 1837.

—A party, who by his business or profession is capable of obtaining a livelihood, although in the possession of no property, is not entitled to proceed in *formâ pauperis*.—The Court refused to tax the costs of the wife against the husband, he being possessed of no property whatever, and having been shortly before discharged from prison, as an insolvent debtor, although not proceeding in *formâ pauperis*, but declined, at his prayer, to appoint a day for hearing the cause.

This was a cause originally of divorce by reason of cruelty, promoted by the wife against the husband; by way of defence the husband gave in an allegation, charging the wife with adultery; and the wife in reply to that also pleaded adultery by the husband.

(a) The affidavit of Sarah Carden, the wife, after reciting the service of the citation at No. 11 Carey Street, in the parish of St. Clement Danes, and also on the parish church, &c., proceeded: "and this appearer further maketh oath, and saith, that she hath made diligent inquiry, and hath ascertained that the said Henry Carnegie Carden, shortly prior to, if not at the very time of, the service of the aforesaid citation and decree by ways and means, was resident at No. 11 Carey Street, aforesaid, and that she hath no reason to believe, and does not believe, that he hath since had any other fixed residence or domicile, &c. &c." And two letters were annexed to the affidavit, the one from Mr. Carden, and the other from Mr. Jones, his agent, from which it appeared that he was cognizant of these proceedings.

In the course of the proceedings alimony was allotted to Mrs. Walker pendente lite, at the rate of one pound per week.

In January, 1835, Mr. Walker, who was a watchmaker in Oxford Street, assigned the whole of his property to trustees for the purpose of paying his creditors a composition of six shillings in the pound; one creditor, however, refused to take the composition, and arrested Mr. Walker; in July, Walker took the benefit of the Insolvent Debtors' Act; and he now prayed to be allowed to carry on the proceedings in formâ pauperis: he had been pronounced in contempt for non-payment of alimony and costs, and a significavit had issued, but he was purged of his contempt by reason of his discharge by the Insolvent Debtors' Court.

Addams, on behalf of the wife, opposed Mr. Walker's prayer to be allowed to carry on the proceedings in formâ pauperis, on affidavits, stating that he had a real interest in two of the best stalls at the Pantheon Bazaar, and which had been [561] colorably transferred to Mary Codey, a female with whom he was constantly associating; that he lived in respectable lodgings, and frequently gave entertainments to his friends; and that he had declared that he never would pay his wife's alimony or costs.

He further contended that Mr. Walker being a skilful workman, in his business of a watchmaker, he could thereby obtain a livelihood, and therefore that he had no right to the privilege of suing in this Court as a pauper.

Phillimore for Mr. Walker. Mr. Walker having been released from prison under the Insolvent Debtors' Act, his property vested in his assignee, and he himself clearly was possessed of no property whatever. And Mr. Walker swears that he has applied to several watchmakers for employment, who have all refused to employ him while this suit was going on. With respect to the declaration imputed to Mr. Walker, he declared that it was not true that he had stated that he would not, but that he had merely said that he could not pay the alimony and costs: he, therefore, prayed the Court to admit his party to proceed as a pauper.

Dr. Lushington. The effect of Mr. Walker's discharge under the Insolvent Debtors' Act is, that the whole of his property became vested in the assignee; up to that time, therefore (July, 1835), he must be considered to be destitute of all property. It becomes necessary, then, to see whether the party has ac-[562]-quired any property since, or whether he is in a condition to acquire any; for, if so, he is not entitled to proceed as a pauper. In *Lovekin v. Edwards* (1 Phill. 183) Sir John Nicholl observed, "To sue as a pauper is a great privilege of law, it belongs only to the necessity arising from absolute poverty, and from the absence of any other mode of obtaining justice; no person is entitled to the gratuitous labours of others who can furnish the means of providing them for himself; besides, it places the adverse party under great disadvantages; it takes away one of the principal checks upon vexatious litigation; the legal claim to so great a privilege ought, therefore, to be clearly made out. It is a complete, but not an uncommon, misapprehension of the law to suppose that because a person is in insolvent circumstances, and because he can truly and conscientiously swear that he is not worth five pounds after all his just debts are paid, that, therefore, he is entitled to be admitted, or rather to proceed, as a pauper; it is *primâ facie* ground to admit him as such, but no more; if it were otherwise, many persons living in great splendour and luxury would be so entitled; for many persons in business, in the enjoyment of an immense income, and maintaining a proportionate expenditure, would not be worth five pounds after the payment of their just debts." In this case it appears that Mr. Walker was brought up as a watchmaker, and it is alleged that he has the means of getting his livelihood as such: he has, however, on the other hand, sworn that his connexions in the trade have, one and all, refused [563] to give him employment until, to use their words, "he is freed from the worthless and disreputable connexion to which he is tied." And he states that he is living upon the charity of his friends. I cannot but express my dissatisfaction with this averment, and the affidavit by which it is supported; it is highly improbable that a person should be refused employment on such grounds. Is the Court to believe, without any corroborative evidence, that Mr. Walker had been to persons of respectability, and that they all had given the same answer? It is irreconcilable with common experience, and incredible, that diligent and skilful workmen should be refused employment in consequence of connexions, however disreputable.

Being then of opinion that Mr. Walker is possessed of sufficient skill and know-

ledge of business to obtain adequate employment and remuneration, it is my duty to reject the present application.

The cause then proceeded in the regular course: witnesses were examined, and publication passed, and Walker prayed the Court to fix a day for hearing the cause.

The proctor of the wife, on the contrary, prayed that his costs might be taxed against the husband, and that the cause might not be heard until those costs were first paid.

Addams for the wife. The proceedings have been all regular, and in the usual course: the husband had applied to sue in formâ pauperis, and that application having been rejected, he must pay his wife's costs as in all other cases of the kind; if [564] the Court were to accede to the husband's prayer, it would be an extreme hardship on the proctor for the wife, who would not, by the payment of the present costs, be reimbursed the whole sum paid by himself out of pocket, as by Mr. Walker's release under the Insolvent Debtors' Act in July the costs up to that time were all lost; should the Court refuse to enforce payment of these costs, it might do the same in any case of a similar kind.

Dr. Lushington. It is unquestionably the general practice that the husband must pay the costs incurred by the wife; but that rule is liable to some modifications; where, for instance, the wife has a separate income. In the present case the wife is not shewn to be possessed of any property; and the husband, it appears, during the proceedings, has been discharged from prison by an order of the Insolvent Debtors' Court, by which whatever property he possessed became vested in the assignee of that Court.

The prayer of the proctor for the wife is, that his bill may be taxed, and that the cause may not be heard until his costs are paid; the husband, on the contrary, prays that the cause may be appointed for hearing, and the question is, what, under the existing circumstances of the case, ought the Court to do?

I apprehend, if I proceed to the length of taxing this bill, I must direct a monition for the payment of it, and proceed, if the costs are not paid, to pronounce Mr. Walker in contempt, and to decree a significavit to issue, the result of which would be that he would be committed to prison, and could not be released unless he paid those costs, or again [565] obtained his discharge under the Insolvent Debtors' Act.

It may be true that in ordinary cases the Court does not inquire into the circumstances of the husband, but there is no authority to shew that it might not be the duty of the Court to make such inquiry.

If the fact of the husband's inability to pay the costs rested entirely upon his affidavit, the Court would hesitate to take notice of it, but here there are facts in the cause shewing that although the husband is not entitled to sue in formâ pauperis, still that he is only earning from twenty to twenty-five shillings a week; that previously to these proceedings he had been a bankrupt, and that subsequently he had been discharged by the Insolvent Debtors' Court, by which he was entirely divested of all property. Is there anything to shew that the party has since acquired any property by which he can discharge these costs? He has sworn that he has not, and there is no evidence adduced to the contrary.

I am to consider, then, whether I must enforce these costs against this party thus unable to pay them. I do not think that I am called upon, in justice to the wife, to accede to her prayer, and I therefore decline to comply with it; on the other hand, I shall not fix any day for the hearing.

Easter Term, 2nd Session, April 29.—The cause subsequently came on for hearing, and the Court being of opinion that cruelty of the husband was clearly and distinctly established, and that the charge of adultery against the wife was unsupported by any credible evidence, pronounced for the divorce.

[566] *BRUERE against BRUERE*. Consistory Court of London, Trinity Term, 1st Session, May 27th, 1837.—The husband being an insolvent debtor, and possessed of no property, and in no business or profession, the Court refused to make any allotment of alimony to the wife, although the father of the husband had considerable property, and had supported his son. But the Court suspended the proceedings until something by way of maintenance should be given to his wife.

This was a cause of divorce by reason of adultery, brought by the husband against the wife; the present application was for alimony pendente lite to the wife. The

husband had been discharged under the Insolvent Debtors' Act, and was possessed of no property, and in no business or profession; upon the death, however, of his father, he would be entitled to certain property.

Addams and Robinson for the wife. The husband being entitled to an estate in reversion after his father's death, cannot be said to be without means, and he is supported now by his father, and there can be no doubt that if the Court were to allot alimony to the wife that the husband's father would pay it; they, therefore, prayed the Court to make some allowance to the wife.

The King's advocate and Phillimore. The husband is in possession of no property, and has no income, nor has he the means of acquiring any income, being in no profession; but it is said that if the Court allotted alimony to the wife, that the father of the husband would pay it; if it had been alleged that the wife was living with her friends, the Court would not take notice of it, nor can it with respect to the husband.

How can the Court, out of nothing, compel any payment? and in this case the wife is charged with adultery, which she does not deny, but says the husband connived at it.

[567] Dr. Lushington. The question is whether I can make any allotment of alimony to the wife. The Court cannot enter into the circumstances of the case. In this stage of the cause I cannot take any of the averments to be true.

Upon advertng to the allegation of faculties and the answers of the husband, it appears that Mr. Bruere will be entitled to an income after his father's death, and that he has taken the benefit of the Insolvent Act, and it does not appear whether the property would be sufficient to discharge his debts. Under such circumstances, when the party is an insolvent debtor (or an uncertificated bankrupt) it is not competent to the Court to make any order for alimony.

But under all the facts stated, I think that in future some allotment ought to be made. The course which I shall pursue is this, I shall stay the proceedings until some small sum by way of maintenance is afforded to the wife.

[568] REYNOLDS *against* THRUPP AND THE EAST INDIA COMPANY. Prerogative Court, Trinity Term, 2nd Session, June 2nd, 1837.—Of two papers of the same date propounded as codicils, one pronounced against, and the other established, the former interfering with the disposition of the property contained in the deceased's will, to which he was shewn to have adhered generally, and the real intention of the deceased being on the face of the paper doubtful, the latter being a simple and intelligible instrument, clear upon the face of it.

This was a cause of proving in solemn form of law three papers, marked No. 1, No. 2, and No. 3, containing together a codicil to the will of Robert Mitford, deceased.

The testator died on the 21st of April, 1836, at Paris, leaving his widow, and a brother and sister, the only persons entitled to his personal estate, in case he had died intestate.

On the 21st of July, 1835, the deceased made his will in his own handwriting; this will was attested by three witnesses, and Mr. H. R. Reynolds and Mr. Thrupp were the executors named in it; this will was not opposed. The papers propounded were without date, but were written by Mr. H. R. Reynolds, the husband of the deceased's niece, on the day before the testator's death, under the circumstances stated in the judgment of the Court.

No. 1 was as follows:—

My property, which is fixed and must be paid, is £600 a year to my wife, but upon her death £4800, as by her settlement, will return to me, now I left Mrs. Jane Bearcroft, I think, £100 a year during her life. Now the interest.

No. 2. I make this a codicil to my will, Ann [569] and yourselves must sink every thing for your own use.

No. 3. This is a codicil to my last will. "I give my servant George one hundred pounds."

The King's advocate and Lushington for Reynolds.

Phillimore and Haggard for Thrupp.

Burnaby for the East India Company.

Addams for Mrs. Johnson.

Blake for the widow.

Sir Herbert Jenner. In this case three papers are propounded as codicils to the will of Robert Mitford, who died on the 21st of April, 1836, at Paris. The papers are without date or signature; they were written on the day before the death of the deceased by Mr. Henry Revell Reynolds, Junr., the husband of the testator's niece, and one of the executors named in his will. The will, which is not opposed, is in the deceased's own handwriting; it is drawn up with much particularity and with great care, so as to leave no doubt as to the real intentions of the deceased at the time it was executed, and the reasons are fully set forth for the dispositions contained in it.

Although the executor represents the interests of all the legatees under a will, still, as in the present case, Mr. Thrupp had no personal interest whatever in the result of the question now before the Court; when this case was ready for hearing, [570] the Court directed that it should stand over, in order that the parties interested might be brought before the Court, and I do not regret that that course was adopted in this case, but I desire that this may not be considered as forming a precedent that generally all parties are to come before the Court.

The Court has now before it a number of parties—Mrs. Reynolds, the niece of the deceased; the East India Company, who are trustees of the residue under the will; Mrs. Johnson, a legatee in 10,000*l.*; and Mrs. Mitford, the widow; in fact, all persons are now before the Court who might possibly be interested in the present question.

The deceased had been separated from his wife, and the will commenced by reciting that in 1832, when he separated from her, a settlement of 600*l.* a-year was made upon her, in addition to the interest she took under her marriage settlement; namely, 20,000 sicca rupees. It also assigned reasons (which it is unnecessary to state) why no bequest was made in favour of his brother, the Reverend J. Mitford; it bequeathed to his nephew, 2000*l.*, and a moiety of a real estate, which the deceased held in common with his brother; to his sister, Mrs. Reynolds, 2000*l.*; to Miss J. Bearcroft, an annuity of 100*l.*; to Mrs. Johnson, 10,000*l.* Another legacy was afterwards obliterated by the deceased, and a memorandum written by him that he had cancelled the bequest on the ninth of December, 1835; but in all other respects that he confirmed the will. The residue of the property (after deducting the annual amount necessary for the keep of his horses, which were to be pensioners) [571] was given to the Government of Bengal, to be applied to charitable, beneficial, and public works in the city of Dacca in the East Indies, for the benefit of the native inhabitants of that city in the manner in which the Bengal Government might consider best conducive to that end. This bequest was expressed in terms clear, distinct, and precise. Mr. H. R. Reynolds, Junr., and Mr. J. W. Thrupp, the deceased's solicitor, were appointed executors and trustees with legacies of 1000*l.* each. The will further stated that whatever alterations should become necessary, would be supplied by a codicil, and that in the event of the lapse of the wife's annuity, and the legacy to Miss Bearcroft, they should go into the residue given to the Government of Bengal. The will was attested by three witnesses, and was deposited by the deceased in the hands of Mr. Thrupp.

In March, 1836, the deceased went to Paris, accompanied by his servant George Chenery, where he died on the 21st of April. Soon after his arrival he became ill, and being informed of his danger he requested Dr. Morgan, his medical attendant, on the 14th of April, to write to his nephew, Mr. Reynolds, desiring him to come to Paris. On the 17th the deceased attempted to write to Mr. Thrupp, to request him to bring his will to Paris, and to countermand the coming of Mr. Reynolds. This letter (attempted to be written by the deceased) was almost illegible, and shewed some symptoms of wandering and incoherence, and was not forwarded, but Colonel Jones, a gentleman residing at the hotel where the deceased was, wrote a letter to the effect attempted by the testator, and sent it to Mr. Thrupp, but it did [572] not arrive in time to prevent Mr. Reynolds going to Paris, where he arrived on the evening of the 18th, accompanied by his wife, the niece of the deceased, both of whom were received by him with the greatest kindness and affection. On the morning of the 20th, the deceased becoming worse, Mr. Reynolds was induced, by the persuasion of the medical attendants (which he had at first declined), to mention the subject of his will to the deceased; much delicacy was evinced by Mr. Reynolds in this respect, as it was not until urged by the medical attendants that he consented to mention the subject. On his asking the deceased whether he had any alteration to make in his

will, and offering to do it, the deceased declined, saying that he (Mr. Reynolds) did not know the will; upon Mr. Reynolds saying that that did not signify, as he could make a codicil, the deceased then desired that a sheet of paper should be procured, and the papers in question were then written. Sir Augustus West was present at this time, but left the room, and returned after the execution, and he says the deceased was perfectly capable of making a will. That the deceased was capable of making a simple disposition of his property is sufficiently proved, but the question is, was his capacity adequate to the due execution of such a paper as is now propounded? With respect to his capacity in general, I am of opinion that it was sufficient to have done any simple independent act, not tending to affect the disposition contained in his will.

What was the history and character of the deceased? He was fifty-two or fifty-three years of age, and had passed a considerable portion of his life in India, [573] where, as he stated, by laborious exertions he had acquired a considerable fortune, estimated at about 4000l. in England, and 50,000l. in India, besides a small real estate in this country. He had separated from his wife, for whom he had provided by settlement. He had a brother and sister, for the latter of whom and her family he entertained a sincere regard and affection, and with whom he lived on terms of intimacy and cordiality. Although some coolness had taken place between the deceased and Mr. Reynolds, Junr., and his wife, yet that had been entirely removed before December, 1835, when he confirmed his will. There is no evidence from which it can be collected that the deceased intended to alter the disposition contained in his will before he quitted England in March, 1836; but it was not improbable that he might intend to give a larger benefit to Mr. Reynolds and his family, and looking to the evidence, had the deceased clearly and unambiguously expressed his intention of making a larger provision for them, the capacity of the deceased was sufficient to enable the Court to pronounce for such an instrument. But the real question is, upon the face of the papers themselves, was the deceased fully aware of the contents of these instruments? And did he intend to alter the disposition contained in his will, considering the care and caution with which it was framed, and has he expressed himself so as to leave no doubt of what he intended?

The first paper sets forth that at the death of his wife 4800l. a year (which was not correct, and which was afterwards struck out) would revert to him, and it went on, "I left Jane Bearcroft, 100l. [574] for life, now the interest"—and there it broke off, so that this is an unfinished paper and contains nothing of a testamentary disposition, and does not, on the face of it, shew strong marks of capacity.

The next paper, the most important paper, is as follows:—"I make this codicil to my will; Ann and you must sink every thing for your own use." Now what is the meaning of these words? *Primâ facie* they dispose of the whole of the property; but it is not contended that such was the intention of the deceased, but merely that the residue given to the East India Company should be bequeathed, and it is clear that the testator intended to give something short of the whole property to "Ann" and her husband, but what particular parts were to be excepted it is extremely difficult to conjecture. It was said that if the papers were all proved together, a Court of Construction would not hold that the entire property was disposed of by this paper, and that this Court had only to say whether the deceased was of sufficient testamentary capacity, and intended the paper to operate, and that it had no right to consider what might be the construction of the instrument; and if this were a finished and perfect paper, I agree to that position; but is this a finished and complete paper? Looking at the paper, is it such a one as to need no extrinsic evidence to support it? The paper is incomplete and unfinished, it has no date nor signature, and the name of the testator does not appear in it; and the Court, before it pronounces for such an instrument, must be satisfied that by so doing it would be carrying into effect the real intentions of the deceased. On the face of this paper it does not appear that [575] the deceased clearly understood what his own meaning was; if he did so, why did he not make it more intelligible? But when asked by Mr. Reynolds, who did not understand him, for an explanation, he extended his arms and said, "You are my executor, take it all—all amongst you." Yet the evidence of Sir Robert Chermiside shews that the deceased intended the legacies to Mrs. Johnson and Miss Bearcroft to stand, but Sir Robert understood the deceased to mean that all the rest was to go to Mr. and Mrs. Reynolds. If the deceased's capacity was so perfectly clear and unclouded as this witness represents, how was it that he did not

fully explain what he meant by "sink all amongst yourselves?" Nothing could have been more easy than to say, "I mean you to have the residue which I have bequeathed by the will to the East India Company;" and had the deceased explained himself to that effect in clear terms, the Court would have held that he had sufficient capacity. But looking at all the circumstances, there is not sufficient evidence to satisfy me that this paper contains the real wishes of the deceased, and that I should not, by pronouncing for it, defeat his intentions; I must, therefore, pronounce against the validity of No. 2.

The paper, No. 3, contains the bequest of 100l. to his servant, George Chenery. If this paper stood alone the Court would have no difficulty in pronouncing for it, it having no bearing upon the disposition contained in the will, and being expressed in terms which exclude all uncertainty. Having, however, no doubt that the deceased intended this legacy for his servant, and being satisfied that he [576] had capacity sufficient for such an act, and the intentions of the deceased being clear upon the face of this instrument, I shall pronounce for its validity. There may be an apparent inconsistency in the Court deciding for the sufficiency of capacity of the deceased for one paper, and for his insufficiency as to the other, both being drawn up at the same time. If the expressions in No. 2 had been equally clear with those in No. 3, the Court would have found no difficulty in decreeing probate of that paper also, but the terms in which these instruments are drawn up form the grounds upon which the Court has come to this determination.

MURRAY AND MALING against M'INERHENY AND IMPEY. Prerogative Court, July 18th, 1837.—A. and B. having appointed C. their attorney, for the purpose of taking administration with the will annexed of D., for their use and benefit, and C., having taken out such administration, and entered into the usual bond with two sureties. The Court refused to permit the bond to be attended with for the purpose of being put in suit against the sureties by A. and B., they never having called for an inventory and account from C., and having given him three years to pay the balance which was due to them under the administration, and he having in the meantime died insolvent.

This was an application to the Court to permit an administration bond to be delivered out of the registry for the purpose of being put in suit at law against the sureties, under the following circumstances:—

James Murray, the deceased in the cause, died on the 12th of March, 1804. By his will he left the whole of his property (except his watch, uniform, [577] and clothes) to his two children, Richard Rackett Murray, and Harriet Augusta Malin, widow, then minors; no executor was appointed by the will. In March, 1806, administration, with the will annexed, was granted to Charlotte Dick (wife of Wm. Dick, Esq.), as the guardian of the children, for their use and benefit; this administration expired in 1816, upon Mrs. Malin attaining her majority. In 1830 administration de bonis non was granted to Humphrey Donaldson, as the attorney, and for the sole use and benefit of Mrs. Malin and Mr. Murray, they being in India; the usual bond was then executed by Mr. Donaldson, and M'Inerheny and Impey, his sureties (the parties now proceeded against). In 1833, upon Mrs. Malin and Mr. Murray's arrival in this country, they applied to Donaldson to account, and to deliver over the balance of the deceased's effects (800l.) to them; in answer to this application Donaldson stated by letter his inability to pay over the balance at that time, but that he expected to be able to do so at the expiration of three years, from the profits of an office to which he had been appointed in Western Australia; in answer to this Mr. Murray, on the 16th of May, 1833, wrote a letter to Donaldson, wherein he consented to waive any demand against him at that time for the balance, and to await the expiration of the three years, "in the hope that the money (the balance in question) would then be forthcoming."

Donaldson left this country on the 16th of December, 1833, and died insolvent in May, 1835. No administration had been taken out to his effects.

In Michaelmas Term, 1836, a decree at the suit [578] of Mr. Murray and Mrs. Malin was served on M'Inerheny and Impey, alleging that Donaldson had possessed himself of 800l., that he had died insolvent, that he had not exhibited an inventory or rendered an account, and calling on them to shew cause why the bond should not be produced in any action at law, &c.

In the course of the proceedings Mr. M'Inerheny died.

The Queen's advocate and Phillimore for Mr. Impey resisted the application on three grounds:

First. That Donaldson being the attorney of the parties now proceeding, it was not competent to them to sue his sureties; that although they might be liable to the archbishop, yet, with regard to the parties before the Court, the act of their attorney was their own act; by the power of attorney they bound themselves to ratify and confirm what their attorney did; that there was no instance in which, under similar circumstances, the sureties had been proceeded against.

Second. That the parties having given Donaldson (the principal) three years to pay the money in, without the knowledge of the sureties, amounted in law to a discharge of their liability; and they cited the following cases:—

As to the time; *Nisbet v. Smith* (2 Brown, C. C. 579), *Skip v. Huey* (3 Atkyns, 91), *Rees v. Berrington* (2 Ves. junr. 540), *Law v. E. I. Company* (4 Ves. 824), *Samuell v. Howarth* (3 Merivale, 272).

[579] That compounding with an acceptor discharges the indorser of a bill; *Ex parte Smith* (3 Brown, C. C. 1).

That composition with the principal discharges the surety; *Ex parte Gifford* (6 Ves. 805), *Boulbee v. Stubbs* (18 Ves. 20).

Third. That there had been no breach of the bond; no inventory having been called for, and no decree made by the Judge.

Lushington contra. The point is whether there has been a breach of the bond; the party having applied 800l. to his own use, had clearly committed a breach of the condition "well and duly to administer" the deceased's effects; (i) a breach was also committed in not having exhibited an inventory or rendered an account within the time limited by the bond. (k)

With regard to the administrator acting by power of attorney, there can be no semblance of reason in suggesting that the sureties are on that account released from responsibility.

And on the other point, as to time being given to Donaldson, the cases referred to do not apply, unless where a sum of money was due at a particular time; but in this case the responsibility was a continuing one, and subsisted until the whole duty was performed.

Sir Herbert Jenner. The essential obligation of the bond is to exhibit [580] an account of payments and receipts; until this is done there is no constat of any residue to be deposed of: but in this case Donaldson, the administrator, had never been called upon to exhibit his account; on the contrary, Mr. Murray, for himself and primâ facie for his sister, had not only not taken any steps in order to obtain an account, but had given the administrator a term of three years before the money was to be called for. Under these circumstances, the parties interested having shewn such a degree of acquiescence in the non-payment of the money, it would be inequitable at this time to call upon the surety.

Application rejected.

WALCOTT *against* OCHTERLONY, BARONET, BY HIS GUARDIAN. Prerogative Court, July 19th, 1837.—The deceased having made a will, which she deposited with one of the executors, caused a letter to be written, desiring that the will might be destroyed. The executor did not destroy the will, and the deceased was not informed, down to the time of her death, whether the will had been destroyed or not; but died without having altered her intention to revoke, and in the belief that she had done so.—Held to be a revocation.

[Referred to, *Maharajah Pertab Narain Singh v. Maharanee Subhao Koor*, 1877, L. R. 4 Ind. App. 245.]

The question in this case was whether the will of Charlotte Ann Montgomerie Ochterlony, late of the city of Edinburgh, spinster, deceased, was revoked or not? The suit was brought by Captain John Edward Walcott, one of the executors named in the will, against Sir Charles Metcalf Ochterlony, Baronet, the brother, and only next of kin of the deceased, a minor, acting by his guardian.

(i) *Archbishop of Canterbury against Robertson*, 1 Crom. & Mee. 690; 3 Tyr. 390.

(k) *Williams's Exors.*, 365, and the cases there referred to.

[581] The allegation on behalf of Sir Charles Metcalf Ochterlony, setting up the revocation of the will, pleaded in substance as follows:—

First. The death of the party on the 19th of June, 1835, leaving Sir Charles Metcalf Ochterlony, her brother and only next of kin, and that her property amounted to between two and three thousand pounds.

Second. Her arrival from India, and her residence with Captain and Mrs. Walcott, and also with the family of Mr. George, until she went to Scotland in May, 1834, to the house of John Ross, Esq., at Cupar Angus, and in November in the same year her going to lodge at the house of a Mrs. Bogle, with whom she thereby first became acquainted.

Third. That about the 30th of April, 1834, she wrote out her own will, and executed the same in the presence of witnesses, and thereof appointed James George, Esq., John Edward Walcott, Esq., and John Ross, Esq., executors; also that she wrote to the said John Edward Walcott, earnestly entreating him to accept the office of executor, and also stating that she had deposited her will with the said James George, but adds, "I have a copy, so I can alter it at any time, and the last made would, of course, be the one acted on, if properly signed and sealed."

Fourth. Exhibited the letter.

Fifth. That in April and May, 1835, the deceased was suffering under a disease of the heart, and that her medical attendants forbade her writing. That during such time she frequently spoke to Mrs. Bogle about her will, and expressed to her [582] her intention to have it destroyed, stating "it was now of no use;" that in pursuance of such intention she directed Mrs. Bogle to write a letter to Charlotte Ann Walcott, the wife of Captain Walcott, to request that she would write to Mr. George, and request him to destroy the will; that Mrs. Bogle accordingly, on the 2nd of May, 1835, wrote to the said Charlotte Ann Walcott a letter in which were the following, among other, words, "Your niece desires her affectionate love to you and her uncle, and wishes you to write to her friend Mr. George, and request him to destroy a will of hers that she committed to his keeping, she says that it has been much in her thoughts for sometime, and wishes it might be destroyed without delay." That upon the said letter being read by Mrs. Bogle to the deceased she approved thereof, and it was by her direction addressed and sent to Mrs. Walcott on the fourth, and received by her on the sixth, of the said month, &c.

Sixth. Exhibited the letter.

Seventh. That at the time of, or immediately subsequent to, the writing of the aforesaid letter, the said deceased delivered to the said Mrs. Bogle a sealed packet, containing, as she then informed her, a copy of the aforesaid will in the possession of Mr. George, and made Mrs. Bogle solemnly promise to put it in the fire without perusing it the moment she heard of the destruction of the original.

Eighth. That on the 6th of May, immediately after the receipt of the letter by Charlotte Ann Walcott, Captain Walcott wrote to Mr. George, informing him of the wishes of the deceased, as contained in the letter of Mrs. Bogle; that in reply, [583] Mr. George wrote a letter to Captain Walcott, wherein, among other things, he wrote, "Would you or myself venture to destroy a will made by a person in perfect health of body and mind, by the desire of a third party, when the maker is in such a reduced state as to be scarcely sensible of what her wishes are? I enclose it to you, my dear sir, as her nearest connexion, and shall be perfectly satisfied with your destroying it, or by your forwarding it to Charlotte, which I think will be the most regular and safe way;" that in a postscript to the said letter he added, "I find the will is too heavy for a frank, I will get an office frank, or forward it per coach to-morrow;" but that he did not forward it until the 14th of the said month.

Ninth. Exhibited the letter.

Tenth. That though intelligence of the destruction of the said will could not reach the deceased for several days after sending the said letter of the 2nd of May, her anxiety to have the said will destroyed increased; and in further pursuance of such her wishes and intention that the said will should be forthwith destroyed, she directed Mrs. Bogle to write to Mr. George himself; that she accordingly, on the 8th of May, wrote to him a letter, containing, amongst other things, the following words:—"In my last letter to Mrs. Walcott, I was desired by my young invalid to tell her to write, and request you to destroy a will that she committed to your care, the copy of which she possesses, she meant to give you her reasons whenever she can write.

She tells me that it annoyed her very much during her serious illness, because there is much in it, she says, that is now of no use." [584] That upon the said letter being read by the said Mrs. Bogle to the deceased, she approved thereof, and it was by her direction forwarded and sent to Mr. George; that he duly received it on the 13th of May, and on the following day endorsed on the envelope of the will of the deceased the following words:—"This will to be destroyed, as per Mrs. Bogle's letter to Captain Walcott and J. George," date, 8th May, J. George, London, 14th of May, 1835.

Eleventh. Exhibited the letter.

Twelfth. That on the 13th of May, 1835, Mr. George wrote a letter to Mrs. Bogle, and, amongst other things, expressed himself as follows:—"Tell dear Charlotte her instructions respecting her will shall be attended to, but she had only to write these few words, "I hereby revoke all wills made to this date," which would have been sufficient. It is quite unnecessary for the dear girl to give any reasons for destroying the document; that George sent the letter by a private bearer, and the same was not received by Mrs. Bogle until the 10th of August, after the death of the deceased.

Thirteenth. Exhibited the letter.

Fourteenth. That on the 14th of May Mr. George transmitted the will, by parcel, to Captain Walcott, at Bath, who duly received the same, and that on the 10th of June following he forwarded the same in a letter, addressed to the deceased, in which letter he wrote as follows:—"I never think it satisfactory to employ other hands than one's own in the destruction of papers of importance. On Mr. George, therefore, forwarding me your will, I determined to wait an opportunity of transmitting [585] it to you which has just offered through the hands of Miss Blackmore, on her way from Bath to Edinburgh."

Fifteenth. Exhibited the letter.

Sixteenth. That Mr. George, in a letter dated the 14th of May, addressed to Mrs. Bogle, apprised her of the writing and sending the letter of the 13th of May before mentioned, which information was made known to the deceased. That she, in consequence of not hearing from Captain Walcott or receiving the letter of the 13th of May, declared to Mrs. Bogle that she would have again pressed the subject upon their attention, but that she expected that the letter written by Mr. George, dated the 13th of May, would announce either the destruction of the will or contain the will itself, for the purpose of enabling the deceased herself to destroy it. That shortly prior to her death the deceased expressed a wish and intention of making a new will revocatory of the will pleaded in this cause, but was dissuaded therefrom by the said Mrs. Bogle, who informed her that as the will would be destroyed, it was unnecessary for her to make another, and that her brother, the said Sir Charles Metcalf Ochterlony, would be her heir without a will, and that the deceased assented to and acted upon such representations of the said Mrs. Bogle.

Seventeenth. Exhibited the letter.

Eighteenth. That on or before the seventh day of June, 1835, Sir Charles Metcalf Ochterlony went to visit his sister, the deceased, at her lodgings in Edinburgh, and remained with her until the ninth of the month, being the day of her decease. That during such time no communication was made [586] either by the deceased or Mrs. Bogle to him respecting the deceased's property, or her said will, or her desire for the revocation thereof.

Nineteenth. That the disease of which the deceased died was an affection of the heart, and her death was very sudden. That in order to avoid her being agitated her medical attendants advised her to abstain from writing or reading, or attending to business. That during the premises the deceased was of sound mind, &c.

Twentieth. Was the usual concluding article.

This allegation was opposed, and it was contended, in opposition to it, by the Queen's advocate and Nicholl, that if all the facts were proved, the will in question was not revoked, that the declarations of the deceased did not amount to more than an intention to revoke at a future time, which even before the Statute of Frauds would not have been a good revocation (*Cranwell v. Sanders*, Cro. Jac. 497). But the twenty-second section of the Statute of Frauds (29 Car. 2, c. 3), it is submitted, is decisive of the point; it enacts, "That no will in writing, &c., shall be repealed by any words, or will by word of mouth only, &c." There is no act done in this case by the deceased; is it not an attempt to repeal by words?

Lushington and Haggard contra.

Court. At present I am not prepared to say that, under the circumstances stated in this allegation, a revocation could not be effected; on the other hand, without seeing the evidence, I cannot say [587] what may be the result. I shall admit the allegation without giving any opinion as to the result.

Witnesses were afterwards examined, and the cause was argued on the 19th of July, 1837.

Sir Herbert Jenner. Charlotte Ann Montgomerie Ochterlony, the deceased in this case, died at Edinburgh on the 9th of June, 1835, of the age of twenty-three years, leaving an only brother, Sir Charles Metcalf Ochterlony, Baronet, her only next of kin. On the 30th of April, 1834, the deceased, when in London, with her own hand made her will, of which she appointed James George, John Edward Walcott, and John Ross, executors. This will was deposited with Mr. George for safe custody; and the question is whether, under the circumstances of this case, that will is revoked. In November, 1834, the deceased went to lodge at the house of a Mrs. Bogle, in Edinburgh, where she continued until her death. In April, 1835, it appears that she was attacked with a disease of the heart, of which she ultimately died; and her medical attendants directed that she should not be suffered to write or read, or attend to business, in order that she might not be agitated.

In the beginning of May, 1835, Mrs. Bogle, by the deceased's desire, wrote to Captain Walcott's wife at Bath requesting her to get her husband to write to Mr. George, directing him to destroy the deceased's will. Captain Walcott accordingly wrote to Mr. George, but he declined to destroy the will, but sent it to Captain Walcott that he might, if he [588] thought proper, destroy it or forward it to Miss Ochterlony. Captain Walcott, it appears, on the 10th of June, enclosed the will in a letter to the deceased, which he forwarded by a lady who was going from Bath to Edinburgh, but the deceased died before the will arrived. It appears that up to the time of her death the deceased expressed her anxiety that the will should be destroyed, and stated to Mrs. Bogle that she would make a new will in order to revoke the former, but that Mrs. Bogle dissuaded her from so doing, informing her that as the will would be destroyed it was unnecessary to make a new one.

It is proved by Mrs. Bogle that the letters were written by the deceased's direction, and that the passages relating to the destruction of the will were read over to and approved of by her. Now, although looking at the contents of the will there was no reason to suppose that the deceased would depart from it; yet improbability must give way to facts, and there is no ground to suspect that Mrs. Bogle, who was ignorant of the contents of the will, had any interest or bias in respect to it.

The first question, therefore, on the facts she deposed to is, what was the intention of the deceased? There could be no doubt of her animus revocandi, and having established this point, what does the law require to give effect to such intention?

The Statute of Frauds provides that no will in writing of personal estate shall be repealed, nor any clause or bequest therein altered or changed by any words; is this a revocation by words? I apprehend not; the deceased did not say, "I revoke [589] my will," but in effect says, "Mr. George is in possession of my will; I am not able to destroy it myself, but I desire that he will destroy it;" and this amounted to a present intention absolutely to revoke, which was written down at the time, approved of by the deceased, and by her direction communicated to the person in whose custody the will was; it was an absolute direction to revoke, reduced into writing in the deceased's lifetime. There is nothing in the Statute of Frauds which prevents such revocation having effect, and it is clear that, prior to that statute, a will might be so revoked. Further, the deceased subsequently directed a letter to be written to Mr. George, intimating that she would give her reasons thereafter, and evinced anxiety for a reply to that letter down to the time of her death; there can be no doubt that she died in the intention to revoke the will, and in the belief that it was revoked.

I am of opinion that the will in this case is revoked, and that the deceased is dead intestate.(a)

(a) See *Doe dem. Reed against Harris*, 8 Ad. & Ell. 1, S. C. 4 N. & P., which was a question as to the revocation of a will as to copyhold estate. The same case as *Harris against Reed* was depending in this Court, but was ultimately compromised.

[590] IN THE GOODS OF SARAH SOPHIA SOAMES MONDAY, Deceased. Prerogative Court, Hilary Term, 1st Session, January 14th, 1837.—Administration with will annexed, as executed in pursuance of a power, refused, the power not being before the Court.

The deceased died a widow on the 11th of March, 1836, having during coverture with Joseph Monday, her late husband, duly executed, as alleged, her last will and testament, in pursuance of a power under her marriage settlement. By the said will Joseph Monday was appointed sole executor, and the whole of the separate property was bequeathed to him, with the exception of a small legacy. He died in the lifetime of the deceased.

The King's advocate. Upon affidavits, stating that the deceased died without any known relation, and that the usual advertisements had been made, prayed administration with the will annexed to be granted to George Maule, Esq., the nominee of the Crown; but there being no proof that the will was executed agreeably to the power, neither the settlement nor a copy of it being before the Court, the motion was rejected.

[591] IN THE GOODS OF JEAN EUGENE LAMONTAGNE BOURGET, Deceased. Prerogative Court, Hilary Term, 1st Session, January 14th, 1837.—A party having died insane, leaving a will, which upon the face of it exhibited marks of insanity, the Court granted administration of the effects of the deceased as dead intestate, but directed the will to be deposited in the registry.

The deceased in this case, a native of Nantes in France, and lately a planter in the island of Mauritius, died on the 23rd of February, 1835, in London, a bachelor, leaving his mother and two sisters his next of kin. The deceased having become insane, his property (about 4000l.) by the advice of Mr. Capper, of the Alien Office, was placed in the hands of Messrs. Rothschild for safe custody. After the deceased's death a will in very incoherent terms was found about his person, addressed to the Lord Mayor.

Addams, upon affidavits to the above effect, prayed administration to be granted to the mother as in intestacy.

The Court having no doubt from the affidavits, and upon the face of the paper itself, that the deceased was insane, granted the motion, but directed the paper to be left in the registry, in order that any one having an interest might propound it, if he should think fit so to do.

[592] IN THE GOODS OF THOMAS WILLIAM BARKER, Deceased. Prerogative Court, Hilary Term, 1st Session, January 14th, 1837.—Where a party has the right to the administration under the statute, he must be cited, or consent, before the Court will grant administration to a third party.

The deceased died intestate, a bachelor, leaving his lawful father him surviving, who had not taken out letters of administration to the deceased's effects.

Lushington moved the Court to grant administration to a third party, limited only to property in which the father of the deceased had no interest; the father had not been cited.

Court. The father is entitled by statute to the administration, although he may have no interest in the property, limited to which this administration is prayed. Whenever a party has a right to the administration, the Court always requires that he should be cited, or consent.

Motion rejected.

IN THE GOODS OF FRANCIS CARY, Deceased. Prerogative Court, Hilary Term, 3rd Session, January 31st, 1837.—No person being able to make the usual affidavit as to the handwriting of the deceased, the same having been compared with signatures of the deceased, and all parties interested consenting, the Court dispensed with such affidavit.

Francis Cary died on the 5th of December, 1836, a bachelor, leaving two nephews and a niece, his only next of kin, the only persons entitled in distribution in case he had died intestate.

He left a will and three codicils, all in his handwriting, of which he appointed his niece, Mary Ann [593] Cary, and his nephew, George Cary, executors. Neither

the will nor codicils were executed in the presence of witnesses, and no parties could be found who could make the usual affidavit as to the deceased's handwriting.

Haggard. Upon the affidavit of Mr. Charles Pain, a solicitor, who had compared the signatures of the deceased to the papers before the Court with his signature to a deed of assignment (made in 1826, in Mr. Pain's presence, and which was the only occasion on which he had seen the deceased write), and which he deposed as to his belief of their being made by the same person, and upon the affidavit of Mr. Goldney, a stockbroker, who had compared the signatures in question with those of the deceased in the dividend book at the Bank of England, and upon the consent of all parties interested, moved the Court to grant probate, which was granted accordingly.

MAYHEW AND OTHERS *against* NEWSTEAD. IN THE GOODS OF MARY NEWSTEAD, Widow, Deceased. Prerogative Court, Hilary Term, 2nd Session, January 24th, 1837.—The executor and universal legatee under a will, having assigned his interest to trustees for the benefit of his creditors, administration with will annexed granted to two of the trustees, he having been first cited.

Mary Newstead, widow, died in the year 1831, having made her last will and testament in writing, bearing date the 31st of July, 1822, and therein appointed her son, Joseph Newstead, sole executor and universal legatee. The son having become embarrassed in his circumstances, on the 3rd of October, [594] 1835, executed an assignment of all his property to four trustees for the benefit of his creditors. On the 2nd of January, 1837, a decree issued, at the suit of the trustees, citing the son to appear, and accept or refuse probate of the will of the deceased, or shew cause why letters of administration with the will annexed should not be granted to them, or one of them; this decree was personally served, and no appearance being given.

Addams moved the Court to grant the administration to the trustees.

Administration with the will annexed granted to two of the trustees.

IN THE GOODS OF GEORGE WATTS, Deceased. Prerogative Court, Hilary Term, 4th Session, Feb. 8th, 1837.—A party deceased, having made a will, who was afterwards found to be of unsound mind from a date anterior to that of the will; the Court refused upon affidavit and consent of parties, on motion, to decree such party to be dead intestate, there being nothing on the face of the will sounding to folly.

The deceased in this case, in June, 1827, executed a will and codicil, which were attested by three witnesses; a few months afterwards, under an inquisition of lunacy, he was found to be of unsound mind, and to have been in the same state from the month of April, 1826, a time preceding the date of the will and codicil. Upon an affidavit of these circumstances, and on the consent of all parties interested, except a few legatees under the will in trifling sums,

Nicholl prayed administration of the effects of the deceased as dead intestate to be granted to the widow.

Sir Herbert Jenner. The will in this case is regularly drawn and executed, and is apparently as sane a will as can possibly [595] be; it is a perfect instrument, and there is nothing on the face of it sounding to folly. How can the Court then, on mere ex parte affidavits, pronounce against such a paper? The consent of parties interested proves nothing; no person's consent can make a will no will. If such a proceeding were countenanced by the Court it might open a door to fraud. This Court is not precluded from an investigation of the circumstances of the case by the mere verdict of a jury. The deceased might have had lucid intervals, and the will and codicil, as in *Cartwright v. Cartwright* (1 Phill. 90), may have been executed in one of such intervals, for which both, on the face of them, bear marks of sanity.

The Court cannot entertain a question of this kind in the present shape.

Motion rejected.

IN THE GOODS OF HENRY HUTTON, Deceased. Prerogative Court, Hilary Term, Bye-Day, Feb. 16th, 1837.—A person having sailed on board a vessel at Manilla in July, 1835, on a voyage to London, and the vessel never having been since heard of, nor any one on board, presumed to be dead.

Henry Hutton, the master of the merchant ship "Forth," a bachelor, sailed from the port of London in the month of November, 1834, on a voyage to Manilla, where

he arrived on or about the 20th of May, 1835. In the month of July, 1835, he re-embarked on board the said ship from Manilla on his return to London, where the ship was expected to have arrived in about four months afterwards, but neither the ship nor any person on board have since been heard of. The ship and cargo were in-[596]-sured, and the underwriters had paid as upon a total loss. The party had made no will.

Phillimore, under these circumstances, submitted that the party must be presumed to be dead, and he prayed administration of his effects to be granted to his mother as next of kin.

The Court granted the administration.

IN THE GOODS OF ROBERT MURRAY, Deceased. Prerogative Court, Easter Term, 1st Session, April 20th, 1837.—A husband, his wife, and child having perished together, administration granted of the husband's effects as dead a widower.

Robert Murray, together with his wife and only child, proceeded on a voyage from Dublin to Quebec on board the barque "Emerald," of London, in the month of October last; on the 25th of the said month, during a severe gale, at eleven o'clock at night, the vessel struck the land.

At the time when the vessel struck the land, Murray was on deck, his wife and child being below in the cabin, Murray afterwards went below, and shortly after the vessel again struck the land and went to pieces, and the deceased, his wife, and child were drowned.

The above circumstances were set forth in an affidavit by the late mate who survived. The deceased left a will in which he had bequeathed the whole of his property to his wife.

The Court, on the motion of Burnaby, granted administration with the will annexed to the next of kin of the husband as dead a widower; there being nothing to shew that the wife survived, the next of kin of the wife consenting.

[597] THE OFFICE OF THE JUDGE PROMOTED BY WILLIAMS *against* HALL. Consistory Court of London, July 31st, 1837.—Articles for brawling at a vestry held in the vestry-room within the churchyard, being proved, the Court suspended the defendant ab ingressu ecclesiæ for one week, but did not condemn him in the whole costs, in consequence of irritating expressions having been proved to have been used by the promoter.

This was a criminal proceeding instituted by the vicar of Hendon, the Reverend Theodore Williams, against James Hall, a parishioner, for quarrelling, chiding, and brawling by words at a vestry meeting of that parish, held in the vestry-room, situate in the churchyard, and adjoining to and communicating with the parish church.

The articles which were admitted on the second session of Michaelmas Term, 1836, pleaded the law, and that, on the 23rd of June, 1836, at a vestry meeting, &c., the said James Hall, in the course of some conversation arising out of the business for which the meeting had been convened, in a brawling, chiding, and quarrelsome manner, and in a loud tone of voice, and addressing himself to the said Reverend Theodore Williams, though cautioned by him to abstain from, and not to commit himself by, the use of intemperate and improper language, said, "You are anything but a gentleman;" and shortly afterwards, "Your conduct is disgraceful to a clergyman;" and "You are a disgrace to your cloth;" to the great offence of the persons assembled.

A defensive allegation was given in by Mr. Hall, [598] which pleaded that the vestry meeting was held pursuant to public notice, specifying the hour of three precisely as the time of meeting; that at three o'clock some of the parishioners had assembled in the vestry-room, according to the notice, and waited till after four o'clock, when, in consequence of the Reverend Mr. Williams not being in attendance, James Heward, a parishioner present, was elected chairman, and the meeting proceeded to business; the notice was read and certain resolutions were proposed and agreed to; that Mr. Williams, having in the meantime learned that the parishioners had so assembled, entered the vestry-room about half-past four o'clock; that upon his entrance he appeared, and in fact was, much excited and angry, and complained of the meeting having proceeded to business without him, insisting that they had no right to do so; and, looking at his watch, said it was only then twenty minutes past

four, and that he threatened to bring an action against the said James Heward for taking the chair in his absence. The allegation went on to deny the charge contained in the articles, and to plead that Mr. Hall, whilst making some remarks upon the business before the meeting, was, from time to time, although in order, interrupted by Mr. Williams, and also by other persons, whilst expressing his sentiments; and when he appealed to the chair for protection, &c., Mr. Williams, addressing him, among other things, said, "If you think you hold any place in my estimation, you are much mistaken;" whereupon Mr. Hall replied that such was not fit language and conduct for a minister of peace; that he expected and had a right to be [599] treated as a gentleman, or expressed himself to that or the like effect; that Mr. Hall kept his temper and refrained from expressing himself in a chiding or brawling manner, and did not raise his voice more than was needful to state his sentiments upon the matters brought before the meeting; that the vestry-room is in dimensions about ten feet by nine, and was formerly a family vault; the persons assembled were about twelve in number, and were seated round a table, so that, from the size of the room and the situation of the persons therein, any expressions which might have been used by Mr. Hall, if spoken in a loud tone of voice, as pleaded, must have been heard by all the persons present.

On the behalf of the Reverend Mr. Williams, an allegation, responsive to the foregoing, was given in, pleading that it has long been the practice in the parish of Hendon not to commence business at vestry meetings until after the expiration of a full hour from the time at which such meetings are appointed to be held, and such practice is well known to and among the parishioners generally; that accordingly the attendance of the parish officers was not required until a full hour after that at which the meeting was formally appointed to be held; that, notwithstanding, the Reverend Mr. Williams was in the church or churchyard by three o'clock, and continued either in or close to the churchyard until a few minutes before four o'clock, awaiting the arrival of the parish officers or some or one of them, and a due attendance of parishioners, previous to taking the chair and commencing the business of the vestry; the only parishioners then in attendance being William [600] Farlar, James Hall, and two or three others, neither of them officers of the parish; that no other person being in sight at such time, Mr. Williams left the churchyard and walked a short distance down the road by which he expected their arrival, in order to meet and expedite any such of the officers or others of the parish as might be in progress to the vestry; and having met and returned, accompanied by certain of such persons, entered the vestry-room by at latest about ten minutes past four o'clock; that, upon so entering the vestry-room, finding James Heward in the chair, he said, but not in any tone of excitement or irritation, that he, as vicar of the parish, was entitled ex officio to the chair which the said James Heward, who made no offer to quit the same, had no right to retain; whereupon (and not before) Heward vacated the chair, which then was taken by Mr. Williams, and denied that he was angry, &c. as pleaded in Mr. Hall's allegation; that Mr. Hall was not interrupted by the Reverend Mr. Williams, who did say to Mr. Hall, "If you think you hold any place in my estimation you are much mistaken," as pleaded, or something to that effect; thereby meaning that he had too little value for the said James Hall to suffer himself to be put out or provoked by him, but that the Reverend Mr. Williams did not so say when appealed to (if appealed to) by Mr. Hall for protection, &c. as pleaded by him, but in reply to and by way of rebuke for the offensive conduct and language of Mr. Hall to him, as set forth in the articles.

The admission of this allegation was debated on the 27th of May, 1837, when

[601] The King's advocate for the party proceeded against, opposed its admission, objecting, in the first place, to the delay which had taken place on the part of the promoter, who had not commenced the suit till the first session of Michaelmas Term, 1836; who had been assigned to give in his answers to the defensive allegation on the 7th of March, 1837, but they were not given till the 29th of April, four months after that allegation had been debated: secondly, that this further plea was unnecessary, as it contained no new facts in support of the original charge.

Addams in support of the allegation, was stopped by the Court.

Dr. Lushington. It is a calamity attending cases of this description that the Court is under the necessity of going into minute circumstances in order to do justice between the parties. Mr. Williams, who promotes the office of the judge, has brought

a charge against a parishioner of chiding and brawling, and the party proceeded against brought in a defensive allegation, which not only contains a denial of the fact, but goes on to plead circumstances whence gross misconduct is imputed to Mr. Williams himself. Then comes the third allegation, pleading certain averments in reply to the defensive allegation.

The first objection is as to the period of time when the allegation is offered, and as to the delay imputed to the promoter in giving in his answers. But if the answers were improperly delayed, the course was to apply to the Court, and the Court [602] cannot, on this ground, be precluded from admitting the allegation. Looking to the whole of the allegation, I think that, in substance, it is clearly admissible; and though at the same time I feel the force of the other objection urged by the learned counsel for Mr. Hall, I am of opinion that I shall do no prejudice to him by admitting it. Although some of the facts pleaded are not strictly responsive, and all of them do not immediately bear on the question of chiding and brawling; yet they have a bearing on this question, whether Mr. Williams misconducted himself or not; and we all know in these Courts that if a party, promoting such a suit, shall have been himself guilty of misconduct, he will stand in a different position with respect to the costs than if he had not misconducted himself. I must, therefore, admit the allegation.

Witnesses were examined on both sides, and the cause came on for argument and sentence this day.

Addams was heard on behalf of the promoter, and the Queen's advocate for Mr. Hall.

The Court suspended its judgment till another case was heard, *Williams* against *Farlar*, which was a similar proceeding, instituted by the same promoter, against William Farlar, another parishioner, for a similar offence on the same occasion, and which case had gone on *pari passu* with the other. In the latter case the words imputed to the defendant were (with reference to the promoter), "You fancy yourself the sultan of Hendon, but I am come to teach you that we are not living in Barbary, and that you have not Turks to deal [603] with;" "You have more impudence than even the Surrey parsons;" "You are anything but a gentleman;" "Your conduct is disgraceful to a clergyman;" alleged to have been spoken in a chiding and brawling manner.

Judgment—Dr. Lushington. Although there is a good deal of conflicting evidence on both sides, in this case, as to some points, yet in those of the greatest importance there is as much unity of testimony among the witnesses as could be expected under the circumstances of the case; for where a vestry has been held, as this was, at a time of great excitement, and where there was much heat, perhaps, on both sides, it is hardly to be expected, and indeed it would be contrary to human experience, that the witnesses could be prepared to depose with minute accuracy to every particular transaction, or to the course of these transactions.

The jurisdiction of these Courts, in matters of this kind, is founded entirely upon the fact of the place of meeting being upon consecrated ground, and the authority is vested in these Courts for the purpose of protecting such consecrated place or ground from that desecration which the law considers would be the effect of allowing abusive language on either side to pass with impunity.

A great many preliminary circumstances have been insisted upon by the counsel for the promoter, which have also been commented upon by the counsel for the defence; I allude, in particular, to the intention of Mr. Farlar in taking a small field at the rent of eight pounds a-year as tenant at will, [604] for the express purpose of attending these vestries; and if I were disposed to press against him the evidence of Mr. Hall, I might be induced to come to that conclusion, as Mr. Hall states that he instigated him to take the land for the purpose of attending the vestry and assisting in the parish business. I am not, however, disposed to lay great weight upon this circumstance, because I apprehend my peculiar duty is to see what actually did pass in the church; and that I am not called upon, as a matter of necessity, to form any determination, or at least to express any opinion, either as to whether Mr. Farlar was so induced to take the land for that purpose, or what were the motives which instigated him in becoming a rated parishioner of Hendon; and for this reason, also, I do not intend to enter with any minuteness into the proceedings of other gentlemen who were with him at this vestry on the 23rd of June, 1836. I should further

observe that nothing can be more unfortunate than the practice which has prevailed in this parish of very great irregularity in the time of holding vestries. It is proved, on the present occasion, that in the notice for the meeting, the time was stated to be "three o'clock precisely;" yet it appears that the custom of the parish was, notwithstanding such a notice, not to meet till four o'clock, one hour afterwards, and sometimes, as it would appear, not even then with punctuality, but as the parishioners attended. Now such a practice might lead to great inconvenience, because persons, occupied in their various businesses, might come a quarter of an hour after, when most important business might have been despatched, in which such persons might have been interested. I [605] earnestly express my hope, after what has occurred on the present occasion, that greater regularity in this respect will be attended to at these meetings.

I now proceed to those parts of the case which it is necessary I should notice with great minuteness. But I will first state what I consider to be the rule which governs this Court in matters of this kind. I apprehend if words, which amount to the offence of brawling, be distinctly proved, that the Court has no alternative but to pronounce the sentence of the law. But the Court has been in the habit, even where words of brawling have been distinctly established by evidence, of entering into a further consideration, to see how far such expressions have been excited by irritating expressions on the other side; and, under such circumstances, the Court has considered itself justified in making these matters form a part of its deliberation, and in diminishing the amount of the costs in which it condemns the party proceeded against, where great provocation has been given. It is right, however, that I should state that there are some expressions of brawling so very gross and heinous, that, if proved, whatever might be the provocation offered, the Court would not apply this principle; but would then be under the necessity of condemning the party in the whole of the costs, leaving that party, if he thought fit, to prosecute the other for the expressions used by him.

I am now, then, in the first instance, to consider whether brawling expressions have been used by Mr. Hall; and, secondly, supposing the words are proved, whether there are any matters of mitigation which ought to govern the judgment of the Court on the question of costs. And here I [606] should state that, according to all principles of evidence, in these Courts and in Courts of common law, and in accordance with reason and good sense, affirmative evidence (unless it is shewn that the person is undeserving of credit) must always preponderate over negative evidence, for divers reasons. I wish it further to be observed that I enter not in any degree into the propriety of what was to be done at the vestry. Every person who conducts himself with propriety has a right to exercise his own judgment as to the part he takes at a vestry meeting.

It appears that these gentlemen arrived at the vestry-room at about three o'clock, whether in pursuance of the word "precisely" in the notice or not I think unimportant, and they remained there a considerable space of time. During that time Mr. Williams, the vicar, came at least once to the church; so that there was no neglect or remissness on his part. The result of the evidence is that these gentlemen waited till four o'clock before they proceeded to business, and, being cognizant of the usage of this parish, if they had done so before, there would have been too much appearance of snapping a vestry. As soon as the clock struck four, in the absence of the vestry-clerk and of the parochial registers, as well as of the vicar, business is immediately proceeded with, and carried into effect with no small despatch, because it is in vain to say only one resolution was passed; there were two very important resolutions, one postponing a church-rate till March, 1837; the other to take the books out of the custody in which they were, and to place them in the hands of Mr. Elford. This last resolution is admitted to [607] have been drawn up when Mr. Farlar was at Kensington. I think it of no importance whether Mr. Williams entered the room a quarter past four o'clock, or at twenty minutes past four, or at the half-hour. I see no reason to impute to him any negligence in the discharge of his duty: want of punctuality had been the order of the day for a long time, and he had been waiting for somebody else.

Mr. Williams, upon entering, was, I presume, a little surprised at finding business had commenced, because it was a little extraordinary, and I apprehend it to be unusual in any parish to commence business without the clerk of the vestry, or

some person experienced in such matters, to take down the proceedings, and without the parish officers. Whether Mr. Williams, upon finding Mr. Heward in the chair, threatened him with an action, has been a matter of discussion. I do not think the evidence is satisfactory on this point; but if I were under the necessity of coming to a conclusion I am inclined to say that Mr. Williams, in all probability, may have used some such expressions as those imputed to him, and, under all the circumstances of the case, I am not much surprised at it, or that Mr. Williams should have felt some affront at the manner in which the business had been carried on.

Now I must keep these two cases distinct, and not introduce anything that comes out of the proceedings against Mr. Hall as against Mr. Farlar, and vice versâ. Now then for the charge against Mr. Hall.

I entertain not a doubt, and I do not think that the contrary has been seriously contended, that the words charged are words of brawling; because, if they are not, I should be utterly at a loss to under-stand what words do constitute brawling. To say "You are any thing but a gentleman; your conduct is disgraceful to a clergyman;" and "You are a disgrace to your cloth;" are words which, in my opinion, if proved, completely bring this case within the limits of the law.

Six persons have been examined in support of this charge, to whom Her Majesty's advocate did not impute perjury; but it is said that they may have been tutored by certain proceedings on the part of Mr. Williams, to which I must presently advert. The evidence of the first witness (for it is not necessary to travel through the whole) is that Mr. Hall, finding the majority opposed to his views, said, addressing himself to Mr. Williams, with great warmth, and in a tone louder considerably than his ordinary mode of speaking, which is very low, "Your conduct is disgraceful to a clergyman; you are any thing but a gentleman;" or "You are a disgrace to your cloth." Now my construction of this evidence is that it speaks positively to this expression, "Your conduct is disgraceful to a clergyman." With regard to the other, the witness entertains a doubt whether it was, "You are anything but a gentleman," or "You are a disgrace to your cloth;" but it is of no importance, for one is of the same tendency as the other.

I need not go through the testimony of other witnesses; there are some slight variations, but supposing they are to be believed, it is impossible to say that the offence of brawling is not established against Mr. Hall.

It has been strongly pressed, on behalf of Mr. Hall, that these witnesses, previous to their examination, had had interviews with Mr. Williams; that [609] papers had been put into their hands, and that their evidence is in conformity to those papers rather than to their recollection. I regret to say that I think it was not right or fitting that these proceedings should have taken place with the witnesses. I make allowance for the difficulty of procuring evidence under the circumstances; but if it is necessary that witnesses should be examined in this manner previously, it is more safely done by the proctor in the cause, one over whom the Court has a control, than by the individual promoting the suit: and therefore I cannot but express considerable regret that these witnesses should have had their memories refreshed in the way Mr. Williams thought proper to have recourse to. But I cannot for that reason travel to the conclusion that they deposed entirely according to the tenor of the papers put into their hands. (a) I see no reason to suppose so at all, and, looking at the means there are of disproving their evidence, if they had spoken falsely, I think this evidence, for the most part, is honest evidence, although there may be expressions which I should have desired to see spared. And how is it encountered? Simply by the evidence of persons who say they did not hear the expressions; nor is it probable that any one witness would have heard the whole, nor is it likely that one witness would recollect the whole. Upon the principle I have already stated, where there is affirmative evidence, I am bound to take that in preference to negative evidence, and in doing [610] so I do not mean to impute to those who have sworn that they do not believe the expressions were used a wilful departure from the truth. I might easily point out reasons for the discrepancy of evidence. It is not to be expected that different witnesses should speak to the same facts; and hardly two of them give the

(a) Some of the witnesses, on the part of the promoter, admitted, on interrogatory, that they had been shewn memoranda made by the promoter of the words used by Mr. Hall and Mr. Farlar at the meeting.

same account of the transaction : and I never would believe witnesses who did depose, under such circumstances, to the same facts in exactly the same manner.

I am under the necessity, therefore, of saying that I am of opinion that the charge against Mr. Hall is proved, and then I come to this question ; whether there be any extenuating circumstances, which ought to induce me to withhold the necessary sentence of the law ? namely, the condemnation of Mr. Hall in the whole of the costs. I greatly regret that the proceedings should have gone to the length they have ; at the same time I do not think any peculiar blame is attributable to either party ; because, if Mr. Hall believed he had not made use of the expressions, it was natural that he should wish to defend himself, and he had a right to plead for that purpose anything which might have been said by Mr. Williams in the way of provocation.

Now the only expression which is relied upon, as extenuating Mr. Hall's offence, is the following :—"If you think you hold any place in my estimation you are very much mistaken." I must first see whether these words are proved ; and I am of opinion that they are proved, as laid by Mr. Hall. The next question is whether they are of such a tenor and meaning as would produce the effect contended for by Mr. Hall. Here arises a considerable [611] difficulty as to the time when, and the circumstances under which, these words were spoken ; and I am utterly unable to fix the time or the circumstances with any thing like due precision. I must say that, in my judgment, these were words of provocation ; that they are words denoting contempt, and what so much excites irritating feelings as words of contempt ? It is not in human nature patiently to submit to expressions denoting contempt. Thinking that Mr. Williams used these words, I am bound to consider them in pronouncing my judgment, which is this ; that Mr. Hall be suspended from entering the church for the space of one week, and that he be condemned in the costs, save and except thirty pounds.

I now proceed to the consideration of the next case.

The charge against Mr. Farlar is that of addressing these words to Mr. Williams : "You fancy yourself the sultan of Hendon ; but I am come to teach you that we are not living in Barbary, and that you have not Turks to deal with ;" and shortly afterwards : "Your impudence is unequalled by all the parsons of Surrey ;" and "You are anything but a gentleman." There is no doubt some discrepancy as to whether the word "Tartary" was not used instead of "Barbary ;" but there can be no doubt that some of the expressions were used, as "You are anything but a gentleman ;" "You have more impudence than even the Surrey parsons." I must say that as to the expression of "Surrey [612] parsons" I entertain considerable doubt—I cannot make sense of that expression.

The witnesses are the same in this case as in the other ; but this case is stronger as to the evidence, because one of the witnesses for the defence establishes brawling beyond all doubt. He deposes to the words, "You are a disgrace to your cloth." It is clear that this observation is a brawling observation.

The conclusion, then, to which I come is that the evidence establishes the charge in this case, and it remains in this, as in the preceding one, to see whether anything was said by Mr. Williams which ought with propriety to induce me to exercise any discretion with respect to costs.

Two circumstances are stated on behalf of Mr. Farlar ; one is, that Mr. Williams said to him, "Such tricks may do at Kensington, but they will not do at Hendon." The other circumstance is, that when Mr. Farlar did not aspirate the letter "H," Mr. Williams noticed it, and told him it was "Hendon," and not "Endon."

With respect to the first, I think I am justified in saying that the burthen of proof has been discharged, and that the evidence does establish the fact that the expression, "Such tricks may do at Kensington, but they will not do at Hendon," did escape the lips of Mr. Williams. As to the other, I have no doubt that Mr. Williams did notice the non-aspiration of the letter "H ;" the dispute is whether it was done in a mild or jeering manner ? which, in the heat and excitement of the moment, might have been the case, and very likely to have given very great offence to Mr. Farlar. If Mr. Williams did [613] so commit himself, by speaking in a jeering manner, it was calculated to give great offence to Mr. Farlar, and his reply shews that there was an impression on his mind that Mr. Williams was ridiculing him ; and it is unfortunate that Mr. Williams, considering his station and office, did not shew himself more his own master. It must be recollected that the clergyman of the

parish ought to consider himself superior to his parishioners, and no provocation ought to tempt him to deviate from temper and calmness, or induce him to place himself on a level with ordinary vestrymen. The same expression from an ordinary vestryman would be less censurable than from the clergyman whose duty it is to keep the peace and set an example to others. I think that both the circumstances were calculated to increase the excitement in Mr. Farlar's mind, and that they cannot be justified on the part of Mr. Williams; and, so thinking, I believe I shall come to a right and just conclusion if, in this case, as in the preceding, I condemn the party in the costs, remitting thirty pounds: with the same sentence of a week's suspension.

[614] BUTLIN *against* BARRY. Prerogative Court, September 5th, 1837.—A will being drawn by a solicitor, in which a considerable legacy was given to himself and to the medical man and butler of the deceased, excluding an only son, the presumption of law is strong against the act, and the Court requires strong evidence to satisfy it that the act is the real and voluntary act of the testator. Under the circumstances sufficient evidence being given of the capacity of the deceased and of his knowledge of the contents of the instrument, the Court pronounced for the will and condemned the son in costs from the time of giving in his allegation.

[Affirmed, 1838, 2 Moore, P. C. 480; 12 E. R. 1089 (with note). See also *Greville v. Tylee*, 1851, 7 Moore, P. C. 329; *Sutton v. Sadler*, 1857, 3 C. B. (N. S.) 97; *Goodacre v. Smith*, 1867, L. R. 1 P. & D. 359; *Fulton v. Andrew*, 1875, L. R. 7 H. L. 461; *Hegarty v. King*, 1880, 7 L. R. Ir. 23; *Brown v. Fisher*, 1890, 63 L. T. 465; *Tyrrell v. Painton*, [1894] P. 151.]

Judgment—Sir Herbert Jenner. The question in this case respects the validity of a paper propounded as the last will and testament of Mr. Pendock Barry, formerly Neale, of Tollerton Hall, Nottinghamshire, who died on the 13th of March, 1833, at the age of between seventy-five and seventy-six, a widower, leaving behind him an only son, Mr. Pendock Barry Barry, his heir-at-law, and the only person entitled to the personal estate of the deceased in case he had died intestate. The deceased was tenant for life of landed estates of the value of between three and four thousand a-year, to which the son succeeded. The personal property amounts to about thirteen thousand pounds, the whole of which is given by the will propounded to persons who are in no degree related to the deceased. The will is dated on the 14th of September, 1827, and it purports to have been executed in the presence of three witnesses, the Rev. Leonard Chapman (who died in the lifetime of the deceased), Dr. Davidson, and Dr. Marsden, who attested the exe-[615]-cution of it. By this will 3000l. are given to the deceased's butler, Samuel Whitehead, who had lived with him in that capacity since 1810, and 300l. to Mrs. Whitehead, his wife, who had been housekeeper to the deceased since 1823; 3000l. to Mr. Percy, his solicitor, and 2000l. to Mr. Butlin, his medical attendant, together with the residue of the property, after payment of some small legacies to the servants, and this gentleman is appointed sole executor. The sum of 10,000l. had been secured on the real estate for the benefit of the deceased's daughter, and to this the deceased succeeded, on the death of his daughter, intestate and a spinster, in 1821, and this constituted a charge on the real estate in exoneration of the personalty. The will was prepared by Mr. Percy, who had been the deceased's agent and solicitor for many years, and was executed in duplicate in his office; it is propounded by Mr. Butlin, the executor, and is opposed by Mr. Barry Barry, the son.

The proceedings in the cause commenced in 1833, and it is proper that I should state a few circumstances accounting for the delay which has occurred. The pleas were long, and objections were taken to some parts of the evidence; many of the objections were sustained by the Court, and from that decision of the Court an appeal was interposed to the Privy Council, but the Judicial Committee pronounced against such appeal and remitted the cause.(a)

(a) The cause came on for hearing on the 30th of November, 1835, and was continued for several days, and much discussion took place as to the admissibility of parts of the depositions of the witnesses. In the first place, an objection was taken to the testimony of John Gough, the managing clerk of Mr. Percy, who drew the will; he had been examined on Mr. Butlin's first allegation, which pleaded the instructions for, and the execution of, the will; the witness was not present when any instructions were given, nor when the will was executed.

[616] When the cause again came on, the arguments of counsel occupied several days, and the Court thought it to be its duty to take time to consider its [617] opinion, rather than to delay proceeding with the other business.

The first allegation propounding the will was in [618] effect a common condidit, pleading in substance the factum and execution; an additional article being necessary, in consequence of the death of one of the attesting witnesses—on that plea four witnesses have been examined. The first allegation on behalf of the son consisted of forty-five articles, setting forth the history of the deceased almost from his birth, upon which sixty-three witnesses have been examined—and no fewer than forty-nine upon the second article. A responsive allegation, on behalf of the executor, consisted of forty-eight articles, on which forty-three witnesses have been examined, and additional articles were afterwards given in, on which two witnesses were examined. A further allegation on behalf of the son was admitted, consisting of twelve articles, on which nineteen witnesses have been examined. After publication, an exceptive allegation was admitted, consisting of three articles, on which eighteen witnesses have been examined. So that there have been five pleas, consisting of one hundred and thirteen arti-[619]-cles, on which one hundred and forty-nine witnesses have been examined. The interrogatories and exhibits are very numerous and at great length, and I must say that this mass of evidence, unprecedented in this Court, and the accumulation of expense caused thereby, are utterly disproportionate to the question at stake between the parties, 13,000*l.* or 14,000*l.* The Court will endeavour to prevent the recurrence of such inconvenience and injustice, which tends to reflect no degree of credit on the manner in which the proceedings of the Court are conducted. It is certainly true that the case presents itself to the Court in a peculiar shape; the will was prepared by the deceased's solicitor, for his own benefit and that of the deceased's medical attendant and butler, all strangers in blood, and the latter having acquired an influence over him. This creates a strong presumption against the act, and which can only be repelled by strong and clear evidence. The Court cannot presume anything in favour of such a will, still the presumption against it may be repelled; and the question is whether, according to the principles of this Court, the evidence is sufficient for that purpose.

Lushington and Addams. The first objection is that Mr. Gough ought not to have been examined at all upon this plea, which is not the usual common condidit. He does not prove that the will was drawn after instructions had been given; he knows nothing of instructions; nor does he prove execution, he was not present and can say nothing on the point. But supposing Mr. Gough to be a competent witness on this plea, the next objection is to parts of his deposition. The witness speaks to instructions being given, from a memorandum written by Mr. Percy, if this were allowed any party could furnish evidence for his own purposes; a witness cannot refer to a memorandum not written by himself; the whole comes to this, the witness deposes to a fact because A. B. made a memorandum to that effect. In this case there are no instructions from the deceased, and the party himself makes a memorandum, in order to supply the defect: the witness says, "None of the entries relating to the deceased are in my handwriting;" the book then was not admissible for the purpose of refreshing his memory. The witness ought only to depose to facts within his own knowledge, or, what he heard from the deceased himself, he goes on to depose "by reference to the office journal"—this is inadmissible.

The King's advocate and Phillimore. The allegation on which this witness has been examined is somewhat different from a condidit, because of the death of one of the attesting witnesses, but in other respects it is the same, and it was competent to the party to examine Mr. Gough upon it, upon the plea as to the drawing up of the will, the person who drew the will may surely be produced as a witness. As to the second objection, the witness had a right to refer to the journal in order to fix the dates; he says "I daily saw the journal;" it was not therefore the private journal of Mr. Percy but the journal of the office—they cited *Burrough v. Martin* (2 Campb. 112).

Sir Herbert Jenner. Two objections have been taken to the evidence of John Gough, the clerk to Mr. Percy, a legatee, and the drawer of the will propounded. The first objection was to the whole of the testimony of this witness, on the ground that he ought not to have been produced upon the plea; that the plea was not a condidit, but that it merely pleaded instructions from the deceased and execution in

Now the principles applicable to such a case are to be collected from a variety of cases in this Court, sanctioned by other Courts (*Paske v. Ollatt* (2 Phill. 323), *Ingram v. Wyatt* (1 Hagg. Ecc. 384), and other cases, founded upon precedents in the earliest times), the result of which is, that where a paper has been drawn up by a person for his own benefit, or where he takes a considerable benefit under it, the presumption lies strongly against the act, and it requires to be proved by satisfactory evidence dehors the instrument that it was the free and voluntary act of a capable testator and executed with a full knowledge of its contents and effect. This presumption is still stronger where an only son is excluded, and requires to be removed by clear evidence of rational motives in the deceased to make such a disposition, by parol evidence, the *res gestæ*, or documentary evidence, which is the strongest of all.

What then is the case set up by the son in opposition to the will? the second article of Mr. Barry Barry's allegation pleads that the deceased throughout his life was a person of very weak and slender capacity, that he was educated in part at Harrow School, and from thence was removed to Oxford, where he resided at intervals for about four years, but that he quitted the university without taking any degree; that at the university he acquired a habit of drinking to excess, in which he ever after indulged, and by which his mental faculties became still further weakened and impaired; and that from such and other causes he became a mere passive instrument in the hands, and solely and entirely under the undue influence and control, of those persons immediately about him successively, by certain of whom the execution in fact of the pretended will was unduly procured.

The third pleads—that in 1780 the deceased, who was at the time about twenty-three years of age, intermarried with Susanna Neale, his first cousin; that the said Susanna Neale was a lady of great sense and discretion, and from the time of her marriage until her death in 1811 exclusively managed all the deceased's affairs; that she received and paid all monies, wrote all letters (some of which were afterwards copied by the deceased), filled up all checks (to which the deceased only affixed his signature) and transacted all matters of business whatsoever; and that the different agents and attorneys, as well those of the deceased himself, as for the most part those of the persons with whom the deceased nominally transacted any matters of business,

the presence of the witnesses whose names are subscribed thereto, and it is contended that no one could be properly produced to prove this but those who took the instructions, or those who attested the execution; but with the exception of these words the plea is the same as the usual *condidit*—the witness cannot prove instructions, but he might prove reading over; he might have been then present, and not at the execution; if the attesting witnesses were dead, the Court in such case could have had no evidence of reading over, or of any circumstances attending the making of the will at all. I think it would be going beyond anything ever yet done in this Court if this objection were held to be good. To come then to the particular parts of the evidence objected to, with respect to the reference to the journal, I think that the witness when speaking of facts within his own knowledge might refer to the journal in order to fix the date; the journal it seems was kept in the office, and the entries were made by the persons who did the business; it would not, however, be competent to the witness to speak to the facts themselves from the books. With regard to the entries made by Mr. Percy, they are clearly not evidence, nor in the nature of evidence, otherwise, as was observed by counsel, a party might fabricate evidence for his own purposes.

The Court directed those parts of the evidence of the witness which were founded upon the entries themselves in the journal to be expunged.

Further objections were taken to parts of the depositions of the witnesses, both on the one side and the other, and the Court having admitted some of the objections on behalf of Mr. Butlin, and overruled some of the objections on behalf of Mr. Barry, the proctor of Mr. Barry alleged an appeal, and the usual steps were taken by him and an inhibition and citation were served upon the proctor of Mr. Butlin, to which he appeared under protest, alleging that the order of the judge complained of was not an appealable grievance; that the whole hearing of a cause was but one continuous act, and that it is not competent to a party to interpose an appeal until sentence be given in the cause; and the Judicial Committee being of that opinion, the protest was sustained with 10l. costs and the cause remitted (see *Moore's Privy Council Cases*, vol. 1, p. 98).

constantly and upon all occasions addressed themselves exclusively to, and really transacted such matters of business with, the said Susanna Neale.

The fourth pleads—that during the lifetime of the said Susanna Neale the servants of the deceased had orders not to contradict him and to keep a strict watch over him to prevent his doing mischief to himself or others; that he frequently destroyed property, as watches and other articles of value; that he would frequently seat himself on the box of a carriage (in which there were no horses) in a box-coat and with a whip in his hand and pretend to drive; that he often saddled one of his men and then mounted on the saddle booted and spurred, and pretended to be riding; that after he had gone up to his bed-room and undressed for the night he often threw his clothes out of the window; that he was seldom or ever trusted with the possession of money to any considerable amount, and was utterly unable to compute, so that in reckoning up even very small sums he had always recourse to his fingers, and could seldom notwithstanding perform the operation correctly; that during the lifetime of his said wife the conduct of the deceased was in all respects silly, childish, and irrational, and he was generally [622] considered to be and was treated as a person who was childish and imbecile.

So that, according to this plea, the deceased was wholly incapable of managing his affairs or of transacting any business, and was never competent to do so, and it would have been impossible, had this imbecility of mind been proved, to say that the will could be valid. The first question for the Court to determine, therefore, is the degree of incapacity proved in the cause. But it is admitted that Mr. Barry has overstated his case, for it was not contended in the argument that the deceased was wholly intestable, or actually insane or an idiot; but that he was naturally of a weak and imbecile mind and liable to imposition: now weakness of mind and imbecility are indefinite terms, and in respect to the meaning of which no two persons agree. The degree of capacity is, therefore, a question for the consideration of the Court, and it is one upon which the witnesses differ materially from each other; one considering the same act rational and consistent with sound sense which another pronounces irrational and absurd. It becomes necessary, therefore, to compare the testimony of the witnesses upon this point. Some of the facts deposed to occurred twenty, thirty, and even fifty and sixty years before the time when the witnesses were examined, and how can the Court rely upon depositions after such a length of time? Some of the facts respecting the conduct of the deceased are isolated instances from which the Court cannot draw inferences as to his usual habits, or as to the general character and complexion of his mind. Having travelled through this mass of evidence [623] over and over again, the Court does not feel itself called upon to go into the details given by every one of the witnesses—a task beyond its physical powers; the utmost that can be required of the Court is to state the result of the evidence, dwelling more minutely upon the most important parts.

(The Court then gave a summary of the history of the deceased. In 1772 he came into the possession of the property under the will of his uncle. The landed estates being strictly entailed upon the deceased's only son. In 1780 the deceased married his first cousin, Miss Neale (his own name), and the issue of this marriage was a daughter and a son, the former being one year older than the latter, who was born in 1783. In 1811 (when he took the name of Barry) his wife died, and, shortly after, the daughter left her father's house and went to live at Bath, where she died in 1821. In July, 1813, the son left Tollerton Hall under peculiar circumstances, previous to which the father and he had lived on terms of great affection, and the deceased continued to write affectionately to his son till 1814, when he withdrew his regard from him. The deceased lived at Tollerton in seclusion, never receiving visits from persons in the neighbourhood, and seldom going beyond the limits of his own property. His amusements were of a frivolous and trifling character; he was shy and timid, and it is stated that he was restrained by his butler, Whitehead, who had acquired an influence over him. He was in the habit of lying in bed during a great part of the day, his usual hour of rising being three o'clock; and of drinking to excess. In 1819 the son filed a bill in Chancery against his [624] father for an injunction to prevent waste on the estate, and for an inventory of certain plate, being heirlooms, and the father not having filed an answer in the following year, the son sued out an attachment against him, upon which the answer was given. In December, 1819, Mr. Barry went down to Tollerton to see his father, but was refused access to him, and on

the ensuing day the deceased proceeded to Nottingham, and swore the peace against his son. In 1821, on the death of his daughter, the deceased came into possession of the property settled upon her, which was made a charge upon the real estates. In 1829 the deceased went to Buxton for a short time, and having returned to Tollerton Hall, he continued there till his death in 1833.)

The case in argument, on the part of the son, is one of original imbecility of mind, increased by habits of intemperance, rendering the deceased incompetent to transact any business, and there are witnesses who go the whole length of the plea; these are mostly servants, many of them in the service of Mr. Barry Barry. But the Court, from long experience, is aware that the opinion of such persons as to capacity is of all others most to be distrusted. Where these witnesses speak to facts, the Court will not distrust them either from the circumstance of their being servants, or that of their being in the service of the party; it is only that part of their evidence which contains comments upon or influences from facts which the Court distrusts.

It must be admitted that the deceased was a man of weak mind. What is the idea which that term [625] presents to the minds of individuals best able to form an opinion?

Russell, who lived with the deceased for nearly twenty years (and is now butler to Mr. Barry Barry), describes him as a man of very weak mind, but not an idiot; as shy, timid, and afraid of seeing strangers. He seldom drank less than two bottles of port a day, sometimes three. Whitehead exercised an influence over him.

Chatfield, the deceased's groom, now in Mr. Barry Barry's service, says the deceased was of weak mind, not like other gentlemen.

Duke, the gardener, who was in the deceased's service for twenty-four years, and very much with him, states that he was a man of very weak mind, and under the influence of Whitehead. He specifies absurd acts done by the deceased in the garden, and others which would go to shew that he was insane.

C. Russell, the deceased's coachman, says he was not like other gentlemen; he was all of a tremble if he had to do with strangers. Mrs. Neale managed his affairs. He cannot say he was childish, but he was not a gentleman "of parts." He could not count without the use of his fingers.

Millicent Naylor, an attendant upon Miss Neale, represents the deceased as not only incapable of managing his affairs, but approaching to idiocy; as not better than a child of a year and a half old.

Dyson, who had opportunities of witnessing the conduct of the deceased, says he was not quite an idiot, but a very simple gentleman, and quite overruled by those about him. He used to indulge in drink—two bottles a day. He was a poor weak creature in the hands of Whitehead.

[626] Barlow, a tenant of the deceased, describes him as a poor weak creature, quite unable to manage his affairs.

Stones, a coach-maker, represents that he was weak and imbecile, and that he gave absurd directions; but he admits that, for forty years, he took his orders and charged for the execution of them.

Other servants concur in describing the deceased as a weak man, and occupied with frivolous amusements; but the facts they state do not go to his general habits.

Sir Richard Paul Jodrell, who knew the deceased from 1807 to 1812, is of opinion that he was a good humoured man, but of very weak intellect.

Mr. Gordon, who went with Mr. Barry Barry to visit his father in 1800, describes him as a weak, silly man, and very likely to be imposed upon.

There are two other witnesses on this part of the case, who are members of the deceased's family, or connected with it, and who are, therefore, capable of forming a true estimate of the character and conduct of the deceased—the Rev. John Neale and Mr. Faulkner.

Mr. Neale is the brother of the deceased's wife. He was originally destined to the medical profession, afterwards went into the Army, and as a dernier resort took orders, and has a small curacy. He certainly represents the deceased as a person almost in a state of idiocy, incapable of doing anything for himself, or of knowing what he was about; he says that he drank four bottles of wine a day; that his intellects were impaired; that he took no interest in the management of his affairs; that from what he saw of the deceased in 1811 he has no doubt [627] that the deceased was naturally so weak in intellect, and from his habits of indulgence, that

he was a mere tool in the hands of others ; that Mrs. Neale exclusively managed all her husband's affairs, wrote all his letters and cheques, and that every one who came to the deceased on business transacted it with Mrs. Neale. But when we look further into this gentleman's evidence, the Court is inclined to place no great reliance upon his opinion, his conduct being at variance with his opinion. He admits that the deceased took him and his two brothers under his protection, and was very liberal to them—though he had said he was imbecile, and never did in his lifetime a liberal act—and that he assisted in defraying the expense of their education ; yet he says he was so weak in mind as to be incapable of counting ten, except with his fingers. "I feel grateful," he says, "for acts of kindness from the deceased till I was excluded from the house." It appears he lent him money to pay his brother's bills, which he knew the witness, with a curacy of 75l. a year, could not pay ; thereby shewing he could judge of his circumstances.

Mr. Faulkner, who, from his situation in life, had an opportunity of knowing and forming an accurate opinion of the deceased's character, says he was treated as a child ; but this gentleman, falling into embarrassment, like Mr. Neale, applied to the deceased for relief, and receives assistance from the deceased through Whitehead.

Such is the general account given by the witnesses relied upon by Mr. Barry Barry as establishing the general incapacity of the deceased. The result is that, even on this evidence, the deceased [628] was not incapable, though no doubt a man of weak and indolent mind.

Then what is the evidence on the other side as to the capacity of the deceased ? Mr. Banks, who married a sister of the wife of the Rev. Pendock Neale, speaks of him as a man of retired and reserved habits, but who conversed rationally and sensibly, and took that moderate share in conversation which a rational man would do. He says that he drank to excess, but that he never saw him intoxicated. Always considered him of sound mind, but not of strong mind ; and that is the true description of the deceased. He was not a silly man, nor a learned and sensible man ; but he was competent to transact the general business of life.

Mr. John Smith Wright considered him a weak-minded man, because he suffered his son to get such an ascendancy over him.

Mr. Samuel Wright, who had been acquainted with the deceased for sixty years, considers him as a person not of bright powers of mind, but capable of conversing on the topics of the day. His pursuits were not irrational or childish.

Two ladies depose that he was a weak but not a silly man ; that he was of gentlemanly manners, and presided with great propriety at the head of his table. He was a straightforward man, and conversed rationally on the topics of the day.

The general result of this part of the evidence is that the deceased, though a man of no extraordinary powers of mind or attainments, was yet fully competent to the ordinary transactions of life ; that he was peculiar in his habits, but polite and gentlemanly in his behaviour. He was treated [629] by his son as competent to acts of business. On his coming of age, it being necessary to raise money, a deed was executed, and no objection was made on the ground of the deceased's incompetency. He transacted money matters at his bankers, and never appeared deficient. He always came alone, and counted the money he received, and checked his accounts, as other gentlemen do. As far as general capacity goes, the Court cannot put the other evidence in competition with this.

With regard to the ascendancy of Whitehead, the deceased had great confidence in him, no doubt, and possibly Whitehead may have abused it and plundered the deceased. The witnesses speak of entertainments given by Whitehead to his friends, and of the deceased having been under some degree of subjection to him, and there is no doubt that on some occasions Whitehead spoke of the deceased's directions as nonsensical and overruled them. But supposing all this was true, and that Whitehead plundered the deceased, his conduct may be reprehensible, but how does it affect Mr. Percy and Mr. Butlin ? There is no suggestion that they ever exercised any influence over the deceased, or were in the habit of partaking of Whitehead's entertainments, nor is it likely that they should have entered into any conspiracy.

But are there not other circumstances to account for this disposition ? It is said there is no suggestion of any particular affection on the part of the deceased towards Mr. Butlin or Mr. Percy ; but the disposition may be accounted for on other grounds than his partiality towards these persons. Supposing the son to be set aside on

account of his [630] misconduct, who could stand in competition with Mr. Butlin and Mr. Percy? Not Mr. Neale nor Mr. Faulkner. The case turns on the feelings of the father towards the son, and on the conduct of the son towards the father. I think the conduct of the son has led to the whole, and that he is the conspirator against himself. The son was the cause of his own exclusion, and although there was an affection between the son and the mother during her life, and although a great degree of regard and affection subsisted between the deceased and Mr. Barry up to a certain period of time, the conduct of the son must have rendered it impossible for father and son to continue on terms of intimacy, and that was the real cause of the property being given to other persons.

The Court is satisfied that the plea of the executor, "that Mr. Barry Barry was, from the earliest period of his life, of profligate and depraved habits," is not made out. It is in evidence that Mr. Barry Barry is a gentleman of high spirit and of strong passions easily excited. The great misfortune of his life is, that he was the idol of his father and mother, who indulged him so much that they could not control him in after life: his passions, especially when under the influence of intoxication, got the better of him, and led him into actions which he must have repented of, not only towards his father and mother, but his uncle, the Rev. Pendock Neale, who had him bound over to keep the peace in May, 1813. The deceased, however, at this time, took part with his son, and refused to hold any intercourse with his brother-in-law. In this year a charge was brought against [631] Mr. Barry Barry by a man named Hickling, of an indecent assault, represented to have taken place on the 24th June, 1813. Mr. Barry Barry left Tollerton Hall on the 6th July, and it is pleaded by him that he did so because he supposed a warrant was out against him on account of another act of violence against his uncle. But it appears from the bill of costs that he was aware of the charge made against him by Hickling on the 3rd July, and it is in evidence that he said he was going to leave the country. The subject of this charge is first introduced in Mr. Barry Barry's allegation, where it is pleaded that it was an invention of his uncle, Mr. Pendock Neale, in order to get him out of the country; but that no effectual steps were taken to prosecute the charge, and that Hickling had expressed regret that he had been induced to make it at the instigation of Mr. Neale. When the allegation of the executor was brought in, this was counter-pleaded, and it was stated that steps were taken to prosecute the charge, but they were defeated by the withdrawal of Mr. Barry Barry. In Mr. Barry Barry's second allegation an extract of a bill of costs of his solicitor was pleaded, but it was contended, on the other side, that the bill itself should be brought in, and, although it was alleged that it contained nothing else relative to the matter at issue in the cause, the Court directed it to be brought in, and it then appeared that, whereas one of the matters at issue was whether Mr. Barry Barry had left Tollerton Hall with a knowledge of the nature of the charge made against him, the bill contained charges by his solicitor, at different dates, for attendance with reference to the warrant against him, [632] and for letters respecting his non-intention to stand the charge: shewing a perfect knowledge on the part of Mr. Barry Barry of the nature of the charge. This was an attempt to impose upon the Court.

When Mr. Barry Barry retired from Tollerton the deceased was at first convinced that the charge was set up by Mr. Pendock Neale to get rid of his nephew, and he continued to correspond with his son down to March, 1814.

An allegation was given in by Mr. Barry Barry, pleading certain declarations by Mr. Neale and by Hickling, to the effect that the former had instigated the latter to make the charge; but the Court was of opinion that this plea was inadmissible, unless the facts were communicated to the deceased. The allegation was then reformed, and pleaded that they were communicated to the deceased, and the allegation was admitted, the Court not supposing that this was done only to make the plea admissible. But when the evidence was taken it shewed that no such communication was made.

So far from no steps having been taken to follow up the indictment against Mr. Barry Barry in the Summer Assizes, when the bill was found, a warrant issued against him, and had he not absconded he would then have been tried. He returned to England under the feigned name of Smith, and in March, 1814, he gave notice that he was ready to take his trial at the next assizes. Counsel were retained for him, and everything was ready for the trial, but, when it was expected to come on, Mr. Barry Barry, by the advice of his counsel, declined to appear, and went away

again, and he did not return till after the death of Hickling, in 1827, Mr. [633] Pendock Neale having died in 1816: so that, if no effectual steps were taken, it was not the fault of the prosecutor, but of Mr. Barry Barry himself.

The Court has nothing to do with the question as to the guilt or innocence of Mr. Barry Barry, but with the effect produced on the mind of the deceased—whether, in fact, a change of opinion took place as to the innocence of his son. What was the consequence of his proceeding? The deceased expected that the trial would come on, and that his son would appear and clear his character; but when he found his son declining to come forward and justify his character to the world, the deceased, if he had a spark of feeling, must have believed, notwithstanding his affection for him, that there was some foundation for the charge. That it produced this effect upon the deceased is clear, for, from this time, he gave up all correspondence with him. But the extraordinary part of the case is, that after Mr. Barry Barry declined to stand his trial, the latter never saw his father, and never explained to him the grounds of his proceeding. It was natural for a person of the deceased's shy temper to retire, upon this, into greater seclusion than before, and that he should be alarmed at the approach of strangers, who would recognize him as the father of such a son. All the witnesses concur in stating that he did not speak of his son after this but in terms of pity, as his "unfortunate son," or "that unfortunate gentleman." There was no attempt at conciliation on the part of the son; every thing was hostile. In 1819, when Mr. Barry Barry came down to Tollerton Hall, Whitehead was absent, but the deceased refused to receive him, [634] shewing that he acted on his own feelings. This visit created confusion in the family; the deceased, apprehensive of personal violence, wrote to Mr. Percy to come to his assistance, and Mr. Percy accordingly went to Tollerton Hall with two other persons, to whom the deceased gave an account of the occurrence, conducting himself in a perfectly collected and rational manner. He made a deposition before a magistrate; but as Mr. Barry Barry left the place there was no necessity for the intervention of the magistrate. These facts shew not only the capacity of the deceased, but his dislike to his son. In 1820 the proceedings were going on in Chancery, and the son writes in terms not likely to conciliate his father, assuming an authority to dictate to him, and employing offensive language.

Under these circumstances, the Court, perhaps, would not have been surprised at anything the deceased might have done with respect to his son; but no immediate steps were taken to make a will. In 1821 the daughter died; in 1822 the 10,000*l.* was raised; in 1823 Mrs. Gentry, the housekeeper, left, and Miss Cooper came, who married Whitehead soon after; in 1826 or 1827 the deceased was taken extremely ill, and was attended by Mr. Butlin.

It is to be regretted that Mr. Percy should be the person to draw the will; but the character of the deceased should be considered, and may in some degree account for it. One of the inconveniences attending this circumstance, however, is, that Mr. Percy cannot be examined as a witness. He was, indeed, produced as a witness, having assigned his legacy to a charitable foundation; but Mr. Barry [635] Barry's proctor objected, and the commissioner, before whom the examination took place, was informed that he was liable to prosecution and penalties if he accepted the trust, and consequently Mr. Percy was not examined. This was irregular, and both parties seem to have lost their way. The Court has already expressed its sentiments upon this point in the course of the proceedings. The objection to the competency of the witness should have been made at the time of hearing, or the Court might have been applied to that his deposition should not be published: instead of which, the Court has been deprived of the evidence of Mr. Percy, by the objection on the part of Mr. Barry Barry, the person now complaining that Mr. Percy was not examined.

The principal witness as to the preparation of the will is Mr. Gough. The deceased had declared he had done with the Neales. The son was not destitute, having the real estate, worth 3000*l.* or 4000*l.* a-year. What other persons were likely to have been the objects of his bounty? Why those with whom he associated—Mr. Percy, his solicitor and agent, Mr. Butlin, his medical attendant, and Mr. Smith, the incumbent of the parish—there were no other persons with whom the deceased was in the habit of associating, and to them it was not improbable the deceased, from the manner in which they had acted towards him, would have left a portion of his property. Whitehead may have misconducted himself, but the deceased was not conscious of it, and he had great regard for and confidence in him. The Court, therefore,

cannot say that the disposition of the property, under the circumstances, was very improbable. There is nothing to shew that [636] the deceased did not act in this matter as a free agent; there is nothing to shew importunity. He goes to Mr. Percy in his own carriage, openly, unattended by Whitehead, and the general result of the evidence respecting the instructions for the will, its preparation and execution, is such as in my opinion to satisfy the requisites of the law, shewing that the deceased was able to understand the act he was about to do.

The case might stop here; but there are later circumstances shewing the capacity, volition, and free agency of the deceased. The next day he went to his banker and drew out money. He gave directions for the painting of his house. He went to Buxton, and in his conduct there, and during the whole time from the execution of the will down to his death, there is nothing from which the Court can infer that the deceased was in any other condition than capable of performing the ordinary business of life. There is nothing whatever in the evidence to shew that there has been any conspiracy to obtain the will, which is but the natural effect of his son's conduct on the mind of the deceased.

I have no doubt or hesitation in pronouncing for the validity of this will, and in decreeing probate of it to Mr. Butlin, the executor. Had the inquiry been conducted in the usual form, and without such unnecessary expense, the Court, under the circumstances, might have been inclined to suffer each party to pay their own costs; but seeing the manner in which this suit has been conducted, and that if each party paid their own costs, the burthen would fall upon Mr. Butlin, who of all persons is the least connected with anything improper; I am of opinion [637] to condemn Mr. Barry Barry in the costs, from the time of his giving in the allegation, which has given rise to the whole of the discussions and expense.

BARRY v. BUTLIN. Judicial Committee of the Privy Council, (a) December 4th, 5th, 6th, 7th, and 8th, 1838.—The onus probandi in every case lies upon the party who propounds a will.—Where the party who prepares a will takes a benefit under it, that is a circumstance which excites the suspicion of the Court, and unless that suspicion be removed, the Court will not pronounce in favour of the instrument.—A will prepared by the deceased's solicitor, under which he took a considerable benefit, the only son of the deceased being excluded, and the deceased being of weak though of testable capacity, under the circumstances, pronounced for: affirming the sentence of the Prerogative Court, with costs.

On appeal.

From the above sentence in the Prerogative Court an appeal was prosecuted on behalf of Mr. Barry Barry to the Privy Council, and the cause was argued before the Judicial Committee (present Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, and the Right Hon. Thos. Erskine, C. J. in Bankruptcy) by Mr. Cresswell and Dr. Addams for the appellant, and by the Queen's advocate and Mr. Thesiger for the respondent, and the following judgment was delivered by

[638] Mr. Baron Parke. The rules of law, according to which cases of this nature are to be decided, do not admit of any dispute, so far as they are necessary to the determination of the present appeal: and they have been acquiesced in on both sides. These rules are two, the first, that the onus probandi lies in every case upon the party propounding a will; and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator.

The second is, that if a party writes or prepares a will under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.

(a) The editor does not profess to report the decisions of the Judicial Committee of the Privy Council; but the principles of law, laid down by their Lordships in the case of *Barry v. Butlin*, being frequently referred to in questions arising in the Prerogative Court, he has thought that he might render an acceptable service to the profession by inserting the judgment delivered in that case by Mr. Baron Parke, to whom the editor begs to tender his sincere thanks for having furnished him with a copy of that judgment.

These principles, to the extent that I have stated, are well established. The former is undisputed. The latter is laid down by Sir John Nicholl in substance in *Paske v. Ollatt* (2 Phill. 323), *Ingram v. Wyatt* (1 Hagg. 388), and *Billinghurst v. Vickers* (1 Phill. 187), and is stated by that very learned and experienced judge to have been handed down to him by his predecessors: and this tribunal has sanctioned and acted upon it in a recent case, that of *Baker and Batt*.

Their Lordships are fully sensible of the wisdom of this rule and the importance of its practical application on all occasions; at the same time their [639] Lordships think it fit to observe, especially as there has been some discussion upon this point, towards the close of this inquiry, that some of the expressions reported to have been used by Sir John Nicholl in laying down this doctrine appear to them to be somewhat equivocal and capable of leading into error in the investigation and decision of questions of this nature. It is said that where the party benefited prepares the will, "the presumption and onus probandi is against the instrument, and the proof must go not merely to the act of signing, but to the knowledge of the contents of the paper" (*Paske v. Ollatt*, 2 Phill. 323), and that "where the capacity is doubtful there must be proof of instructions, or reading over" (*Billinghurst v. Vickers*, 1 Phill. 143). If, by these expressions, the learned judge meant merely to say that there are cases of wills prepared by a legatee so pregnant with suspicion that they ought to be pronounced against in the absence of evidence in support of them, and that extending to clear proof of the actual knowledge of the contents by the supposed testator; and that instructions proceeding from him, or the reading over the instrument by or to him, are the most satisfactory evidence of such knowledge, we fully concur in the propositions so understood, in all probability the learned judge intended no more than this. But if the words used are to be construed strictly; if it is intended to be stated as a rule of law that in every case in which the party preparing the will derives a benefit under it the onus probandi is shifted, and that not only a certain measure, but a particular species of proof, is therefore required from the party propounding the will, we feel bound to say that we conceive the [640] doctrine to be incorrect. The strict meaning of the term "onus probandi" is this, that if no evidence is given by the party on whom the burthen is cast, the issue must be found against him. In all cases this onus is imposed on the party propounding a will; it is in general discharged by proof of capacity and the fact of execution; from which the knowledge of and assent to the contents of the instrument are assumed, and it cannot be that the simple fact of the party who prepared the will, being himself a legatee, is in every case and under all circumstances to create a contrary presumption, and to call upon the Court to pronounce against the will, unless additional evidence is produced to prove the knowledge of its contents by the deceased; a single instance of not unfrequent occurrence will test the truth of this proposition; a man of acknowledged competence and habits of business, worth 100,000*l.*, leaves the bulk of his property to his family, and a legacy of 50*l.* to his confidential attorney, who prepared the will; would this fact throw the burthen of proof of actual cognizance by the testator of the contents of the will on the party propounding it, so that if such proof were not supplied, the will would be pronounced against. The answer is obvious, it would not. All that can be truly said is, that if a person, whether attorney or not, prepares a will with a legacy to himself, it is, at most, a suspicious circumstance of more or less weight, according to the facts of each particular case; in some of no weight at all, as in the case suggested, varying according to circumstances; for instance, the quantum of the legacy, and the proportion it bears to the property disposed of, and numerous other contingencies: but in no case amounting to more than a [641] circumstance of suspicion, demanding the vigilant care and circumspection of the Court in investigating the case, and calling upon it not to grant probate without full and entire satisfaction that the instrument did express the real intentions of the deceased. Nor can it be necessary that, in all such cases, even if the testator's capacity is doubtful, the precise species of evidence of the deceased's knowledge of the will is to be in the shape of instructions for, or reading over, the instrument. They form, no doubt, the most satisfactory, but they are not the only satisfactory, description of proof by which the cognizance of the contents of the will may be brought home to the deceased. The Court would naturally look for such evidence; in some cases it might be impossible to establish a will without it, but it has no right in every case to require it.

I have said thus much upon the rules of law applicable to this case, with the concurrence of all their Lordships who heard the argument, not particularly with a view to the decision of this case, but in order to prevent any misconception upon a subject of so great practical importance; at the same time their Lordships wish it to be distinctly understood that, entirely acquiescing in the propriety of the rule so qualified and explained, they should be extremely sorry if anything which has fallen from them should have the effect of impeding its full operation.

The case which their Lordships have now to decide has been argued at the bar with much industry and ability on both sides; and all their Lordships have besides had an ample opportunity of perusing and considering with due care and attention the immense mass of evidence, more or less material, which was adduced in the Court below: as the result of that consideration has been to satisfy our minds that the decree of the judge of the Prerogative Court was right, it is not necessary to go into the same minute statement or comment upon the evidence in the cause in detail, which we should have thought it our duty to have done if we had happened to arrive at a different conclusion from that of the learned judge. Adopting the principles above laid down and admitted on both sides, we are all quite satisfied that the deceased was competent, and that the paper propounded by the respondent is proved to be his true last will, and to express his real intentions.

A tolerably just estimate may be formed of the character and mental powers of Mr. Barry, the deceased, from the parol evidence on both sides, after making allowance for the bias under which the witnesses speak; and the written documents which are proved by the handwriting of the deceased. From these sources it may be collected that he was a person of slender capacity, of a retired disposition, indolent habits, addicted to drinking, somewhat singular in his appearance, frivolous, and occasionally even childish in his amusements and occupations. On the other hand, it is clear that he was not insane, and although the evidence embraces a period of more than fifty years, and an account of most of the transactions of his life, there is no satisfactory evidence of a single act denoting that he was labouring under delusions, or indicating such a degree of folly as to shew that he was unfit to be trusted with the management of his own concerns. Though certainly not a man of business, he was capable of transacting the ordinary affairs of life, and the letters produced, under his hand, and the parol evidence of the annual settlement of his accounts and attendance at the banker's, distinctly shew that he paid considerable attention to his pecuniary concerns, and was competent to the conduct of his affairs. It is not indeed disputed on one side but that he was of testable capacity, nor on the other that he was a person of weak mind; as to the extent of that weakness there is a difference, but admitting its existence, even to the degree represented on the part of the appellant, the only consequence will be, that it adds to the suspicion, which unquestionably belongs to the circumstance of the attorney who prepared the will, taking no less than a fourth of the estate, and the legatees taking the whole, to the exclusion of his own family, and calls upon us to watch the proof of the will itself with increased jealousy and suspicion. The question is, whether these grounds of suspicion have been satisfactorily removed, and the instrument proved to be the real will of the testator himself?

That he should pass over his own relations is rendered highly probable under the unhappy circumstances of this case. If, all the other facts of the case being as they were, he had lived on terms of affectionate intercourse with his son; had received him occasionally as an inmate of the house; had habitually corresponded with him, and had always expressed for him parental regard, the case would have been one of much greater suspicion and more difficult to decide than it is; but, unhappily, there is proof of estrangement from his only son, [644] so clear and distinct, as to admit of no doubt, and upon grounds which, whether the charge against the son were true or false, cannot assuredly be deemed irrational. Though Mr. Barry had been guilty of the violent conduct which is deposed to by some of the witnesses, and that operating on the timidity of his father might have sometimes excited his fears, it is clear from the correspondence that his father was on a friendly footing with him, and professed much regard for him, even after that gentleman had absconded, to avoid being taken on a bench warrant founded upon the charge against him; but after the time that he declined to take his trial at the assizes in March, 1814, and thereby afforded a strong ground for believing that the charge was true, all intercourse

ceased ; the deceased never wrote to, or saw, his son afterwards—he held no communication whatever with him, and in December, 1819, when in the absence of Whitehead and Butlin, under whose control the deceased is supposed to have been, Mr. Barry Barry went to his father's house, his father himself, of his own accord, excluded him from his presence ; and it appears to be clear that from the month of March, 1814, he ceased to speak of him, except as an unfortunate and unhappy man. In this state of complete alienation from his son it is by no means unnatural to suppose that he would not make him the object of his bounty, but that he would seek elsewhere for those on whom he would bestow it. After his daughter's death in 1821 he had no relations except the Neales ; from them also it is equally clear that his regards, if he ever entertained any, were estranged. With Pendock, who died in [645] September, 1816, he had unfortunately quarrelled, and he kept up no intercourse with the other members of that family ; under these circumstances it is highly probable that he would make a will, in order to prevent his son enjoying his property, and that as none of his relations were on terms of friendship with him, he would bestow his bounty on those persons who were, and none seem to have been in habits of intercourse with him more than Mr. Percy and Mr. Butlin, and it is by no means improbable that he would give a part to an old servant, in whom he had reposed great confidence and trust. It is true that this confidence was in some respects misplaced, and Whitehead seems to have taken liberties in his master's house which he could hardly have sanctioned, but it does not appear that his master knew it, and he was intrusted to the last with the management of his domestic affairs.

With these probabilities then in favour of the will propounded, let us look at the evidence of the factum, which, though not so strong as direct proof of written instructions, to the full extent of the will, or direct proof that it was read over, is still of a satisfactory nature, and with the other circumstances to which I have adverted leaves the mind perfectly satisfied that the instrument expresses his real wishes.

In the first place, it is a fact beyond dispute that Mr. Percy, who prepared the will, at all events meant that it should be fairly and openly executed in the presence of respectable witnesses. Mr. Smith was certainly applied to by him for that purpose, and could not attend. Dr. Davidson and [646] Mr. Chapman, all answering that description, did attend ; this circumstance is strong to prove the absence of clandestinity and fraud.

There were instructions for the burial and funeral in the handwriting of the testator (exhibit D). These prove no more than that his mind was directed to the subject of arrangements after his death ; but they do not carry the case further ; they do not lead necessarily to the inference that he had a will in view ; but exhibit C is proved by Gough (and there is no fair ground to disbelieve his evidence) to have been transmitted to the deceased. It incorporated the memorandum D, and was a draft of the will, and that draft, in a page of it which contains the legacies to Whitehead and his wife, is twice altered in the handwriting of the testator ; which distinctly proves that his mind was employed on the subject, and affords reasonable evidence that he was cognizant of the contents. In addition to this, Gough proves that it was Mr. Barry who sent him to desire Mr. Chapman "to come to see him execute his will." He also sent him with the same message to Dr. Marsden, but that gentleman was not at home ; Dr. Davidson, who did attest it, expressly swears that Mr. Barry declared it to be his last will and testament, and requested him and Mr. Chapman to witness it, and he adds his belief that Mr. Barry was of perfectly sound mind, memory and understanding, and capable of doing any act requiring thought, judgment and reflection. It is suggested that there was some secrecy in the preparation of the will in Mr. Percy's office, for Nightingale, who was an old clerk, did not know it, but we think that this does not raise any inference [647] of this kind, as it may naturally be accounted for by the practice of entrusting different matters of business to different clerks, and if a fraud had been intended and concocted between the three legatees, it is rather more likely that Nightingale, who was an associate of Whitehead, should be employed than Gough, who was not.

We think, therefore, that the evidence of the factum, coupled with the strong probabilities of the case, is sufficient to remove the suspicions which naturally belong to the case of all wills prepared by persons in their own favour, especially when made by those of weak capacity. The undue influence and the importunity which, if they are to defeat a will, must be of the nature of fraud or duress, exercised on a mind in

a state of debility, are insinuated, but not proved. Whitehead's authority and power over his master are no doubt sufficiently established, but that such authority and power were in any way exercised to procure this will to be made is only conjecture, and there is nothing like proof of authority or control of any kind on the part of Butlin or Percy. We are therefore of opinion that the will is established, and ought to be admitted to proof. We have entertained some doubt as to the propriety of that part of the decree which condemns the appellant in the costs subsequent to the giving in his allegation, dated the 7th of November, 1833: the case is one in which the appellant was well justified in calling for the proof of the will, and watching and sifting that proof, and certainly ought not to have had to pay the costs of that inquiry. But as the case made by his allegation was a charge in the nature of con-[648]-spiracy and fraud, and that charge has failed, and as a part of it, and that causing no small addition to the expense, is introduced for a collateral purpose, not material to the decision of this suit, we do not think we ought to vary the decree of the Court below in respect to the costs and the appeal must be consequently dismissed, and we think with costs.

BLUNT AND FULLER *against* HARWOOD. Arches Court, Michaelmas Term, 2nd Session, Nov. 8th, 1837.—In a suit for subtraction of a church-rate, made in virtue of the statutes 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, the libel ought to shew upon the face of it that the conditions required by the acts have been complied with.—Libel to be reformed.—A vestry meeting having been held on the 17th of March, at which a committee was appointed to consider a plan then produced for affording additional accommodation to the parishioners in the church, and to report whether it would be expedient to adopt that or any other plan. At a subsequent vestry it was resolved to adopt the report of the committee, and to borrow 3300l. on the security of the church-rates, in order to carry the plan into effect. Quære, whether the latter vestry had the power of borrowing the money, the notice pleaded of the vestry being “to receive the report of the committee appointed to consider the plans produced to the vestry meeting, held on the 17th of March, for affording additional accommodation to the parishioners desirous of attending divine worship in the parish church.”

This was a question as to the admissibility of a libel in a suit for subtraction of church-rate, promoted by the churchwardens of Streatham against Mr. Benjamin Harwood, a parishioner; the rate in question was made to repair the parish church, and to repay certain portions of a principal sum of 3300l. borrowed under the statutes 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, and interest on a part of that sum.

The libel pleaded in substance:

That, on Saturday, the 13th of February, 1836, and in pursuance of notice duly published, &c., on the 7th day of that month, the parishioners and inhabitants of the said parish, assembled in vestry, in the committee-room of the workhouse of the said parish, then and there resolved to make a [649] rate or assessment of one shilling in the pound on all the properties, &c., for the necessary repairs of the said parish church, and for other occasions belonging to the said church, and for and towards the repayment of such portions of the principal sum of 3300l., borrowed in or about the month of November, 1830, under the authority and pursuance of an act of Parliament, passed in the 58th of Geo. 3, intituled, “An Act for building and promoting the building of additional churches in populous parishes;” and also of another act, passed in the 59th of his said Majesty, intituled, “An Act to amend and render more effectual an act passed in the last session of Parliament, for building and promoting the building of additional churches in populous parishes;” for the enlargement, repair, and alteration of the church, as would become due in the year ending at Easter then next; such portions amounting to the sum of 165l., being five per cent. on the said principal sum of 3300l., and a half-year's interest at four per cent. per annum on 2475l., being that part of the said principal of 3300l. as then remained due and unsatisfied, such half-year's interest amounting to the sum of 49l. 10s. That such rate was accordingly made and assessed on all such inhabitants, at one shilling in the pound for all such houses, lands, or tenements which they had occupied or enjoyed in the said parish, and was afterwards duly confirmed, &c.

The remainder of the libel was in the usual form.

Lushington in objection to the libel. The averments in the libel are not sufficiently [650] specific to put the party proceeded against in possession of the facts necessary

for him to know whether he has a good defence or not. Suppose the libel to be admitted as it stands, still the money may not have been borrowed in conformity with the provisions of the acts of Parliament; and how is the party to shape his defensive plea? The libel, as it stands, is incapable of proof, or of being counterpleaded. But there are other objections. Application has been made to the vestry clerk, who has refused access to the books. Then assuming that the money was borrowed, and for the three purposes stated in the plea—the enlargement, alteration, and repair of the church—ought it to be left to the defendant to ascertain under what sections of two voluminous acts of Parliament this was done? Prior to these statutes it was illegal, under the general law, to borrow money on the credit of church-rates at all; but under certain limitations such power is now given, nevertheless most carefully guarded, in order to prevent abuse. It was found in some cases impossible, where the churches required to be enlarged, or where extensive repairs were wanted, to raise the money within a single year, and the statutes passed in the 58th and 59th of Geo. 3 give a certain power, the object of which is to spread the expense over a number of years that would be too great for a single year; but these powers are given under certain conditions. By the 59th section of the 58th Geo. 3, c. 45, with regard to the enlarging or otherwise extending the accommodation in churches, a power is given to churchwardens to raise money in a certain manner set forth in the act, with the consent of the bishop [651] and incumbent, and with the express proviso that “one-half of the additional accommodation be allotted to uninclosed or free sittings”—has not the defendant a right to know whether this was done, and whether, consequently, the funds were properly raised or not?

With respect to repairs, the stat. 59 Geo. 3, c. 134, sect. 14, gives certain powers, but under different conditions to those in the 58th Geo. 3, as to enlargement; for the 59th of Geo. 3 requires, where money has been raised for repairs, that “a sum sufficient from time to time, to pay the interest of the money so borrowed, and not less than ten per cent. of the principal, shall be raised, until the whole of the money borrowed shall be repaid,” and in *The King v. The Churchwardens of Dursley* (5 Ad. and Ell. 10) the Court of King’s Bench decided that churchwardens cannot raise a loan under this statute, on the credit of church-rates, to pay a debt for repairs incurred in a past year, but that the loan should be raised at the time when the repairs were done, and that the rates for the repayment should commence immediately, and be continued, so as to pay off the debt by ten annual instalments. Different considerations apply to money raised for enlarging of a church, and for repairing a church, and you cannot raise one and the same loan for the double purpose mentioned in the statutes; yet a sum has been borrowed for both purposes, and it is impossible to find from the libel how this has been done.

Nicholl in support of the libel. It is sufficient to aver that the money has been [652] borrowed in pursuance of the acts of parliament. The Court will assume, until the contrary be shewn, that the rate is a legal one. If the other party has anything to allege in answer, he can do so by way of defence. On the face of the libel, and of the rate, there is nothing irregular.

The Court. The difficulty under which the party proceeded against labours is this, that he is called upon to prove a negative. You are in possession of the parish books, and can shew that the money was borrowed in the manner pointed out by the acts of parliament. Suppose I were to admit the libel, and the defendant were to admit the facts, the rate may not be valid nevertheless.

Nicholl. We plead that the money was borrowed in pursuance of the act of parliament.

The Court. But not in pursuance of the conditions of the act. Until you plead that all the conditions of the act have been complied with the Court cannot enforce the rate.

Sir Herbert Jenner. I am unwilling to throw out anything that might prejudice a particular case, but I must say, with reference to this case, that it lies with the party claiming payment of the rate to shew that the Court can enforce it. The libel states that the money was borrowed “under the authority and in pursuance of the acts,” so that it is not a common-[653]-law right, and before the party can ask the Court to enforce payment of the rate, he must shew that the requisites of the acts of parliament have been complied with. What are those requisites? The money is stated to have been borrowed for three objects—the enlargement, repair, and altera-

tion of the church; taking enlargement to include alteration, the 58 Geo. 3, c. 45, sec. 59, requires the consent, not only of the vestry, but of the bishop and incumbent, to the borrowing upon the credit of the rates such sums of money as shall be necessary for defraying the expense of "enlarging or otherwise extending accommodation." And it empowers churchwardens "to make rates for the payment of the interest of such sums of money so to be borrowed and raised, and for providing a fund of not less than the amount of the interest upon the sum advanced, for the repayment of the principal thereof, or for repaying such principal in such manner, and at such times, and in such proportions as shall be agreed upon with the persons advancing any such money, provided always that one half of the additional accommodation which shall be obtained by any such expenditure shall be allotted to uninclosed or free seats." Is it not incumbent upon the churchwardens to shew that they have complied with these conditions? It is quite impossible, unless they put themselves in such a position that the Court can enforce the rate.

Again, with respect to repairs. The 58 Geo. 3 contains no provision for borrowing money for repairs; but under the 14th section of the 59 Geo. 3, c. 134, churchwardens are empowered to borrow money upon the credit of the rates, for defraying [654] the expense of repairs, with the consent of the vestry, the bishop, and the incumbent; and they are empowered and required in such cases "to raise by rate a sum sufficient from time to time to pay the interest of the money so borrowed, and not less than ten per cent. of the principal sum borrowed out of the produce of such rates, until the whole of the money so borrowed shall be repaid." They are required to raise a fund for the repayment of the principal sum, for this reason, that the repairs of the church lie on the present inhabitants; whereas the expense of enlargement falls likewise on future inhabitants. Unless the churchwardens bring themselves within these provisions they are not able to sue for the rate, and I cannot see how the Court could enforce payment of this demand, unless it be satisfied by legal proof that the money was borrowed in compliance with the conditions of these two sections of the acts of parliament. The churchwardens have the power of proving the affirmative, if it can be proved; whereas the other party is to prove a negative, that the churchwardens had not obtained the consent of the bishop and the incumbent, and that they have not allotted the required number of free seats. How is the party who has not access to the books to prove a negative? and is it not for the churchwardens to shew that they have complied with the acts of parliament?

I am of opinion that the libel must be reformed.

[655] Hilary Term, 3rd Session, Jan. 31st, 1838.—The libel, as reformed, with additional articles, came on for admission this day (a further alteration having been directed to be made by the Court on the 11th January last), pleading,

"That the population of Streatham having increased, and the church being insufficient to accommodate the parishioners at a vestry held on the 17th of March, 1830, in pursuance of notice published on Sunday, the 7th of that month, a committee was appointed to consider a plan then produced to the vestry, and to report whether it would be expedient to adopt that or any other plan for affording additional accommodation to the parishioners desirous of attending divine worship in the said church. That at another vestry, held on the 2nd August, 1830, in pursuance of notice published, &c., on 25th July, the committee presented their report, recommending an enlargement of the church, agreeable to certain plans submitted by Joseph Parkinson, at an expense not exceeding 3300l.; and that it was resolved that such report should be adopted, and the plans carried into execution, provided proper persons could be found to give security to carry the same into effect, at a sum not exceeding 3300l.; that the churchwardens and rector be authorized to carry the plans into execution, and the churchwardens be authorized to borrow the sum of 3300l. at a rate not exceeding 4l. per cent. per annum, on [656] the security of the church-rates." It went on to plead that the conditions of the stat. 58 Geo. 3, c. 45, had been complied with, setting forth the particulars, and that the money had been borrowed, &c.

It further pleaded that the notice published on the 7th March declared that a meeting was to be held in the vestry room of the said parish on the 17th of that month, at nine o'clock in the morning, for the purpose of considering a plan which would then be produced by the churchwardens of the said parish for affording additional accommodation to the parishioners desirous of attending divine worship in the said church, or to that effect; and that the notice published on the 25th of July declared

"That a vestry was to be held in the vestry room of the said parish on the second day of August then next, at nine o'clock in the forenoon, to receive the report of the committee appointed to consider the plan produced to the vestry meeting, held on the said 17th day of March, for affording additional accommodation to the parishioners desirous of attending divine worship in the said parish church, or to that effect;" and that such notices had been lost or so mislaid that they could not be found, though diligent searches had been made for them.

Lushington objected to the sufficiency of the notice for the second vestry, when the rate was made for borrowing the money.

The notice pleaded is nothing more than a notice of considering a plan to be produced, of which the parishioners were ignorant: all that could properly be done under this notice was to receive the plan [657] and consider the propriety of adopting it, but the churchwardens proceeded to borrow the money; this was clearly beyond the terms of the notice, and the money was therefore borrowed on no legal security, and the rate made to repay the money so borrowed, was consequently bad.

The Queen's advocate in support of the libel. It is not denied that due notice was given of the first meeting, and the second notice was to consider the plan proposed to the first meeting, and although there is no direct mention of borrowing money, it was clear that money must be raised. The party opposing the rate was present at the meeting—the consent of the bishop and incumbent has been obtained, and the borrowing of money must be considered as comprised within the object mentioned in the notice. The parishioners could not have been taken by surprise.

Sir Herbert Jenner. The only question now before the Court appears to be this, whether the notice given for the vestry of the 2nd of August, 1830, was such as authorized the churchwardens to borrow money on the credit of the church-rates, to be applied to the enlargement of the parish church, for the accommodation of the parishioners.

It is true that before the Church Building Acts there was no power in a vestry of a parish to borrow money on the security of the rates by the common law, and where money was so borrowed, it was done without any legal security. But the Church Building Acts empower churchwardens to raise money in this way, with the consent of the bishop [658] and incumbent as well as of the vestry; but there must be due notice of the object for which the vestry is held. The Vestry Act (58 Geo. 3, c. 69) requires that no vestry shall be held unless notice shall have been given, three days before, of the place, hour, and special purposes for which the vestry is called; the intention of which was to prevent any surprise on the parish, by doing, under cover of a notice, what was not within the terms of the notice. The question here is, whether what was done at the vestry, on the 2nd of August, was not a necessary consequence of the special business for which that vestry was called? The libel pleads that the population of Streatham having increased, and the church being insufficient, a vestry was held on the 17th of March, when a committee was appointed for the purpose of considering a plan for affording additional accommodation; that another vestry was held on the 2nd of August, when the committee presented their report, recommending a certain plan, which was adopted by the vestry, and the money borrowed by the churchwardens. Now, the notice pleaded of this last vestry meeting is this: "To receive the report of the committee appointed to consider the plan produced to the vestry meeting, held on the 17th of March, for affording additional accommodation to the parishioners desirous of attending divine worship in the parish church." The plan was considered, and adopted, and the churchwardens were authorized to borrow money under the act of parliament to carry it into execution. How much of the business done at this vestry is supposed to come within the meaning of this notice?

[659] Lushington. It was competent to the vestry to have approved of any plan before it, but it should have reserved the raising of money until a further notice was given.

The Court. It appears to me that, taking the two notices together, the vestry could confirm and adopt the report of the committee, and, as a necessary consequence, direct the plan to be carried into execution, and also resolve to borrow money, in order to carry it into execution: I think that the one was the consequence of the other, and that it was not necessary to call another meeting to carry the plan into execution. Undoubtedly the borrowing of money is a very important part of the

functions which a vestry is authorized to exercise; but it is one without the exercise of which the church could not have been enlarged. It is impossible that the vestry could have taken any undue advantage of the act, or that any person in the parish could have been misled, or that the money could have been raised in any other way.

Lushington. My objection is, that in order to borrow money, there must be a special notice that money was to be raised.

The Court. Unless cases can be pointed out in which it has been held that there must be a special notice for borrowing money, I shall consider the notice in this case sufficient to cover the business done at this vestry. It was of no use to appoint a committee to [660] prepare and propose a plan for another vestry, unless the second vestry had the means of carrying the plan into execution; and the second vestry having met for that purpose, and having approved of the plan, resolved that the report of the committee should be confirmed, and that the plan should be carried into execution. It appears to me that the second vestry did not go further than the first empowered them to do; that they did not exceed the authority they had by directing the churchwardens to borrow money on the security of the church-rates. It would be straining the acts of parliament to say that no money could be borrowed, unless a special notice were given that money was to be raised.

If the notice is proved to the extent stated in the libel, I shall be of opinion that the money was fairly borrowed, and that the rate made for the payment of the interest and part of the principal sum is a legal rate; I therefore admit the libel as reformed.

The question as to the sufficiency of the notice in this case was brought before the Court of Queen's Bench, a rule having been granted by that Court on the 21st of April, 1838, to shew cause why prohibition should not issue to the Arches Court, on the ground of the notice being insufficient, under the statute 58 Geo. 3, c. 69, s. 1. The point came on for argument on the 12th of June, 1838, but in the mean time the original notice itself had been found, which was as follows:—

[661] Streatham, 24th July, 1830.

“Notice is hereby given that a vestry will be held in the vestry-room of this parish on Monday, the 2nd day of August, at nine o'clock precisely, to receive a report from the church committee, and to adopt such measures as may appear necessary for carrying that report into execution; and, further, that it is intended that such vestry do adjourn to the workhouse of this parish, there to transact the business of the day.” And the Court, (a) being of opinion that this was a sufficient notice, discharged the rule nisi for a prohibition, upon the understanding that the libel should be reformed by pleading the real notice.

By-day, Trinity Term, 29th June.—Additional articles were afterwards brought in and admitted in the Arches Court, pleading the notice above set forth, upon which the party proceeded against no longer opposed the rate, whereupon the Judge pronounced for the rate, but without costs.

It would seem that unless the notice itself had been discovered that a prohibition would have issued. (See the case reported in 8 Ad. & Ell. 610.)

[662] WRIGHT *against* ELWOOD, FALSELY CALLING HERSELF WRIGHT. Arches Court, Michaelmas Term, 2nd Session, Nov. 8th, 1837.—Nullity of marriage.—Marriage without due publication of banns not void under stat. 4 Geo. 4, c. 76, unless both parties cognizant of the undue publication.—Semble, that a marriage without any publication of banns would be held to be without due publication of banns under sect. 22 of 4 Geo. 4, c. 76.

[Referred to, *Templeton v. Tyree*, 1872, L. R. 2 P. & D. 422.]

This was a suit of nullity of marriage, promoted by Mr. James Dennis Wright against Amelia, otherwise Emily, alleged to have been the wife, and now the widow, of Mr. Harlow Elwood, by reason of undue publication of banns, under the statute 4 Geo. 4, c. 76. The suit was brought by letters of request from the commissary of the bishop of Westminster, for the parts of Surrey within that diocese.

The libel pleaded the marriage in Ireland, in 1821, of Mr. Harlow Elwood and Emily Elwood, then Dames, spinster, by virtue of a license from the bishop of Killaloe. The libel went on to plead that Mr. and Mrs. Elwood cohabited together until 1823, when Mrs. Elwood separated from her husband; that in a deed of settle-

(a) Lord Denman, C. J., Littledale, Patteson, and Williams, Js.

ment (which was exhibited) dated 10th September, 1822, she is described as "Emily Elwood," and that in proceedings in the Court of Chancery, in Ireland, against Mr. and Mrs. Elwood, the latter is designated as "Emily:" that she became acquainted in London with Mr. Wright, to whom she represented herself as "Emily Elwood, spinster," and as free from matrimonial contracts and engagements, and that she was addressed by the Christian name of "Emily," and no other, as well by Mr. Wright (until her subsequent assumption of the name of "Emma") as by others; and that Mr. Wright paid his addresses to her; that she having repre-[663]-sented to Mr. Wright that she was a minor, and that her friends and guardian would not consent to her marriage, they agreed to effect a marriage by banns, and that she should assume the Christian name of "Emma," which was done: that Mr. Wright caused the banns between himself and "Emma Elwood, spinster," to be published on the 28th of May, 4th of June, and 11th of June, 1826, and that on the 6th July following they were married at the parish church of St. John's, Westminster: that Mr. Elwood was living at the time when the banns were published, and that he died on the 27th of June, before the marriage de facto took place; that the parties cohabited till 1828, when Mr. Wright, discovering that she was a married woman at the time of his contract with her, separated from her, and had not since cohabited with her.

Phillimore and Haggard for Mr. Wright, contended that this marriage was null and void on two grounds:

First, because at the time of the publication of the banns the lady was a married woman; that the publication of the banns, therefore, was no publication, and consequently that the marriage was invalid.

Secondly. That the parties had "knowingly and wilfully intermarried without due publication of banns," and that the marriage was void under the 22nd section of the statute 4 Geo. 4, c. 76.

Addams contra. This is not such an undue publication as would [664] render the marriage void; the names Amelia, Emilia, Emily, and Emma may be considered the same name; but supposing there was an undue publication, still this is a good marriage; it is Mr. Wright's own case that he was deceived by this lady, who, in 1826, was upwards of thirty years of age, yet made him believe that she was a minor of seventeen; as far as he knew it was a due publication, and unless the undue publication be made knowingly and wilfully by both parties, according to the principle of this Court and of the Judicial Committee of the Privy Council, in the case of *Tongue v. Allen*,^(a) and of the Court of King's Bench,^(b) this is a valid marriage.

4th Session, Nov. 24th.—*Judgment*—*Sir Herbert Jenner*. This is a suit of nullity of marriage by Mr. James Dennis Wright, of the parish of St. Pancras, Middlesex, against Amelia, otherwise Emily Elwood, described as of the parish of St. Mary, Lambeth, in the county of Surrey, and diocese of Winchester, and it is brought by letters of request from the commissary of the Lord Bishop of Winchester for the parts of Surrey.

The marriage sought to be set aside was solemnized in the parish church of St. John the Evangelist, Westminster, on the 6th July, 1826, in virtue of banns published in that church on the 28th May, the 4th June, and 11th June preceding, the banns having been published in the names of "John Dennis Wright, bachelor, and Emma Elwood, [665] spinster," and their names so appear in the register of marriages.

It is contended that the marriage is null and void on two grounds: first, because it was celebrated without any publication of banns at all, for, at the time of the publication of the banns, the person described as "Emma Elwood, spinster," was not entitled to that description, inasmuch as she had been married in 1821 to a person of the name of Harlow Elwood, who did not die until the 27th of June, 1826, that is, after the last publication of banns, which was on the 11th June; secondly, because the marriage was solemnized without due publication of banns, as required by the act 4 Geo. 4, c. 76.

The citation was returned into Court on the fourth session of Michaelmas Term, 1836; an appearance was given; the libel was brought in and its admission was debated, and several reformations and corrections were directed by the Court, which

(a) Ante, p. 38, and 1 Moore's P. C. Cases, 90.

(b) *The King v. Inhabitants of Wroston*, 4 Barn. and Adol. 640.

were made accordingly, and the libel was admitted as reformed. Several witnesses have been examined upon the libel (some of them in Ireland, where the first marriage took place); but no interrogatories have been addressed to any of the witnesses, nor has any plea been given in on behalf of the other party, in the way of defence; so that the Court has nothing before it but the evidence in chief of the witnesses examined in support of the libel, and the exhibits annexed thereto: although it has had the benefit of the assistance of the learned counsel for the party cited, both on the admission of the libel and on the hearing of the case, for which the Court has to express its obligation.

[666] Now, it is hardly necessary to observe that, in all cases of this description, it is the duty of the Court to be extremely cautious in pronouncing a marriage, solemnized between two parties, null and void, and to examine the whole of the evidence produced in proof of the nullity with great vigilance and jealousy; because, in these cases, opportunities are offered to parties to practise fraud and collusion; and this is the more necessary where the party, whose interests are apparently affected, and whose object it is to uphold the marriage endeavoured to be set aside, seems to have afforded every facility to the other party. Where the party before the Court, whose interests are affected, abandons his cause, the Court would be inclined to withhold its interposition for the protection of such a party; but where, as in this case, the interests of third parties and of the public are concerned, it is a duty incumbent on the Court to be upon its guard against surprise.

If this is the duty of the Court generally, it is still more so in the present case, when the circumstances of the case are considered; for this is the third attempt to obtain a sentence of nullity of marriage, the two preceding attempts having failed. The first suit was instituted in 1829 in the Consistory Court of London (2 Hagg. Ecc. 598), for the purpose of having the marriage declared void on account of the former marriage of the party; that is, on the ground that the marriage in question was solemnized during the life time of Mr. Elwood, the first husband; but it turned out on the proof that at [667] the time of the solemnization of the second marriage Mr. Elwood was not alive, for it appeared in evidence that the solemnization of the marriage took place on the 6th July, 1826, and Mr. Elwood had died on the 27th of June preceding; and therefore the Court was of opinion that it could not pronounce the marriage void, on the ground that it was celebrated during the life of the former husband, though the banns were published before he died.

The second attempt was made in the same Court in 1835 (ante, p. 49), after the lapse of six years from the former sentence; and at that time the ground alleged for setting aside the marriage was that there had been an undue publication of banns, inasmuch as the husband was alive during the time the banns were published. In neither of these cases was it alleged that the name of "Emma" had been assumed for the purpose of the marriage, but simply that, at the end of the year 1825, Amelia Elwood assumed the name of "Emma," and gave herself out as a spinster, and that Mr. Wright, believing her to be so, paid his addresses to her; that the banns were published in the name of "James Dennis Wright" and "Emma Elwood," and that a marriage was solemnized between them: but it was not suggested that he knew her by any other name than that of "Emma." The learned judge of the Consistory Court was of opinion that if there was nothing to shew that Mr. Wright had any knowledge of the existence of the former husband at the time of the publication of the banns, the marriage [668] was not void under the 4 Geo. 4, c. 76, and he rejected the libel. There was no appeal from this decision; but, shortly after, a citation was taken out in another jurisdiction, the party residing in the diocese of Winchester; and the suit was brought here by letters of request.

Now in the libel brought in and admitted in this cause it is for the first time alleged that the name of "Emma" was assumed for the very purpose of this marriage, and assumed with the knowledge and consent of Mr. Wright, and the object for which it is alleged to have been assumed with the knowledge and consent of Mr. Wright was that this lady, who represented herself to be a minor, could not obtain the consent of her guardian to the marriage, and therefore it was for the purpose of solemnizing the marriage without his knowledge that Mr. Wright and herself agreed that she should assume the name of "Emma" instead of "Amelia" or "Emily." This circumstance aroused the vigilance of the Court, and when the admission of the libel came on for discussion the Court intimated plainly and explicitly to the counsel

for Mr. Wright that it would expect full and satisfactory evidence of all the circumstances pleaded in the libel; and accordingly, if it should turn out that Mr. Wright has failed in adducing such evidence, it will not be for want of timely notice of what was expected from him.

The question then is, what is the effect of the evidence produced? With respect to some parts of the evidence produced to prove the former marriage in Ireland, in October, 1821, the time when Mr. Elwood died, and also the times of the publication of banns of the second marriage, [669] without examining very minutely the evidence on the two first points, namely, the marriage in Ireland, and the death of Mr. Elwood, the Court will assume that the marriage in Ireland is sufficiently established (and I think there is no doubt that it was a valid marriage in Ireland), and I am of opinion, on the evidence, that Mr. Elwood died on the 27th June, 1836, and that the third publication of the banns for the second marriage took place on the 11th of that month: so that there is no doubt that the first husband was alive during the time of the publication of the banns. Giving the party, therefore, the full benefit of the facts, the Court then proceeds to consider the law applicable to this state of facts.

Now it has been maintained that the publication of banns of a woman who is already married and whose husband is alive is a mere nullity; that it is not properly an undue publication of banns, but it is no publication at all, and that it would be contrary to the policy of the law if the Court were to uphold a marriage not preceded by any publication of banns nor by a license; and it has been also stated that such was the case, even before the passing of the first Marriage Act, 26 Geo. 2, c. 33, in 1754. But I confess I do not feel very strongly the force of that argument: for, as far as I can understand the principle upon which marriages are made null and void, on these grounds, under the act, it is that where false names are used intentionally, with a view of deceiving the public, it is no publication at all. So that in the case of the publication of false names the publication is a mere nullity. In [670] *Pouget v. Tomkins* (2 Hagg. Con. 146) Lord Stowell said: "The clear intention of the act is that the true names of the parties should be published, and if they are not so published, it is no publication: no notice is given, and no opportunity is afforded to any one to allege an impediment. It has been constantly held, therefore, since the case of *Early v. Stevens*," which was in 1785, and I believe the earliest case under the Marriage Act, "that a publication in false names is no publication." And on no other principle could such a case have been brought under the provisions of that act, where the terms made use of are, "Without publication of banns;" it does not speak of "undue publication;" but that statute required that a marriage should be preceded by publication of banns or by license. It seems to me that a marriage was void under that statute only where there had been no publication—undue publication was not sufficient, unless it amounted to the absence of all publication.

This was the state of the law under the 26 Geo. 2, c. 33. Before that statute marriages, without publication of banns or any religious ceremony—contracts per verba de præsenti—might be good and valid, though irregular: the parties and the minister might be liable to punishment, but the vinculum matrimonii was not affected. After the passing of the act 26 Geo. 2, c. 33, marriages were placed on a different footing as to banns and licenses; a certain degree of regularity was essential to the validity of the marriage contract, and marriages not preceded by banns or license were null and void. In [671] that act, however, there was no provision for the protection of innocent parties, and many cases are in the recollection of the Court in which it had produced very injurious consequences. Parties even guilty of actual fraud have obtained a separation without the possibility of doing justice to the party not cognizant of the fraud.

This state of things continued many years, but at length the legislature interfered to prevent the mischievous effects resulting from the provisions of this act, and to soften the rigour of the existing law.

I pass by the act 3 Geo. 4, which existed but for a short time, and I proceed to the act 4 Geo. 4, c. 76, which was in force at the time of this marriage, and is the law which is applicable to it.

This act begins by repealing all the former acts then in force. Part of the act 26 Geo. 2 had been repealed by the act 3 Geo. 4, but still part remained in force, and the remainder of that act, as well as the 3 Geo. 4, was repealed: so that at that time, if the legislature had done no more, the common law and general law, as it

existed before the Marriage Act of 1754, would have been restored, and a marriage would have been good and valid without any publication of banns or license. But the legislature did not stop here; it went further and declared, in the 22nd section, that where parties shall intermarry, knowingly and wilfully, without due publication of banns or license, the marriage shall be null and void. It has not adopted the terms of the former act, declaring that marriages shall not be solemnized "without publication of banns;" but the legislature has said: "If any persons shall [672] knowingly and wilfully intermarry without due publication of banns, or license from a person or persons having authority to grant the same, first had and obtained, the marriages of such persons shall be null and void to all intents and purposes whatsoever:" thereby, as I have stated, softening the rigour of the former law under the 26 Geo. 2. And according to the construction put upon this section by the Consistory Court of London (*Wiltshire v. Prince*, 3 Hagg. Ecc. 332) by this Court, during the time of my predecessor (*Hadley v. Reynolds*, not reported), as well as in my own time (*Tongue v. Allen*, ante, p. 38), by the Court of King's Bench (*The King v. The Inhabitants of Wroton*, 4 B. & Ad. 640), and I think I might say by the Judicial Committee of the Privy Council (*Tongue v. Tongue*, 1 Moore's P. C. Cases, 90) (though, perhaps, the point has not received an actual and direct decision of the latter tribunal), where the parties are not both cognizant of the false name, the marriage cannot be declared void. It is necessary that both parties should be accessory to the fraud; the act of one will not operate to the prejudice of the other, unless a participator.

The question then is, as the act speaks of marriages "without due publication of banns," what is the consequence where there is no publication of banns? for, according to Lord Stowell, in the case to which I have adverted, the publication of banns in a false name is equivalent to no publication. The Court can see no difference between the cases, which stand precisely on the same grounds; nor does there seem a reason why there should be a [673] difference; the fraud is the same in both; the remedy is the same in both.

It is, however, contended that the words, "without due publication of banns," used in the statute 4 Geo. 4, c. 76, do not extend to cases of marriage not preceded by any publication of banns, as there are no words in the act to that effect; but if that were so, the former Marriage Act being repealed altogether, upon its repeal the general law was revived and came into operation, and continues to be in operation, except so far as it is qualified and restrained by the 4 Geo. 4, c. 76, the only act now in operation; and unless this act extends to cases of marriage not preceded by any publication of banns, as distinguished from undue publication, a marriage where a false name was used would be a good and valid marriage. But I have no doubt that a marriage which has not been preceded by any publication of banns at all is a marriage within the meaning of the terms—that is, a marriage without due publication of banns. Marriages without due publication of banns are declared null and void, and I should be glad to know how it is possible that that can be a due publication of banns which is no publication at all, and how it can be contended, with any effect, that marriages where the publication of banns is a mere nullity can be distinguished from marriages without a due publication of banns.

Then the question arises whether Mr. Wright was cognizant of the fraud pleaded, with respect to the publication of the banns; for it is not suggested at all that he was aware of the existence of the husband; nay, in the other cases, he set up that he was deceived altogether: that this lady represented [674] herself as a spinster and a minor, and it is only here that he has alleged the publication of the banns under a false name to deceive her guardian; if she had been of full age there would have been no necessity for such imposition. There is no evidence to satisfy the Court that there was any imposition practised by Mr. Wright, or that he was cognizant of any necessity that a fraud should be practised. I am clearly of opinion that, on that part of the case, the proof on the part of Mr. Wright has failed, there being nothing to shew that at the time of the publication of the banns he knew the husband of this lady was in existence.

This brings me to the consideration of the other objection, on which it is contended that the marriage is void; that is, that a name was used in the publication of the banns to which the female party was not entitled; that the name of "Emma" was substituted for "Amelia" or "Emily." It is not denied that, to annul a marriage on this ground, there must be a guilty knowledge by both the parties; and, accord-

ingly, it is pleaded in the libel in this case that the name of "Emma" was assumed with the knowledge and consent of both parties, in order to deceive the guardian of a minor person, for I have already stated that this lady represented herself to be a minor and spinster. In neither of the former suits was such fact alleged, and I must say that the circumstance of its having found its way into this plea for the first time does not make a very favourable impression on the mind of the Court. This gentleman's averment is true or false; if true, how happens it that it should have been brought forward only at this late period of his pro-[675]-ceedings? If false, he has been guilty of a gross attempt to practise a fraud upon the Court, and with his eyes open; for the Court cautioned him and warned him of its suspicions, as the circumstances of the case authorized it to do; and I must say that the evidence brought forward in the cause is not at all calculated to remove the unfavourable opinion which the Court originally entertained of the case.

It is not necessary that I should enter into this part of the case minutely. I shall not consider whether the change of "Emma" for "Amelia" or "Emily" is such as is calculated to produce a sufficient disguise of the identity of the party; whether it was calculated to deceive any person interested in the prevention of the marriage. I will assume that Mrs. Elwood took the name of "Emma," for the purpose alleged, and that "Amelia" or "Emily" was the name to which she was entitled. But I cannot find any evidence, or anything in the shape of evidence, which brings the knowledge of the fact home to Mr. Wright, though it is expressly pleaded that the name was assumed with his knowledge and consent. Mr. Wright undertook to prove that fact, for he was warned of the necessity of doing so, on the debate as to the admission of the libel. The only evidence which the Court can find, with reference to a guilty knowledge by Mr. Wright, as to the substitution of the name of "Emma" is, that one of the witnesses states that she was acquainted with Mr. Wright and Mrs. Elwood before their marriage, and that she heard him call her "Emily," when she desired him to call her "Emma;" and the sister of this witness [676] says he sometimes called her "Emily," or "Emmy," or "Emma." This is the only passage of the evidence which at all bears on this part of the case; the depositions of these two witnesses (sisters) is all that is brought to prove that Mr. Wright knew this lady by any other name than that of "Emma," used in the publication of the banns. If, therefore, the Court gave entire credit to these two persons (though their account is full of improbabilities), still it falls short of the proof which the law requires to fix Mr. Wright with a guilty knowledge; but when the Court looks to the whole of the evidence in the cause, and compares it with the account given by these two persons, their story is so full of inconsistencies and improbabilities that the Court is bound to dismiss it from its consideration.

Now, what is the story set up by Mr. Wright, and the probability (looking at the evidence) that he was a party to the fraud? It is this: that this lady represented herself to be an unmarried person, and a minor, and that she had a guardian, whose consent it was, under the circumstances, necessary to obtain; that the guardian would not give his consent to her marriage, and that, therefore, Mr. Wright agreed with her to substitute the name of "Emma" for "Amelia" or "Emily," and have the banns published in the former name. What comes out in the evidence? Why, that this lady, who, in 1826, it is stated, represented herself to be a minor, had been cohabiting for two or three years with Mr. Elwood, previous to their marriage in 1821; that she had passed herself off as a widow in Dublin; that at the period of her marriage with [677] Mr. Elwood she was of the age of about thirty, so that, in 1826, when this marriage took place, she must have been thirty-five or thirty-six years of age; and I can hardly conceive that Mr. Wright could have been so grossly deceived upon this point as he wishes it to be believed he was, notwithstanding that the appearance of this lady was aided by the use of paint, which she was in the habit of applying liberally to her face, and by the pains taken in her dress. At all events, it must be supposed that after the marriage Mr. Wright could no longer have been deceived as to her age; and yet we are told, in evidence, upon which the Court is expected to rely, that Mr. Wright was in the habit of speaking of his wife as a minor and a ward—a story which destroys itself by its own improbability, if it were not defeated by the facts.

The Court cannot dismiss this case without a strong expression of its disapprobation of the conduct of Mr. Wright, of the manner in which he has endeavoured to

make out his case by a fraudulent attempt upon the vigilance and credulity of the Court, in setting up a story so improbable in itself, and defeated by the evidence adduced to support it.

I therefore pronounce that there is a failure of proof in support of the libel, and I dismiss the party from further observance of justice in this cause.

[678] COLLETT *against* COLLETT. Consistory Court of London, Hilary Term, 1st Session, Jan. 19th, 1838.—Divorce by reason of cruelty and adultery. Cruelty not proved. Proof of adultery from inference. Medical testimony, how considered.

[Referred to, *Morphett v. Morphett*, 1869, L. R., 1 P. & D. 704. Discussed, *Browning v. Browning*, [1911] P. 164.]

Judgment—*Dr. Lushington*. This is a suit brought by the wife against the husband for a separation by reason of cruelty and adultery. The parties were married in July, 1826, and continued to cohabit together until the end of June, 1836; on the 30th of that month Mrs. Collett quitted her husband's house, and went to reside with a relation in Norfolk. It is necessary for me to consider the charges contained in the libel given in on her behalf, and how far they are substantiated by the evidence in the cause.

The first charge is contained in the fifth article, which alleges that in July, 1829, Mr. Collett contracted the venereal disease, and it further pleads that he acknowledged the fact to his wife, who discontinued sleeping with him; but on his declaring he was well, and on his promising not to offend again, she returned to his bed.

This is the first charge, and it is separate and distinct from that contained in the sixth article. The second charge is, that so soon after as September, 1829, he again contracted the venereal disease, which he concealed from his wife, and infected her, although Mr. Collett had consulted Dr. Gairdner, who warned [679] him that there was danger of communicating it; that Mr. Collett took his wife to Dr. Gairdner, who prescribed for her, and it goes on to plead that on Mr. Collett's promising fidelity she forgave him, and again returned to cohabitation. This is nearly the substance of these two articles, in which it is alleged by Mrs. Collett that her husband had the venereal disease twice in the year 1829, and that he knowingly communicated the same to her, and consequently, as I apprehend, that he was guilty of the offence of cruelty as well as adultery.

Now, I have no doubt that the deliberate communication of the venereal disease to his wife would constitute the offence of cruelty; but the question is, how far this averment is proved on the present occasion? The whole of this part of the case rests entirely upon the testimony of Dr. Gairdner. Dr. Gairdner does prove that Mr. Collett had the disease at the end of August, 1829; he proves that Mrs. Collett was infected in September of that year; but there is no evidence whatever to establish the fact that Mr. Collett had the disease twice in the course of that summer. I am of opinion that the fifth article is utterly and entirely unproved. The question then remains whether Mr. Collett knowingly and wilfully infected his wife in the course of the year 1829? That the disease was contracted by him, and that his wife was thereby infected, are admitted by him in plea, and by his counsel; but I think that to establish so serious a charge against him, as that he knowingly and wilfully communicated this disease, requires very strong and conclusive evidence. The evidence of Dr. Gairdner is to this effect: "That Mr. Collett came to him in [680] August or September, 1829; that he was a stranger to him; that he represented himself as being infected, &c.;" the object of his visit to me was in order to ascertain whether, in his then state, there was any danger of infecting his wife by having sexual intercourse with her. I, after having had an inspection . . . was of opinion, and to him declared my decided opinion, that his having sexual intercourse, during the then present state of his health, would be extremely dangerous with reference to the probability of his infecting her with the same disease."

Now, if, after he had been warned by Dr. Gairdner, he had intercourse with his wife and infected her, that would have been a deliberate act of cruelty. But the evidence does not go to that extent; it does not appear that Mr. Collett slept with his wife after he had been warned by Dr. Gairdner, and on the 8th of September he called upon him, and stated his apprehension that he had infected his wife. If the disease had been previously communicated, that would not be sufficient to

shew a wilful intention on the part of Mr. Collett. He might very possibly have believed himself cured, and although he may have been careless and imprudent, there is nothing to shew the disease was wilfully communicated to his wife. I am bound therefore to acquit him of having, with his eyes open, and with malice aforethought, communicated this disease to Mrs. Collett.

In respect, then, to this first charge, it being now limited to the crime of adultery, it is admitted that it was condoned by Mrs. Collett, voluntarily and with a full knowledge of the facts. I now proceed to examine the other charges.

[681] The eighth article of the libel pleads that this gentleman again, in April, 1833, contracted the venereal disease. This charge is distinctly proved by Mr. Brown, but, on the other hand, I must observe it is equally established that Mrs. Collett had a complete and perfect knowledge of what had occurred; that she afterwards returned to his bed, and that there was a condonation of the offence.

There is nothing further in the proceedings to which it is necessary to refer, prior to the charge in the ninth article, that is, the matters which occurred in June, 1836. Whatever might have been the footing upon which the parties lived together between 1833 and 1836, there is nothing, until this occurrence, which requires the attention of the Court. There may have been disputes between the parties—charges by Mrs. Collett on the one hand and by Mr. Collett on the other; and these disputes may have been followed by reconciliations; but all these differences are entirely irrelevant to the matter of this suit, and to the points which I have to decide. Up to June, 1836, prior to the facts pleaded in the ninth article, after ten years' cohabitation, Mr. Collett, notwithstanding he had shewn himself regardless of the marriage vow, in reference to the crime of adultery, has not been proved to have been guilty of personal cruelty towards his wife. I must observe that, during the whole of this period, it is not even alleged that he treated his wife with any harshness, or that he attempted to inflict personal severity upon her. I say this in justice to Mr. Collett, that there is no presumption against him on this head—no ground of probability laid that he would have used the [682] personal violence imputed to him in June, 1836; having been guilty of no misconduct of that kind antecedent to this period; though he was guilty of other misconduct of a most serious and grave character.

The act of violence charged in the ninth article is said to have taken place on the night of the 11th of June, and it is a single act. It is not pleaded that on this occasion any blow was inflicted by Mr. Collett on his wife; but it is said that he abused her without cause, seized her arm with great violence, so that by his continued compression of it the arm was bruised, and that she was, in consequence, ill the next day. This is in substance the charge contained in this article; the only charge of personal violence.

Now the only witness produced in support of this charge is Sophie Gérin. Her evidence upon this article is to this effect—she says that, having heard the child, she went up stairs, and she continues: "I went to the door of the bed-room of Mr. and Mrs. Collett, and heard the child there, and the voices of Mr. and Mrs. Collett; I then went into the bed-room, and found Mrs. Collett lying on the carpet, as if she had fallen; the child was in her arms crying, and on asking her what was the matter, Mr. Collett said, 'Nothing, nothing;' he scarcely said anything, but the child and Mrs. Collett talked together; Mrs. Collett told the child, 'Your papa has ill-used me, and I must leave him,' and the child said, 'Naughty papa.' When Mrs. Collett said that she must leave him, Mr. Collett answered, 'Then why don't you go?' and I believe he said, 'Why don't you go to-night?' but he did not act [683] or speak to her with violence in my presence or hearing. Mr. Collett, after a little while, said to Mrs. Collett, 'I don't know what you are going to do, but I am going to bed,' upon which Mrs. Collett said that 'she did not intend to sleep there, but that she would sleep in the next room (which was a spare bed-room) with the child,' and she went with the child, I accompanying her into that room; Mrs. Collett afterwards altered her mind, and sent the child up stairs again, and desired me to remain and sleep with her, which I did. While undressing Mrs. Collett, she told me that Mr. Collett had, that evening, been ill-using her, and she shewed me her arm, which I saw was bruised above the elbow, and she said that such bruise had been caused by Mr. Collett holding her violently to prevent her going to the door and shewing a light to the child, when she, Mrs. Collett, had heard the child screaming. I recollect that Mrs. Collett was very poorly on the next day, but whether she was confined to her bed throughout the

said day I am not sure, and I cannot remember to have observed the bruise on her arm after the evening of its happening; I did not myself hear Mr. Collett say that he wished the child had broken her neck." The question is whether this evidence, for I am not aware that there is any other testimony in the cause which can properly be said to bear upon this point, is sufficient to lead my judgment to the conclusion that Mr. Collett was guilty on this occasion of cruelty in the eye of the law. I think, considering that this is a solitary charge of cruelty, and that there is one witness only in support of it, that I should go too far to hold that it is sufficient to [684] found a sentence of separation upon. I think so, if the case rested here, but if I had any doubt I should be confirmed in my opinion by what is pleaded by Mrs. Collett herself in the tenth article of the libel, which was altered after debate, so that the attention of the party was drawn particularly to that article. It is pleaded in that article that, in the evening of the next day, the said Emma Collett was commanded by the said John Collett to return to his bed, which she accordingly did, with great reluctance, &c.; so that it is admitted by this lady that almost immediately after the act of cruelty committed by her husband (if it was cruelty at all) she returned to the bed of that husband. It is true that in the article her return to cohabitation is qualified by the averment that it was "with great reluctance;" but I must say that, looking to the whole circumstances of this proceeding, and to the conduct of this lady from the beginning to the end, I am not prepared to say that her reluctance could have arisen from a fear of personal violence at the hands of her husband. I cannot satisfy myself, from the whole of the *res gestæ*, that there is the least probability that Mrs. Collett, who had friends to protect her, who was not left desolate in the world, or abandoned by her connexions, would have returned to the bed of her husband if she had entertained any apprehension of personal ill-treatment; and this view of the case is entirely corroborated by what is pleaded in the eleventh and twelfth articles, for an express reason is assigned for Mrs. Collett's leaving her husband's house—not a fear of personal violence, owing to what occurred on the 11th of June, but as expressly pleaded, because she [685] was apprehensive that he was then infected with the venereal disease, and had again communicated the same to her.

On this branch of the case, then, I have no hesitation in saying that the treatment of his wife by Mr. Collett, on the 11th of June, 1836, is not such as to justify me in pronouncing for a separation.

Before I proceed to the remaining part of this unfortunate inquiry, it is necessary to see the position in which the case now stands. I have come to the conclusion (and I have no difficulty in doing so, as the facts are admitted) that Mr. Collett had twice committed adultery; that he had twice been infected with the venereal disease, and had once communicated it to his wife, but that both these acts of adultery had been duly condoned and pardoned by her.

The remaining part of the case is of a nature exceedingly difficult to examine with the ordinary means; but it is still a duty incumbent upon me to consider it with all the care and means in my power. The last charge is that Mrs. Collett was again infected with the venereal disease when she quitted her husband's house on the 30th of June, 1836, and that on the 19th of August, when she consulted Mr. Crosse, a surgeon of Norwich, he found her to be then labouring under the disorder. Now assuming, without at present deciding what the fact may be, that Mrs. Collett had the venereal disease when she quitted her husband's house, what inference would the law draw from a fact of that description? What would be the conclusion of law as to adultery? Does it establish the fact that the husband [686] must have been guilty of adultery? Clearly it does not necessarily prove the guilt of the husband, for it is at least possible that the wife may have contracted the disease from another quarter. It is impossible to lay down any general inflexible rule, for each case must depend on its own circumstances, and it is scarcely possible to conceive a case without some circumstances which would assist the Court in coming to a conclusion. I may further merely observe that I think it unnecessary to press this inquiry further, for if any such case should occur, bare of circumstances, it will then be time to consider this important point. In this case there are many circumstances, the effect of which I must consider presently. But the point to which I must first direct my attention is the question of fact, so much discussed by the counsel on both sides, whether Mrs. Collett had or had not the venereal disease when she quitted her husband's house in June, 1836.

It is very important, before I proceed to state the evidence, and the impression which it has made on my mind, that the principles which ought to prevail should be clearly understood. The principal evidence is the testimony of a medical gentleman of the name of Crosse. Now what degree of credit and weight ought to be given to the evidence of medical men under the circumstances in this case? I apprehend that medical evidence may be of two kinds, and that it is under such conditions that medical evidence is received in other Courts.

First. That it is necessary for the satisfaction of the Court that it should be informed of the conclusions drawn by persons of skill and science as to a [687] matter, from facts proved in the cause aliunde, for instance, it may ask the opinion of medical men if so and so were the case.

Secondly. Which is a superior kind of evidence, opinions founded upon the observation and inspection of the medical man himself. I find that such evidence is received in all questions of murder, infanticide, and poison; the learned judges who preside in the Courts where such questions arise rely not merely upon the opinions of medical men who have seen the body, but persons are frequently produced in Court and examined who have not seen the body; and in the well-known case of *Lord Gardiner*, in the House of Lords, the evidence of medical men was mainly relied upon. On a consideration of what is done in other Courts, and from the extreme difficulty of the Court's forming a judgment in a matter of this kind, I think, if there be medical evidence speaking to the fact of venereal disease, and there be sufficient opportunities for the medical witness to form his opinion, I am bound, unless his evidence be discredited, to believe it. Let us consider a little into what difficulties any other mode of looking at this evidence would lead us. How is it possible that the Court, having had no medical education, could deduce from the symptoms that the disease was of this or that character? particularly where, as in the present case, there is great difficulty in distinguishing between symptoms of a similar character, and drawing a correct conclusion.

This, therefore, is the principle upon which I shall consider the evidence of Mr. Crosse. I do not intend to go into the disgusting details of his [688] evidence with minuteness. Mr. Crosse proves that on the 19th of August he saw this lady, and from personal examination, and from an inspection of the linen which was brought to him, he swears distinctly that she was at that time suffering under venereal disease, in consequence, he says, of "recent impure contact." Why should I distrust Mr. Crosse? Is he an incompetent witness? What right have I to suppose that he has made a mistake? I do not see any ground why I should distrust the evidence of Mr. Crosse, or suppose that when he believed that this lady was affected with the venereal disease, he was labouring under a mistake. I must, therefore, come to the conclusion that, in whatever way it was contracted, at the period when Mr. Crosse saw this lady, she was, undoubtedly, suffering under the venereal disease. I am aware that there is a part of the case which was pressed in argument by the counsel for Mr. Collett, and which I advert to, in order to shew that I have not overlooked it; I mean the exhibition of certain linen of 1835, which had been preserved, and which may raise a suspicion that Mr. Crosse's opinion might be partly founded upon that; and certainly it is not satisfactorily explained by the evidence; it comes out in the testimony of Sophie Gérin. But it does not raise any inference to justify me in disbelieving the opinion of Mr. Crosse, founded upon personal examination, and upon the inspection of linen recently worn by Mrs. Collett. I now dismiss this disgusting part of the case.

Being satisfied then by the evidence that it is proved that Mrs. Collett was infected with the disease on the 19th of August, what is the legal [689] inference to be deduced from the fact? Am I to conclude that the husband communicated such disease to her, and that consequently he was guilty of adultery? Now it cannot be denied that Mr. Collett was exceedingly unmindful of his marriage vow; that he had indulged in intercourse with women of a lewd description; and that he had twice before been infected with the disease, and these offences lay a strong ground of probability that he would be guilty of a third lapse. On the other hand, against the conduct and chastity of Mrs. Collett there is not the slightest imputation, much less is there a shadow of ground for an argument that this lady indulged in habits which would render it likely that she should have had such a disease from any other person than her husband. But it was pressed by the counsel for Mr. Collett that from the

lapse of time between the 30th of June and the period when Mr. Crosse examined Mrs. Collett, and found her infected with the disease, it was highly improbable that the husband could have communicated it to her. This objection, however, is removed by the testimony of Mr. Crosse, who expressly swears, at the end of his answer to the thirty-ninth interrogatory, that in his opinion the disease might have been communicated to her sixty-six days previously; and the result of the testimony of the medical men is that in the case of a female the lapse of ten weeks after cohabitation with her husband is not such a lapse as would render it at all improbable that he was the cause of the contamination. There being then, in this case, an entire absence of all suspicion that the disease could have been communicated by any other person, the Court [690] is bound to infer that the husband, who had had the disease twice before, and had once before infected his wife, had the disease again, and again committed adultery. Is any other solution of the evidence practicable? If I am to come to any other conclusion, I should go in the teeth of all the evidence, and I should distrust the medical testimony, particularly that of Mr. Crosse. If I were to doubt the fact of the disease being communicated by Mr. Collett, I must hold Mrs. Collett herself guilty of adultery; any attempt to come to a different conclusion would be the greatest absurdity, and would be diverging from the strict line of all judicial proceeding, namely, to credit the evidence of respectable persons, unless they are contradicted, or unless there is something in their testimony to excite a suspicion of the fidelity with which they have deposed.

I must observe that, in coming to the conclusion I have done, if there is any error in my judgment, Mr. Collett must take the blame to himself. It is the conduct of Mr. Collett which renders the conclusion to which the Court has come a probable one. Mr. Collett, by the conduct admitted by himself, by his gross violations of his marriage vow on former occasions, has laid a foundation for the opinion I have given, and the conclusion to which I have come; and if it should unfortunately be founded in error (as I do not think it is), I am bound to give a judgment supported by admitted facts in the case, and not inconsistent with the circumstances. The result of the evidence leads me to the conclusion that Mrs. Collett is entitled to a separation from her husband, by reason of adultery [691] committed by him, as pleaded in the twelfth and thirteenth articles of the libel; but not on the ground of cruelty, from which I entirely acquit Mr. Collett.

Affirmed on appeal in the Arches Court, June 8th, 1838.

KOSTER against SAPTE. Prerogative Court, 26th Jan., 1838.—The Court will not revoke an administration which has been outstanding for a considerable time, unless weighty reasons be shewn for its revocation. A decree having been taken out to shew cause why letters of administration with will annexed, limited to property in this country, of a person who died domiciled at Leghorn, should not be revoked, as being void under a sentence of the Courts at Leghorn, and also as having been obtained through a suppression of facts, the party calling in the administration not having proved the sentence of the Court at Leghorn, nor the other ground alleged, to the satisfaction of the Court; the administrator, who appeared under protest, dismissed with 50*l.* costs.

On petition.

Martha Sapte, spinster, a native of Tuscany, and domiciled at Leghorn, died in April, 1811, possessed of property in Tuscany, and also personal estate in England to the amount of 3000*l.* She made a will on the 25th of May, 1805, by which she bequeathed various legacies, and among others one of 200*l.* to Amelia Koster, wife of John Adolphus Koster. The residue of her property in this country she gave to her nieces, Jane and Julia Sapte, resident here, and in case of their decease that residue was given to Francis Sapte and Henry Sapte, her nephews, also resident in this country. She appointed certain persons her executors, and substituted others in case of their decease, one of such [692] executors being Mr. J. A. Koster, the husband of Amelia Koster. Shortly after the death of the deceased a copy of the will was sent to Mr. Francis Sapte, in this country, but no steps were taken to obtain probate here until 1813, when, upon the death of Julia Sapte, the last surviving residuary legatee, Mr. Francis Sapte took out letters of administration of her effects, and as her representative applied for letters of administration, with will annexed, of Martha Sapte, limited to the property here; and upon an affidavit made by him, stating that the

original will was remaining of record at the Courts at Leghorn, and that the executors were in Tuscany, and not likely to come to this country, a decree issued, calling upon the executors to take probate in this country, or shew cause why letters of administration, with will annexed, limited to the property in this country, should not be granted to Mr. Francis Sapte, as the representative of Julia Sapte. This decree was served in the usual way on the Royal Exchange, and no appearance being given, the limited administration was granted to Mr. Sapte, who remained in the possession of the grant until this time.

This administration was now called in, a decree having been extracted by Mr. Peter Frederick William Koster, the son and representative of Amelia Koster, who died in 1820 (Mr. Koster, her husband, having renounced), calling upon Mr. F. Sapte, the administrator of Martha Sapte, to shew cause why the letters of administration should not be revoked, as having been unduly obtained, and administration granted to him as the representative of Amelia Koster. To this decree an appearance was given under protest.

[693] On behalf of Mr. P. F. W. Koster, the party calling in the administration, it was alleged that Martha Sapte, the deceased, a native of Tuscany, died domiciled at Leghorn, by the laws of which country the disposition of her personal estate is to be governed, that by her will she appointed certain persons executors, one of whom, J. A. Koster, was the husband of Amelia Koster (since deceased), whilst living the niece of the deceased, and who, together with her husband, were domiciled subjects of Tuscany; that the deceased's nieces, Jane and Julia Sapte, and her nephews, Francis and Henry Sapte, were domiciled in this country; that by the then and still existing laws of Tuscany such portion of the deceased's property as was given to them, in consequence of their being so domiciled, devolved upon Amelia Koster, as the sole next of kin of the deceased resident in Tuscany; that the deceased, by the laws of Tuscany, was dead intestate as to that part of her property which was in this country; that notwithstanding the premises the fiscal authorities at Leghorn claimed such portion; that such claim was resisted by Amelia Koster, and that on the 4th of December, 1811, a sentence was pronounced in her favour by the tribunal of First Resort, which sentence was appealed from, but affirmed by the Superior Court on the 7th of July, 1812, and general administration of the deceased's effects granted to Amelia Koster, who paid debts and expenses exceeding the effects of the deceased by three thousand pounds. That in October, 1812, copies of these decrees were sent by J. A. Koster to Mr. Sapte, the other party, the receipt whereof he acknowledged; that nevertheless he proceeded to obtain the limited [694] administration with the will annexed, without disclosing such decrees to the Court, he being aware that by such decrees the residuary legatees here were declared to be legally debarred of all property under the will.

For the party cited and in support of the protest it was alleged that Francis Sapte, the administrator, soon after the deceased's death, received from the executors a copy of the will, for the purpose of the same being proved in this country; that in August, 1813, the administration was granted, that the legacies were paid here and also abroad by the executors, by which they recognised the validity of the will, that F. Sapte was for several years the agent of J. A. Koster, that he credited the account of the said J. A. Koster with the 200l. legacy to his wife, Amelia Koster, a receipt of which account was acknowledged by Mr. Koster—that Amelia Koster died in 1820; that her husband survived her, but took no steps in calling in the administration; that on the 16th March, 1836, P. F. W. Koster, her son, upon the renunciation of J. A. Koster, her husband, took administration of her effects; that in 1820 the said P. F. W. Koster was resident in London, and had ample opportunities of taking steps for calling in the said administration: that at the time of the proceedings in the courts in Tuscany the Duchy of Tuscany was in the possession of the French armies, then in a state of hostility with this country, and that Jane and Julia Sapte, and Francis Sapte were then resident in this country, and had no means of appearing in those Courts. That the law was not, as alleged by the other party, that parties domiciled out of the dominions [695] of the Grand Duke of Tuscany were precluded from being entitled to the personal estate of persons domiciled and dying within those dominions, unless by the laws of the country in which such persons resided and were domiciled; persons residing within the dominions of the Grand Duke of Tuscany were in like manner precluded from succeeding to the estates of persons dying within that country, and refer-

ence was made to the Royal Ordinance, of the 3rd of August, 1784, and to the 726th and 912th article of the Code Napoleon, which declared to that effect.

Lushington and Addams for Mr. Koster. The administration granted in this case is void on two grounds.

In the first place, it was obtained by concealing from the Court the facts of the case; it has been, therefore, surreptitiously and, in the legal sense of the term, fraudulently obtained.

In the second place, the will of Martha Sapte is of no validity, so far as respects the disposition of the property in this country; consequently, neither Jane Sapte nor Julia Sapte, nor Francis Sapte were entitled to take anything under it.

After the death of the testatrix, proceedings took place in the Courts of Tuscany, and it was finally decided that she had died intestate as to all legacies out of the Tuscan dominions; that the will as to them was void; and administration was granted by the Tuscan Courts to Amelia Koster.

When Mr. Sapte applied to this Court for administration with the will annexed, he was in possession of information that the Courts in Tuscany had [696] pronounced the will void quoad the legatees in this country; yet he stated in his affidavit that the will was of record in the proper Court at Leghorn; the inference which the Court would draw from this was that the will was in force there; the Court, therefore, received a false impression from the affidavit of Mr. Sapte: this was, therefore, a legal fraud, and no lapse of time prevents the ripping up of a legal fraud.

The Court. Does that rule apply where the adverse party is aware of the fact and takes no step?

Argument continued. If he is aware of it, and being resident in this country remains dormant for twenty years, it might bar him; but here the parties were resident abroad, and did not know the administration had been granted to Mr. Sapte. Besides, the party then interested was the mother; the right of the party now before the Court did not commence until 1836, when he took administration of his mother's effects.

The rule of law is now settled that the *lex domicilii* shall govern the disposition in testacy or intestacy, as well as the meaning of the instrument. *Hog v. Lashley*, 6 Bro. P. C. 577. Robertson on Personal Succession. On the death of Martha Sapte the proper tribunal to decide as to the validity of her will was that of the country in which she died domiciled—the Tuscan Tribunal. The *lex loci rei sitæ* is repudiated by all civilized nations. Here are decrees pronouncing the will null and void by the laws of Tuscany.

[697] The Court. I have not those decrees before me.

Argument continued. We so allege and it is not denied.

The next point is, Can the validity of the decrees be impeached? What is the effect of a foreign judgment, and how far is it conclusive on the present occasion? Suppose the judgment not to be conclusive, in what way is its validity examinable?

First. Is the foreign judgment conclusive? The last case in the House of Lords is *Houlditch v. Donegal*, 8 Bligh, 301, where the whole of the authorities are collected. The result of the judgment in that case was that, in the opinion of Lord Brougham, there were cases in which it was competent for the Court to look into the grounds and reasons of the foreign judgment, and satisfy itself as to the law of the country. In *Martin v. Nicolls* (3 Sim. 458) the Vice Chancellor held a foreign judgment to be conclusive. Under certain circumstances we admit, where there is a question as to jurisdiction, or whether the party was cited according to law, and for some other purposes, that you may examine a foreign decree; but you cannot open any decree of a foreign country, and try by your own lights and knowledge whether the foreign judgment was pronounced on good ground or not.

Second. If the judgment be not conclusive, how is its validity to be tested? Not by the opinions of advocates—opinions can have no weight against a decree of a competent Court.

[698] The whole question comes to this, whether there be a valid will or not, according to the law of the place where the party died domiciled?

Burnaby and Haggard contra. The party cited to bring in the administration has been in possession of the grant for twenty-four years: there is no instance in which an administration so long outstanding has ever been revoked, though the Court has power to revoke it, if it has been obtained under false pretences, and by a deception

practised upon the Court itself. If Mr. Koster is precluded from any advantages by the grant of administration obtained by Mr. Sapte, it is through his own laches. As next of kin of the surviving residuary legatee, Mr. Sapte has a right to the administration. The judgments of foreign Courts, when proceeding in rem, are said to be conclusive, but not as to moveable property out of the jurisdiction of the country pronouncing the judgment.^(a) There is no proof that the law of Tuscany precluded a person in this country from receiving a legacy under the will of a Tuscan subject out of property here. The sequestration of the property of English subjects, by the Berlin and Milan decrees, did not take this property from Mrs. Martha Sapte, who was not an English subject. Mr. Sapte, in his affidavit, says, and he believes, that the copy of the will was sent over to this country to be proved; for what other purpose could it have been sent? Mr. Sapte remitted to Mr. Koster an account of the payments for proving the will, which Koster acknowledged. Mr. Sapte's [699] impression was that the decree which was obtained, without the knowledge of the residuary legatees, could not refer to property out of Tuscany, and the Court, even now, is not instructed as to what the decree really was. Mr. Sapte, therefore, was justified in applying for administration, and there is no pretence for saying that there was any concealment or misrepresentation practised on the Court, when he stated, as he believed, that the will was of record in the foreign Court, for he considered the will a valid instrument.

February 7th.—*Judgment*—*Sir Herbert Jenner*. The administration which has been taken out in this case is of so long standing, that the Court is very unwilling to disturb it, without weighty reasons being shewn for the revocation of such an administration regularly granted. The Court would, undoubtedly, revoke an administration, if sufficient ground were shewn; but the party who seeks to impeach the administration must state the grounds upon which he is entitled to impeach it; *prima facie*, the title to the property is in the residuary legatees.

It is stated that the administration is revocable on two grounds: first, that by the law of Tuscany, as it existed on the death of the deceased, residuary legatees living domiciled out of the Tuscan dominions, generally, were not capable of taking under the will: secondly, that when Mr. Sapte obtained the administration with the will annexed, he concealed from the Court that proceedings had taken place in the Courts at Leghorn, with respect [700] to the deceased's property, and that it had been decided to belong to Mrs. Koster, as nearest of kin to the deceased in Tuscany, and that administration had accordingly been granted to her. So that the case on the part of Mr. Koster, the party taking out this decree, stands on these grounds: the incapacity of the residuary legatees to inherit according to the law of Tuscany, and the suppression of the proceedings at Leghorn, from this Court, which would have prevented the Court from granting the administration. The party setting up such a case is bound to furnish the Court with the law of Tuscany, and the proceedings of the Courts in that country, by which it was decided that the property in England belonged to Mrs. Koster. How is the Court to be satisfied on this point? It must have information as to the law of Tuscany.

It has been said that proceedings of a certain kind took place before the tribunals of Leghorn, and the question having been decided there, this Court cannot inquire into the validity of the sentence. But the first question before the Court is, what was the law of Tuscany at the time? Whether all persons residing out of the Tuscan dominions were incapacitated from succeeding to the personal estate of a Tuscan subject, or whether the incapacity was limited to certain countries? whether the whole property of a subject of Tuscany, wherever situated, was affected by the law, and the incapacity of residuary legatees was general, applying to all persons out of the Tuscan dominions, or only to persons resident in this country at that time, in a state of hostility with the authorities then in Tuscany, namely, the French, who were then in possession [701] of Tuscany, and had substituted their laws for those which originally existed in the Tuscan dominions.

Although succession to personal property is governed by the *lex domicilii*, and not by the *lex loci rei sitæ*, yet a measure controlling the law of a country may be limited and qualified so as to affect certain descriptions of property only: and it does not appear, from the proceedings in this case, that it was a general law, applying to

(a) See Phillipps & Amos on Evidence, pt. 2, ch. 1, sect. 3, p. 532.

all property, wheresoever situated, but only to what was in the Tuscan dominions. Although the rule, that personal property is supposed to accompany the owner wherever he goes, is true to a great extent, and in general cases, it cannot be said to be universally true without exception. For what was done in this case? There was a sequestration of English property, real and personal, in that country, and if this included all personal property, wherever situated, which accompanied the person to the person's domicile, it would go to shew that the sequestration ought to extend to property in this country; and if it had so happened that the French had remained in possession of Tuscany, they would have been entitled to the property, and this country would have been bound to give it up to them when hostilities ceased, in obedience to the Berlin and Milan decrees, against which this country had been in the habit of protesting: which would be absurd.

What has the Court before it on this point? It is said the law of Tuscany must be proved by the sentence of a competent tribunal, and I am not prepared to say that this is not a proper way of proving the law of a country: but how is the sentence [702] proved? Here is no copy or exemplification of the decree, but a mere averment of an interested party, and a certificate, bearing no marks of authenticity, purporting to be a certificate of sequestration. In all cases of decisions of foreign Courts an exemplification of the judgment is required, and although, in some few cases, foreign judgments have been received as evidence of what was decided, and held to be conclusive on certain points, yet in *Houlditch v. Donegal* it was held that a foreign judgment was open to examination—in point of fact, the judgment is no more than *prima facie* evidence of what was decided, and is good until it is impeached. At all events, according to the opinion of the learned judge referred to in the argument, a foreign judgment may be examined for certain purposes: if not, how is the Court to know the effect of it? Therefore, the production of the judgment is the root and foundation of the whole proceeding, without which the Court cannot proceed a single step.

What is the Court called upon to receive as a substitute? A certificate of replevy of property, belonging to Martha Sapte, purported to be sequestered by the French authorities, in pursuance of the Imperial decree of 21st November, 1806. The decree of sequestration referred only to that part of the property actually sequestered, and to no other. It is simply limited to the property sequestered under the decree of 1806, and, as far as this certificate goes, it can only shew an incapacity to inherit that.

As the judgment is not produced before the Court, the Court cannot tell what the effect of it [703] might be; but if there was a judgment, it should have been produced, because the whole question turns upon the incapacity by the law of the country. The certificate has no marks of the character of a Court of law.

But suppose the judgment went to the extent of the certificate, what would be its effect? The sequestration was of the property of Martha Sapte in that country; it could have no effect upon the property in this country.

If it is not proved to the satisfaction of the Court that by the law of Tuscany the property of Martha Sapte in this country was not inheritable by persons domiciled here, what becomes of the imputation against Mr. Sapte of keeping the fact from the knowledge of the Court? If the law of Tuscany, to the effect alleged, had been clearly established before the Court, perhaps it might have considered it sufficient to revoke the administration on the ground of a suppression of a material fact; but where the Court is in the dark as to the law of Tuscany, there is no ground of imputation against Mr. Sapte for keeping information from the Court. If the judgment of the foreign Court was in conformity with the Berlin and Milan decrees, I doubt whether the Court could hold it binding and conclusive on the party, so as to make the grant a nullity.

But, independent of this circumstance, what is there to account for the lapse of time in instituting this proceeding? In 1813 the administration was granted to Mr. Sapte. In 1814 Tuscany was restored to the Austrian Government. If, therefore, there was an inability to proceed earlier, in 1814, [704] it was quite competent for Mr. Koster to proceed, in order to recall the grant of administration to Mr. Sapte. But no step was taken by him. In 1820 his wife died, and he has not taken administration of her effects. The party now proceeding was resident in this country in 1820, and continued here some time, but it is not till the year 1836, twenty-three years after the administration had been out, that a single judicial step was taken—a

circumstance which influences the Court considerably in refusing to disturb the administration.

I am clearly of opinion that there is no ground whatever in proof before me for disturbing the grant already made, and that the protest under which the party cited has appeared is proper, and I pronounce for it; and I am bound to say that it was incumbent upon the party proceeding to furnish the Court with the fullest information; and as he has not produced the document from which alone the Court could be instructed as to the law of Tuscany, he must take the consequences of an experiment made at his own risk. He has given security for costs to the extent of fifty pounds, and I am of opinion that I should not do justice to the party in possession of the administration if the other party is not condemned in costs to that extent. I, therefore, pronounce for the protest, dismiss the party, and condemn Mr. Koster in the costs to the extent of fifty pounds, if they amount to that sum.

[705] SATTERTHWAITE *against* POWELL. Prerogative Court, Jan. 31st, 1838.—Where husband and wife are drowned by the same accident the presumption is that they died at the same time; and in order to entitle the next of kin of the husband to the wife's property, it must be shewn that he survived the wife.

On petition.

Ann Armett, the deceased in this case, sailed in January, 1819, with her husband, Cæsar Colclough Armett, Esq., then a major in the 35th Regiment of Infantry, and four children, on a voyage from Bristol to Cork, in a vessel called the "Berwickshire Packet," which was lost in the Channel, and every one on board perished.

By an indenture of settlement, dated the 19th of February, 1811, certain property was settled previously to the marriage of the parties in trust, for the separate use of the wife during her life, and after her death for the husband for life, in case he survived her; and after the death of the survivor, then as she should appoint by deed or will among her children; but in case of the children dying under twenty-one and unmarried, and in default of appointment, then in trust for her executors, administrators and assigns, and personal representatives, to and for their own proper use and benefit. The deceased made no appointment and was dead intestate, and on the 3rd of June, 1819, letters of administration of her effects were granted to Mary Satterthwaite, widow, as her mother and next of kin. She was now dead, and had left part of the goods of the deceased unadministered, and the question was, [706] whether administration of the unadministered effects of Ann Armett should be granted to her next of kin or to the representatives of the husband?

The Queen's advocate and Haggard, on behalf of Frances Powell, the administratrix of the husband, contended that where the husband and wife perish by the same accident, the ordinary presumption of law was that the husband survived. Such was the doctrine of the civil law (Dig. 34, 5, 9, 3); and in *Taylor v. Diplock* (2 Phill. 261-279) such it should seem was the opinion of Sir John Nicholl, for after stating the facts of that case he says: "Looking to their comparative strength, there is nothing to take away the ordinary presumption that a man was likely to survive a woman in a struggle of this description." In that case the property was the husband's, and the administration was granted to his next of kin. Here the property was the wife's, and there being nothing to shew that she survived, and the presumption being that the husband would live the longest, the administration should go to his representative.

Lushington and Addams contra.

Sir Herbert Jenner. It appeared to me that this point was settled; the principle has been frequently acted upon that where a party dies possessed of property that the right to that property passes to his next of kin, unless it be shewn to have passed to another by survivorship. Here the next of kin of the husband [707] claims the property which was vested in his wife; that claim must be made out—it must be shewn that the husband survived. The property remains where it is found to be vested, unless there be evidence to shew that it has been divested.

The parties in this case must be presumed to have died at the same time, and there being nothing to shew that the husband survived his wife, the administration must pass to her next of kin.

GOOSE AND BAILEY *against* BROWN. Prerogative Court, Jan. 31st, 1838.—The will of an aged testator, prepared by a solicitor from instructions given by an executor and legatee in the will, the will not having been read over to the deceased, who did not sign the will in the presence of the attesting witnesses, but merely acknowledged his signature, pronounced for ; there being no plea given in against the will, and nothing in the evidence to impeach the capacity of the deceased.

This was a cause of proving in solemn form of law the last will and testament, with a codicil, of John Anderson, a market gardener, of Croydon, deceased, bearing date respectively the 4th of March, 1837. The instrument was propounded by Mr. John Goose and Mr. Benjamin Bailey, two of the executors, and was opposed by Thomas Brown, an executor in a former will, dated 23rd February, 1836, with two codicils thereto, dated 6th and 8th October following. There were also remaining in the registry another will, bearing date October 23rd, 1833, and a codicil dated July 8th, 1834.

The will was propounded in a condidit, upon which the three witnesses who attested the execution were examined.

It appeared that Mr. Bailey, one of the executors, [708] and who took 250l. under the will, gave the instructions to Mr. Drummond, and that the will was drawn by Mr. Drummond, without his having seen the deceased : when completed, the will was sent to the deceased's house for his perusal ; and Mr. Drummond and his two clerks soon after attended to witness the execution. The contents of the instrument were as follow :—The deceased devised the house in which he lived, with the land thereto adjoining and two cottages, to Mr. Thomas Brown, of Hampstead, gardener, subject to a charge of fourteen shillings per week, to his servant Elizabeth, and the wife of Joseph Baker during her life ; Joseph Baker and his wife also to live in the cottage they occupied, free of rent, taxes, and repairs during their lives and the life of the survivor ; on the decease of the survivor, their children in the same manner to occupy the cottage ; a cottage was given in the same manner to William Jones and his wife and four children. Two cottages to Jane Elizabeth, the wife of Thomas Jeffery Bailey and her heirs and assigns for ever ; two cottages also to William Jones aforesaid, his heirs and assigns for ever.

To George Steers, of Croydon, tailor, 50l.

To John Thomas Twigg, 100l.

To Benjamin Bailey, 200l., besides 50l. to him, as well as the other executors, for their trouble ; the wearing apparel was given to Mr. Jones, and the residue of the property to Marian Anderson, the sister of the deceased, and he appointed Messrs. John Goose, Benjamin Bailey and Charles Lashmar executors ; and if Benjamin Bailey died in the deceased's lifetime, he appointed Benjamin Ellinsworth Bailey an executor in his stead, with 50l.

[709] By the codicil the household furniture was given to Mrs. Baker.

Mr. Drummond deposed, after stating that Mr. Bailey gave him the instructions, and speaking to the respectability of Mr. Bailey, "After Mr. Bailey was gone, I immediately altered the old will in pencil to form a draft of the new one, and then gave it to my clerk, Mr. Chrees, who made a fair draft, which I corrected ; Mr. Chrees then, by my direction, made two fair copies for signature. I recollect that Mr. Bailey had requested that two copies should be made, and on the next following day, viz., the fourth of March, I put one of these copies in an envelope, sealed it, and sent it to Mr. Anderson. It was all prepared for execution, except the blank left for the date ; I forget at what hour it was exactly that I sent it, but it was during office hours. I sent it by my servant to Mr. Anderson, and in about half an hour after I took two of our articulated clerks, my fellow witnesses, Mr. Arthur William Woods and William Weall, with me, to the deceased's house, for the purpose of attesting the execution of it. I carried with me the duplicate copy ; I don't remember whether it was morning or afternoon, but if the latter, it must have been before five o'clock, because Mr. Weall leaves at that time. On arriving there, the old servant, William Jones, let us in and shewed us into a parlour, where we found Mr. Bailey, and directly we went in he said to me, 'You have omitted one thing, the furniture, &c., was to have been left to Mrs. Baker ;' I said, 'It was—it is an omission of mine ; I'll rectify it by a codicil, and it will make no difference ;' I then sat down at a table in the room, [710] and drew up a codicil to the effect just named ; I did it on the will and also on the duplicate, and on my draft, which I had also brought with me. The will was lying

on the table at this time; while I was so engaged, Mrs. Baker came into the room with a lighted candle, which, at my suggestion, Mr. Bailey had gone to the door and asked for, and I then put a seal on the codicil and duplicate. I found wax there; I had not brought any with me, not knowing it would be necessary; I used my pencil case to make the impression; Mr. Bailey then gave the will and duplicate, with the codicil on each, to Mrs. Baker, to take up to Mr. Anderson for his signature. I was not surprised at this mode of executing the will, because Mr. Bailey had told me at his visit to me at the office, and which is, I believe, the only thing I forgot to state, that the will would be executed in that way, for that Mr. Anderson was very nervous in the presence of strangers, that nervousness was his complaint, and so great was it that he never saw strangers, and that even he himself had never spoken to him; that testator had often seen him pass and repass while at his window, but had never asked him to walk up; that so great was his nervousness that he thought there would be great difficulty in his signing the will in the presence of any strangers. So I was prepared for his signing the will first, and it was agreed that, after he had signed it quietly, I was to see him afterwards and to hear him acknowledge it. Mrs. Baker then took the will and duplicate out of the room, and I heard her go up stairs; she shortly returned and brought them down, and said Mr. Anderson was ready. My two clerks and myself [711] then accompanied her up stairs, and she shewed us into a bed room on the first floor, a front room, where we found an old man sitting up in bed. He had a clean day shirt on; Mrs. Baker merely opened the door for us, and when we entered she shut it and left; I addressed the deceased, saying, 'How do you do, Mr. Anderson?' or some salute of that sort, adding, 'I'm sorry I made a little mistake in your intentions, and that I've given you the trouble of signing twice, but it's all the same, now there's a codicil, as if it had been put into the will:' he said, 'Oh, it's no matter, or, don't mention it,' as shewing that he did not mind the trouble he had had; I then took the will, which, if Mrs. Baker had brought it down, I had carried up again, as well as the duplicate, but as I have no distinct recollection of that fact, she may have left it on the table in his room while she announced to us that he was ready, and I put it before him, and said, 'Put your finger on this seal,' and he did so (the seal on the will). I then said, pointing to his signature, 'You acknowledge that to be your handwriting, and you declare this to be your will, in our presence, and request us to be witnesses;' he said, in a very agreeable manner and pleasant tone of voice, 'I do;' he looked at me and smiled as he said it; he also repeated after me as I said those words in a solemn tone, 'I declare this to be my will, and request you to witness it;' I then pointed to his signature to the codicil, and said, 'You acknowledge this also to be your handwriting, and he said, 'Yes;' I added, 'You declare this to be a codicil to your will, in our presence, and request us to be witnesses,' and he again said, 'Yes;' I [712] then took the duplicates and said, 'You do the same to this, it is an exact copy,' meaning of the other, and he said 'Yes.' I went through the execution of the duplicate in that short manner, thinking it sufficient, though from his appearance I did not observe any signs of exhaustion which might cause me to avoid troubling him to go through the form again; we three then signed the will and codicil, and duplicate in his room, at the table. There were chairs, three chairs, put there ready, and we sat and signed in his presence, and in that of each other. We did not see him sign at all, I am sure of that, but only heard him acknowledge his signature; he did so three times, first to the will, then to the codicil, and then to the duplicate of both jointly; several other things passed before we came away. I had, I recollect, two envelopes with me, I put into each one of the wills, and sealed it up; there was a lighted candle in the room, but how that was brought I forget; I gave one of the packets to Mr. Anderson, and the other I took down and gave it to Mr. Bailey; both envelopes were endorsed with the name of the deceased and his executors, as containing his will. The deceased, I recollect, asked me how much he was in my debt; I said one guinea; he said, 'Oh, is that sufficient? Will that satisfy you?' I said, 'Yes, sir;' and he took out thirty shillings—a sovereign and a half—from off the bed where he had some money, and said, 'Please to accept that;' I thanked him, and sat down and observed to him, 'Well, sir, you knew our old clerk Mr. Twigge, whom we have lost (I had often heard Mr. Twigge, before his death, speak of the deceased as his respected [713] friend), and he said, 'Oh, yes,' adding, 'He was a nice, steady, regular man,' in as near as possible those very words; he then said, 'How's your father?' and he continued this little gossip by saying 'I have known him

these many years.' I remarked, 'There have been great alterations in front of your house, Mr. Anderson,' alluding to the number of new houses built there, and he said, 'Yes; do you remember my garden here before it was altered?' I told him I did not; he said, 'What, not when it was full of herbs?' I said, 'No, it was before my time;' I observed his present garden was remarkably neat, and made some observations about the spring coming on, and that I hoped he would get out, but he said, 'Ah! ah! I don't know, I hope so;' there were a few other light and passing remarks of the same sort, which I now forget, and he held out his hand to shake mine, which I gave him; and we took our leave; he did not shake hands with them. This is all that I recollect that took place. Of the said deceased's testamentary capacity I have not the smallest hesitation in deposing I did not doubt it for a moment. It was impossible to witness his intelligent look and his cheerful, tranquil manner, and to hear his sensible remarks, and doubt for a moment that he was of sound mind, memory, and understanding, fully capable of making his will and doing any act of that nature requiring thought, judgment, and reflection. In consequence of the remarks Mr. Bailey had made about his nervousness, I did not enter on the subject of his will more than I could help; I did not wish to excite him by disturbing his tranquillity, but I recollect the happy, calm, and delightful [714] state of the old man was quite the subject of conversation between my clerks and myself as we went home; it was the theme of admiration to us to see an old man so near his end (his form was very attenuated) and yet so happy. I did not speak more on the will with him for another reason; I felt the fullest confidence in Mr. Bailey, and though I do admit that Mr. Bailey said that owing to the deceased's nervous complaint he had not spoken to him, my impression was that there were those persons, Mrs. Baker, for instance, round the deceased, who were in his confidence, and who had conveyed his wishes to Mr. Bailey. His acknowledgment of the will under these circumstances appeared to me sufficient; I had not any suspicion of fraud, or I should have risked exciting his nervousness by questioning him more closely as to his intentions, and as to the contents of his will, &c."

Lushington, against the will, contended that there was not sufficient evidence to justify the Court in pronouncing for the validity of the instrument; where capacity is undoubted, execution is *prima facie* evidence of knowledge of the contents on the part of the testator, unless where the instructions come through an interested party; here, Mr. Bailey gives the instructions, he being a legatee and an executor in the will. Mr. Drummond never had any conversation with the deceased as to the contents of the paper, nor was it read over to the deceased, who did not even sign it in the presence of the witnesses. The deceased being an old man, and much attenuated, as the witness says, in bed, and whose death took place ten days after-[715]-wards: it is to be presumed that his mental capacity was failing with his bodily strength.

Addams *contra*. From the papers before the Court it clearly appears that the deceased was a whimsical man; it is, however, proved beyond a doubt, by the testimony of Mr. Drummond, that he was of perfectly sound mind; this will, therefore, is entitled to probate; and there is no reason whatever for suggesting that Mr. Bailey, a respectable man, would have fraudulently given instructions for the will, the benefit he takes under it being no more than two hundred and fifty pounds.

Sir Herbert Jenner. The difficulty is that the party opposing the will has left the Court in the dark. How can I, in the absence of all evidence, and looking to the conversation spoken to by Mr. Drummond, conclude that the deceased was not in a fit state to make a will?

Lushington. I will then pray the Court to rescind the conclusion of the cause, for the purpose of adducing proof of the incapacity of the deceased.

Sir Herbert Jenner. Such an application must be founded upon an affidavit, stating the grounds upon which you make your prayer.

February 3rd.—The following affidavit having been brought in:—

"Appeared, personally, Thomas Brown, of the Hampstead Road, in the county of Middlesex, [716] florist, party in this cause, and made oath that, having after the death of John Anderson, the party in this cause, deceased, great reason to doubt the validity of the alleged will of the said deceased in question in this cause, bearing date the 4th day of March, 1837 (of which will he then heard for the first time only), he instructed his proctor to put the executors of the said will to the proof thereof, by witnesses in solemn form of law, on the part of him the deponent, as one of the executors of a

former will and codicil thereto of the said deceased. And he further made oath that, in consequence of inquiries then made for the purpose of obtaining information for the cross-examination of the subscribed witnesses to the said will, he, the deponent, had great suspicions that the said will in question, or the instructions for the same, had been obtained from the said deceased by some one or more of the parties interested therein, and at a time when he was in a state of great bodily weakness and mentally incapable of knowing and understanding the nature and effect of any such testamentary act; and he, the deponent, was more especially led to believe such suspicions to be well founded, by certain circumstances then made known to him and his proctor, by Dr. Chalmers, of Croydon, by whom the said deceased was attended as his medical adviser for some months prior and down to within three or four weeks of his death. But he, the deponent, was also informed that Mr. Drummond, of Croydon, solicitor, in whose office the said will was prepared, and by whom, with two of his clerks, the same purports to have been attested, is a highly respectable man, and in con-[717]-siderable practice as a solicitor in Croydon, and he therefore concluded that the fullest information would be obtained from him and his said clerks, on their examination, relative to the instructions given for and to the making and execution of the said will, as well as relative to the mental capacity of the said deceased throughout the transaction. And he lastly made oath that it was in consequence of such, his expectation of the information to be obtained from the evidence of the said Mr. Drummond and his clerks, and of his, the deponent's, disinclination to incur the expense of entering into evidence on his part in this cause, that he instructed his proctor not to give any allegation therein, on his part, in proof of the facts and circumstances of which information had been obtained as aforesaid, and particularly from the said Dr. Chalmers."

Lushington renewed his application to the Court to rescind the conclusion of the cause, for the purpose of enabling his party to adduce evidence of the incapacity of the deceased; the case was a peculiar one, the party opposing the will, knowing Dr. Chalmers's opinion to be that the deceased was not of sufficient capacity to make a will, and knowing that the will was prepared and attested by a respectable solicitor, Mr. Drummond, of Croydon, expected that full information would have been given as to the state of the deceased and his testamentary intentions; but what was the fact? the instructions came through the party benefited, he being also appointed an executor, and not having himself seen the deceased, but received those instructions from a third [718] party, and that an interested party, the will never having been read over to the deceased, nor even executed by him in the presence of the witnesses; under these circumstances it would be hard not to allow the party to adduce evidence to shew the real state of the deceased at the time.

Addams in opposition to the application. The affidavit before the Court sets forth no grounds to justify the present prayer, and if the Court were to accede to the application now made, it may be called upon to do the same thing in every case which may come before it; at all events, should the Court give leave to the party to adduce evidence in the cause, it would be at the risk of costs, and the executors must have an opportunity of contradicting such evidence.

The Court. This is an application of a novel nature, to allow parties to adduce evidence of incapacity, after the cause has been concluded and the evidence seen. But there are peculiar circumstances in this case which induced the Court to listen to the present application—the extraordinary way in which the instructions were given to Mr. Drummond, and the manner in which the execution took place, the deceased not having signed the instrument in the presence of the witnesses, but merely acknowledged his signature. If the conclusion of the cause were rescinded, both parties would certainly be at liberty to adduce evidence, and it would be at the risk of costs on the part of the person making the application.

[719] What then are the facts? (The Court here read the affidavit and proceeded.) If the party had these suspicions, he ought then to have made further inquiries; he says that he inquired of Dr. Chalmers; he, therefore, at that time, had reason for seeking evidence; but he says that, being informed, and believing Mr. Drummond to be a highly respectable man, and in considerable practice as a solicitor, and expecting full information from his evidence, he instructed his proctor not to give any allegation; then, as far as appears, Dr. Chalmers gives certain information, but not sufficient to counteract the weight of Mr. Drummond's character and evidence. I am of opinion,

upon the statement contained in the affidavit, that it does not follow that the Court would come to the conclusion that the deceased was in such a state of mind as to be incapable of executing his will; I must, therefore, reject the application.

February 7th.—*Judgment*—*Sir Herbert Jenner*. The question in this case relates to the will of Mr. James Anderson, who died on the 14th of March, 1837; the will is dated on the 4th of that month, and purports to have been executed in the presence of three witnesses, Mr. William Drummond, a solicitor, and two gentlemen who are his clerks; and there is a codicil witnessed by the same gentlemen. The question is whether, under the circumstances, there is sufficient evidence that this will is the act of a capable testator at the time of execution?

The will is propounded in a conditio, on which [720] the three subscribed witnesses have been examined. There is no plea on the other side; so that the Court has no evidence but that of Mr. Drummond and his clerks.

The deceased was a botanical gardener, at Croydon, growing herbs for physical purposes. He had executed two or three other wills. By one of the 23rd of February, 1836, Mr. Brown is residuary legatee and an executor, and a Mr. Christie has 500l.; there were also two codicils to that will, dated the 6th and 8th of October, 1836. By the first of these codicils the deceased revoked the legacy of 500l. given to Mr. Christie; and by the second he directed his residuary legatee, Mr. Brown, to pay to Mrs. Baker, his housekeeper, fourteen shillings per week for her life. By the present will Mr. Brown is excluded, and Messrs. Goose, Bailey and Lashmar are appointed executors, with a legacy of 50l. each for their trouble, in addition to which, Mr. Bailey has a legacy of 200l. The residue of the property is given to the sister of the deceased. The codicil, which bears date the same day, gives the plate, linen, and furniture to Mrs. Baker.

It appears that Mr. Drummond was the drawer of the will, and that he received instructions, not from the deceased, but from Mr. Bailey, the executor with a legacy of 250l., and that it was executed, not in the presence of the witnesses, but simply that the signature was acknowledged in their presence: there is no proof of instructions or of reading over the will prior to execution, or of knowledge of its contents, except so far as the acknowledgment of the signature to the instrument. Mr. [721] Bailey himself had never spoken to the deceased, so that he could not have received instructions from him, but through the medium of another person. The material evidence, and the only evidence in the cause which gives the Court any information, is that of Mr. Drummond, the solicitor, who drew the instructions from Mr. Bailey; the two other witnesses are young gentlemen, who are not able to give much information. Mr. Drummond says there was no person acquainted with the deceased, who, of late years, had lived very retired. He (the witness) knew Mr. Bailey to be a steady, upright person. The result of Mr. Drummond's evidence is, that he believes the deceased to have been in a perfect state of testamentary capacity. Mr. Drummond would have done better if he had informed himself as to the deceased's knowledge of the contents of the will; yet I cannot say he has stated anything whatever which goes to shake the capacity of the deceased, or to lead the Court to suppose that when he acknowledged his signature he did not mean to give force and effect to the instrument. If there was any reason to doubt the capacity of the deceased, the Court would have required further evidence. When the papers were first read by the Court, it did seem an extraordinary transaction, and one which required to be examined with considerable minuteness; but upon a further consideration of the case I am satisfied that Mr. Drummond's evidence is sufficient to support the act as that of a capable testator, there being nothing to lead me to suppose that the deceased's mental faculties were affected. I, therefore, pronounce for the will, but decree Mr. Brown's costs to be paid out of the estate.

[722] *HANDLEY AND JONES against EDWARDS*. Prerogative Court, February 21st, 1838.—A person (a solicitor) produced as a witness, by the executors who propounded a will, having admitted that he retained their proctor in the first instance, and was responsible to him for his bill of costs, held to be an incompetent witness on their behalf.

This was a cause of proving in solemn form of law the last will and testament of Mr. John Edwards, who died on the fifth of October, 1835. The will was propounded by the executors, and was opposed by Mr. William Edwards, the nephew and next of kin of the deceased, on the ground of incapacity and undue influence. At the hearing of the cause an objection was taken by the counsel for Mr. Edwards to the competency

of Mr. Joseph Parkes as a witness, on the ground of his being interested in the result of the suit. He had been examined on behalf of the executors, and was the principal witness in support of the will. The objection was founded upon his answer to the sixty-third interrogatory, in which he stated that "the proctor for the producents was retained by him, to conduct the cause on their behalf, that he did by such retainer become responsible for the payment to the said proctor of his bill of costs or expenses in this cause."

Lushington in support of the objection. The question is, whether a liability for costs on the part of the witness (Mr. Joseph Parkes) constitutes such an interest as will disqualify him from giving evidence in the cause?

The Court. Is it admitted that he is legally responsible to the proctor?

[723] The Queen's advocate. No, we do not admit it.

Lushington. Mr. Parkes, having stated in answer to the fifth interrogatory that he acted as solicitor for the producents, says, in answer to the sixty-third interrogatory: "The proctor for the producents was, in the first instance, retained and employed by me to conduct the cause in their behalf; I did by such retainer become responsible for the payment to the said proctor of his bill of costs or expenses in the cause." Then he gave his evidence, under the impression that he was liable to pay the costs in the cause, and it might be contended that this would disqualify a witness, on the ground of supposed interest, but assuming it to be otherwise, was he not under a legal responsibility? In the first place, the witness admits that he is legally responsible; secondly, how can his legal responsibility (he having retained and employed the proctor) be denied? Is not every man liable for the expenses incurred in a work or business which he directs to be done? Is not a solicitor in the same situation? There can be no doubt that a liability for costs results from such a circumstance. He further answers, "I have not since in any way been released from such my responsibility. In case the producents should be unable to pay the amount of the said proctor's bill, I will not venture to swear that he, the proctor, would not have any remedy at law or otherwise against me for the recovery of the amount of his said bill, but it is evident that the responsibility is merely nominal." It is immaterial whether he considers it nominal, for this reason: If I become responsible for the costs in a cause, it may be true [724] that another person may be responsible over to me, and he may be an individual of enormous wealth, but I am responsible in the first instance, and the individual responsible to me may be worth ten thousand pounds one day and nothing another. Mr. Parkes has rendered himself liable for the costs in the first instance, and is, therefore, interested in the result of the suit; for on the result of the suit may depend the amount for which he is liable: so that he has a direct legal interest in the cause.

The authorities in Courts of Common Law are clear upon the point, and what is infinitely more material, the same rule prevails in Courts of Equity, not because one is more of an authority than the other, but because the proceedings in Courts of Equity are more analogous to our proceedings, the mode of taking depositions being precisely the same.

First, then, as to cases in the Courts of Law. In *York v. Gribble* (1 Esp. 319) a person who had made himself liable to the attorney for the costs of the action was considered incompetent as a witness, without a release. In *Parker v. Vincent* (3 Car. & P. 38) the witness had instructed the attorney to go on with the action, which, it was held, rendered him liable to the costs, and Lord Tenterden rejected his evidence. Mr. Parkes has done more; he instructed the proctor to begin the suit. In *Rex v. Newland* (1 Leech, C. C. 311) the same principle was acted upon, and Mr. Baron Perry said, "If a witness admits himself to have an interest, whether he has an interest in fact or not, yet the belief of it has an equal operation on his mind; and in either of these cases it would be an objection to his testimony;" [725] and it was stated in that case on the authority of *Rex v. Woolridge*, in 1784, that "a master may maintain the suit of his servant; but if he acknowledge that he is under an honorary obligation to pay his costs he cannot be examined in his cause."

In *Bell v. Smith* (5 Barn. & Cress. 188) the witness had rendered himself liable to the attorney for the costs, and the Court of King's Bench held that he was incompetent on that ground—so much for the authorities in Courts of Common Law.

I will now refer to a case in the Court of Chancery which entitles me to say that the same rule is completely settled there. It is a decision of Lord Eldon, than which

I need not state there can be no higher authority, and it was made under circumstances which called for careful attention and after vast deliberation. The case is that of *Vaughan v. Worrall* (2 Swanston, 395). The observations of the Lord Chancellor were as follows:—"There is no doubt that of late years Courts of Justice have struggled to convert objections to the competence of a witness into objections to credit; and recent decisions (which, though it is difficult always to understand the grounds, are substantially right) establish this, that if the witness has no interest in the event of that cause, though his answer to the questions may be evidence for or against him in another cause, that is not an objection to his competence; but I have never known that doctrine applied to a case in which a bill has been filed in this Court, and the witnesses have engaged to pay the costs of the proceedings; there neither the plaintiff nor the wit-[726]-nesses could be otherwise than aware that they had an interest in the event of that suit."

The Court. In that case, was the party interested in respect to the costs of the other party?

Lushington. It does not appear. But what is the principle as to the competency of witnesses on the ground of interest? Has he or has he not any actual legal interest in the result of the cause? That is the true principle, and it is impossible to fix any standard of the amount of interest which shall create bias or operation on the mind of a witness with reference to his situation in life. If he has an interest of eighteen pence he cannot be a witness: he is completely disqualified. Mr. Parkes tells the Court he has an interest, that the result of the suit may occasion loss to him, and if it may be the effect of the suit to expose him to pecuniary loss, it is the nature of man to endeavour to avoid it: the evidence of a person is altogether rejected if he be interested directly, though in the remotest degree, and be the amount of interest ever so small.

But what has been done in our own Courts? In a variety of cases the same doctrine has been acted upon, that a liability to costs renders a person incompetent as a witness. In *Hudson v. Beauchamp* (1 Add. 352) a motion was made to compel a witness, who had been examined on behalf of Hudson, one of the parties in the cause, to answer explicitly to an interrogatory (which he had refused to do), whether he was or was not responsible for the ex-[727]-penses of the suit. What was the decision of the Court? "I think that the witness is bound, and may be compelled to answer the interrogatory in question explicitly; and, consequently, I direct the monition to issue as prayed." Why should the Court have been pressed to require an explicit answer? To shew that if the witness was responsible for the costs, he was incompetent.

There is also the case of *Cooper v. Kempton*, in 1808, before Sir W. Wynne (not reported), in which, according to my note, the Judge himself took the objection, and refused to allow the evidence to be received.

The Court. I have been furnished with Dr. Arnold's note of that case, but it does not appear whether the Judge took the objection or the counsel. One of the witnesses had agreed to pay a small sum towards the expenses in the cause; it does not appear that he had a direct interest in the suit; and the Court said (according to the note before me), "clearly incompetent." And there is a case in 1745 where a witness had promised to pay the proctor and had paid money, and he was rejected. So far as Dr. Arnold's note goes, the witness was considered incompetent.

Lushington. And on the ground of his being liable for costs?

The Court. It should seem so.

[728] Lushington. There is another case which shews that this Court, where a witness acknowledges himself to have any interest whatever, has declined to receive his evidence. The case of *Sudyer and Sudyer* against *Man* (1 Cases before Sir G. Lee, 159), before Sir George Lee, where a witness had been examined in support of a will under which he took a ring. Sir George Lee directed the deposition to be suppressed, and that the witness should renounce, or be paid his legacy and be re-examined. It was, therefore, the invariable doctrine of these Courts at that day, as subsequently, that the slightest interest in the result of the suit disqualifies a witness.

Cooper v. Derriennic (Hagg. E. R. 482) goes to establish the position that in any case, even though the result is uncertain, a direct interest will disqualify. In that case William Giles had been examined in support of a will, under which he had a legacy of 300l., but the legacy had been paid to him by order of the Court of Chancery; and his interest could by no possibility be affected unless the will had been overturned,

and the executors commenced a suit to recover the legacy as paid in error in point of law, or he should be called upon for a rateable proportion of the costs; yet it was an interest depending on the result of the suit, and the Court allowed him to be reproduced and resworn only on a release. A similar case is mentioned in the note to the report.

The Court. There is the case of *Salmon v. Cromwell*, in [729] 1820, where Sir John Nicholl held a witness competent.

Lushington. In considering a point of this kind we should look to decided cases that are reported, to see whether the Court was in possession of all the necessary information before it determined the point.

The Queen's advocate. In *Salmon v. Cromwell* the objection was made to the evidence of a witness who on interrogatory admitted he was liable to the proctor for the expenses of the suit; but the judge overruled the objection.

Lushington. In that case, although the party may have considered himself responsible to the proctor, that might have been his opinion only, and it is a nice question whether the judgment of the individual is to disqualify him.

The Court. The note before me says that the judge admitted the evidence because the witness had no interest in the suit. "The case is different," he says, "where a party has entered into an engagement to pay a part of the costs;" so that it would appear that he was not responsible for the costs.

Lushington. He might not have been responsible; here is a legal responsibility. The only points are whether Mr. Parkes has a legal interest: and whether the Court can receive the evidence of a [730] person who, at the time of giving it, had an interest in the result of the cause.

Addams on the same side. The witness has admitted that he is legally liable to pay the proctor's bill, and if he is so liable, then he is not a competent witness.

In all the cases up to *Salmon v. Cromwell* it has been held that a legal liability for costs renders a witness incompetent. All the decisions in the Courts of Common Law and Equity are to the same effect. Then it comes to this, whether that single case is to ride over all preceding decisions. The doctrine of that case was not adopted by the Court of Admiralty in the case of *The Harvey* (2 Hagg. Adm. 83, note), in 1827. That was a case of serious hardship, and not a case in which to take such an objection, and the party objected to was almost a necessary witness; for there was hardly any one able to prove the case but himself, still, as he was liable for the costs, Lord Stowell rejected the evidence.

The Court. He was liable to all the costs of the cause perhaps of both parties; this case does not come up to that.

Addams. Can it be said that, on the result of Mr. Parkes's evidence, it may not depend whether the adverse party shall be condemned in the costs? If the condemnation of the adverse party in the costs depends upon his evidence, he has a strong [731] interest in the suit, for by his evidence Mr. Edwards may be condemned in the costs, or the will may be pronounced against, and the executors may be condemned in costs. They may be able to discharge a small sum, but not a large sum. But if there is a primary liability, the witness is disqualified from giving evidence.

The Queen's advocate contra. It appears to me an extraordinary position to lay down that if Mr. Parkes is under any contingency in the slightest degree liable to any part of the expenses of this suit, it is sufficient to vitiate his testimony. But, first, is Mr. Parkes in reality responsible for those expenses? There is this great distinction between the cases cited in the Common Law and Equity Courts and the present case, that in those cases the parties made themselves responsible for the costs generally, not only of their own party, but of the other side, if condemned in costs, which gave them a direct interest in the suit, for nothing disqualifies a witness but a direct and certain interest in the event of the suit. In this case, whichever way the suit is decided, Mr. Parkes, according to his own opinion, may be responsible to the proctor whom he retained, in case the party whose agent he is shall be unable to pay.

The Court. That is not quite the effect of his answer; he says he is responsible.

The Queen's advocate. If he retained the proctor, and his party is unable to pay him, the proctor [732] would have a remedy against the solicitor. But the parties are responsible to the proctor also, though Mr. Parkes may be responsible, and that would be the case whichever way the cause was decided. There is nothing dependent upon the event of the suit, his liability is the same on that side, and that side only.

There is a responsibility on one side only, and only in the event of the party being unable to pay; the responsibility, therefore, is merely nominal.

The Court. May it not still be his interest to make as favourable a representation as he can?

The Queen's advocate. It would not alter his responsibility. In *York v. Gribble* the witness had employed the attorney and rendered himself liable for costs, by which, I understand, the costs of the action; a release was taken and the witness was examined. But there was no discussion of the principle in that case, which was in 1795, and there are later cases of a different tenor.

In *Birt v. Kershaw* (2 East, 458) the marginal note is, "An indorser on a note who has received money from the drawer to take it up is a competent witness for the drawer in an action against him by the indorsee to prove that he had satisfied the note; being either liable to the plaintiff on the note, if the action were defeated, or to the defendant for money had and received, if the action succeeded; and his being also liable, in the latter case, to com-[733]-pensate the defendant for the costs incurred in the action by such non-payment makes no difference." Lord Ellenborough said, "It appears to me, in a very simple and clear view of the case, that the witness stood indifferent between the parties. He must either be liable to the plaintiffs as indorsers of the bill, or to Kershaw, for the money received by him in order to discharge it. It is true that in the latter case, if these plaintiffs recover, he may also be liable to Kershaw for the costs of this action: but that argument was urged in *Ilderton v. Atkinson* without effect." This was in 1802, seven years after *York v. Gribble*. In *Ilderton v. Atkinson* (7 T. R. 480), referred to by Lord Ellenborough, the marginal note is, "If A. have received money from B. to pay to C., and the question be, whether A. were the agent for C. for that purpose, A. may be called as a witness to prove the agency." On the trial the question was, whether one Barber were a competent witness? He had been the agent of the plaintiff, and, as asserted by the defendant, continued to be so at the time when he received a sum of 200l. (the money in dispute) from the defendant, and received the money in that character. The plaintiff admitted the receipt of the money by Barber, but denied his agency at the time of the receipt. The defendant called Barber to prove the agency, but he was objected to on the ground of interest: it was said by the defendant's counsel that his interest was equal either way, and, therefore, that he was admissible; against his admissibility it was argued that Barber's interest was stronger in favour of the defendant, [734] because the defendant would be entitled to recover the costs of that action, as well as the money itself from Barber, if Barber had received the money under a misrepresentation of his own character, and Mr. Baron Thompson rejected the witness: but upon a motion to set aside the verdict the Court were of opinion "that the objection to the admissibility of the witness was not well founded, because, in any event, the witness stood indifferent in point of interest between the parties, being liable either to pay the money received to the plaintiff, or to refund it to the defendant. That if such an objection as the present were to prevail, it might exclude brokers who had effected policies of insurance; and that it would be difficult hereafter to draw any certain line." A broker, therefore, may be called to give evidence, and so, I submit, ought to be the case with a solicitor, who is almost a necessary witness, being the drawer of the will.

The Court. There is a much later case (1834), *Doe v. Allbutt* (6 Car. & P. 131), in which a witness was called, who had made himself responsible for costs, and the attorney executed a release, discharging him from all "fees, costs, and charges." Baron Gurney held that the release was sufficient, and the witness was examined. It was thus assumed that the party, being liable, was disqualified without a release.

The Queen's advocate. The cases in the Common Law Courts seem to be conflicting, but the decisions [735] there, or in the Courts of Equity, are not so important as the decisions in our own Courts. In *Vaughan v. Worrall* there was a subscription, and an agreement to act gratuitously, and to advance 100l. towards the costs. The party was the solicitor of the plaintiffs, and if they had been condemned in costs, he would have had to pay a part of the costs of the other side. I consider that the witness in that case had placed himself in the situation of the plaintiffs. This seems to distinguish that case from the present. It was extremely proper, there, that the witness should not have been examined.

In the case decided by Sir William Wynne, *Cooper v. Kempton*, the party had joined in a subscription, and was responsible for the costs.

In *Hudson v. Beauchamp* the witness had been asked whether he had not advanced money for carrying on the cause, and the Court decided that the answer was not sufficient; these cases, therefore, are distinguishable from the present.

The only case directly in point is that of *Salmon v. Cromwell*. In that case the witness, the drawer of the will, was the solicitor in the cause, and had the management of it, and considered himself responsible for the expenses of the proctor. It is true he was an executor and a legatee under the will, but he had renounced the executorship, and the legacy was given him only as executor. He had taken an indemnity as to the expenses, but that made no difference; the party might not be able to pay. This case, therefore, goes the full length of the present, and is so similar to it, in all its parts, that the cases are not distinguishable. The objection was taken and argued before Sir John Nicholl, [736] who overruled it, and admitted the evidence, and upon that evidence the will was supported.

Phillimore on the same side. The proposition contended for by Dr. Lushington is an alarming one, and if adopted will have the effect of altering our practice. I deny that in Courts of Common Law there is an unbending rule; Mr. Phillipps and Mr. Starkie say there are exceptions to the rule. Should not this case be an exception?

Mr. Parkes was the drawer of the will, and is a subscribed witness; he was the confidential solicitor of the deceased, and the depository of his testamentary intentions. According to my view, Mr. Parkes was (in the sense in which Mr. Justice Buller uses the term) a necessary witness in the cause. It is impossible that the Court can come to a conclusion satisfactory to its own mind, without the essential evidence of this witness. What does he in effect say? "I am the agent quod hoc of the executors; I employ the proctor, and consequently he has a remedy against me in the first instance, and I have a remedy against them." Before he is liable to the costs we must presume inability in the parties to pay them. It is not a direct responsibility, it is a remote responsibility, which, in all Courts, stands upon grounds distinct from direct responsibility. A witness who gains by the direct result of the case is incompetent; but writers state that there are exceptions to that rule. Some witnesses, *primâ facie* incompetent, are rendered competent by act of Parliament; others are competent from necessity; others from principles of public policy. The objection to competency, on the ground of interest, proceeds from a supposition of too great a bias on the mind of the witness, and it is the great interest of the public to obtain pure testimony; but the public interests may suffer more from rejecting evidence than from receiving it. The inclination of all Courts is to let a witness be examined, and to deduct from his credibility. Lord Mansfield, who was imbued with the doctrines of the civil law (by which hardly any interested witness was excluded) favoured this principle. The rules of evidence adopted in our Courts of Law are repudiated to a great extent by many nations, and are held to be the greatest blot upon our system of jurisprudence. Our Courts are infinitely more lax and liberal in their principles, being founded upon the doctrines of the civil law, and are not bound down by those of the Common Law Courts. In *Abrahams v. Bunn* (4 Burr. 2251), which was an action for an usurious contract, tried by Lord Mansfield, a motion for a new trial was founded upon the alleged incompetency of a witness for the plaintiff, the borrower of the money, who was called to prove the usurious contract. Lord Mansfield delivered the judgment of the Court, in which, after referring to certain cases, particularly that of *Bailie v. Wilson*, before the Delegates, he says, "The solemn discussion, in these three cases, drew the line between interest, which goes to the competence, and influence, which goes to the credit, more clearly than had before been understood. It established a rule, 'that where the matter was doubtful, the objection [738] shall go to the credit.'" The witness in that case was held competent.

Phillipps lays down the rule broadly, yet he says there are exceptions to it, as respects responsibility for costs. Starkie lays it down that an engagement to pay the costs constitutes a disqualifying interest. There is no engagement here: the party must be directly responsible; he must have an interest in the result of the suit; where the interest is doubtful the objection goes to the credit and not to the competency of the witness. Starkie, referring to *Carter v. Pearce* (1 T. R. 163), says, "The interest must be a present, certain, vested interest, and not uncertain or contingent." The

general result of the common law cases is, that a direct and certain interest must be shewn; a less interest will go, not to competency but to credit only.

In *The Catherine of Dover*, in the Court of Admiralty (2 Hagg. Adm. 145), where an objection was raised to the competency of a witness, on the ground of interest, the Court said: "In a case of doubt it would be disposed to admit rather than exclude the evidence." "Objections to competency, on the ground of interest, are sustained in order that evidence may be obtained free from bias; but if to effect this the Court excludes the only proof that can be offered by the defendant the principle is destroyed, by transferring the bias to the other side, and by hearing the case on ex parte evidence alone." In the present case the evidence, without that of Mr. Parkes, will be ex parte evidence. The Court added: "If [739] evidence could have been produced from the galliott, on one side or the other, I certainly should not have admitted witnesses liable to this objection of interest; but the necessity of the case justifies the exception; and this is the ground of my judgment. That ground of exception is recognized in all books. Mr. Justice Buller, in his *Nisi Prius*, states it "as the third exception, under the general rule, that a party interested will be admitted where no other evidence is reasonably to be expected." And in *The Pitt* (inserted in a note to the report of the preceding case), the Court admitted the evidence of witnesses who were interested, as plaintiffs, in the costs, observing that such witnesses may be examined in some cases ex necessitate rei; that the Court always endeavours to exclude biassed witnesses, but it must sometimes admit them.

In *Sudyer and Sudyer v. Man* the witness was a legatee.

The fair result of the cases, though they are not without difficulty, is that the Courts struggle to admit evidence, and in doubtful cases favour its admission. The case of *Salmon v. Cromwell*, in which such evidence as this was admitted, after great deliberation, is a case absolutely in point.

Lushington in reply. My learned friend cannot be serious in his exposition of the doctrine of evidence, according to which, if the evidence be material, the Court will admit it, whether the witness is interested or not; that the Court is to decide whether the evidence be material, and has then the power to dispense with the rule. The Court has no such power, and no Court ought to be armed [740] with such authority. The question whether the witness is interested or not is a distinct point, with which the discretion of the Court has nothing to do. Then, who are necessary witnesses? Not the drawer of a will, or the attesting witness to a will. A necessary witness is one to a transaction to which no one else can be privy. Then it is said that, in case of doubt, all Courts lean to the admission of evidence, but there is not a shade of doubt here, the witness admits his interest.

The case in *Burrow* shews no more than that whereas, prior to the judgment in that case, Courts of Law had held that not only every witness who had an interest in the suit should be excluded, but any one who had an interest in the question was disqualified. Lord Mansfield examined the distinction, and it was held, for the future, that exclusion, on the ground of interest, should be confined to those who had an interest in the result of the suit itself, not in the question.

It has been contended that a liability for costs will not disqualify unless it be for costs on both sides. There is no authority for such a distinction; there is no principle for it. The ground of disqualification is the interest, however small it may be.

In *Salmon v. Cromwell* the whole decision went upon the answer of the party, that "he considered himself responsible." But, although I admit the weight of this decision, I oppose to it that of Lord Stowell, in *The Amitié* (5 Rob. 344, in the note), where the evidence of a witness was excluded who was biassed in fact, though not in law.

[741] It is now said, in spite of the decision in *Vaughan v. Worrall*, that this Court is not to be bound by such rules, but may adopt its own notions of what is convenient in particular cases. If we repudiated the principles of evidence adopted in Courts of Common Law and Equity we should get rid of no blot, but reject one of the greatest advantages to the jurisprudence of any country—that of having certain rules of evidence not depending upon the discretion of this or that judge. The rejection of Mr. Parkes's evidence will put an end to an injurious practice, where the solicitor who prepared the will not only conducts the suit and examines the witnesses, but makes himself responsible for the costs of the proctor; whereby his passions and feelings are excited, and his evidence is rendered unworthy of credit.

February 27th.—*Judgment*—*Sir Herbert Jenner*. The question which the Court has now to decide is whether Mr. Parkes, a solicitor, who is the drawer of the will propounded in this cause, and one of the subscribed witnesses, is a competent witness to prove the execution of it. The objection to the competency of this gentleman is founded on his answer to the sixty-third interrogatory, in which, as it is argued, he has admitted himself to be liable to the proctor in the cause for his bill of costs. It is contended that by this responsibility he is disqualified from being examined as a witness in support of the will. On the other hand, it has been contended that Mr. Parkes is not legally responsible for the costs by what he has stated in his answer to [742] the interrogatory; that he has no interest in the result of the suit, and consequently that he is a competent witness, whatever deduction may be made from his credit in consequence of his having employed the proctor and admitted himself to be, to a certain extent, responsible for the costs.

This question has been argued with great zeal and ability on both sides—the counsel on both sides probably feeling that the question as to the validity of the will must depend on the manner in which this question shall be decided.

The competency or incompetency of Mr. Parkes to be examined as a witness in this case depends upon the question whether he had a legal interest to support the cause of his clients; and in the course of the argument the Court was referred to a variety of cases that have occurred in the Courts of Equity and Common Law, and in proceedings at Nisi Prius, and also to one or two cases which have been decided in these Courts, in which the question as to the competency or incompetency of witnesses had been very much discussed. It is unnecessary for the Court to travel with very great minuteness through the facts of the cases referred to, for they are not very material: the question has been whether, if a witness was responsible for costs, it was or was not an objection to the credit or competency of the witness? and in a variety of cases very nice distinctions have been drawn between objections which go to the competency, and those which go to the credit of the witness; but I think the general result of the cases to be this, that, where a witness is legally responsible for the costs, that operates as a disqualification to be examined in [743] support of the cause, for the expenses of which he had rendered himself liable. The question, therefore, at present is whether Mr. Parkes, in the first instance, is or is not legally responsible for the costs: because I think, according to later and better decisions, it is not a mere imaginary responsibility, not a mere honorary obligation to pay the costs, that will disqualify a witness to be examined in a particular cause. Whatever may have been the decisions in earlier times, and in the cases referred to in the Court of Admiralty, in later days it has been held that, in order to make a witness incompetent, there must be a legal responsibility and an interest in the matter in dispute. This is laid down strictly by Mr. Phillippis and Mr. Starkie on the Law of Evidence, and it is expressed in the clearest, most intelligible, and most convincing terms by the latter writer: "The interest to disqualify must be some legal, certain, and immediate interest, however minute in the result of the cause, or in the record, as an instrument of evidence acquired without fraud. In the first place, it must be a legal interest in the event of the suit or in the record, contradistinguished from mere prejudice or bias, arising from the circumstance of relationship, friendship, or any other of the numerous motives by which a witness may be supposed to be influenced." "If a party be really interested in the event of a cause, he is not competent, although he does not apprehend that his interest is a legal one: for it would be exceedingly dangerous to violate a general rule, because the witness does not understand his legal responsibility. If a witness supposes that he is under an honorary, though not a legal, engage-[744]-ment as to indemnify the bail, he is still competent, for he is under no binding engagement, and it would be highly inconvenient to make competency, in such cases, to depend on the witness's notions of propriety, and it would savour of inconsistency to found a suspicion of his veracity upon a just and honorable feeling" (Starkie, vol. 2, pp. 744, 755). And the case of *Parken v. Whitby* (1 Turn. & R. 372) is, I think, a sufficient authority to shew that there must be a legal responsibility, and not a mere honorary obligation, which a witness may consider himself to be under.

Now, the first thing to be considered is whether Mr. Parkes is legally responsible to the proctor for the costs in this suit, and in order to arrive at a just conclusion on that point it is necessary to read, not only the answer to the interrogatory, but the

interrogatory itself, in order to determine the effect of the answer, the whole of which must be taken together. The interrogatory is to this effect: "Let the said Joseph Parkes be asked, was not the proctor for the producents, in the first instance, retained and employed by you to conduct the cause on their behalf? Did not you by such retainer become responsible for the payment to the said proctor of his bill of costs or expenses in this cause? Have you since, in any way, and if yea, when and in what way, been released from such your responsibility?" The answer is to this effect: "The proctor for the producents was, in the first instance, retained and employed by me to conduct the cause in their behalf. I did by such retainer become responsible for payment to the said proctor of his bill of costs, [745] or expenses in the cause. I have not since in any way been released from such my responsibility." As far as I have read, the answer states an absolute and unqualified admission that Mr. Parkes had retained and employed the proctor, and was responsible to him for his bill of costs, and that he had not been released from this responsibility; and if the interrogatory had rested here, there could be no doubt that he was under a legal responsibility; he might have been indemnified and released from liability; but there is no release, and Mr. Parkes was legally responsible, though other parties might also be responsible. But the interrogatory goes on: "In case the producents should be unable to pay the amount of the said proctor's said bill, will you venture to swear positively that he (the proctor) would not have any remedy at law or otherwise against you for the recovery of the amount of his said bill?" Mr. Parkes answers: "In case the producents should be unable to pay the amount of the said proctor's said bill, I will not venture to swear that he (the proctor) would not have any remedy at law or otherwise against me for the recovery of the amount of his said bill; but it is evident that the responsibility is merely nominal, as far as I am concerned."

Let us see what is the true construction of these answers, and the purpose for which the interrogatory was framed. He admits that he is responsible to the proctor for his bill of costs in the cause; and there is no doubt that if the examination had been *vivâ voce* it would have gone no further than to have asked Mr. Parkes whether he had any release from his responsibility. But as the answers of the [746] witness to the first part of the interrogatory could not be known to the other party, it was necessary to probe the witness farther, in order to meet the possibility of an answer not admitting his liability; and accordingly the interrogatory, in effect, proceeds upon a supposition that he had denied his responsibility to the proctor; and it goes on in effect to ask, "If you are not generally responsible for the proctor's bill of costs, will you swear you are not in a limited degree liable; that is, if the executors should not pay the proctor, must not the costs be paid by you?" and he admits this; but this is not any qualification or limitation of his own responsibility, for he had admitted before that he was responsible to the proctor. I am of opinion that Mr. Parkes was, according to his own admission, responsible to the proctor for the costs, and it was the necessary legal consequence of his act, and as he has not had any release from that responsibility it still exists.

The next question is, what is the effect of this legal responsibility? Does it affect the competency of the witness or his credit only? I have stated that, in many of the cases referred to, there were nice distinctions between objections which go to competency and those which go to credit only; but it is necessary to consider those distinctions here, for I am not aware of any case except one (to which I shall advert) in which there was any doubt, as far as decisions in Courts of Common Law go, that a responsibility to answer costs in an action would be a disqualification of a witness. It is laid down expressly by writers on the Law of Evidence—Mr. Phillpotts and Mr. Starkie—that a responsibility for [747] the costs, or any part of the costs, constitutes such an interest as disqualifies a witness; and this rule appears to be supported by so many authorities (which were referred to in the argument) that it would be a waste of time to go minutely into a consideration of the subject. It was indeed admitted in argument that there was a rule laid down to that effect and supported by authorities; but it was contended that, in some of the cases, the costs for which the witness was responsible included the costs of the other party, and that the result of the cases shewed that there must be a liability for the costs of both parties to work a disqualification. But this is not the case in *York v. Gribble*, or in *Doe dem. Dully v. Allbutt* (6 Car. & P. 131), where the responsibility does not go beyond the costs of the attorney to the party for whom

the witness was called to give evidence. It was admitted in those cases that the rule was general; that it was an universal rule that a person responsible to the attorney who conducted the cause for the party in whose behalf he was called was disqualified.

Both these cases, it is true, were decisions at *Nisi Prius*, but it can hardly be said that they were decided without much consideration. There could be no misunderstanding of the law applicable to the case, for there was no question as to the rule of evidence; the only question was whether the release tendered was sufficient?

But there is another case which was not a decision at *Nisi Prius*; but an application to the Court of King's Bench for a new trial, in consequence of a misdirection of the Judge at *Nisi* [748] *Prius*; this is the case of *Bell v. Smith* (5 Barn. & C. 188), in which one of the grounds of objection to the competency of a witness was that he was responsible to the attorney, employed to commence the action, for the costs; and Abbott, C. J., said: "If the action was brought by his authority, either express or implied, he became liable to pay the attorney employed to bring it; and he is still under that liability, nothing having been done to deprive the attorney of his right to recover his costs from him." Bayley, J., said: "The attorney employed to bring the action has a claim upon the assured for his costs." The other Judges—Holroyd and Littledale—concurred, and a new trial was granted, this being a decision of the Court of King's Bench, that a witness responsible to the attorney in the action for his costs is disqualified. I do not understand that there is any case adverse to this rule.

The case of *Vaughan v. Worrall*, cited in argument, seems to shew that the same rule is applicable in Courts of Equity, and that there a person responsible for costs would be considered an incompetent witness. Then I cannot help thinking that this is a general rule in Courts of Common Law and of Equity, and I am not aware that there is a different practice in these Courts; I do not think I am at liberty to say that in these Courts other principles of evidence are understood to prevail than in the Courts of Common Law and of Equity. It has been urged in argument that these Courts are more lax in respect to those principles than other Courts. It may have been so, perhaps, formerly; but I must relieve this Court from the [749] imputation that, at this time, it adopts other rules of evidence than other Courts, since in all Courts the same principles are applicable, though there may be different modes of application; and I do not wish it to go out to the world that a greater degree of laxity prevails in the proceedings of these Courts than in those of other Courts. I apprehend the same principles apply to these Courts as to other Courts, though the different modes of proceeding may admit sometimes of a difference of application. These Courts have endeavoured to conform, as far as possible, to the principles adopted in other Courts.

No cases were referred to in the argument in which this point had been directly decided in these Courts. *Hudson v. Beauchamp* was a case in which the point was not expressly determined: it turned out on re-examination that the witness had been responsible for costs at his first examination, when, on his refusal to answer an interrogatory, his re-examination was directed; but I think there is reason to collect, from the manner in which the objection was pressed and received, that if he had stated at the former examination that he would be responsible for costs at the time the first examination took place, the Court would have rejected the evidence; but as it did not so turn out, the evidence was received.

The case of *Salmon v. Cromwell* is considerably more to the point than any other adverted to in the later proceedings of the Court; and it does appear that Mr. W. H. Salmon, who was the attorney in the case, stated that he had taken an indemnity from the parties for whom he appeared, but that he [750] considered himself liable for the costs if the other was unable to pay. The objection was that the indemnity did not render him competent; that the person granting the indemnity might not be able to pay the amount, and that he was, therefore, incompetent in law—that was the objection; and the learned Judge (my predecessor) who decided the case, did receive the evidence of Mr. Salmon, and, therefore, he considered it as no objection to the competency of the witness that he had employed the proctor, and was responsible to him for the costs. The note I have of what the learned Judge said is this: "I admit the evidence of Mr. Salmon. The cases cited are not against it (*Cooper v. Kempton*, 1808, *Ward v. Parker*, 1745). He says he is the attorney of the proponent, but there was no engagement between them; he has no interest in the suit. It is very different

where the party has entered into an engagement to pay part of the costs, and where he considers himself liable for the costs of the other party, that is very different."

This case of *Salmon v. Cromwell* is the only case in these Courts which seems to go contrary to the universal rule in the Courts of Common Law and of Equity; and if this case had been followed up by others of the same kind, it might be necessary for this Court to hold that the principle and practice of these Courts had not been assimilated to those of the other Courts. But it is too much to attribute such weight to this single case as to make it overrule the doctrine which has always obtained in other Courts, and more particularly when I find that there are cases, which were mentioned in the argument, in which such evidence had been re-[751]-jected. In *Cooper v. Kempton*, in the Prerogative Court, February, 1808, where the objection was raised, the evidence was rejected, the Court holding that the witness was incompetent. And in the case of *Ward v. Parker*, in 1745, where the witness was responsible to the proctor for his costs, his evidence was rejected. So that it appears that the doctrine of these Courts is conformable to that of the Courts of Common Law; and with respect to the case of *Salmon v. Cromwell* (which was decided at the moment without consideration, and in which there seems a distinction drawn between cases where the witness considered himself liable, and actual legal liability), I do not think that that case should form a rule for these Courts, all the other Courts adopting a different principle.

Therefore, I consider in this case that the witness, having been originally responsible for the costs, and being still responsible, as he has not been released from his liability, is not a competent witness to be examined in support of the will, and I am under the necessity of rejecting his evidence, as of a person having, in the contemplation of law, an interest in the result of the suit.

But it has been argued that although the general rule is to this effect, it is not an inflexible rule, and that cases have occurred in which witnesses having a direct interest have been permitted to be examined, and that these cases form an exception to the rule on account of the necessity of the case, and that in such cases witnesses having a direct interest may be examined. But it must be shewn that there is an absolute necessity that the witness should be examined, and not a necessity in any [752] particular case, but in a particular class of cases, as Mr. Starkie states (vol. 2, p. 753): "This necessity must result not from the accidental failure of evidence in a particular and isolated case, for it would be highly impolitic to sacrifice a general rule in order to alleviate a particular hardship, but it must be general in its nature, embracing a large and definite class of cases, and it must arise in the usual and natural course of human affairs." And he goes on to say: "It is to be remarked that the law has justly been jealous of any extension of this rule, and that its operation has consequently been very limited in practice."

Now certainly the drawer of a will, although in all cases an important witness, is not a necessary witness, and cannot be considered a necessary witness. In this particular case he may be a necessary witness to prove this will, but he is not a necessary witness in the usual legal acceptance and meaning of the term. Mr. Parkes is undoubtedly an important witness; he is the drawer of the will; he received the instructions from the deceased for the preparation of the will, and he is, therefore, a very material witness; and it may be that, without Mr. Parkes's evidence, the case of the executors cannot be sustained, and so he is a necessary witness in this particular case. But he is not so important in contemplation of law; it cannot be said that a will cannot be established without the evidence of the drawer of the will, because there may be the subscribing witnesses, or other persons, who were present at the time he read the will; so there is no [753] necessity, in a general view, for the examination of Mr. Parkes, however important his evidence may be under the particular circumstances of the case before the Court; and instances are given by Mr. Phillpotts and Mr. Starkie as to who are considered necessary witnesses; as, for example, where a party is robbed, and brings his action against the hundred; in his action he is permitted to prove the robbery and the extent of his loss, because, under the circumstances of the case, no other witness was able to prove this. But, in respect to other circumstances, he is not admitted to prove them: such as that the place in which he was robbed was within a particular hundred, because other witnesses could prove that as well as himself.

Under these circumstances, I am of opinion that Mr. Parkes is not a competent

witness, and accordingly I reject his evidence; and perhaps it is as well that the matter should be so left, considering the situation in which he is placed; it will remove from the Court what it has always felt to be a great inconvenience; that is, when the Court has to derive the principal evidence in the cause from a party who has had the conduct of the cause. I say nothing as to this particular case; but, as a general rule, it is desirable that the drawer of the will, and the attesting witness of the will, should not be the person who has the management and conduct of the cause—who retains and instructs the proctor and examines the witnesses.

I am of opinion that the evidence of Mr. Parkes cannot be received, and that it is my duty to reject it.

[754] The Judge having rejected the evidence of Mr. Parkes, the proctor of the executors protested of an appeal; but the Court, considering the whole hearing of the cause to be one act, under the authority of *Barry v. Bullin* (1 Moore's P. C. Cases, 98), before the Judicial Committee of the Privy Council, and that the rejection of Mr. Parkes's evidence was not an appealable grievance, intimated its intention of proceeding with the cause, and suggested to the counsel of the executors that they would not prejudice their right of appeal by proceeding with the argument.

On a subsequent day the Queen's advocate and Phillimore prayed that the cause might stand over, contending that the present was an appealable grievance, and submitting that the Court ought not to proceed to give sentence.

Sir Herbert Jenner. If this is an appealable grievance you must present your petition on your own responsibility; I am not to determine whether this is a grievance: I see no distinction between this case and that of *Barry v. Bullin*.

The Court refused to allow the cause to stand over, and Lushington and Addams continued their argument against the will.

March 7th.—The cause was again called on, and the counsel for the executors not appearing, the parties were called in the usual way; the proctor of the execu- [755] tors then alleged that he had presented a petition of appeal, and that the petition had been answered. The Court, however, directed the cause to be proceeded with, and finally pronounced against the validity of the will.

COOD OTHERWISE COODE *against* COOD OTHERWISE COODE. Consistory Court of London, March 23rd, 1838.—Divorce for adultery.—A husband, who, upon the discovery of his wife's adultery, commences a suit against her for divorce, but abandons such suit through want of funds to carry it on, is not thereby barred from seeking a divorce at a subsequent period. A collated copy of an entry in the marriage register at Barbadoes admitted as evidence.

This was a case of divorce, by reason of adultery, brought by Lieutenant Henry Cood or Coode, R.N., against Jane, his wife.

The libel pleaded that in 1823, Mr. Cood being master's mate in his Majesty's ship "Pyramus," then on the West India station, paid his addresses in the way of marriage to Jane Durkin, widow of James Durkin, a warrant officer (carpenter) of the said ship, and who had, since his death, remained on board the "Pyramus;" that on the 11th of August, 1823, Mr. Cood having obtained leave of his commander, Captain Newcombe, went on shore at Barbadoes with Jane Durkin, and they were married at a private lodging-house, in Bridge Town, in the parish of St. Michael, by the Rev. Wm. [756] Garnett, the rector of the parish, in the presence of Mr. Wm. Duke, a lieutenant of the "Pyramus," in pursuance of a license for that purpose from the secretary's office of the governor; an entry of the marriage being made in the register book of the parish, of which a copy was exhibited. The libel went on to plead that Mrs. Cood came to England in 1828, after the parties had cohabited abroad as husband and wife; that Mr. Cood remained abroad from October, 1828, till October, 1830, absent from his wife; and that during that time she formed a criminal connexion with a man unknown, in London, became pregnant, and was delivered of a still born child at Portsea, in March, 1830; that these facts were not known to Mr. Cood till after his arrival in this country, in October, 1830; that in 1830 he commenced proceedings against his wife in the Court of the Dean and Chapter of Westminster; but that having in the said year sustained a loss of nearly the whole of his property, in consequence of a relative, who was indebted to him in the sum of eleven hundred pounds, having become a bankrupt, and having, in conjunction with a co-trustee of certain funded property, of considerable amount belonging to him (Mr. Cood), sold

out the same, and applied the proceeds thereof to his or their own use, he (Coode) was obliged to abandon the said proceedings for want of sufficient pecuniary means to bear the expenses of the same, he having, at that time, no other property than the moiety of the proceeds of a small leasehold house, amounting to the sum of fifteen pounds or thereabouts yearly, and his half-pay as a lieutenant in the Royal Navy, amounting to ninety-one pounds yearly, and that [757] he had never, at any time since the said period, acquired any further or other property, save the sum of three hundred pounds or thereabouts received by him in sundry payments, on account of the said trust stock.

It was further pleaded that, after the abandonment of the proceedings, Mr. Coode was induced, for the purpose of avoiding claims and suits from the creditors of his wife, to enter into a deed of separation with her, whereby he agreed to allow to her, and hath continued to allow and pay to her, for her separate maintenance, the annual sum of twenty pounds (she being in addition thereto entitled to a government pension of twenty-five pounds per annum, as the widow of James Durkin, deceased).

The principal point in question before the Court was the sufficiency of the proof of the marriage. Lieutenant Duke was dead, and the Rev. Mr. Garnett, the rector, could not identify the parties. The copy exhibited of the entry of the marriage was to the following effect:—

“*Barbadoes.*

Parish of St. Michael.

1823.
August 11.

MARRIAGES.
*Henry Coode to
Jane Durkin.”*

“The above is a true extract from the register of the above parish, given under my hand, this 17th August, 1837. To all whom it may concern.

“W. GARNETT, Rector.”

This signature was attested by a notarial certifi-[758]-cate from Mr. Edward Hooper Senhouse, acting secretary, and in that capacity exercising the office of sole notary public of the island of Barbadoes.

Captain Newcombe, who was examined as a witness, had no doubt the certificate related to the marriage in question, and that the parties were married; he believed that the signature “W. Garnett” was the real signature of the rector of the parish of St. Michael, Barbadoes. He deposed that he (the witness) applied, at Mr. Coode’s request, to the governor of the island for a special license for the marriage, and had no doubt that it was granted; that the parties on returning to the “Pyramus” owned and acknowledged themselves to be man and wife, cohabited as such, and were so treated.

The parties did not subscribe the register.

Addams and Curteis for the husband. The only point seems to be whether there is sufficient proof of the marriage of the parties.

The only witness living who was present at the marriage is Mr. Garnett, the minister, who cannot identify the parties; the marriage, therefore, must be proved as if all the parties present were dead. The copy of the register which is exhibited, although not a collated copy, may be taken in supply of proof; the signature of the minister is proved to be in his handwriting; the register is a public document, registers of marriages being directed to be kept by the law of the colony.(a) [759] The question is whether there is not sufficient proof of the marriage, under the case of *Rex v. Brampton* (10 East, 282). In *Morris v. Miller* (4 Burr. 2057), which was an action for criminal conversation, the question was whether, in order to support the action, there must not be proof of an actual marriage? the fact being, that the parties

(a) And whereas it hath been, and still is, a laudable constitution, and custom of our native country to have in every parish a true and perfect register kept of all christenings, marriages and burials, and the names of all such fairly entered in the same, and the day and year annexed, which hath been, and is found to be of much advantage to posterity; be it therefore enacted, published, and ordained, by the president, council, and assembly, and by the authority of the same, that after the publication hereof as a duty incumbent on every minister in his respective parish

were married at May Fair Chapel, and the register or books could not be admitted in evidence, the minister (Keith) had been transported, and the clerk was dead. But cohabitation, name, and reception were proved, and Lord Mansfield said: "Proof of the actual marriage is always used and understood in opposition to proof by cohabitation, reputation, and other circumstances from which a marriage may be inferred." In such actions there must be proof of a marriage in fact, as contrasted to cohabitation and reputation of marriage arising from thence. Perhaps there need not be strict proof from the register or by a person present; but strong evidence must be had of the fact, as by a person present at the wedding dinner, if the register be burnt, and the minister and clerk are dead. Here Captain Newcombe states that the parties returned on board as married persons, and that they [760] were always treated as man and wife. This is strong evidence of the fact.

The Court. Lord Mansfield puts in on the supposition that the other proof is impossible.

Addams. The party has given all the evidence that can be reasonably required of him, *nemo tenetur ad impossibile*. If, however, there is any difficulty on this point, we would pray the Court to rescind the conclusion of the cause, in order that further proof may be given of the copy of the entry of the marriage; for since the cause was set down for hearing the party has received a collated copy of the entry from a gentleman who is just arrived from Barbadoes.

The Queen's advocate and Haggard for the wife. No case has been pointed out in which a divorce has been pronounced for, unless there had been proof of the fact of marriage. The circumstances stated by Captain Newcombe go to prove the identity of the parties, supposing there had been legal proof of the fact of marriage; but they are insufficient as a foundation for a divorce. The Court requires the best evidence that can be obtained. As to the entry itself, it is a question whether it could be received as evidence. Fleet entries cannot be received. Books kept under public authority in this country may be received; but this would be the first instance of books kept in foreign countries (and Barbadoes for this purpose is a [761] foreign country) being received. In *Leader v. Barry* (1 Esp. 353) Lord Kenyon rejected an examined copy of a register of marriage in the Swedish ambassador's chapel at Paris; but supposing the copy of the register to be evidence, it must be proved in the regular way; a copy certified under the hand of the clergyman is not sufficient; it must be proved to have been collated with the original.

Assuming, however, the proof of the marriage to be sufficient, what has been the conduct of the husband? He alleges that his wife had an illegitimate child in March 1830, and that he knew it in October or November, 1830, and that he commenced a suit against her; but he abandoned that suit in January, 1831, and although he assigns his poverty as the ground, it does not appear that he is worth one shilling more now than then. But he entered into an agreement to make his wife an allowance, which it is his object to get rid of.

The Court. My impression is that the deed would remain the same if a divorce be pronounced.

Judgment—Dr. Lushington. Assuming for the present purpose that the marriage is proved, and it being admitted that there is satisfactory evidence of the adultery charged against Mrs. Coode, distinguishing this part of the case from the other, I go to the next branch of it, namely, whether Lieutenant Coode, in consequence of the lapse of time between the period when the [762] adultery first came to his knowledge and the commencement of this suit, can be properly debarred from the remedy he prays.

It has been argued, on the part of Mrs. Coode, that she has been exposed to considerable disadvantage by losing a possible opportunity of recriminating against her husband; that it is possible some evidence may have thereby been lost. I observe that this is the suggestion of counsel only, and is not supported by anything which

within this island, he do keep a true and faithful register of all and singular the christenings, marriages and burials within their respective parishes; the churchwardens of every parish to provide a large book fit for the keeping of the said register, and enter both the Christian and the surname of each, together with the day and year expressed, and send a certificate of the same to the secretary's office, in the month of March, yearly, there to remain on record.—Law of 1661.

appears in the evidence, or that there is anything bearing upon it in any of the circumstances of the case. The principle of this Court, and of all Courts, is that the husband ought to proceed with such celerity as the case admits of, to obtain the remedy he seeks; but I conceive it is also settled that, if any circumstances occur which reasonably prevent him from proceeding, he is not thereby debarred from doing so at a time more convenient to him.

In *Best v. Best* (2 Phill. 161) there was a considerable lapse of time between the adultery and the suit; but the Court was satisfied with the reasons assigned for the delay by Mr. Best, in an affidavit, and allowed the case to proceed. It appears in this case that Mr. Coode is a lieutenant of the Navy, and on half-pay, and when he commenced the suit in the Court of the Dean and Chapter of Westminster he had no other property. Now, the marriage having taken place at Barbadoes, and the adultery being committed in this country, he would have incurred considerable expense, before his object could have been effected, if his wife had resisted the suit. I think it abundantly probable that if the suit had [763] gone on, and the wife had opposed it, the expense would have been beyond his means. I should have more difficulty if I could be satisfied that the wife can have been in any degree prejudiced by the delay; if, for instance, any benefit secured to the wife would be annulled by a sentence of divorce. But I apprehend there is no just ground for this opinion. In *Thurlow v. Thurlow* the same thing occurred, but a divorce was pronounced, and the trustees, under the deed of separation, retained the money secured by the deed for the benefit of the wife, under the opinion of the whole of the Court of King's Bench (*See v. Thurlow*, 2 Barn. & Cr. 547). I am, therefore, satisfied that the husband had a right to proceed, and the only point is whether the marriage is established by the evidence in the cause, and that question is of very great importance indeed.

In this case, or arising out of the circumstances of the case, many considerations occur as to what the Court would deem sufficient evidence of marriage to entitle a party to proceed in a suit for adultery, and to support a sentence of divorce. I do not know that there is in the books any express authority for the quantum and species of evidence. But ought the Court to be stopped from doing justice because it has no legal precedent, or be debarred by technical rules? The Court must not forget that Great Britain has colonies of its own, as well as cessions from other powers; that since the peace, the inhabitants of this country have resorted in great numbers to foreign countries, and that a great many marriages have been celebrated on the continent, as well as in the colonies, and I [764] should be sorry to lay down as an absolute rule, from which there should be no deviation, that in every case I ought to require the same strictness of proof as in this country.

The first question is whether, laying aside the certificate of Mr. Garnett, there is evidence sufficient to satisfy me that there has been a marriage between these parties. What is the nature of that evidence? It is the testimony of Captain Newcombe, the commander of the vessel, who states that he was perfectly aware of the parties' intention to marry; that he wrote to the governor to obtain a special license for their marriage, and that after the marriage was supposed to have taken place they returned to the ship as man and wife, and were so treated.

I will not determine, unless driven to it, that such evidence as this is alone sufficient proof of a marriage, though I am perfectly aware of the great inconvenience which would arise from laying down a fixed rule; but there is other evidence.

A paper is produced of the following kind: it is a printed paper, headed "Barbadoes, parish of St. Michael," and purports to be an entry of a marriage on the 11th August, 1823, between Henry Coode and Jane Durkin, certified to be a true extract from the register of that parish. "Given under my hand, the 17th August, 1837. To all whom it may concern. W. Garnett, Rector." And on the other side is a notarial certificate as to the handwriting of the Reverend Mr. Garnett.

Let us consider the different circumstances under which certificates of this kind would come from places out of England. They may come from foreign countries, or from places subject to Great [765] Britain; they may come from the East Indies or the West Indies; from colonies where the same law prevails as in England; or from colonies where there is a different system in its rules and general principles, as Barbadoes, Saint Lucie, Trinidad, or Demerara, in each of which there is a different system of law. It is not necessary to say what I should do with any certificate from Demerara, Trinidad, or Saint Lucie. Before I did so, I must consider what law

prevailed there—Dutch law, Spanish law, or French law. But this certificate comes from Barbadoes, one of the oldest British settlements in that part of the world, and where the old English law prevails, and unless altered by some enactment of the British Parliament, or of the House of Assembly there, with the consent of the Crown, the marriage law of that island is the same as it was in England before Lord Hardwicke's Marriage Act. Then the question arises, whether supposing a certificate to be produced, which had been duly collated with, and proved to have been a copy or extract from a marriage register kept in the colony, and on the authority of an act of Parliament, or of the House of Assembly, how I should treat such a document?

In the first place, this document is no such thing; what it purports to be is this—a copy of the register, but it is not pretended to have been collated with the original document, which is in existence; it is signed by the rector, whose signature is verified by Mr. Senhouse, the acting secretary at the island. It is clear that this cannot be legal evidence; it amounts to no more than written hearsay.

[766] But it is stated that there is a collated copy in this country, and which may be produced if the Court would rescind the conclusion of the cause, in order to receive this evidence. I do not know that I am bound, in this stage of the cause, to give my opinion as to the effect of receiving such a collated copy; but as it may save the party expense, I do not hesitate in delivering my opinion.

The only point on which I have to speak is the effect of such a copy of a register kept by the authority of the law of the colony where the marriage took place, that law being English law.

In *Huet v. Le Mesurier* (1 Cox, 275) a copy of a register of baptism in Guernsey was not admitted, because it did not appear by what authority the register was kept. Supposing it to have been proved that Guernsey was part of the diocese of Winchester (as it is), and that by ancient canon a register was required to be kept there, different considerations might have applied to that case, in my opinion; for I am of opinion that there is no ground of distinction, supposing the register had been kept by the order of a competent authority, between registers kept in Guernsey and in this country. The case referred to by the Queen's advocate, *Leader v. Barry*, does not interfere with any opinion I am about to pronounce. There Lord Kenyon refused to receive an examined copy of a register of marriage in the Swedish Ambassador's Chapel at Paris, for a reason which does not apply to an examined copy of a register kept by British authority: the [767] whole distinction lies between a copy of a foreign register and a copy of a British register.

It must be recollected that the greatest possible inconvenience would arise if the rule were to be pressed too far of requiring that the clergyman who celebrated the marriage in such a case should be examined, he being the only person living who was present at it. Recollecting that marriages take place in the East Indies, and that considerable delay must arise, and perhaps deaths might happen, before a marriage could be so proved; recollecting also that we have settlements in Africa, I think it is too much to lay down as a positive rule, which must never be relaxed, that some person present at the marriage must be examined, in order to establish its legality.

The counsel for Lieutenant Coode have referred to one of the laws of the island of Barbadoes, which law must have received the sanction of the Crown, and that enactment is of the first importance. By that law registers of christenings, marriages, and burials are directed to be kept in the different parishes, under a penalty. I apprehend that the House of Assembly had ample authority by the constitution to pass that act, and that it must have received the sanction of the Crown, whereby it became a part of the law of the island. I see, therefore, no reason, satisfactory to my mind, why, under the circumstances, I should not be justified in receiving such examined copy of the register as evidence of the marriage; and I am not aware of any case in which it has been laid down that where a register is kept in any colony under English law, an examined copy of such register is not evidence.

[768] I think, therefore, on the whole, that I am bound to receive the collated copy, and I think the evidence produced in the cause will satisfy me, on the production of the collated copy, as to the marriage, the identity of the parties, and the adultery, and that I should be bound to pronounce for the divorcee.

I therefore rescind the conclusion of the cause, in order to receive this evidence, the party at the same time pleading the law of Barbadoes, directing registers to be kept.

April 24th.—The Court, on the further evidence, pronounced for the divorcee.

HOBBS against KNIGHT. Prerogative Court, June 19th, 1838.—A party duly executed a will in 1835, and after the 1st of January, 1838, cut therefrom his signature. Held, first, that the effect of such act was to be considered with reference to the provisions of the stat. 1 Vict. c. 26; the 34th section of that statute enacting that the act “shall not extend to any will made before the 1st of January, 1838,” not applying to any act done to a will after that date. Secondly, that the cutting out the signature amounted to a revocation of the will under the terms “tearing or otherwise destroying the same,” in the 20th section of the statute.

[Distinguished, *Lord Langford v. Little*, 1845, 2 Jo. & Lat. 633. Approved, but not applied, *Walker v. Armstrong*, 1856, 8 De G. M. & G. 531.]

On the admission of an allegation.

Joseph Hobbs, deceased, died on the 7th of March, 1838, leaving a widow and one child; on the day after his death there were found in a drawer of his writing desk the following testamentary papers:—A will, dated the 19th of January, 1835, with three codicils, written upon the same paper, the first without date, the other two dated the 25th of February, 1837; from this will which had been executed in the presence of two witnesses [769] the signature of the deceased was cut out; in other respects it was uninjured; there was also found a will dated the 17th of February, 1838, signed by the testator, but not attested by witnesses, which was consequently invalid, by reason of the statute 1 Vict. c. 26.

An allegation, propounding the will of 1835, with the codicils thereto, was brought in on behalf of Mr. C. W. Knight, one of the executors, which was opposed on the part of the widow.

This allegation, after pleading the making and execution of the will in question, set forth circumstances and declarations of the deceased, in order to shew that it was in a perfect state until after the 1st of January, 1838 (when the act 1 Vict. c. 26, came into operation); and it also pleaded the will of the 17th of February, 1838, to be in the deceased's handwriting, and that at the date thereof, and sometime prior thereto, he well knew that two attesting witnesses were requisite, in order to give validity to any will made or executed after the 31st of December, 1837, and that at different times in the present year (1838) prior to the said 17th of February he so declared or expressed himself, to or in the presence of divers credible persons.

Phillimore opposed the admission of the allegation, on two grounds: First, that the stat. 1 Vict. c. 26 did not apply to this case, and that under the old law the will was clearly revoked. Secondly, that, supposing the act 1 Vict. to apply to the present question, the excision of the name of the testator amounted under that statute to a revocation of the will.

[770] With respect to the first point. The words of the 34th section of the act are clear, and seem to be capable of but one construction; it is expressly enacted in that clause “that this act shall not extend to any will made before the first of January, one thousand eight hundred and thirty-eight.” It is plain, from these words, that the legislature intended to leave all wills made before the 1st of January in the same situation as if the act had never passed; there is no limitation in the words, and the Court cannot restrain the meaning of a statute, the words of which are so clear and unambiguous; if the act does not apply to this case, there can be no doubt that the will is revoked.

But, secondly, supposing the act to apply, still this instrument is revoked; the twentieth section of the act provides “that no will or codicil, or any part thereof, shall be revoked, otherwise than as aforesaid (that it is as enacted in the eighteenth section), or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator or by some person, in his presence, and by his directions, with the intention of revoking the same;” now, supposing that cutting should be held not to fall within the term tearing under this clause; but which, if it were so held, would lead to great absurdities, still there can be no doubt but that this will is revoked under the terms otherwise destroying; for the will itself is destroyed; there is no signature to it, and it does not appear whose will it is. A [771] will is no will unless it be signed at the foot or end thereof, which is not the case in this instance.

Lushington in support of the allegation. This allegation is admissible, and the will propounded, supposing the facts set forth to be true, is entitled to probate.

Two objections have been taken: first, that the statute 1 Vict. c. 26 does not apply to this case; secondly, if that act does apply, that what has been done to the will in question amounts to a revocation. (As to the first point, he contended to the effect of the observations in the judgment of the Court.)

With regard to the second point, under the present act of Parliament a will, when once made, cannot be revoked, except in the manner pointed out by the statute. The only modes of revocation permitted by the statute are (except by other means which do not apply to this case) by burning, tearing, or otherwise destroying. Under the Statute of Frauds there were also the words obliterating and cancelling, and these words being omitted in the present act, the Court must presume that they were advisedly omitted, as no doubt they were, in order to avoid the uncertainty and doubt caused by those terms; a will, therefore, to be revoked, must first be either burnt or torn; with respect to the first, of which terms the recent decision of the Court of Queen's Bench, in the case of *Reed v. Harris* (6 Ad. & Ell. 209; S. C. 1 N. & P. 405), shews that, in order to satisfy that term, there must be actual burning, the intention of the testator, although perfectly clear, will not do, unless there be [772] some burning; and so I should submit as to tearing, there must be some tearing; is then cutting to be considered tearing under this statute? it is quite a distinct act; tearing is not cutting any more than burning; to hold otherwise would be allowing another mode of revocation than is pointed out by the statute.

Then does this fall under the terms otherwise destroying? I submit that it clearly cannot; the legislature must have meant that the thing itself should be destroyed; for obliterating will not do; cancelling will not do; if the whole will be obliterated, that would not revoke the instrument; can then this will be revoked by cutting out the name of the testator only, which is so carefully done as not in the least degree to destroy the will?

The testator knew that two witnesses were necessary to the validity of a will, he intends then to execute a new will, and on the 17th of February last he, himself, writes a new will, and takes his signature off the old one, intending, when he executed that of February, that the former will should then be revoked, but the latter never having been completed, the first is not revoked. *Onions v. Tyrer* (1 P. Wms. 345).

June 26th.—Sir Herbert Jenner. The purport of the allegation, which now stands for admission before the Court, is to shew that the will executed by the deceased in January, 1835, remained entire and complete until after the commencement of this year (1838), when the act of her present Majesty, entitled “An act for the amend- [773]-ment of the laws with respect to wills,” came into operation: and the question is whether, under the circumstances stated in the allegation, this will is revoked? The admission of the allegation was opposed on two grounds: first, that the act 1 Vict. c. 26 does not apply to this case at all; that the law applicable to the paper is that which existed before the 1st of January, 1838. Secondly, that if the act does apply, the excision of the signature of the deceased is a sufficient revocation of the will with reference to the provisions of that statute.

On the other hand, it has been argued that the allegation is admissible on these grounds:

First, that the act does apply;

Secondly, that the excision of the name is not a revocation under the statute; and,

Thirdly, that supposing a will may be revoked under the statute by the excision of the name of the testator, still, that in this case the deceased did not intend to revoke the will until a second will should have been duly executed, which not having been done, that the will before the Court remains unrevoked.

The first question then is, does the act 1 Vict. c. 26 apply to this case? because if it does not apply, it is admitted that the present will is revoked. Whether the act does apply depends upon the construction to be put upon the thirty-fourth section, which is to this effect, “And be it further enacted that this act shall not extend to any will made before the first day of January, 1838;” the rest of the section relates to other purposes which it is not necessary to mention. It cannot be denied that these words are of a general import, and seem *prima facie* to be intended to leave all wills executed before [774] the 1st of January, 1838, in the same situation as if the

act had not passed, and that they should be treated and dealt with according to the law as it then stood, not only as to the manner of their execution, but also as to their revocation and their effect and operation; and I confess, on first looking at the act, that I did entertain the notion that this was the true interpretation to be put upon it; but upon further consideration, and looking at the inconveniences and inconsistencies which would arise out of such an interpretation, the Court has been induced to adopt a more restricted interpretation, and to hold that the legislature did not intend that wills executed before the 1st of January, 1838, should be exempted from the necessity of complying with the provisions of the statute with respect to any act done to such wills after that time.

Let us see the inconveniences of a more extended application of these words. But for this clause every will made after the passing of the act, namely, the third of July, 1837, in order to be valid must have been executed in the manner prescribed by the statute; but by this section, any will executed in the manner allowed by the law, previous to the passing of the act, would be valid, if made before the 1st of January of this year; and it appears to the Court that this clause was inserted for the purpose of the alteration in the law becoming known before it should come into effect; but the Court cannot think that the legislature intended that wills executed before the 1st of January, 1838, should be subject to the old law for an indefinite term, and that they might be altered, obliterated or interlined, and still continue to have effect. If this were the true interpretation [775] of the statute, what would be the effect? Suppose a will executed on the day before the act came into operation, that will would require neither witness nor signature, the consequence would be that the testator, if he lived sixty years, might from time to time alter the will to any extent; he might remove the names of legatees and substitute others, he might substitute one residuary legatee for another, and one executor for another, and make an entirely new disposition of the property without the necessity of having any witnesses, or of any persons being privy to the alterations, if these changes and alterations were capable of being identified as his act: this is one of the inconsistencies which would arise from an extended application of the 34th section of the act. Again, the 18th clause of the statute enacts that a will shall be revoked by the subsequent marriage of the testator; but a will executed before the 1st of January, 1838, would not be revoked by marriage alone, and would be revoked by presumption arising from an alteration in the circumstances of the testator, contrary to the provisions of the 19th section. These are consequences so inconsistent with the professed intention of the legislature, to place all wills from a certain date on the same footing, that the Court is of opinion that it never could have been intended by the legislature to leave wills executed, prior to the time when the act came into operation, subject to all the considerations of the law as it stood previously, and therefore that a more restricted interpretation must be put upon the words; and the Court will hold, until otherwise advised by the decision of a superior tribunal, that wills executed [776] before the 1st of January, 1838, are subject to the provisions of the statute 1 Vict. c. 26, with respect to any act done to them subsequently to that day.

Assuming, then, that the statute applies to the case before the Court, the next question is, does the cutting out of the signature of the testator, the rest of the paper remaining entire, amount to a revocation of the will? In order to determine the effect of this act (the excision of the name of the testator) we must consider what is necessary to create a valid will under the statute. The ninth section of the statute is to this effect, "That no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator, in the presence of two or more witnesses present at the same time, and such witnesses shall attest, and shall subscribe the will in the presence of the testator; but no form of attestation shall be necessary." It appears, then, that the signature of the testator is necessary to the validity of a will; that no will is valid without it, so that it is not only a material part, but an essential part, without which a will cannot exist.

A will being so executed, the next question is, How is it to be revoked? The 20th section provides "that no will or codicil, or any part thereof, shall be revoked, otherwise than as aforesaid" (that is, by marriage, under the 18th section) "or by another will, &c.," which does not apply to this case, "or by the burning, tearing, or otherwise

destroying [777] the same by the testator, or by some person in his presence, and by his direction, with the intention of revoking the same." Assuming, then, that this act was done by the deceased, it must be taken to have been deliberately done; the effect of that act is now to be considered. The signature of the testator being, as I before said, an essential part of a will, it is difficult to comprehend when that which is essential to the existence of a thing is destroyed, how the thing itself can exist. There can be no doubt that if the name of the testator had been burnt or torn out, the revocation would have been as complete as if the will had been torn into twenty pieces. If this were not the case, it would lead to many absurd consequences. But it has been argued that, as the present act of Parliament has pointed out certain modes with regard to the revocation of wills, the Court cannot go beyond the express terms of the act; that the words being confined to burning, tearing, or otherwise destroying, omitting the terms "obliterating" and "cancelling" used in the statute of frauds; there must be an actual burning or tearing, or as to "otherwise destroying," that the whole instrument must be destroyed; that the cutting, in the present case, is not tearing (burning is out of the question), and, the instrument not being destroyed, that there is no revocation; and upon this part of the argument the case of *Doe dem. Reed v. Harris* (6 Ad. & Ell. 209. 1 Nev. & P. 405) in the Queen's Bench was referred to, in which the testator had thrown his will on the fire, with the intention of destroying it, and a part of the cover was burnt, but there being no [778] burning on the instrument itself, the judges of that Court held that the will was not revoked; that the words of the statute of frauds had not been complied with. But that case is not applicable to the present point, for here a part of the will, the most essential part, is removed, and if in that case the name of the testator had been burnt or torn off, I think the Court of Queen's Bench would have held that to be an effectual revocation by burning or tearing, for, according to the judgment in that case, it was not required that the whole will should be burnt or torn. The learned judges do not say how much it is necessary should be burnt, but Mr. Justice Coleridge says it is sufficient if the entirety of the will is destroyed; his expressions are these, "We were pressed with the argument; must the whole of the document be destroyed? I say no: but there must be a destruction of so much as to impair the entirety of the will, so that it may be said that the will does not exist in the manner framed by the testator." So I say here, is not the entirety of the will destroyed by the removal of the signature of the testator? It is true this is not an act of tearing in the strict sense of that term; but, if the circumstances of this case required it, I think it would not be difficult to shew that a will might be revoked by cutting with an instrument as well as by tearing, if a corresponding effect be produced by the one act as by the other. The Latin equivalent for the verb "to tear" is *lacerare*, but I find, upon looking into the dictionaries, that *exscindere*, "to cut out," is also used in the sense of "to tear," and Cicero uses the phrase "*exscindere epistolam*" (which is remarkable) with regard to the destruc-[779]-tion of a document. But it is unnecessary to enter further into the consideration of this point, for, consistently with the true construction of the act of Parliament, and the decision of the learned judges of the Court of Queen's Bench, it is not necessary, in order to bring the act within the meaning of the words "otherwise destroying," that the material of the bill should be destroyed; it is sufficient, as it appears to me, if the essence of the instrument (not the material) be destroyed. Suppose a will to be written in pencil, and the words were removed by means of Indian rubber, could there be any doubt that that would be a sufficient revocation? Cutting is a mode of destroying as effectual as tearing, and it appears to me that if tearing a will to this extent be a sufficient destruction of it, the same effect must be attributed to the act of cutting it; what would be the consequences of a different construction? Suppose a will were torn into two or more pieces, the will, no doubt, would be revoked; but if it were cut into twenty pieces with a knife, that would be no revocation, and if the pieces could be collected and pasted together, the will must be pronounced for by the Court. I cannot conceive it possible that it was the intention of the legislature to leave the law in that state. The question then comes to this: whether this be or be not a destruction of the will. I consider the name of the testator to be essential to the existence of a will, and that, if that name be removed, the essential part of the will is removed and the will is destroyed; otherwise the statute does certainly not deserve the title it bears, namely, "An act to amend the laws with respect to wills."

[780] It was said in the argument (perhaps it is not very material) that a will cannot now be revoked by obliteration, the term obliteration having been advisedly omitted by the legislature; but I am not prepared to say (although I now merely throw this out) that a will may not be revoked in that way, for I see no reason why, if the obliteration amount to a destruction of the will (that is, if the name of the testator, which is essential to a will, be so obliterated that it cannot be made out), a will may not be revoked in that way as well as any other. Suppose a testator had so obliterated his name from a will as to render it impossible to make it out, and I am not at liberty to supply it by evidence aliunde, how would this operate with respect to the 21st clause of the act, which enacts, "that no obliteration, interlineation, or other alteration, made in any will after the execution thereof shall be valid, or have any effect, except so far as the words, or effect of the will before such alteration, shall not be apparent." By this clause, as I understand it, where words are so obliterated that they do not appear, it is a good revocation pro tanto. Would not the same rule be applied with respect to the name of the testator? I think that it was the intention of the legislature that it should be sufficient if the name of the testator was so obliterated that it could not be made out: it never could be intended that a testator might revoke his will pro tanto, and yet not be at liberty to revoke the whole will.

Lushington. What does the Court say as to the names of the two witnesses? By a parity of reasoning there would be a revocation by the obliteration of the names of the attesting witnesses.

Sir Herbert Jenner. I think so too; and, if any such case should occur, I should think that if the names of the attesting witnesses were erased by the testator *animo revocandi* it would be a sufficient revocation. It might be difficult to make it appear that the names of the witnesses were erased *animo revocandi*; but, if it could appear, I should be of opinion that it would amount to a destruction of the will, within the meaning of the act of Parliament. I do not think that the words "otherwise destroying" mean that the material of the will must be destroyed, but that it must be something which would amount to a destruction of the will itself.

I am, then, of opinion that the 34th section of the act of Parliament did not exempt the deceased in this case from the necessity of complying with the requisites of the act as to the manner in which this will was to be revoked; and, secondly, that the act done to the will (the excision of the name) amounts to a destruction of the will within the meaning of the statute.

With respect to the further point, whether the excision of the name was intended only as a revocation, upon a new will being duly executed, I am of opinion that the case of *Onions v. Tyrer* (1 P. Wms. 345), referred to in the argument, does not apply to the circumstances of this case, because in that case the deceased believed that the last will was a valid will, [782] and on that supposition he proceeded to annul the former will; while in the present case it is pleaded in the allegation that the deceased knew that two witnesses were necessary to the due execution of a will, and therefore that the paper before the Court could not have any effect.

The Court rejects the allegation.

CROFT *against* DAY AND OTHERS. Prerogative Court, June 29th, 1838.—A will and five codicils being propounded; the will and four codicils established; the fifth being prepared by a solicitor in his own favour, the deceased being at the time of fluctuating capacity, was pronounced against. The Court not being satisfied that the deceased understood the contents of the instrument and intended it to operate, although no fraud was imputed to the solicitor.

Charles Day, the deceased in this cause, died on the 26th of October, 1836, leaving behind him Rebecca Day, his widow, and Caroline Clagett (wife of Horatio Clagett, Esq.), his natural, lawful, and only child. He died possessed of real property of the value of about 140,000*l.*, and personal property to the amount of about 200,000*l.*

The testamentary papers before the Court were a will and codicil, both of the date of the 11th of May, 1834, and four further codicils dated respectively the 2nd, 3rd, 10th and 22nd of September, 1836.

The will and first codicil were propounded on behalf of the executors and probate prayed of those papers only.

The codicils of the 2nd, 3rd and 10th of September were propounded on behalf of parties interested under them ; they were not opposed by the executors.

[783] The codicil of the 22nd of September was propounded by Mr. Dufaur ; this was opposed by the executors, and was the only paper against which any strenuous opposition was made. It was as follows :—

“This is a codicil to the last will and testament of me, Charles Day, of Edgeware, in the county of Middlesex, Esquire, which I desire may be considered as annexed to and be taken as part thereof. I hereby nominate, constitute and appoint Mr. Frederick Dufaur, of 23 Queen Ann Street, Cavendish Square, one of my executors, jointly with the executors appointed by my said will, and I give and bequeath unto the said Frederick Dufaur the sum of five hundred pounds, free and clear of legacy duty, for the trouble he may have attending the execution of the trusts thereof ; and it is my will and desire that the said Frederick Dufaur should continue after my decease to receive the rents of my houses in London, and also the annuities and mortgage interest which he now receives for me, upon the same terms he now receives the same, dated this twenty-second day of September, one thousand eight hundred and thirty-six.

“CHARLES DAY.



“Signed in the presence of, &c.—Thomas Ansaldo Hewson, Surgeon, 6 Woburn Place, Russell Square ; Horatio Clagett, Edgeware ; Frances Barton, Edgeware.”

[784] The case was argued by Lushington and Jenner for the will and first codicil. Burnaby and Haggard on behalf of the widow.

Phillimore and Robinson for the codicils of the 2nd and 3rd of September.

The Queen's advocate and Addams for those of the 10th and 22nd of September.

Judgment—*Sir Herbert Jenner*. The deceased in this cause, Mr. Charles Day, died on the 26th October, 1836. He left a widow, and one daughter married to Mr. Horatio Clagett : and the property which the deceased left behind has been estimated at between three and four hundred thousand pounds. I may take the real property at 140,000*l.* and the personal property at about 200,000*l.* The deceased in the month of May, 1834, executed a will and codicil, and on the 2nd September, 1836, he executed a second codicil ; on the third of that month a third codicil ; on the 10th of the same month a fourth codicil, and on the 22nd a fifth. All these papers are before the Court for its opinion as to whether any and which of them are entitled to probate.

By the will, three gentlemen, Messrs. Underwood, Croft, and Pinder Simpson, are appointed executors and trustees, and they have thought it right to prove the will in solemn form of law. Accordingly the wife and daughter (the only persons entitled in distribution to the per-[785]-sonal estate of the deceased, in case he had died intestate) have been called on to see the will and first codicil propounded. The other codicils, four in number, have not been propounded by the executors, but some of the parties interested under them have appeared before the Court for that purpose. Those of the 2nd and 3rd September have been propounded, one on behalf of the sister and sister-in-law of the deceased ; the other by one of the cousins ; that of the 10th of September by the guardians assigned to three illegitimate children of the deceased, who are provided for by the codicil ; and the codicil of the 22nd of September, 1836, is propounded by Mr. Dufaur, whom it purports to appoint an executor, and to whom it bequeaths a legacy of 500*l.* free of legacy duty, directing also that he be continued in the collection of certain rents as during the lifetime of the testator. An appearance has been given for the widow, but not for the daughter and her husband, as against whom the proceedings have gone on in pœnam.

Some observations have been made on the conduct of the executors in not propounding the codicils of the 2nd and 3rd of September, the former having been drawn up by Mr. Pinder Simpson, the executor, and the latter by Mr. John Simpson, his son, a person in the confidence of the testator. But I think that there has not been anything improper in the conduct of the executors in this respect ; for the circumstances under which they were made so connected them with those which were subsequently made, and respecting which greater doubts existed than with regard to the codicils of the 2nd and 3rd of September that, looking to the trusts [786] that were

to be executed, and the property that was to be distributed under the will, it was proper, for the protection of others as well as themselves, that they should propound only the will and codicil of 1834, with respect to which there could be no doubt that they were the act of the testator; and that they should propound them in solemn form of law; for it was right that they should have a more solemn authority for the administration of this large property than a mere probate in common form; and as some of the codicils were made under circumstances which left considerable doubt as to their validity, it was natural that the executors should desire to propound only the will and first codicil, leaving the parties interested under the other codicils, made at a later period of the testator's life, and after he had been attacked with a disorder of the brain, to protect their own interests, and exonerate themselves from all imputation of wishing to support codicils which were not entitled to the probate of this Court.

When the case began, only one of the executors was before the Court, Mr. Croft; and it has been suggested that some inconvenience may have arisen to the parties propounding the codicils from the absence of the other two executors, who did not appear till after publication had passed, so that the other parties were not entitled to call for their answers, which they might have done if the executors had appeared in the cause before publication. But no real injury, as it appears to me, has arisen to the parties for want of this evidence, and I think I may dismiss the circumstance from consideration, though I thought it right to notice it, in the course [787] of the observations which the Court has felt it its duty to make with reference to the several instruments propounded in the cause.

It appears that the deceased was engaged in business as a manufacturer of blacking in this town, and that by his attention to that business, and by the manner in which he employed his funds, he amassed a very large fortune, to the amount I have stated. It appears that he had a wife and one daughter, who was married, and for them he has provided by the will, leaving to the wife an annuity of 2000*l.* and the house at Edgware, with the property in the house (furniture, plate, wines, &c.); and to the daughter he has bequeathed an annuity of 3000*l.* and the house called Harley House in the Regent's Park, and the furniture, plate, &c. therein; this he has left to her sole and separate use, independent of her husband. By the will he has given various annuities to his own sisters, and the sisters of his wife, and to some other persons; and a legacy of 1000*l.* to each of certain nephews and nieces, the sons and daughters of his sisters, and the children of the sister of Mrs. Day, and also legacies to other individuals, and to servants. He disposes of the residue under certain trusts. It is not necessary to go into them. With respect to the residue of the property it is sufficient to say that, under certain circumstances, the relations of the deceased under the will would be entitled to the residue, and that, under certain circumstances and contingencies, others might be entitled to an interest arising from the residue. But it is perfectly immaterial what may be the ultimate fate of the residue and the trusts under which it is to be disposed of. [788] By the codicil of even date with the will the sum of 100,000*l.* is bequeathed for the purpose of being invested by the trustees in the three per cent. consolidated annuities, for founding and endowing an asylum for blind persons, the deceased having suffered under loss of sight for twenty years. Of this will and codicil the deceased named Mr. William Underwood, Mr. William Croft, and Mr. Pinder Simpson, executors, who are appointed to manage the whole of the property, real and personal, under the trusts mentioned in the will. Mr. Pinder Simpson appears to have been for many years on the most intimate terms with the deceased, who had the most perfect reliance on and confidence in him. With Mr. Underwood he was also on terms of intimacy; and these two gentlemen had been named executors in several former wills, which the deceased had executed. Mr. Croft was introduced as executor for the first time, in the will of 1834; the testator having previously consulted and advised with Mr. Pinder Simpson as to the appointment of a third executor. To each of the executors the deceased has bequeathed a legacy of 500*l.* free of legacy duty. The will and codicil seem to have been very carefully prepared; the draft was settled by Mr. Sidebottom, and with him the deceased had several interviews before it was completed; therefore these acts were done carefully and deliberately.

In support of the will the three subscribing witnesses have been examined, as also Mr. Sidebottom; it is useless for the Court to go through the depositions; it is

sufficient to state that, by this evidence, it is proved beyond all doubt that the deceased gave instructions for the will, and that Mr. [789] Sidebottom had communications with him two or three times prior to settling the draft, and the other gentlemen who are attesting witnesses to the will—Mr. Shaw, Mr. Jopling, and Mr. William Simpson,—have fully proved the execution of the two instruments. With respect to these, therefore, there can be no difficulty—the Court must pronounce for them, and the executors are entitled to probate of them.

From this time (May, 1834) it does not appear that any testamentary act was done by the deceased, or was contemplated by him, till September, 1836—that is, from the 1st May, 1834, till the 2nd September, 1836, the deceased seems to have remained completely satisfied with the testamentary acts he had done, and he continued in confidential intercourse with Mr. Pinder Simpson and his son.

The character of the deceased is not immaterial in the consideration of the circumstances connected with the other testamentary acts. He is described as a man possessing a very strong and acute mind. He was remarkably clear in his intellect, and his skill in figures is described by Mr. John Simpson as “quite wonderful.” His memory was so extraordinary that (as is stated by Mr. John Simpson and others, who have been examined in the cause) he could remember the items of a very complicated account when read to him but once, he could recollect all the items and the order in which they stood in the account, undoubtedly a remarkable instance of tenacity of memory. The deceased, as I have said, was blind, and had been so for twenty years, and for the last two years of his life he had lost the use of his legs, so that he was not able to [790] superintend the business personally, as he had been previously accustomed to do; but the accounts connected with the business were rendered to him monthly, and he was in the habit of going into the minutest details of them. He paid all the household expenses, and went so far (so I understand it) as to check the washing accounts, sometimes with the assistance of his daughter, and sometimes with the assistance of Mr. John Simpson. He is described as a person of a somewhat overbearing disposition; he would not endure contradiction, and expected implicit obedience to whatever he ordered. He is described by Mr. John Simpson as a man who knew his own abilities, and who expected that what he desired to be done should be done without question or hesitation. The health of the deceased had been (except the loss of his sight, and latterly the use of his legs) remarkably good; there was no serious effect upon it till the early part of the year 1836, when Dr. Clutterbuck first began to attend the deceased in consequence of a disease of the brain, and also on account of symptoms which tended to paralysis—but there was no serious effect on his health till August, 1836. On the 26th day of that month he was attacked by epilepsy, and he had three fits on that day, and five or six on different days afterwards, between 26th August and his death, all, as far as I collect from the evidence, before that on the 9th or 10th September, if that was a fit at all, of which the witnesses have some doubt. The effects of the attack on the mind of the deceased were not at first very remarkable. He appears to have recovered to a certain extent his memory and recollection; shewing that, after the [791] fits had subsided, though they left some effect on his mind, the effect was not permanent. Mr. Foote attended the deceased on the 26th August, and afterwards, and Mr. Hewson attended him from the 28th August; Dr. Clutterbuck was called in on the 31st August, when he saw him on nine other days between that day and his death. The account given by Dr. Clutterbuck is that to which the Court is inclined to pay most attention, considering that he is a person of skill, knowledge, and ability, and that he seems (from the tenor of his evidence) to be perfectly indifferent between the parties in the cause.

The opinion of this gentleman is given on the third article of the allegation; he says that he attended the deceased professionally in his last illness. He had been acquainted with him for five or six years, and had attended him in the early part of the year 1836, “at which time he exhibited various symptoms of a paralytic nature, his speech being affected to a certain extent, and his lower extremities completely paralysed.” “The illness for which I attended him,” he says, “more immediately preceding his death, was a continuation of the same disorder—a disease of the brain and spinal marrow,” so that the commencement of the illness was an affection of the brain and spinal marrow, “which led to paralysis. At this latter period I attended Mr. Day first on the 31st August, 1836, and from that day I continued to attend him occasionally to the time of his death, towards the end of October following. I

saw him during that period ten different times, with an interval of five, six, or seven days between each visit." He says, "The deceased was attended also [792] at this period by Mr. Foote, an apothecary of Edgeware, and by Mr. Hewson, an apothecary of Woburn Place, both of whom I met on each of my said visits. Mr. Hewson had attended Mr. Day in his illness in the earlier part of the year. My visits," Dr. Clutterbuck says, "to Mr. Day during the said latter period were but of short duration, seldom exceeding a quarter of an hour. At these times there was a good deal of feverish excitement about him; his mental powers appeared to be weakened, so that, although at my first entrance he conversed quite freely and rationally, he became confused in his thoughts after a little time, so as to induce us to terminate the conversation. After a time his memory seemed to fail him; he became incoherent, unable to sustain conversation, or collect his thoughts; that was the general remark I made upon him throughout. The confusion to which I have deposed seemed to be gradually increasing upon him each time I saw him; his mental powers seemed to be getting more impaired, and he was less capable of sustaining conversation from time to time to the last, more particularly, I should say, during the last two or three times I saw him." And he refers to his notes for the observations he made on the visit of the 5th October, the last visit but two: "Mr. Day this day displayed much unsteadiness and imbecility of mind, wandering as he did on the last two or three visits I paid him;" so that not only on the 5th October, when this note was made respecting him, but on two or three preceding occasions, he shewed "much unsteadiness and imbecility of mind" and "wandering." And in another part of his deposition, on the interrogatories, he says that [793] the visit he paid to Mr. Day, immediately before that of the 5th October, was on the 21st September, which is not an unimportant day. He adds, in the subsequent part of his deposition in chief, that "although Mr. Day did, on the occasion alluded to, betray wandering and imbecility of mind, yet there was not one of them at which for a certain time he did not shew tolerable consistency of mind, so far as to know us and to be able to answer questions. On the last occasion I saw him Mr. Day's mind seemed nearly gone." On the preceding occasions, he says, "For ten or fifteen minutes at first, but which period gradually decreased in length from visit to visit, he shewed a clearness and intelligence of mind, and he then became confused and incoherent." And at the conclusion of his deposition he says, "Before he got confused, in the course of my visits, his mind, so long as that period lasted, seemed clear enough for anything."

This is the result of the evidence of Dr. Clutterbuck. But Dr. Clutterbuck only saw him occasionally, and not at the early periods of the disorder, on the 26th August, when there might have been longer periods of clearness than Dr. Clutterbuck observed in his attendance, and the periods might be sufficiently long to admit of his executing such a paper as any one of the codicils propounded in the cause, whether they were sufficient must be determined by the evidence of the witnesses who attested the execution—whether the disorder developed itself, or whether the recollection of the deceased had returned, and he understood and intended to do what by the codicil he purports to have done, at the time the instrument was made [794] and executed by him. Neither Mr. Foote nor Mr. Hewson thinks there was any serious affection of the deceased's mental faculties till after the 10th of September, and it appears from the evidence of Mr. John Simpson that he did not see him after the attack till the 3rd of September, and not again till the 11th. This, then, is the account of the deceased's state up to the 10th September, and after that date given by Dr. Clutterbuck; he is unable to detail the observations he made at every one of his visits, but he has made the general observations during the time to the effect I have stated.

The first act the testator did, which the Court has to consider, is with regard to the codicil of the 2nd September; that codicil was prepared by Mr. Pinder Simpson, the confidential solicitor and the executor of the deceased. It appears that on the morning of that day he was sent for from London, and also Mr. Lawrence, the eminent surgeon, and Mr. Beaman, the partner of Mr. Hewson, a medical attendant of the deceased. Mr. Foote had been sent for from Edgeware to remain in attendance upon the deceased. With respect to this codicil, all these gentlemen concur in opinion that the deceased was at this time perfectly capable of understanding any business to the extent to which this codicil purports to go: the codicil was explained to the deceased by Mr. Pinder Simpson; he approved of it and executed it by his mark, sealing it and

declaring it to be his act. And the Court has no doubt on the evidence in pronouncing for the codicil of the 2nd of September.

The next is that of the 3rd of September. This is a codicil to give to the sons and daughters of the [795] deceased's mother's brothers and sisters (with one exception) annuities of 20l. free of legacy duty in addition to those given by the will. The witnesses to this codicil are Mr. Hewson, Mr. Dufaur, and Mr. Shaw. It appears that on the 2nd September (the day the former codicil was executed) a letter was written by Mr. Pinder Simpson, by direction of the deceased to Mr. Dufaur, stating that it was the wish of the deceased that he (Dufaur), together with Mr. John Simpson, and another gentleman, Mr. Shaw, would go to Harley House, in the Regent's Park, and open the strong room, where the deceased's papers were deposited, and bring certain papers from thence, and attend at the house at Edgeware on the morning of the 3rd September. Accordingly, having got the papers from the house in the Regent's Park, they proceeded to Edgeware. On the attendance of these gentlemen at Edgeware, Mr. John Simpson had an interview with the deceased, and it is not immaterial to see the deposition of this gentleman as to what occurred on that occasion. He had been very much in the deceased's confidence before this; he deposes that he came up from Brighton on the night of the 2nd September, in consequence of receiving a letter from his father, apprising him that Mr. Day, the deceased, wished to see him, "particularly with a view to his making some alterations in his will." That is the information given to Mr. John Simpson by the letter from his father, sent to him at Brighton: "I do not know," he says, "whether my father's letter is now in existence. On my arrival in London on the morning of the 3rd September, having first seen my father, I proceeded in a post-chaise to the house [796] of Mr. Day, at Edgeware, taking with me the draft of his will, which, by my father's direction, I procured in my way from Harley House, Mr. Day's house in London, and, accompanied by Mr. John Shaw, a solicitor, a friend of Mr. Day, and by Mr. Dufaur, the party in this suit; Mr. Day having, as my father informed me, suggested that I should bring those two gentlemen as witnesses." So that the purpose for which Mr. Simpson was to attend was to make an alteration in the deceased's will, and Mr. Dufaur and Mr. Shaw were to be the two witnesses to attest the alterations, whatever they might happen to be. "On our arrival at Mr. Day's house at Edgeware that day, it being about noon, I sent word to Mr. Day that we were there, and Mr. Day's servant presently came to us with a message that Mr. Day must see me alone. I went up into his bedroom where he was in bed, and on my entering he said to me, 'Oh, John, I want to make a little alteration; I want to double the legacies of the children of my mother's brothers and sisters.' Those were, I believe, his very words. I said I supposed he meant 'their annuities; they have 20l. a year under your will each, and I suppose you want that doubled.' He said, 'Yes.' He then added, 'I want to give some additional annuities to my sisters and sisters-in-law.'" That was the effect and purport of the codicil he had executed on the preceding day, and, supposing this account to be correct, it is evident that the deceased had at this time entirely forgotten the transaction of the preceding day, namely, the execution of the codicil; and, looking to the tenacity of his memory, it strongly tends to shew that the disorder had had considerable effect [797] on his mind at that time. He says, "I think he named them, but of that I am not positive—I think he must have named them; for I remember well my reply to him was, 'Why, sir, you made these additions yesterday' (referring to the last named addition) 'in a codicil drawn by my father.'" He goes on to say: "I had with me at the time the draft of a codicil which had been handed to me by my father, as one which he (my father) had prepared for him, and he executed, the day before, and by which it appeared that he (Mr. Day) had made this further provision for his sisters and sisters-in-law. On my making the observation just stated, Mr. Day said, alluding to the codicil" that is, "in allusion to the codicil of the 2nd September, 'Oh, no, I never signed it; how could I?' You were at Brighton, and we had no witnesses. 'Oh, yes, you did,' I said, 'I have got that draft in my hand, and I'll read it to you.' I am not quite sure that it was at this time I mentioned my having the draft, or whether I mentioned the fact just before he declared he had not signed it; but I remember that I now read the draft codicil over to him, and when I had done so, he said, 'Yes, it's right.' I then made some remark to him in allusion to the draft codicil; 'Now, sir, this is the draft of the codicil my father prepared for you yesterday, and it has your mark to it;' he still said, 'No,' but upon my saying to

him 'Yes, it has, and the medical men are witnesses,' or to that effect, the recollection of the circumstances seemed to flash upon his mind, and he said, 'Oh, yes, I had forgot, so they were.'" So that, at last, he is brought to a recollection of what took place on that day, and he then recollects [798] all the circumstances about it. But evidently the disorder had had great effect upon the memory and recollection of this gentleman at this time. The witness goes on—"The draft of the codicil had been made perfect, and the mark of Mr. Day, and the names of the witnesses supplied to it, whether signed by themselves, or copied in my father's writing, I am not sure." The witness has produced the draft of the codicil which is annexed to his deposition. The witnesses to this codicil are, as he says, Mr. Lawrence, Mr. Foote, and Mr. Beaman. The deceased then proceeded to give instructions for a codicil—of alterations he desired to make; and he says to Mr. Simpson, "Well, then, interline the annuities of my mother's brother's and sister's children, except Sam Virgo." It appears that Virgo was a person whom the deceased had excluded from the former will, and this tends to shew a return of recollection, and a knowledge of the reason why Virgo was excluded from the former will, and proves the motives by which he was actuated in some degree. Mr. Simpson says, "Mr. Samuel Virgo was an excepted person in Mr. Day's will also. I told Mr. Day that I could not interline the annuities, but that I must make a fresh codicil. I don't remember that he made any reply to this, and I went on and said something to him to this effect: 'Now, sir, I have brought the draft of your will; had I not better read it to you; my father told me he thought there was some alteration you wished to make, and if there is you can do it all in one codicil'—"it is better than making so many codicils.' He then said, 'Well, John, then give me the heads of it in your flippant way.' [799] That was an old expression of his, and I knew what he meant, and did so. I went through the will, briefly stating the heads of it to him. He made no remark till I had gone through the will, and then he said, 'It's all right—now I'll sign.'" So it was evident that, though the deceased's mind had been wandering, when his attention was roused and his recollection returned, he knew the purpose for which he had expressed a desire to Mr. Dufaur, through Mr. Simpson, to come with the will, in order to give instructions as to the alterations he intended to make in it, and he was aware of its being different from the other codicil—that is, to increase the annuities to his mother's brother's and sister's children. "I told him," Mr. Simpson says, "that before he could do that, I must go down stairs and draw the codicil. He said, 'Why can't you do it here?' and I gave as my reason that he would talk so much, and that I should therefore make mistakes." He then says that he went down into the drawing-room, and drew out the draft codicil conformably to the deceased's instructions, and he says, he mentioned to Mr. Dufaur and Mr. Shaw down stairs what had occurred with the deceased, and consulted with them as to the propriety of making the codicil under the circumstances, but it was agreed between them that there could be no harm in making it, as it was merely in furtherance of the deceased's will. He says, "I read the draft of the codicil just written over to them, and then proceeded with it up stairs to Mr. Day's room. I then sat down at Mr. Day's bedside, and read the draft codicil over to him, and said to him, 'Now, sir, is that what you wish?' He replied, 'Exactly.' I then told him that I [800] would go down and copy it, and then bring up the witnesses. Before I made this observation, Mr. Day, after expressing, as I have stated, his approval of the codicil, said, 'Now I'll sign it.' But I represented to him that I must first copy it out; that it must then be read over to him in the presence of the witnesses, and that then he could sign it. He seemed angry at this, and said, 'Why should they know what I do?'" Evidently forgetting what had occurred on former occasions, that, on account of his loss of sight, it was necessary that the codicil should be read over to him in the presence of the witnesses. "I represented to him that he seemed to forget that, owing to his infirmity (being blind) it was absolutely necessary that the codicil should be read over to him in the presence of the witnesses. I do not remember that he made any further remark upon this, and I went down stairs, taking the draft codicil with me for the purpose of copying it out. Whilst I was copying it, Mr. Hewson, one of Mr. Day's medical men, arrived from London, and to him I represented the state in which Mr. Day was, and the want of recollection he had just manifested to me, and requested him to go up and see Mr. Day, and report to me if I could with propriety let the codicil be executed. On his return down stairs he said he thought I might do so; and he having told me, in answer to my question, that he would not

object to be one of the witnesses to the codicil, I went up stairs, having finished copying it, taking the copy with me, and accompanied by Mr. Hewson, Mr. Shaw, and Mr. Dufaur, the proposed witnesses. I told Mr. Day, on our going into his room, that I had brought the witnesses with me, [801] and that I would read the codicil to him, and then he could sign it. I then, in the presence of the three witnesses, read the codicil over distinctly to Mr. Day, Mr. Shaw, as I best recollect, having the draft in his hand, looking at it as I read. When I had finished the reading I asked Mr. Day if it was right, and he expressed his approval of it. I am quite confident that he well knew and understood the contents of the codicil, and that he expressed his approval of it in some way, but whether he said anything, or only nodded his head, in the way of approval, I do not recollect." So that, according to the evidence of Mr. Simpson, the deceased was to a certain extent confused, and betrayed a want of recollection. In the first place, he could not recollect that he had executed a codicil on the preceding day; afterwards, this is brought to his recollection; then when the draft codicil was prepared from the instructions the witness had received, he supposes that there was no need to do more than sign the codicil, forgetting that it was necessary that the codicil should be read over in the presence of witnesses before it was executed, on account of his loss of sight. But Mr. Simpson is of opinion that when the codicil was read over he knew and understood the contents of it, notwithstanding the confusion and inconsistency of the deceased, and notwithstanding his forgetting in the first instance that a codicil had been executed by him on the previous day. And Mr. Simpson, at the conclusion of his deposition, says that he thinks the deceased was "so far of sound mind, memory, and understanding, that he understood what he was doing at the time he gave instructions [802] for and executed the codicil in question;" but he says he cannot depose that he was of sound mind, memory, and understanding at such time, as he evinced great failure of memory during the time the codicil was in preparation. But the other witnesses present on the occasion (Mr. Hewson and Mr. Shaw) both say that they believe the deceased to have been at the time perfectly capable of knowing and understanding the contents of the codicil, and of sufficiently sound mind, memory, and understanding to execute the same, or to do any act requiring thought, judgment, and reflection.

Now it is said that the account given by Mr. Simpson is not one on which the Court can altogether rely; that in the subsequent part of his deposition, as to subsequent transactions, Mr. Simpson has given an inflated and exaggerated account of the state of the deceased; that he is the party by whom the opposition to the last codicil is got up, and that he is the promoter of the opposition to that codicil; and with respect to certain transactions to which he has deposed it is said that there is not such a very perfect impression on the mind of this gentleman as might be expected from one in the profession of the law (though he is not in partnership with his father in the conveyancing line, but in certain agencies of several noblemen's estates); but I do not see any reason at present to doubt the account given by him, and that the circumstances did occur as Mr. Simpson represents; although it is true that neither Mr. Hewson nor Mr. Shaw confirms the account given by Mr. Simpson as to many of the circumstances stated by him to have passed previous to the execution of the [803] codicil. The fact that neither Mr. Hewson nor Mr. Shaw has mentioned the circumstances stated by Mr. Simpson is no proof that they did not occur. They may not have had their attention called to them in the allegation on which they were examined, and they were circumstances which might not make any great impression on their mind at the time of the execution of the codicil. And therefore there is no reason why the Court should presume (considering the distance of time of the transaction) that Mr. Simpson could have invented these circumstances.

With respect to this codicil, it is not an unnatural or improbable alteration; and whatever was the state of mind of the testator, the codicil originated with himself, for he is the person (as far as the Court can see) who directed Mr. Shaw and Mr. Dufaur to attend to attest the alteration. It emanated from his own mind, and is not inconsistent with the other acts. Looking at all the circumstances together, although the Court does believe that there was a considerable degree of confusion and incoherence in the deceased's mind and understanding, and in the observations he made; the Court is still of opinion that there is sufficient proof that the codicil was the act of the testator, and that he executed it with a knowledge of the contents of the instrument, though probably he might have forgotten the transaction some short time after it had

occurred. But all parties seem agreed that it is better that the executors should take probate of this codicil; and the parties present, one and all, conceived no doubt of the fact of the deceased's competency at the time, though at a later period [804] the condition of the deceased might be such as to render his acts invalid. With respect to this codicil, therefore, I am clearly of opinion that it is entitled to probate, and I pronounce for it accordingly, and I now proceed to the other transaction which shortly after occurred; that is, the codicil of the 10th September.

I am not aware that between this time (between the 3rd and the 10th September, one week) any thing very important happened. Dr. Clutterbuck visited the deceased on the 5th and the 7th of the month, but he has no recollection of anything particular occurring at either of those visits. The account given of the deceased, as far as I can find, does not state that between the days now referred to he had had an epileptic fit. He had three on the 26th August, and five or six on different days after; but I do not find that any witness states that between the 3rd and the 10th September there was a single day on which the epileptic fits returned.

Early on the morning of the 10th of September the deceased had a severe attack of some kind or other, followed by a return of the epileptic fits. This attack was of an alarming character, so much so as to induce the deceased and Mr. Foote to apprehend that his dissolution was at hand. On this occasion Mr. Foote was sent for, and Mr. Pinder Simpson from London, but Mr. Foote, being on the spot, was in attendance before Mr. Pinder Simpson arrived; and the account given by Mr. Foote, in his deposition on the allegation propounding the codicil, is this: "Mr. Day, when I saw him, was in a state of great nervous agitation, and he was evidently under the apprehension that he was [805] about to die; in fact, he was very ill, and I thought that he might die, and in consequence I had his sisters, Mrs. Lockwood and Mrs. Mary Day, called up, and it was after they came into his chamber that he disclosed to me that he had three natural children; his man-servant, Thomas Hunt, was in the room at the time also. Mr. Day made this disclosure to me as a declaration, as a dying declaration of his intentions, and calling upon myself" (that is Mr. Foote) "and his sisters and his servants, to bear witness to what he said, which, as near as possible, was as follows:—'I have three natural children, to whom I have given post obit bonds for 5000l. each, which will be presented at my death, and I wish them to be doubled, and hope Mrs. Day will not object.'" Nothing can be more sensible and rational than these expressions from the deceased. He goes on to say, and it is not an immaterial circumstance, that the deceased then "at the same time stated their ages, saying that one was 16, one 13, and the other 11;" and I may observe that, though these ages do not exactly agree with the account given by Mrs. Peake, the difference is such as may be easily accounted for, without supposing that the deceased laboured under any confusion at this time. Mr. Foote proposed to the deceased to write down his wishes on paper to give to these children of the deceased some additional benefit, before Mr. Simpson's arrival. The deceased acceded to it, and the codicil of the 10th September was drawn up by Mr. Foote, and executed by the deceased in the presence of Mrs. Mary Day, and Hunt, the servant, who signed their names [806] to it as witnesses; it was likewise attested by Mr. Foote himself.

It appears that other circumstances occurred between the deceased and Mr. Foote with respect to the preparation of this codicil. He says, "When I proposed to write down what Mr. Day had said he desired me to do so, and having procured writing materials, I wrote it down in the best way I was able, to express what he had said. During the writing of it I asked Mr. Day if the children were to have their money as they came of age, and he said that was to be left to the discretion of his trustees." Here a question is put, and he gives a rational and proper answer: "And that will be found in what I wrote for him. It was very short. I made no draft or copy of it, but, when I had finished it, I read it audibly and distinctly to Mr. Day in the presence of his two sisters and his manservant, and he appeared perfectly to understand it, and then signed it by making his mark to it in the presence of his said sisters and myself and the manservant Hunt." He says, "I put a wafer seal to it, and Mr. Day went through the ceremony of placing his finger to it, and declaring it to be his act and deed. I was particular in having everything done which occurred to me to be necessary to make it a perfect act, for I thought Mr. Day might die before Mr. Simpson could arrive, and Mr. Day himself thought that he was about to die. I took possession of the codicil after it was executed until Mr. Simpson came, when I

delivered it to him. Mr. Day was of perfect sound mind, memory, and understanding throughout the transaction; he talked rationally [807] and sensibly altogether on the subject; he perfectly understood everything which passed, and was fully capable of giving instructions for a codicil to his will, or of doing any act requiring thought, judgment, and reflection." He says "He did not desire me to keep the codicil till Mr. Simpson came; I did that of my own accord, and then gave it to Mr. Simpson, who read it in my presence, and said that it would do very well. I wanted him to prepare a more formal codicil, but he would not do that, and assigned a reason for it." And then a circumstance occurs which shews the deceased's recollection, and that his conduct was rational and sensible: "He called Mr. Day's attention to the circumstance of there being another bond which he had heard of; Mr. Day was reluctant to admit that there was such a bond, but at last he did admit it, and said that that bond had been destroyed, and the child was dead."

From the evidence given by this gentleman, and from the circumstances which occurred on this occasion, nothing can be more clear than that this was the act of the deceased himself, for the persons about him had no previous notion of the existence of the three natural children. The deceased for some reason or other had kept it a secret from all but one or two individuals. But during the whole transaction the deceased is perfectly rational and attentive; he gave directions for this codicil, and thereby relieved his mind of a weight which was upon it; and perhaps there was some reference to this intention on the 3rd September, when he called for Mr. Dufaur and Mr. Shaw to attest the alterations of the will; for Mr. Simpson says there [808] appeared to be something on his mind, which he could not come to a resolution to disclose. But it is clear from the evidence that the deceased was rational and sensible on the occasion, and even if the case had been less clear, the codicil is an act so natural—that of providing for such children—that the Court would not hesitate in pronouncing for it.

But the case does not rest here. Not only is there proof that the deceased at the time was rational and sensible, but at a subsequent period he enters into conversation with others on the subject, declaring what he had done, and that he was satisfied with it. And though the evidence of Mrs. Peake is the only proof of a previously expressed intention of providing for his illegitimate children, he had made a provision for them in 1832, by post obit bonds of 5000*l.* for each child. She deposes that the deceased at that time declared his intention of making a further provision for them. The evidence of Mrs. Peake is extremely strong on this point. It appears that the deceased being anxious that the children should be identified, a letter was written to Mr. Weston by the deceased's desire, directing that the children should be brought to town, and this is forwarded to Mr. Osborne, one of the clerks at the deceased's establishment at Holborn, Mr. Weston himself, the deceased's brother-in-law, being unwell at the time. The children, who were at Margate, were accordingly brought to London by Mrs. Peake, and she saw the deceased on the 15th of September, and had a long communication with him. But previous to this Mr. Weston and his wife (the sister of Mrs. Day) had visited the deceased, that is, on the 11th [809] of September, the day following the execution of the codicil and the sending for the children. Mr. and Mrs. Weston have both given an account of what passed between them and the deceased on that day. He enters into conversation with them on the subject of these illegitimate children, and of what he had done; he expresses himself satisfied with the act—the execution of the codicil—that he should die happy in having done what he wished to do; and they depose to the deceased being at this time of sound mind, memory, and understanding. On Monday the 12th, when Mrs. Mary Day, the deceased's sister who attested the execution of the codicil, was about to leave Edgware, she asked whether he remembered what he had done, and he entered into the subject with her, and expressed himself satisfied with what he had done. The bonds have been produced, dated in 1832, and witnessed by Susan Peake and Robert Barbrook, who was employed in collecting the deceased's rents, and was also a clerk in his establishment.

The deceased on this occasion evinced no want of recollection; he adhered to the disposition contained in this codicil, and (though he was at this time in a state of fluctuating capacity) the matter originating with himself, the codicil being executed by him in the most rational manner, and he retaining a recollection of it for many days after, I am clearly of opinion that this paper is entitled to probate. But some

circumstances connected with the execution of this codicil are—the effects of them—not confined to this particular transaction; I think they bear very materially on what sub-[810]sequently took place as respects the character of the deceased, and the effect produced on his mind by the several attacks. Notwithstanding the evidence of Dr. Clutterbuck, that he became confused after a short conversation with him, during which, however, he was enabled to recollect names and to answer questions consistently and rationally and for a time appeared capable of business; notwithstanding this evidence and the evidence of other witnesses as to the frequency of the return of the periods when he was in a state of confusion and incoherence, the evidence shews that, when the fits had withdrawn, he could concentrate his thoughts and conduct himself consistently and rationally for a considerable period of time. During the instructions for the codicil, and the communication respecting the children to Mr. Foote, he conducted himself in a perfectly rational manner, and his recollection of the circumstance, and the frequency with which he referred to it, shewed that his general capacity was not so low as in the opinion of many of those about him, and even of Dr. Clutterbuck himself, it was supposed to be. It appears, according to Mr. Weston, that a conversation took place between the deceased and him on the 11th of September, in which he referred not only to the codicil but to other matters of business. Mr. Weston had been travelling to Manchester on business connected with the manufactory, and he had a long conversation with the deceased on this subject, so that he was capable of attending to business for a long time together, according to Mr. Weston, and there is no reason why the Court [811] should distrust the account given by this person, though he states that there was a longer period before a change took place.

But it appears that on the afternoon of the 11th Mr. John Simpson visits the deceased. He was sent for in consequence of what had passed, and he saw the deceased on that day; that is, on the very day that Mr. Weston and Mrs. Weston had a long conversation with the deceased, in which he was perfectly rational, and conversed for a considerable length of time. He went to Edgeware by desire of the deceased, as he was informed by his father, in consequence of the disclosure of the secret as to the three illegitimate children, and the execution of the codicil which had taken place. He states that Mrs. Day was extremely anxious that the deceased should be prevailed upon to annul the codicil, and make a provision for the children in some other way. His evidence is given on the 5th article of the allegation, and it is not immaterial for the Court to refer to it, not so much with reference to this transaction, as to the execution of the last codicil of the 22nd of September. Mr. Simpson states that he saw the deceased both on the 11th and 12th of September, that he attended him on both occasions on the subject of his making a provision for his natural children, of whose existence he had recently made a disclosure. He had not seen him since the 3rd of September, which was soon after the first attack of the 26th of August. He says he tried to draw the deceased's attention to the subject of the codicil, but that he could not get one word from him on that or any other subject. "At the earnest desire of Mrs. [812] Day and Mrs. Clagett, his wife and daughter," he says, "who were in great distress at the disclosure just made in respect to the natural children, and who, to avoid the exposure, were most anxious that the codicil just executed by Mr. Day in their favour should be annulled, and provision made for them in some other way; I made one or two further attempts in the course of that day to get Mr. Day to enter upon the subject, but I was unable to get a word from him." It has been said that this is altogether inconsistent with the account given by Mr. and Mrs. Weston, for if it be true that the deceased was in this state when Mr. Simpson saw him, it is extraordinary that he should have had so much command over himself, and had evinced so much recollection and consistency as to be able to enter into the topics he did, and to discuss matters of business with Mr. Weston (as to his journey to Manchester), and to talk with Mrs. Weston on the subject of his natural children on the very day when Mr. Simpson saw him. But I am of opinion that these accounts are not inconsistent one with the other. The communication between the deceased and Mr. Weston had probably taken place in the early part of the day, when the deceased's mind was in a state of clearness and vigour; after this (Mr. Simpson's visit being in the afternoon of the day) he had relapsed into that state of incoherence and confusion of mind and recollection into which, as appears by the evidence of Dr. Clutterbuck, he was in the habit of relapsing, and therefore the

evidence of Mr. and Mrs. Weston is not inconsistent with the account given by Mr. Simpson, looking to the state the deceased was in [813] during the latter part of his life especially. When the conversation took place with Mr. and Mrs. Weston he was rational and coherent; he then became confused and incoherent, as is stated by Dr. Clutterbuck. Therefore there is no reason to discredit the account given by Mr. Weston of the conversation which took place on the 11th September. Now on the 12th September Mr. Simpson saw him again on the same subject; he says, "I did get him to speak, but he talked in so irrational a manner that I could do no more with him than I had done the day before. Upon my going up to him the second day I said something to him to this effect: 'So, sir, you have been making a codicil, I understand, for the benefit of your natural children.' Upon my saying this he looked at me savagely and said, 'No, John, bonds, and I will have more.' He then repeated the word 'bonds' several times." So that in this conversation with Mr. Simpson, on the 12th September, here is a reference to the provision he had made for them in 1832, as if he had forgotten that he had made a further provision for them. But though he might have forgotten this at the time of his conversation with Mr. Simpson, this is not inconsistent with the statement of Mr. Weston, that the deceased was at the time in a state of perfect recollection; and it is not inconsistent with the state of the deceased; that the account given by Mr. Simpson should also be accurate, when he says, "I then tried again to bring him round again to the subject, saying to him something to this effect: 'Now, sir, can't we make some arrangement and do away with that codicil?' He gave me no answer to this, but began telling me [814] that he had a great deal to say to me, and then he went on to ask me several times, in the most childish way, how long I could stay, and how long it would take me to walk up to town; 'Now, John,' he kept repeating, 'how long can you really stay?' After this I made another attempt to get him round to the subject of the codicil, asking him if we could not invest the money in the funds for the benefit of the children, upon which he said quite petulantly, 'Why?' I told him that he should do it to save the feelings of his wife and daughter. He made no reply to the observation, but, addressing me abruptly, he said, 'You shall have the carriage, and go to Pine-Apple Gate; but tell me how long it will take you to walk up to town, and what is the latest moment you can stay?' Whilst running on in this way the doctors were announced, and I left him for the time. Nothing further passed on the subject of the codicil or the provision for the natural children, either on the part of Mr. Day or myself. Finding that in the state he was it was hopeless to fix his mind to any rational point for a second, I made no further attempt to renew the subject with him." Now this is the account of what passed on the 12th September between Mr. John Simpson and the deceased. It does not at all conflict with the evidence of other persons. It is very possible that though at the making of the codicil he expressed himself rationally on the subject, and approved of what he had done, this should not conflict with the evidence of other witnesses, and of the servants, Hunt and Barton. Barton says that he suddenly flew off, and he might at this time have been in that state of confusion mentioned by Dr. Clutter-[815]-buck, and by other witnesses, and which the papers exhibited in the cause shew did frequently take place. This communication with Mr. Simpson shews, however, that there was on the mind of the deceased a considerable effect produced by the disorder under which he laboured.

On this account given by Mr. Simpson some observations have been made pressing on the character of this gentleman as to the purpose for which he has come forward to give evidence in the cause. These observations are calculated to produce painful reflections in the mind of this gentleman, and it is but justice to him to say that, as far as the Court is able to judge from the evidence, he has not rendered himself liable to a just suspicion of any design to give an inflamed and exaggerated account of the state of the deceased, or any representation other than the facts and circumstances would justify. What is the motive ascribed to this gentleman? Why, that he has a personal interest to state facts contrary to the codicil propounded by Mr. Dufaur, in which Mr. Dufaur is appointed an executor, with a legacy of 500*l.* free of legacy duty, and in which Mr. Dufaur is continued in the collection of certain rents and annuities in London as during Mr. Day's lifetime. By a codicil executed by the deceased, appropriating a large sum of money to the founding of an asylum for blind persons, there is a direction that his trustees shall allow to a secretary or clerk a salary of not less than 100*l.* a year, and it is suggested that if Mr. Dufaur, who is executor

by the codicil propounded on his behalf of the 22nd September, 1836, is appointed, it may interfere with the prospects of Mr. John Simpson, who has a better [816] chance of an increase of salary from the other executors, one being his father and the other persons on terms of intimacy with him. Really, looking to the remote contingency, the remote expectation on which Mr. Simpson is supposed to have acted in this cause, in giving an inflamed and exaggerated account of the deceased's state, it is far too slight to lay any just foundation for the charge which has been made against him. But it does not rest solely on Mr. John Simpson. The imputation must go further, and rest upon the executors and trustees of the trust fund; and it implies that Mr. Underwood and Mr. Croft would not be unwilling to lend themselves to an abuse of the trust reposed in them by the deceased. What right has the Court to suppose that either of these gentlemen or Mr. Pinder Simpson, the father of Mr. John Simpson, should be so forgetful of their duty in the trust they have to execute as not to discharge it with honesty and perfect integrity? What right has the Court to suppose that they would make an addition to the salary of Mr. John Simpson (it is directed by the codicil of the deceased that he is to be the first clerk, so that this is not at the option of the trustees) contrary to the wishes and intention of the testator? Really, the bare statement of the circumstance makes it appear so improbable that it is hardly deserving that the Court should take notice of it; but I have thought it right to counteract the effect of the observation if it should go abroad, and to protect the character of this person, who appears to have conducted himself with perfect integrity.

It is now necessary for the Court to consider what was the character and state of the deceased [817] between the 10th and 22nd of September, with reference to the testamentary act now more immediately before the Court—it is immaterial, I say, to consider what was the state and condition of the deceased according to the accounts given by several witnesses as compared with the account given by Mr. John Simpson.

Mr. John Simpson has given a general account of the state of the deceased on the third article of the allegation. He speaks to his general character in the early part, and he goes on to depose that on the 3rd September he was quite struck with the failure of memory he evinced. "His whole conduct," he says, "and demeanour on every occasion of my being with him from that time manifested to a greater degree on each successive day the impaired state of his mind." Dr. Clutterbuck says the same thing, that is, that he became inconsistent, incoherent, and confused at much shorter periods of time than previously. On some of the said occasions when I was with him he would remain perfectly silent, and not utter a single word for an hour together. On others, and as more generally happened, he would run on from one subject to another, asking questions, and making a number of unconnected remarks of the most absurd and irrational nature. He would begin, perhaps, by asking some question, or making some remark of a rational nature, such as making inquiry after my family or something of that sort, and then, the next moment after, without waiting for a reply, he would abruptly change the subject, and make some absurd inquiry, such as 'What is the price of herrings?' or 'What sort of a crop of apples is [818] there?' or he would run off with a series of remarks perfectly unconnected and irrational to the greatest degree. After harping on some ridiculous idea—that poison had been put into his food, and that he was to have his legs cut off to let out the poison, so that he might be able to walk—or some idea equally irrational, he would sometimes run on in this way for a length of time together. This was the more striking in him from his having been, before his illness, a man who never said a word more than was necessary, and then what he did say he expressed in the most clear and forcible manner. There is a paper somewhere in this cause, it is one of the testamentary papers, or scripts I believe they are termed, upon which, on one of the occasions when I was with Mr. Day during his illness, I, in his presence and from his own mouth, unknown to him, took down with a pencil, and afterwards traced over with ink, a number of remarks and questions made and put by him at the time, and the contents of which paper shew the impaired and weakened state of his mind, and is a specimen of the mode in which he conducted himself on the various occasions of my being with him during his illness." And this paper is annexed to the affidavit of scripts of one of the executors, and marked (H), and which is dated on a day not immaterial—the 24th September, two days after the execution of the codicil propounded by Mr. Dufaur. The conversation detailed in that paper occurred on the occasion of my taking down

from Mr. Day, at his desire, and to avoid irritating him, some instructions for a codicil dictated by him, of the most absurd and unintelligible nature, and which were taken down on the [819] same paper. It is not necessary for the Court to refer to the paper. It does bear the character given by the witness, and if written down from the dictation of the deceased on this occasion, it proves that the deceased was in a most incoherent and confused state of mind at the time. "Throughout his illness Mr. Day was for ever going on talking in some absurd, unconnected way, constantly most ridiculous and irrational, and very often perfectly unintelligible. He would frequently run on to me about his bills and his bonds, and more particularly his will; he was for ever telling me that he must have a new will, and saying that he must nullify the residue—that was an expression he frequently used on the subject." We shall see presently whether, by the other witnesses, this account given by Mr. John Simpson is not confirmed. "It is impossible to remember the absurd trash which he would keep repeating over and over again about his will and his bonds. What he said on these subjects was always unconnected and irrational to the greatest degree; and yet at the same time it gave you the idea that he had something floating in his mind which he could not bring to maturity. In fact, his mind, which before his illness was most clear and decisive, was now in a state of confusion altogether. One mode in which the impaired state of Mr. Day's mind was shewn during his illness was by the ridiculous orders which he used to give to his servants and others. I remember, for instance, hearing him on one occasion order his coachman to take his carriage to town and bring back in it Mr. Hopkinson, his coachmaker, and any six tradespeople. I have at other times heard him [820] tell his coachman to take the carriage to Pine-Apple Gate, and then turn round and bring it back again." He goes on to describe the manner in which the deceased conducted himself and expressed himself during the time at which Mr. John Simpson saw him; he says, "He may have made occasionally a rational observation, and have appeared rational for the time, but as far as came within my observation that never lasted above a moment or two, and then the subject was gone. He never, that I witnessed, during his illness could carry on any subject rationally beyond two sentences. That such as I have described Mr. Day's state at the period in question was known to all his family and those who had access to him, as well as to his medical attendant, there is not a doubt. It was the subject of open conversation throughout the whole establishment, both in the family and among the servants." And he goes on to depose: "On the 12th September, when I was at Mr. Day's house, I conversed with all three of his medical attendants—Mr. Hewson, Mr. Foote, and Dr. Clutterbuck—as to the state in which he was, and they all three concurred in the opinion that he was at that time perfectly childish and unequal to transact any business." Here again it is said that Mr. Simpson is contradicted by Dr. Clutterbuck; that he never expressed any opinion of the general incapacity of the deceased, whereas, in his deposition, Mr. Simpson has stated that Dr. Clutterbuck told him so. He says that all the three medical attendants at that time concurred in opinion that the deceased was in a state of incapacity; and, in answer to the 3rd interrogatory, [821] Mr. Simpson says, with reference to this point: "By reference to my notes of the various conferences I had with the said medical men during Mr. Day's illness, I am enabled to depose to the very days when they severally expressed to me their opinion that he was not in a state to transact any business; on the said 12th of September they all three jointly gave that opinion to me; on the 16th, the 24th, and the 26th of that month Mr. Foote each day expressed that opinion to me; and on the 8th of October following, Dr. Clutterbuck and Mr. Hewson, on my calling upon them at their houses, severally gave it as their opinion that Mr. Day's mind was all but gone, and that he was totally unfit for any business." I confess I see no contradiction of Mr. Simpson's account in what is stated by Dr. Clutterbuck, Mr. Hewson, and Mr. Foote as to their opinion of the state of the deceased. Dr. Clutterbuck saw him at intervals, for a short time—ten or twenty minutes—and during part of that time he was competent to answer questions, but afterwards he became confused and incoherent; and all that Mr. Simpson says is that, on the 12th of September, Dr. Clutterbuck declared to him that the deceased was perfectly incompetent to do acts of business, and that Mr. Foote said the same on the 16th, 24th, and 26th; and it is impossible to look at Mr. Foote's evidence and not see that he is of opinion that the deceased was altogether incompetent to do any act requiring thought, judgment, and reflection; and a person of Mr. Simpson's credit cannot have meant to depose

contrary to the fact, when he stated that Dr. Clutterbuck, Mr. Foote, and Mr. Hewson concurred [822] in opinion that the deceased was at that time incompetent to business. What was the situation of the deceased on the 12th of September, when Mr. Simpson saw him? On that day he had not one of the fits called epileptic, but what is called a "silent fit;" and on this part of the case the evidence of Barton, the nurse, has been taken, a witness on whom the counsel for Mr. Dufaur have been inclined to place considerable reliance: and the Court is also inclined to place great reliance on her evidence, as that of a witness to the act of execution of the instrument, and to the state of the deceased so far as her knowledge extended. She says, on an interrogatory, that she was very much in attendance upon the deceased, almost constantly, from the 26th of August until his death. "It was on the 26th of August," she says, "that he was first attacked with fits; they were what they call 'epilepsy fits;'" he had three on that day, and he had on six different days and at different intervals attacks of exactly similar nature. Besides which, he had two what we call 'silent fits;' that was the name we gave them, for there he would sit in his chair and would not say a word, nor would he take any nourishment, nor let anything be done for him, but sat apparently in a childish state:" perfectly agreeing with the account given by Mr. John Simpson on the third article of the allegation, and which the Court has just referred to. When was the first of these silent fits? Why, on the 12th of September, the day when Mr. John Simpson saw him, and Dr. Clutterbuck stated that he was incompetent to business, and it is improbable that Dr. Clutterbuck should have given another account. [823] The fit came on about ten o'clock at night of Monday, the 12th of September. She says: "The first of these silent fits came on about ten o'clock at night of Monday, the 12th day of September, and it lasted till about four o'clock on the Tuesday afternoon:" that is about eighteen hours; and Hunt has also deposed to the same effect. During the time these silent fits lasted she says "he would sit in his chair and not say a word, nor would he take any nourishment, nor let anything be done for him, but sat apparently in a childish state." And the account which Hunt gives, on the second interrogatory, is this: "I did not consider that it was a fit which Mr. Day had between the 9th and 10th of September last. He was very ill, but quite collected. He woke up and thought he was dying. On the night of the 12th of that month he sat for nineteen hours without moving or speaking. He could not be induced to move or speak, or do anything whatever. I think he was at times after that in complete possession of his memory and mental faculties"—he marks that as a period when a material alteration took place in the state of the faculties of the deceased—"but not for any length of time together." "His mental faculties were not greatly impaired at first, but they gradually got worse and worse, and the failure of them shewed itself in various instances; and I am certain that the state of Mr. Day was such as I have stated from and after the 12th day of September." These are persons on whose evidence the Court is inclined to place reliance, as it is given with great fairness. Barton appears to have given a fair representation as to the deceased's state of mind, according to her [824] impression as to how the deceased was at the several periods of time. According, therefore, to this account, the deceased at this period of time sat in a silent state without uttering a word; on the 11th, when Mr. Simpson saw him, he talked incoherently, before the silent fit came on on the 12th of September, in the way he has represented. But this was not the only silent fit, there was one on the 16th of the month. Barton says the second silent fit began at half-past nine at night of the 16th, and continued until three o'clock the following day. She says: "The effect of the fits, both the epilepsy and the silent ones, was to weaken and impair both his mind and memory; that is to say, at times; but even up to the day of his death he was at times just as rational and sensible as ever;" concurring, therefore, with the opinion of Dr. Clutterbuck. But these silent fits of the 12th and 16th of September were no slight evidence of the effect, the increasing effect, of the disorder on the mind of the deceased. It is clear that at this time, the 12th and 16th of September, the date of these silent fits (one lasting for eighteen hours, the other from nineteen to twenty hours), the deceased's state of capacity was not the same when the silent fits subsided. It is not like the epileptic fits, which rendered his mind impaired and confused, but, when the effects went off, his mind remained perfect; but here, for nineteen or twenty hours, he is visited with a silent fit, during which the deceased sits in his chair in an irrational state, not uttering a

word, or taking food, or suffering anything to be done—his mind unconscious of everything passing, incapable of [825] rational conversation, or of any rational act; therefore on the 12th and 16th the disorder had increased very rapidly, and become of a much more serious nature.

But, in point of fact, what effects did it produce? Why, Barton says that after the 12th of September she observed many instances of incoherent, irrational and childish behaviour in the deceased. "He would give the most nonsensical orders and directions: for instance, he one day, about that time, but I cannot name the day precisely, ordered three or four large clothes-horses to be made for the linen to be hung on in the kitchen, because he himself, and all of us, could then sit by the kitchen fire without scorching ourselves. He would go on talking nonsense of this kind for an hour or two; then he would go off to sleep, as if from exhaustion, and wake up again in an hour quite refreshed, and his mind and memory perfectly collected, and so he would remain three or four hours, and then off he went with his nonsense; and so he kept on, sometimes foolish, and at others quite rational, until his death." So that, at least, he was in a state of fluctuating capacity. She says she remembers on the evening of Saturday, the 17th of September—that follows immediately the abatement or cessation of the silent fit—"he told Hunt, the butler, and myself, who were in attendance upon him, that he meant to talk to us till five o'clock in the afternoon, and he should then only communicate with us by dumb-shew. However, the clock struck, I think it was six"—and what did the deceased do? "he then began counting thus—two and one make three, and so on, till he got to thirty-six, [826] and then began again, and he bid me help in counting, and then he desired the butler, but neither of us could do it to please him; so he sent for Mr. Clagett, who was in the house, and he could not do it right, so he set to again himself, and then he made the butler try again, and kept him on at it, without stopping, for a quarter of an hour; at last he exclaimed, 'There now, you have done it at last—that's just what I mean; how stupid they have all been!' This sort of game went on for three hours, until the deceased had completely worn himself out with fatigue; and, after all, it was not any calculation, it was nothing but merely counting after his fashion from 1 to 36. He did at times give incoherent and ridiculous orders that could not be obeyed, but they were not frequent. The fact is, the house in Regent's Park (Harley House) was undergoing a thorough repair, and the deceased had always been in the habit of giving the orders himself for everything that was wanted." I only read this to shew that the account of Mr. Simpson is corroborated by all the witnesses. He speaks in general terms of the state in which he saw the deceased from the 3rd September till the last time he saw him before he died; and I read this to shew that he has given a probable and accurate account, and that he is confirmed by Barton: "And he would sometimes order the carriage to be sent up to London to fetch the principal tradespeople down, in order that they should have beds and be made comfortable; and the arrangements at Harley House seemed to be much upon his mind, and he would give directions about the tradespeople there, and so on, which he [827] never thought of attending to, and we therefore pacified him in the best way we could. For instance, he would sometimes say to me, 'Well, Fanny, could you manage to go to London this evening? the carriage shall take you as far as Pine-Apple Gate, and you can walk the rest of the way, and get back as you can.' I used to assent to it, and leave him for a little time, and then return to him, and his orders about going to London would have been by that time all forgotten. And in this manner we generally acted when he gave orders which were evidently given by him unconsciously. Sometimes he would not have any recollection of having given such orders; at others he would be aware that he did at times give foolish orders, and that they were not obeyed, which made him suspect that none of his orders were obeyed, and he would then have two or three different persons up, and find out by that means whether or not his orders had or had not been attended to." And the witness, Hunt, also deposes to a circumstance which is in accordance with the evidence of Barton as to his mode of conducting himself after the silent fit. He says, "On the 17th September, 1836, I was had up by Mr. Day to say my multiplication table, and to count figures, and Mr. Clagett and Mr. Foote were had up to do the same. He kept us at it for four hours, one and the other, and at last I did it to please him, and he was as delighted as a child. He conducted himself in a manner wholly irrational. The figures we had to count were—two and one are three, and twelve make fifteen, and eleven make twenty-six, and ten

thirty-six, and that we had to go over and over again. He had a re-[828]-markably strong and retentive memory. During his illness after the 10th of September it was the practice of those about him to appear to yield the same obedience to him as before, but when withdrawn, to pay no attention to what he said or ordered. Sometimes he forgot altogether what he said or ordered; he was treated as a child in that respect." Now, I say it is quite impossible, reading this evidence, to say that Mr. Simpson's account is an inflamed or exaggerated account. It is said that Mr. Simpson has not fixed the exact date of the occurrences, as the other witnesses have done, and that if the deceased was at this time liable to such complete aberration of mind, such unconsciousness and forgetfulness of what passed, it is impossible that any act done by him could have had effect; but his state was such that it required to be particularly watched, to see whether it was a rational act rationally executed—whether or not he was sufficiently master of himself, even a short time after the access of the disorder, to be enabled to do an act capable of having operation.

But another effect of the disorder of the deceased after the 10th of the month, according to the evidence of Hunt, on the third interrogatory, is this: "Previous to and about the middle of the month of September he often talked of his affairs; he never did talk of his affairs before the 10th of that month, never on any occasion." And it comes out in the evidence of Barton, on the eighth interrogatory, that "after the first silent fit the deceased was in the frequent habit of talking about making new wills, and of having Mr. Simpson down about making a will for him; and whilst he was in these moods, [829] and more particularly during the last three weeks of his life, he talked a great deal about giving considerable sums of money to various persons, saying he had got more money than he knew what to do with, and that I should have 200l. per annum, as he should like me to be able to go to a watering-place every summer; he asked Mr. Foote, one day just before he died, how much he would like to have, whether 500l. would satisfy him? And he made similar inquiries and observations to many persons; amongst others I recollect, on the 6th October, Mr. Bull came down, and the deceased told him he was going to make a new will, and inquired if 500l. would satisfy him. He used sometimes to order his book in which the bills of exchange were entered to be brought and read to him during his last illness, and would evidently be under a mistake respecting the time at which some of them became due, and he, during the last three weeks, used to say he wanted to see Mr. Bull and Mr. Dufaur about money matters, and bonds, and such like, and that they must not be kept away from him; indeed, these matters were evidently uppermost in his mind at the time of his being in a state of wandering and irrationality, which, as I have already stated, he was at intervals subject to. Previous to his last illness the deceased was particularly reserved and close about his affairs, and so he continued up to the time of his death, except when he was labouring under the temporary attacks of weakness of mind, to which he became subject after the first silent fit on the 12th September, 1836." And I think it appears from the evidence of Mr. Foote, to which the Court will not particularly [830] refer, as the other party has not had an opportunity of cross-examining him, that this gentleman, after the 12th September—indeed after the 10th, but certainly after the 12th—was in a state of mind very different from what he had been in before; that he was in the habit of talking of his affairs, which he had not been before, of making an alteration of his will, and of sending for his book of bills and bonds, in respect to which he was in the habit of employing Mr. Dufaur. It certainly shews that an alteration had been produced by the disorder, and that the mind of the deceased required to be watched with great caution.

It appears that, on the 18th of September, Mr. Bull, a surveyor, employed in respect to certain repairs at Harley House, visited the deceased on the subject of a lease; and, in the first instance, he was refused access to the deceased by Mrs. Day and Mrs. Claggett, his wife and daughter; which has been argued to be an improper act on their part, as if they wished to make it appear that the deceased was not at this time in a state to see persons on business; but he did get admission to the deceased, and transacted business with him. Mr. Bull has not entered into a detail of the matters which occurred between him and the deceased; but he says he did transact business with him on that occasion, having acted on the instructions he received from the deceased. Considering when the visit of Mr. Bull took place, it is not very extraordinary that the wife and daughter should have hesitated to let the

deceased be troubled with any business whatever. It was the day after the second silent fit, and the counting fit, which lasted for [831] three hours—the very day afterwards. But what comes out in the course of the evidence of Mr. Bull? The object of the visit was the delivering up the counterpart of a lease. I do not understand that there was any other business. And it appears that on the 20th, the day but one afterwards, a letter is written by Mrs. Clagett, under the direction of the deceased, shewing an evident confusion in his mind; and considering the extraordinary accuracy of the deceased's memory, when in the possession of all his faculties, that it was so great as to enable him to repeat a long account, and the items of it in the order in which they were set down, it shewed an incoherency and confusion in his mind, evidently the effect of the disorder under which he was labouring, and which was an affection of the brain, producing the ordinary results of that disorder.

Annexed to the deposition of Mr. Bull is the letter of the 20th September, written by the direction of the deceased, and with reference to the delivering up of the counterpart of the lease; and there was evidently a confusion, as Mr. Bull states, in the mind of the deceased on the subject. It is not necessary for the Court to point out the confusion, which, though slight in itself, is not slight when considered as the act of a person of so accurate a memory as the deceased; I refer to the letter as leading up to the visit of Mr. Dufaur on the 21st September, immediately preceding the execution of the codicil. But before I proceed to the evidence as to this codicil it is proper to consider the situation of Mr. Dufaur with regard to the deceased, and the alteration of the will by the addition of Mr. Dufaur's [832] name as executor with Messrs. Underwood, Croft, and Pinder Simpson.

Mr. Dufaur is a solicitor in this town, and I understand that it is not intended to throw any imputation on his general conduct and respectability. All that is intended by the interrogatories is to shew that the business in which he was employed by the deceased was not of the same confidential nature as that entrusted to the management of Mr. Simpson and his son; that is, that they were inferior matters in point of value of the property concerned, and different in other respects from the more confidential commissions received by Mr. Simpson and his son from the deceased. This gentleman was, in the lifetime of Mr. Day, employed occasionally in lending money on mortgage—(there is one bond for 6000*l.*)—on other occasions in discounting bills, and laying out money in the purchase of life annuities, whilst the deceased employed Mr. Simpson and his son in transactions of much greater magnitude and moment, and in investments of much greater value than those entrusted to Mr. Dufaur, though considerable advantages were obtained by the deceased by means of Mr. Dufaur's employment; and there is no reason to suppose that Mr. Dufaur led the deceased to the modes in which his money was employed; for the deceased had a capacity to judge for himself as to the most advantageous mode of employing his capital, and he only employed Mr. Dufaur in carrying his schemes into effect. It might be (as indeed it must be in all such cases) that the deceased suffered considerable losses, from the manner in which Mr. Dufaur, under his own superintendence, invested [833] his property. With the family of Mr. Dufaur the deceased was intimate in the first instance; it so appears from the evidence of Mary Day, who states that the deceased became acquainted with the uncle of Mr. Dufaur when both of them were in the Custom House; the acquaintance was broken off, but a grateful recollection of it remained, and of some advice which the uncle of Mr. Dufaur had given to the deceased. He was also acquainted with his father, and probably determined to do something for the son's benefit. It appears that Mr. Dufaur had for some years—six or eight—been employed in the way I have described: and within the last year and a half, on the illness of one of the clerks of the establishment in Holborn, Mr. Dufaur was employed by the deceased in collecting certain rents in London, at a commission of two and a half per cent., and he continued till the death of the deceased in the habit of occasionally visiting him. It appears in evidence that he accompanied the persons who went to the strong room in Harley House, where the deceased's papers were kept, and of which Mr. Dufaur, with a clerk, was employed to make an inventory; and he had access to the room when papers were wanted with respect to the business on which he was employed. Under these circumstances I am not prepared to say that it might not be a rational act for the deceased to appoint Mr. Dufaur, executor: I see no reason, if the deceased thought proper so to do, why he should not have appointed Mr. Dufaur with the other gentlemen named in the will. But the question

for the Court is whether he did appoint Mr. Dufaur an execu[834]-tor; whether the deceased did the act himself, knowing what he was doing.

Mr. Dufaur had been sent for by the deceased on the 3rd September, to be a witness to an alteration in his will; at that time, therefore, Mr. Dufaur must have been, to a considerable degree, in the confidence of the deceased, to the same extent at least as Mr. Shaw, also a solicitor (one of nine, I believe) employed by the deceased. He was sent for by the deceased to be a witness. Mr. John Simpson is sent for to make the alteration, and Mr. Dufaur to be a witness. But on the 20th of the month the deceased writes the letter to Mr. Bull (to which I have referred), in which I think is this passage: "Mr. Day observes that Mr. Bull has still 112l. 10s. to pay for interest to Midsummer, which he particularly requests Mr. B. will do to-day;" though, in fact it was not due; "and send word by the bearer if Mr. D. may rely on his so doing. Also, say if Mr. Dufaur may be expected on Thursday," that is, the 22nd. "Dinner at 5 o'clock, and a bed at his service; reminding him of the long stages from the Green Man and Still from half-past two till half-past three o'clock; that he will be wise to take advantage of the first that will take him." This visit of Mr. Dufaur, therefore, was in consequence of an invitation expressed by the deceased himself. That letter was shewn by Mr. Bull to Mr. Dufaur; and Mr. Dufaur, being anxious to return to his family at Brighton, goes on the 21st instead of the 22nd, and remains at the house during the night of the 21st. What particular purpose the deceased had in view in wishing to see Mr. Dufaur does not appear in the [835] evidence, whether it was connected in any degree with any of the investments of the deceased, or any purpose connected with the will, or any other, there is not a trace in the evidence. The visit of Mr. Dufaur is, however, paid on 21st; he sleeps in the house that night, and during that time the instructions are said to have been given by the deceased to Mr. Dufaur for the codicil. At the house of the deceased, during that night, Mr. Hewson also slept; and in the course of the evening (as appears by the evidence of Mr. Hewson, who has not only been examined on the allegation given in by Mr. Dufaur, but on a prior allegation given in by another party), on the evening of this 21st of September, Mr. Dufaur communicated to him the intention of the deceased, that he (Mr. Dufaur) should be an executor of his will. The next morning, when the family was at breakfast (Mrs. Day, Mr. and Mrs. Clagett, and Mr. Hewson), according to the evidence of Mr. Hewson, the subject was renewed. He says, "I very well recollect that the producent was also then at the deceased's house, and that he slept there on the night of the 21st; and on the following morning, the producent being alone with me in the breakfast-room, just before the family assembled for breakfast, which they did about ten o'clock, he informed me that he had received directions from the deceased to prepare a codicil to his will, and thereby to appoint himself (the producent) an executor of the deceased's will; that shortly after this the family assembled at the breakfast-table; the party consisting of Mrs. Day, the wife of the deceased; Horatio Clagett, Esq., and Mrs. Clagett, his [836] wife, the daughter of the deceased, the producent (Frederick Dufaur) and myself. Whilst at breakfast the producent, in the presence of all the said parties, and addressing himself more immediately to Mrs. Day, but still making the matter one of general communication, stated that he had seen the deceased that morning, and that the deceased had expressed to him a wish that he (producent) should be one of his executors; and he added that the deceased had assigned as a reason for such wish the circumstance of his being a considerably younger man than the other gentlemen whom he had already appointed as executors;" so that the communication was made to Mrs. Day, Mr. and Mrs. Clagett, and Mr. Hewson, that the deceased had expressed such a wish, and as far as this goes there is nothing to contradict it. A good deal of observation has been made on the manner in which Mr. Dufaur made this communication; but nothing arises from that. From the situation of the deceased he could have done nothing without the knowledge of the family; and it cannot be an extraordinary degree of candour and openness on his part that he communicated this transaction, which could not be concealed from the family, who could have taken steps to prevent it. He goes on: I cannot speak quite positively, but I have a very strong impression that Mrs. Day, in reply to such communication, observed that if such was Mr. Day's wish, she, of course, could not object to it. Neither Mr. nor Mrs. Clagett made any observation on the subject. A little time afterwards, and before we quitted the breakfast-table, the producent asked me if I would act as his [837] clerk or amanuensis,

or some peculiar term of that nature, and fair copy the said codicil, which he said he had drawn out in pencil on the back of a letter; and I consented so to do. I am quite positive that he did not state that it was the deceased's wish that I should do so; he only asked it of me apparently as a mere request of his own. I then withdrew from the breakfast-table to another table at a distant part of the room, and was furnished with pen, ink, and paper. I cannot say quite positively whether it was by Mrs. Day or Mrs. Clagett, but I am pretty certain it was one of them; certainly it was not Mr. Dufaur. Mr. Dufaur "handed me the pencil draft, and I copied the same verbatim on a sheet of letter paper." So that on this occasion there was no impediment thrown in the way of executing the codicil by Mrs. Day or Mr. or Mrs. Clagett; on the contrary, they lend their aid and assistance as he deposes in the next article. They all go into the deceased's room to complete the execution of the instrument, and Mr. Hewson goes on to depose as to the manner in which the codicil was executed. But it is to be observed that the instructions are represented to have been given by the deceased to Mr. Dufaur. No other person took the instructions, or was present when they were given to Mr. Dufaur, who saw the deceased in the morning before he came down to the breakfast-room on the 22nd September, the day on which the codicil was executed; but it is admitted in the answers of Mrs. Day that on that morning Mr. Dufaur had seen the deceased before he had come down to the breakfast-room, and a conversation may have taken place between them [838] as stated in the allegation, and which may, if it did take place, notwithstanding the disorder under which the deceased laboured, be sufficient to establish the codicil. But did the conversation take place? There is nothing but the allegation of Mr. Dufaur himself; for it is not in evidence. Barton does not speak to having seen or heard Mr. Dufaur in conversation with the deceased, or mention anything to support the representation given by Mr. Dufaur in his allegation as to what took place on that occasion. If it did take place, the witness Barton, who was almost constantly in attendance with the deceased, and if she left the room was only in an adjoining room—if, I say, there had been any communication with the deceased in a loud tone of voice, she must have heard it; but she says nothing at all as to anything passing between Mr. Dufaur and the deceased between the night of the 21st and the morning of the 22nd. There is nothing whatever to support the account given in the allegation of what is said to have passed between Mr. Dufaur and the deceased. The transaction is not impossible; it would not be an irrational transaction; but the Court must be satisfied (considering the state of mind of the deceased prior to the execution of the codicil) that it was his own act, and done with caution and deliberation, and with a full knowledge of the effect it would have on the disposition of his property. We have nothing but a draft prepared by Mr. Dufaur in his own handwriting in pencil, and delivered to Mr. Hewson for the purpose of being copied; and the knowledge of Mrs. Day, and Mr. and Mrs. Clagett, of the paper from which the codicil was to be prepared [839] for execution; and it remains to be seen whether, in the absence of proof of the instructions themselves, the manner of execution is sufficient to supply this defect of evidence. What are the facts? The parties assembled in the breakfast-room go up stairs into the room of the deceased, who was sitting in his chair dressed, and Mr. Hewson (in the presence of Mrs. Day and Mr. Clagett) said to the deceased, "I have prepared a statement in compliance with the request of Mr. Dufaur, and shall I read it to you, sir?" He goes on to say, "The deceased signified his wish that I should read it to him by nodding his head in token of assent, that being his usual mode of signifying assent; I then read the codicil to the deceased in the presence of the aforesaid parties. I read the same as distinctly and clearly as I was able, and the deceased appeared to pay great attention to it. Having completed the perusal of the document, I asked the deceased if that (meaning thereby the said codicil) was his wish, and he then answered, 'Yes,' firmly and distinctly; and having so done, the producent asked him if he would execute it, or rather said, 'Now, Mr. Day, you can make your mark to this.' Upon which the deceased, in rather an irritable tone and manner, said, 'Why make my mark? why should I not sign my name?' And deceased then himself called Mrs. Day to bring his desk, which she did, and the paper being placed thereon, she, as was her usual custom, guided the deceased's hand, and he signed the codicil. I have no recollection whatever of there being any seal affixed thereto; I have no recollection either of any alteration being made by the producent or myself, [840] or any one else, in the attestation clause, in consequence of the

deceased having signed his name instead of making his mark" (but the witness Barton says there was); "nothing whatever was said by the deceased as to declaring the paper to be a codicil to his will, or publishing it as such; neither did he go through any form of sealing, nor did he request any persons to attest the execution thereof. I remember that I, Mr. Clagett, and Fanny, Mrs. Day's maid, did sign our names as witnesses; but when the latter came into the room, or during what part of the transaction she was there, I cannot recollect. I remember that Mr. Dufaur asked us three to sign our names as witnesses, and that we did so in the presence of the deceased, in testimony of our having been present at the due execution of the codicil by the deceased." This is the account given by this gentleman as to the execution of the instrument; that he told the deceased that he had prepared a codicil at the request of Mr. Dufaur, and asked him whether he should read it; that the deceased nodded by way of assent; that he read it over clearly and distinctly; and the deceased, when asked whether it was his wish, said, "Yes," firmly and distinctly; and, according to the account of Mr. Hewson, when he was told that he might make his mark, the deceased said, in an irritable manner, "Why should I not sign my name?" But here is not a single expression from the deceased as to recognizing the contents of the codicil. No doubt, if the instrument had been read over to any one of unimpeached capacity it would be sufficient to supply the want of instructions. But the question is whether, in the state of the deceased, [841] there was a sufficient knowledge of the contents of the instrument, when we consider what followed afterwards, and the state of mind in which the deceased was? It is to be observed that the deceased had, between the 10th of September and this day, three silent fits; that he had been visited during this time by Dr. Clutterbuck, as well as other medical attendants; and that Dr. Clutterbuck states that, though he was clear for about a quarter of an hour or twenty minutes, the duration of this period decreased at each visit, and that on the 20th the letter was written to Mr. Bull, shewing a confusion in the deceased's mind and memory, which was so accurate; it is impossible, therefore, that this evidence can supply the want of instructions, the instructions being taken down by the person who is benefited by the codicil, without any communication between him and the deceased on the subject of a will proved by any person who heard any part of it; which the deceased does not recognize by a single syllable implying a knowledge of the contents of the instrument. It is true the instrument was read—merely read—but the deceased's loss of sight made this absolutely necessary; and though the family knew of and assisted in the execution of the instrument, which they might have interfered to prevent if improperly obtained, the deceased's mind had been running, according to the testimony of Barton, on the subject of new wills and the alteration of his will. The account given by Barton of the transaction does not shew any material difference from the account of Mr. Hewson. She was not in the room during the whole time, she left it on their entering, according [842] to custom, and returned to look after the fire, or for some other purpose, and she overheard a part of the codicil read, and she confirms the account given by Mr. Hewson as to the effect of the paper which was read by him to the deceased.

Now what is the statement given by Mr. Hewson and Barton as to the condition in which the deceased had been? Mr. Hewson says he cannot depose that the deceased was at and during the time of the transaction of sound mind, memory, and understanding; "that is, not of perfectly sound mind, memory, and understanding; he was evidently labouring under a state of irritability, not violent, but still different from his natural character; there was also a sullenness about him, and though the distinction is a very nice one, I should say that he did understand what he said and did, and what was said to him, and that he knew what he was about; and I form that opinion from the circumstance of his assent to my reading the paper to him when I inquired of him if I should do so, and also from his observation about signing his name thereto, instead of making his mark; but even that was done in an irritable manner, and I knew that the nature of his disease was such that his mind was necessarily weakened, and I do not consider that at the time of executing the said codicil the deceased was capable of making and executing a codicil to his will, or of doing any serious act requiring thought, judgment, and reflection, his manner was so entirely distinct from his natural manner. He was on this occasion in a highly irritable state, whereas his natural manner was peculiar for his cool, calm, and deliberate [843] mode of transacting any business of such like importance." And

this agrees very much with the general character of the deceased given by other witnesses in the cause.

Now, according to this gentleman's account, he was not entirely free from the effects of the disorder under which he was labouring: it appears that his manner was irritable, and Mr. Hewson says that he was in an irritable state, different from his natural manner, which was cool, calm, and deliberate. Then, can I say that the deceased was free from the effects of the disorder under which he laboured—that disorder being an attack on the brain, which was proved by the results on the 12th and 17th, and by the aberrations which the deceased on other occasions so clearly shewed? The witness Barton is of a contrary opinion to Mr. Hewson. She says—after having stated that Mrs. Day guided the deceased's hand, and that he repeated words of publication—that she looked at Mr. Hewson “for the purpose of ascertaining from him whether she ought to sign the paper or not.” She says: “I did not ask him in direct terms, ‘Am I to sign this?’ but I looked at him and caught his eye, and pointed to the paper, or placed my finger on it where I supposed I was to sign my name, and Mr. Hewson then said, ‘Yes, sign it there;’ and I did sign it. I feel not any hesitation in deposing that, throughout the whole of the time of the circumstances occurring of which I have deposed, the deceased perfectly well knew what he was about, what he said and did, and what was said in his presence. He could not know all that was done because of his blindness. During all the time, I do consider that he was of sound [844] mind, memory, and understanding. Being in constant attendance upon him, I had, according to my own idea, an accurate knowledge of the state of his mind, and I do repeat that during all the time of the business of this said paper going on he was quite himself, and that during such time he was fully capable of making and executing a codicil to his will, or of doing any other serious or important act.” Now nothing certainly can be stronger than the evidence of this witness as to the state and capacity of the deceased; but unfortunately she does not give to the Court a single circumstance in addition to what had been stated by Mr. Hewson, that the deceased nodded assent, and shewed an alacrity to sign the paper (if he had acted so with the former papers, it would have been a circumstance of importance); he does shew an alacrity contrary to his usual habit (with the codicils of the 2nd, 3rd, and 10th September) not to make his mark, but in an irritable manner he said, “Why should I not sign my name to the paper?” But Barton, I say, gives the Court no account of any circumstances from which the Court might judge for itself what was the state and condition of the deceased, and come to a conclusion as to the state of his mind when the execution of the codicil took place, not one syllable of conversation occurs between her and the deceased during the morning of that day, nor does she overhear any conversation between the deceased and Mr. Dufaur, when, as represented, the instructions for the codicil were taken down in pencil by him. There are the circumstances of reading over to a person of fluctuating and doubtful capacity, and of his calling for the writing desk, and his [845] alacrity to sign the instrument which had been read to him; but there is not one syllable from which the Court can come to a conclusion that he perfectly knew the contents of the instrument.

The Court having nothing else before it—nothing preparatory to the execution of the codicil, let us see the account which is given of what occurred immediately after. Barton states that “the deceased, immediately after the execution of the codicil, and before Mr. Clagett and Mr. Hewson left the room, began to give directions to Mr. Clagett respecting some game which he was to bring down from London. The deceased lived principally upon game, and always ordered it himself, and it was generally sent down once or twice a week. He desired Mr. Clagett to make memoranda of what he wanted, and I remember that he ordered pheasants, and either Mr. Hewson or Mr. Clagett told him they were not in season; but he still insisted upon having it written down, and he directed the memorandums to be written part in ink and part in pencil, and kept on giving so many orders that he detained the carriage at the door for half an hour or more; and from the manner in which he gave the orders to Mr. Clagett, and his repeating the same directions over and over again, I should say the deceased was not at such time of sound mind, memory, and understanding; for I remember saying to Mr. Hewson, in reference to the difference in his manner during the time of his giving those directions and what it had been whilst executing the paper, ‘See how soon he goes off again!’” So that immediately on the completion of the instrument the deceased gave incoherent instructions to Mr. Clagett,

which he [846] wrote down (the paper has not been preserved), which leads her to the belief that he was not at the time in a state of capacity to execute a will. Mr. Hewson deposes to the same effect, and Mr. Clagett, who was present on the occasion, has also deposed to the same effect, though the Court cannot place much reliance on the evidence of Mr. Clagett, considering the situation in which he is placed, and his relationship to the family. He has not been examined in chief in support of the paper, but on interrogatories; (a) and the only purpose for which [847] the Court attends to Mr. Clagett's evidence is to explain the motive on which he acted in lending [848] any assistance to the execution of the codicil, for it is certainly an extraordinary circumstance that neither Mrs. Day nor Mr. or Mrs. Clagett offered any impediment to the execution of this codicil.

What are the facts deposed to by Mr. Clagett as to the motives which induced him to attest the execution of the codicil? Why, they are these. [849] That the deceased was a person impatient of contradiction; that what was to be done must be done immediately, without delay or remark; that he was in the habit of dictating to persons what was to be written down, and it was immediately taken down on paper, and that he had done this on very many occasions (on the 24th September, two days after this transaction, there are some directions with respect to alterations of his will); that he consented to do so on all occasions, and some of these papers have been produced, and they contain most inconsistent and incoherent directions; that in consequence of this, and of the deceased's habits, he, from a consideration of the delicacy of his situation, consented to witness this alteration of the will, Mrs. Clagett having learned from Mr. Foote, with respect to the deceased's capacity, and with respect to any transactions in regard to testamentary acts; and according to the evidence of Mr. Foote, he had expressed to Mr. Clagett in a letter which is not produced (it having been destroyed), that in the then state of the deceased, any act of business

(a) On the fourth session of Easter Term, 1837, the proctor for Mr. Dufaur having prayed publication without having examined Mr. Clagett, one of the attesting witnesses, the proctor for the executors prayed a monition against Mr. Clagett, in order to his being produced for the purpose of being cross-examined on behalf of the executors.

Lushington and Nicholl for the executors. A party who propounds a testamentary paper is bound to produce all the attesting witnesses to such paper, and should he decline to examine them himself, they must at least be produced for the purpose of cross-examination by the other party.

In this case it is said Mr. Clagett is interested, as he is the husband of the deceased's daughter, but if he has any interest at all in the question it is against the codicil; the interest, therefore, is the wrong way, and Mr. Dufaur having chosen him as his witness cannot be excused from producing him. Were a party at liberty not to produce a witness under such circumstance, very important evidence might be shut out.

The King's advocate and Addams *contra*. The prayer of the other party comes to this, that they may be allowed to cross-examine Mr. Clagett, whom they cannot produce as a witness, he being interested to support their case against the codicil.

Sir Herbert Jenner. But should Mr. Clagett not be produced you will have the benefit of his being a subscribed witness to your codicil—without his being examined at all, as the other parties cannot produce him as a witness.

The King's advocate. If they were to produce him it might be questionable whether we could object to his examination.

In the Courts of Law one of the attesting witnesses alone would be sufficient—and although it is the general rule in Chancery that all the attesting witnesses shall be examined, still that rule is subject to exception, and in the late case of *Tatham v. Wright* (2 Russ. & Mylne, 1), in an issue from that Court, the party who set up the will did not examine the whole of the witnesses.

How is Mr. Clagett situated? He is the husband of the next of kin, and is interested to support the will against this codicil, and to compel his production would be smothering the course of justice.

Lushington in reply. This is the first time that an objection has been taken to producing an attesting witness.

The case of *Tatham v. Wright* is mainly distinguished from this—that was a question as to an issue, and according to the proceedings in Chancery the attesting witnesses

he might perform might be set aside by the evidence of himself, Dr. Clutterbuck, and Mr. Hewson, as they were satisfied he was not in a state to transact business. It appears from the evidence of Barton and Hunt that on many occasions, when the deceased was in a state of wandering and aberration, he gave orders which were inconsistent and incoherent, and which were not possible to be obeyed; but they pretended to obey, and when the orders were dictated and taken down in writing, the deceased was satisfied with it. Therefore, when Mr. Clagett says that what he did was under the [850] impression that the act would have no validity, and was consistent with the practice of the servants and others about the deceased, it furnishes a reasonable ground for assisting in the execution of the codicil, on the supposition that the deceased was in that state that it could not give effect and operation to the paper. He says he was taken by surprise, and when he did it he was inclined not to have done it, but he had no means of opposing and preventing the execution of the paper. Mr. Hewson says he thought it a matter of minor importance, as it was only the appointment of Mr. Dufaur to be an executor. Mr. Hewson was of opinion that the act was not of importance; but the making Mr. Dufaur an executor and trustee might be productive of very important consequences. But be that as it may, the Court is to judge for itself, not with reference to the understanding of Mrs. Day, and Mr. and Mrs. Clagett, nor from anything they may have understood, they not being acquainted with business. Mr. Clagett thought he had acted for the best in what he did, for the reasons he has assigned, which are sufficient to satisfy the Court.

The act being performed, and being known to the family, was communicated to Mr. Simpson, and on the 24th of September Mr. Simpson visited the deceased, and at this time a paper of instructions was taken down from his dictation, which shews that he was then in a state of utter incapacity to execute a testamentary paper, or to do any other act of business. But nothing is said to come from the deceased with

are examined there before the issue is directed—therefore the Court knows what the witnesses have sworn; and that was not the case of a devisee filing his bill to have the will established, but it was a proceeding by the heir-at-law. But the witnesses there had been examined, and the other party might himself have examined the witness on the trial of the issue—in this case we cannot produce Mr. Clagett, which also forms a distinction from that of *Tatham v. Wright*.

We submit that the other side have not shewn an exception to the general rule, and if they were excused from producing the witness the same thing may be done in every case which comes before the Court.

Sir Herbert Jenner. The present is an application to compel the production of Mr. Clagett, one of the subscribed witnesses to a codicil propounded by Mr. Dufaur, in order that he may undergo cross-examination.

It cannot be denied that the general rule of the Court is that a party propounding an instrument must produce all the attesting witnesses to that instrument—if not to examine them himself, still in order that they may be cross-examined by the other party; and the question is whether the present case forms an exception to that general rule, for although the general rule is as I have stated, still there may be exceptions. It is said that to compel the production of this witness would be defeating the ends of justice—but so far from the production of this witness being detrimental to justice, I think, on the contrary, that his non-production would cause injustice, for the party propounding the codicil would then have an advantage to which he could not be entitled; but if the witness be produced, the question will then arise as to his credibility, because a witness by attesting an instrument does, to a certain extent, pledge himself that the transaction is a proper one.

It is said that it is to be presumed that the witness will not support his own act, but not more so in this than any other case where a party declines to examine his attesting witness, and in this respect the present case differs from that of *Tatham v. Wright* cited in the argument, for there the party could see what the evidence of the witness would be, as he had already been examined in Chancery. I am of opinion that I must direct Mr. Clagett to appear for the purpose of undergoing cross-examination, and the more so because the other party cannot produce this gentleman as a witness, he being incompetent; and although the counsel on behalf of Mr. Dufaur say they would not object to the production of Mr. Clagett as a witness against the codicil, still, as he would be in law an incompetent witness, the Court would not allow it.

reference to the appointment he had made. Looking to the observations of the deceased with respect to the codicil of the 10th [851] September, which was frequently alluded to by him, expressive of his satisfaction with that codicil, and considering that it was made in consequence of a previous intention declared by the deceased to make a further provision for his illegitimate children, and the care and attention of the deceased in the preparation and execution of the instruments for carrying the bulk of his intentions into effect (I mean the will and codicil of May, 1834), I cannot say that the manner of his giving to Mr. Dufaur, as he is said to have done, instructions for this codicil is a circumstance which argues a sound mind, or calm consideration and deliberation on the part of the deceased. There could have been nothing improper in the deceased's avowing what he had done, though no previous intention had been expressed of making this important alteration in his will.

There had been no diminution of confidence in his executors, for, the persons whom on the 10th of September he consulted or wished to consult, as to the testamentary act of that date, were Mr. Simpson and his son Mr. John Simpson. Mr. Pinder Simpson saw him first on the 10th of September, and Mr. John Simpson afterwards; and, as far as the Court is able to trace, there was no diminution of confidence on the part of the deceased towards any of the gentlemen who had been selected by himself for the purpose of carrying his intentions into execution. What had been the conduct of the deceased when he appointed an additional executor in his will of 1834? He consulted with Mr. Simpson as to the addition of a third person, and as to whether the person was a [852] proper one, and his expression is remarkable; "He should like to have a person who would dovetail in with Mr. Simpson;" that is, whose views were the same, and who would act in concurrence with him; therefore there was not anything like want of confidence or distrust on the part of the deceased towards him. Here, however, without anything having been said to either of the executors whether it was agreeable to them to act in concert with Mr. Dufaur, or whether it was likely that Mr. Dufaur would coincide with them, which may or may not be possible, this gentleman is added to the number of the executors. It is said that it is probable that the deceased had conceived some degree of disapprobation against Mr. Pinder Simpson and Mr. John Simpson; but there was no appearance of any want of confidence towards Mr. John Simpson on the 10th or 11th September, or on any other occasion. But without one syllable being said to these gentlemen, or any subsequent recognition, Mr. Dufaur is placed in the important situation of an additional executor (not expressly a trustee, but it is said that that is implied), to carry the will into effect along with these gentlemen, the deceased being uncertain whether they would act in concurrence with him or not. Nothing would have been more natural than for the deceased to have consulted these gentlemen whether they would act with him or not.

But the deceased was communicated with afterwards, and yet no reference was made to this codicil. Certainly it is somewhat extraordinary that when it was known to Mr. Dufaur that Mr. John Simpson, in their interviews of the 28th and [853] 29th September, expressed an opinion as to the invalidity of the codicil, he did not require that the deceased should be asked with respect to it; and it is also extraordinary that some inquiries should not have been addressed to the deceased by those about him with respect to the transaction, whether he had executed the codicil or not. But so it is: neither Mr. Dufaur, who was appointed an executor, nor any part of the family, asked the deceased anything with respect to this codicil, and the deceased on his part was silent. There is nothing whatever to confirm the instructions given by the deceased according to the allegation of Mr. Dufaur, on the very morning the codicil was prepared for execution. No person heard the conversation between the deceased and Mr. Dufaur. The instructions were taken in the handwriting of Mr. Dufaur, and Mr. Dufaur, not thinking it right that the codicil should be in his writing, gave the instructions to Mr. Hewson to copy; but Mr. Dufaur, as a solicitor, should have been more careful, and should have placed himself in a condition to prove circumstances with respect to the deceased's mind and capacity.

I must not be understood to convey any opinion as to Mr. Dufaur's having committed anything like a fraud. I have no right to say that he has been guilty of anything of the kind. It is very possible that everything pleaded by Mr. Dufaur may be true; and if he had proved it by evidence it might have been sufficient

to satisfy the Court that the codicil was the act of the deceased, notwithstanding there was no previous declaration and no subsequent recognition. But there is no evidence to satisfy me that this was the intention of the deceased; I have [854] not the benefit of any fact before me. I do not mean to say that the deceased himself was not capable of originating such a codicil, or capable of expressing himself in the manner stated in the allegation of Mr. Dufaur; but I have no evidence to shew that he did; the only evidence before the Court with respect to the execution is that it was read over without one syllable being said by the deceased with reference to the contents of the instrument read; and seeing the fluctuating state of the deceased's capacity during the very time it was read—for immediately afterwards he relapsed into a state of incoherency and inconsistency—I say I am not satisfied in my own mind (and that is the whole extent to which the Court goes) that the deceased did intend that this codicil should be carried into effect in connection with the instrument he had previously made, and (as far as the Court can find) adhered to up to the period of the execution of this codicil; that is, that the three gentlemen named in the will should manage the whole of his affairs after his death.

I do not say anything as to the manner in which the opposition to this codicil has been conducted. I think it was the bounden duty of the executors to take the opinion of the Court as to the validity of this paper; and it is but justice to say, with regard to Mr. John Simpson and Mr. Pinder Simpson, that I see no reason why they should feel greater animosity to Mr. Dufaur than Mr. Underwood and Mr. Croft. I see no reason why Messrs. Underwood and Croft should not be as much against this codicil as Mr. Pinder Simpson and Mr. John Simpson. I think it was the bounden [855] duty of the executors to take the opinion of the Court as to this paper, and if they were of opinion that the codicil could not stand under the circumstances in which it was made, they were justified in opposing the paper, not as improperly or fraudulently obtained, though if they believed that Mr. Dufaur had not conducted himself with perfect propriety towards the deceased, and on that ground declined to act with him, I see no reason why they should not oppose the codicil and conduct themselves as they have done. But when it is suggested that Mrs. Day has no interest to oppose Mr. Dufaur, and that no person has an interest but Mr. John Simpson, or "cares a pinch of snuff" whether the codicil is established or not, I must say that the executors were perfectly justified in opposing the codicil, there being as much doubt whether it was the intention of Mr. Day to add to the number of his executors as to add Mr. Dufaur, considering the probabilities of the case, the great caution of the deceased when he added Mr. Croft to the number, to ask whether the person he appointed would dovetail with Mr. Simpson or not, shewing how anxious he was as to the best mode of carrying his intentions into effect.

Under all the circumstances of the case, I am of opinion, not that there has been fraud here, but that there is a defect and failure of proof; that I cannot come to the conclusion on this evidence that there is sufficient to satisfy the requisites of the law. Mr. Dufaur was himself present at the execution of the codicil. If Mr. Dufaur had suggested, as he ought to have done, that under the circumstances of his being the person benefited by [856] the codicil, and the instructions being in his handwriting, that he should withdraw from the room, and questions should be addressed to the testator as to whether he knew the contents of the instrument, and whether it was in accordance with his wishes and intentions, as it was supposed to be, the case would have worn a different aspect; but no questions are suggested—all passes in dumb shew, as far as the deceased is concerned, with the exception only of what he said about signing his name, and another exception of his asking for the desk.

On the whole case, I am of opinion that there is a failure of proof, and I pronounce against the validity of the codicil, and decree probate of the will and four other codicils to the executors.

DE BONNEVAL against DE BONNEVAL. Prerogative Court, August 7th, 1838.—The domicile of origin continues until another is acquired. A new domicile is not acquired by residence unless it be taken up with an intention of abandoning the former domicile.—A Frenchman having quitted France in 1792, in consequence of the Revolution in that country, and having resided in England until 1814, when he returned to France, and from that time resided occasionally in both countries, held, not to have abandoned his original domicile.—The validity of a

will is to be determined by the law of the country where the deceased was domiciled at his death.

[Referred to, *Croker v. Marquis of Hertford*, 1844, 4 Moore, P. C. 360. Discussed, *Lanenville v. Anderson*, 1860, 2 Sw. & Tr. 43.]

On petition.

Guy Henri du Val, Marquis de Bonneval, the deceased in this case, died in Norton-street, Fitzroy-square, on the 22nd September, 1836, a bachelor, without a parent, leaving the Comte de Bonneval, his brother by the whole blood, and the Marquis de la Jonquiere, his brother by the half blood, his only next of kin.

He left a will in the English language, executed [857] in England on the 19th of December, 1814, of which the First Lord of the Treasury for the time being, his nephew, Guy Charles Oscar du Val, Vicomte de Bonneval, Robert Herries and Ottywell Robinson, Esquires, were appointed trustees and executors.

He also executed a further will in France on 14th February, 1826, disposing of his property in France only, and confirming his will made in England.

Probate of the English will was prayed on behalf of the Vicomte de Bonneval, one of the executors; this was opposed on the part of the Comte de Bonneval, the brother of the deceased, who prayed to be heard on his petition in objection thereto: the act on petition was afterwards brought in, and the only question now before the Court was, whether the Marquis de Bonneval, the party deceased, was domiciled at his death in England or in France?

Lushington and Haggard for the French domicil.

Addams and Curteis contra.

Judgment—*Sir Herbert Jenner*. This question comes before the Court in the shape of an act on petition, respecting a will of the Marquis de Bonneval, dated in 1814, the deceased having died in 1836. He was a bachelor, and he left a brother by the whole blood, and a brother by [858] the half blood, who would be entitled in distribution to his personal estate both by the laws of France and England if he died intestate.

The parties before the Court are Charles François Guy du Val, Comte de Bonneval, the brother by the whole blood, and Guy Charles Oscar du Val, Vicomte de Bonneval, nephew of the deceased, who would be entitled to a benefit under the will, if good and valid. The simple question is, whether the deceased was domiciled in France or in this country? On that point it will depend by the laws of which country the validity or invalidity of the will is to be tried: for it is now settled by the case of *Stanley v. Bernes* (3 Hagg. Ecc. 273) that the law of the place of domicil, and not the *lex loci rei sitæ*, governs the distribution of and succession to personal property, in testacy or intestacy. In that case the question related to the validity of certain codicils disposing of property in this country, and it was decided by the High Court of Delegates that if the instrument be not executed according to the law of the domicil of the testator, it is invalid. As far as I am aware of the point decided in that case, it was held that the law of the domicil applies to questions of testacy as well as of intestacy. It appears that my learned predecessor expressly stated the question in that case to be, whether a British subject, who died abroad (Mr. Stanley, the testator, having died abroad, after acquiring a domicil in Portugal), disposing of his property in this country by will, must make it according to British law or foreign law? and he went on to say that if, in a case of testacy, the *lex domicilii* applied, and not the law of the country where the property was situated, it would [859] operate to defeat the intention of the testator; for, he observed (p. 443): "What is the Court called upon by the opposer of the codicil to decide? That it is invalid, contrary to the manifest intention of the testator; that intention being expressed in an instrument duly executed, according and with reference to the law of this country, in his own handwriting, and attested by three witnesses." The Court of Delegates having reversed the sentence of the Prerogative Court, it follows (though no reasons are given by the Court for its decision) that the two codicils were pronounced against, on the ground that they were not executed according to the law of Portugal, where the testator was domiciled, and that consequently this Court must hold that all wills disposing of personal property situated in this country must be executed according to the law of the country where the party executing the instrument was domiciled.

The facts of the case, as set forth in the act on petition, and affidavits on both sides, are these: That the deceased, Guy Henri du Val, Marquis de Bonneval, died at

the age of 71, on the 22nd September 1836, in Norton-street, Fitzroy-square; that the will in question is made in the English form, and was executed for the purpose of disposing of the property in England alone, being confined simply to that; that he also made a will, in 1826, at Paris, by which he disposed of his property in France, and that he thereby institutes the Vicomte de Bonneval, his nephew (son of the party before the Court, the Comte de Bonneval), sole and univer[860]-sal heir; that the deceased was born in France, in 1765, of French parents, and continued to reside there till 1792, when he left that country in consequence of the Revolution; that his parents were of high rank, and he succeeded to estates in France, and was President à Mortier in the Parliament of Normandy; that on his leaving France, in 1792, he proceeded first to Germany and afterwards to England, and continued to reside here till 1814 or 1815, during which time he received an allowance from the government of this country, as a French emigrant; that on the return of the Bourbons he repaired to France, and it is stated on behalf of his brother (who asserts the French domicile) that the deceased went to France in 1814, and that on the escape of Bonaparte from Elba he came again to this country, but returned to France in 1815; that from 1815 (according to the statement of the brother) he continued to reside in France, occasionally visiting this country, till 1821, when he became entitled to certain property under the will of his aunt, including the chateau and estate of Soquence, in the district of Rouen, and in 1823 he succeeded to part of the estate of his mother; that from 1814 to 1827 he was actively engaged in the settlement of his property and family affairs in France; that he agreed to purchase of his brother part of his paternal property, which had been confiscated under a decree of the French government, and to part of which property he was entitled. It is further stated that in the deed of purchase of these estates in 1827, made at Paris, the deceased is described as "residing usually at the chateau of Soquence," and that in a decree of the Court of [861] Appeal, at Caen, he is described as "living on his rents and domiciliated in the Commune of Sahurs, district of Rouen." The act on petition goes on to state that in 1825 the deceased received compensation as a French emigrant for the property confiscated at the Revolution, and that from 1815 to 1821 he resided on his property in France, and took up his domicile in the chateau of Soquence, and maintained it till his death; that from 1815 to 1821 he made occasional visits to England, and in 1821 he took a house in Norton-street, in which he resided when he came to England, but that such visits (which is not denied by the other side) were interrupted for several years together; that in 1834 he came to England, but with the intention of returning again to France; that he was rated as proprietor of the property at Soquence to the electoral contributions of the district; that he exercised his political rights as a French subject, and constantly described himself, and was described in legal proceedings, as domiciled in France, and there are entries in the Register of Mortgages at Rouen, from 1827 to 1836, in which he is so described; that the deceased was a Marquis of France, and by the will of 1826, disposing of his property in France, he directs his nephew, out of certain estates in France, to form a majorat, to serve as an endowment to the title of hereditary marquis, granted to their ancestors about 1680, and to settle the same upon the heirs male of their name, by order of primogeniture and proximity to the elder branch.

These are the grounds upon which the brother contends that the deceased was domiciled in France, [862] and consequently that the validity of the will must be determined by the law of that country.

On the other side, it is alleged that the deceased came to this country in 1793, and that, with certain exceptions, he ever after resided here down to the time of his death; that in June, 1814, the deceased took the lease of a house in Mortimer-street, Cavendish-square, for the term of eight years, and in 1820 he took the lease of another house in Norton-street for forty-four years, for which he paid 360l. premium and a rent of 40l. per annum, putting himself to considerable expense in fitting up and furnishing the house, which he continued to occupy till his death, keeping up an establishment of servants there, and spoke of the house as his "home." The act denies that, on his return to France, he was generally or principally resident there from 1814 to 1821, and alleges, that in 1821, he had no house in France, but went there merely to visit his friends and relations, and to obtain compensation for his losses; that, after he became entitled to the chateau and estate of Soquence in 1821, he was involved in law suits in France, which he was compelled frequently to visit,

passing considerable portions of time there, and in order to give validity to acts done there he was obliged to describe himself as of a certain residence or domicile in that kingdom, but from 1834 to the time of his death he continued permanently to reside in this country, without paying a single visit to France, though not prevented from doing so by ill health, or by any other circumstance than his uniformly avowed preference for a residence in this country, and that, in 1834, the name of the deceased was included in [863] the list of persons entitled to vote at the election of members of Parliament for the borough, and that he at all times kept his property in England wholly distinct from his property in France.

These are the principal grounds on which it is contended that the party died domiciled in this country.

In the reply it is alleged that the deceased kept up an establishment at Soquence, and that, at his death, a correspondence consisting of about 1200 letters, dated from 1818 to 1835, and from different persons and places, was found at his chateau at Soquence, carefully preserved and classed, and that the family papers and plate of the deceased were deposited there. That the house in London was kept for his convenience when here, and in case of new disturbances in France, of which he expressed fears, and that he exercised in France the political rights of a French subject.

Before I proceed to consider the effect of the facts stated in the affidavits, admissions and documents, I will refer briefly to what I consider the principles on which this question ought to be decided, with reference to the state of the facts. I apprehend that it being *prima facie* evidence only that where a person resides there he is domiciled, it is necessary to see what was the domicile of origin of the party. Having first ascertained the domicile of origin, that domicile prevails till the party shall have acquired another, with an intention of abandoning the original domicile. That has been the rule since the case of *Somerville v. Somerville* (5 Ves. jun. 750). Another principle is, that the acquisition of a domicile does not simply depend upon the residence [864] of the party; the fact of residence must be accompanied by an intention of permanently residing in the new domicile, and of abandoning the former; in other words, the change of domicile must be manifested, *animo et facto*, by the fact of residence and the intention to abandon. A third principle is, that the domicile of origin having been abandoned, and a new domicile acquired, the new domicile may be abandoned and a third domicile acquired. Again, the presumption of law being that the domicile of origin subsists until a change of domicile is proved, the onus of proving the change is on the party alleging it, and this onus is not discharged by merely proving residence in another place, which is not inconsistent with an intention to return to the original domicile; for the change must be demonstrated by fact and intention.

Applying these principles to the case now to be decided, there is no doubt that the domicile of origin of the deceased was France, for there he was born and continued to reside from 1765 to 1792, and he left that country only in consequence of the disturbances which broke out there. He came here in 1793, but he came in the character of a Frenchman, and retained that character till he left this country in 1814, for he received an allowance from our government as a French emigrant. Coming with no intention of permanently residing here, did anything occur, whilst he was resident here, to indicate a contrary intention? It is clear to me that, as in the case of exile, the absence of a person from his own country will not operate as a change of domicile, so, where a party removes to another country to avoid the inconveniences attending a residence in his own, he does not intend to abandon [865] his original domicile, or to acquire a new one in the country to which he comes to avoid such inconveniences. At all events, it must be considered a compulsory residence in this country; he was forced to leave his own, and was prevented from returning till 1814. Had his residence here been, in the first instance, voluntary; had he come here to take up a permanent abode in this country, and to abandon his domicile of origin, that is, to disunite himself from his native country, the result might have been different. It is true that he made a long and continued residence in this country, but I am of opinion that a continued residence in this country is not sufficient to produce a change of domicile; for he came here avowedly as an emigrant, with an intention of returning to his own country so soon as the causes ceased to operate which had driven him from his native home. He remained a Frenchman, and if he had died during the interval

between 1793 and 1815 his property would have been administered according to the law of France.

Up to 1814, then, he had not acquired a domicile in this country; the connexion with his native country was not abandoned; from whence then is the Court to collect that he had at any time acquired a domicile in this country by any act manifesting an intention to do so? I can find no fact beyond the mere residence in this country till 1814, and his taking the lease of a house for eight years, which would be a strong fact to shew intention, if it had been followed up by a continued residence here. But what is the fact? In 1814 the Bourbons were restored, and as he returned to his own country after taking this house, [866] the inference is that he did not intend to reside here, but took the house with a view of securing a residence of his own if he should be forced to return hither; and it turned out that his apprehensions were not ill-founded. He remains in France during the greater part of the interval, between that time and 1821. It is alleged that he was employed during these visits in settling his family affairs, and it has been argued that his return to France was not in order to resume his French domicile—an argument which might have some force if he had lost his French domicile. But the question is, Had he abandoned his French domicile? I am of opinion that he had not abandoned his French domicile, nor acquired one in England, up to 1814 or 1815.

I have looked through the affidavits to find what time the deceased resided in this country after 1815, but there is no evidence as to the period he resided here between 1815 and 1821. Maria Bureau, his servant at the house in Norton-street, knew nothing of him till 1824, and his agent in France, M. Gamare, was not acquainted with him till 1826; M. Gamare, whose affidavit is produced by the party who contends for an English domicile, states that he “considered at all times that the general residence of the deceased was in England;” that the deponent was in the constant habit of corresponding with him by letter, when he was there; that “upon many occasions, when the deceased was in England, and his presence was necessary in France, the deponent experienced great difficulty in inducing the deceased to quit his residence in England, and to come to that country, to attend his interests [867] there.” That must have been after 1826, “that from the end of September, 1834, until his decease, the deceased did not quit his residence in England, although he was not prevented from so doing, as he sincerely believes, by his health or by any other circumstance than his constantly avowed preference for his residence in England;” and he goes on to state that the deceased kept his property in England entirely distinct and apart from that in France.

The evidence with respect to the periods of time during which the deceased resided in the two countries respectively is extremely loose. It is difficult to collect, from the affidavit of Gamare, what were the periods of the deceased’s residence in France, and he says nothing of his residence there for three years and a half from 1828, spoken to by Bureau. It appears, from her affidavit, as well as from documents in the cause, that he left England in 1828 and resided entirely in France for three years and a half; that subsequently he was again absent from England for eight months (which is not spoken to by Gamare), and in the contract of sale in March, 1827, when he purchased some property of his half-brother, he is described as “residing usually at the chateau de Soquence, near Rouen.” It would appear that he was engaged in law proceedings in France till 1831; that he was there in 1833 and 1834, and that between 1830 and 1834 he was seen frequently to proceed by the steam-boat up the river to Rouen.

Now, under these circumstances, it appears to me that there is no evidence to shew that the deceased ever acquired a domicile in this country. I see nothing but the fact of the taking of the lease of [868] a house in Norton-street in 1820, for a long term undoubtedly, but which does not appear to denote anything more than an intention of providing a place of occasional residence in this country. But up to 1820 he had acquired no domicile here, and during the subsequent time he was absent in France for several years; there is nothing, therefore, to shew that he had abandoned his original domicile and had taken up his sole domicile (for that is the expression used in *Somerville v. Somerville*) in this country, although he kept two female servants in this country; yet when I find that he kept an establishment at Soquence; that he had plate and furniture there worth 1200l.; that his family papers and his correspondence were deposited there, the letters classed and arranged, his having a house

here can have been only for an occasional residence in England, even if he divided his residence between the two countries, or even if he spent the greater part of his time here; but all the evidence as to his continued residence in this country is that he resided here from 1834 to 1836, though it does not appear that he did not intend to return to France. I do not consider that, in this case, any more than in *Somerville v. Somerville*, the declarations made by the deceased at different times that he preferred a residence in this country can be a ground upon which the Court is to rest its judgment; the domicile cannot depend upon loose declarations of this sort, where there are documents which shew that the party looked to France as his home. Unless the evidence was nicely balanced, the Court would pay no regard to such declarations, shewing a preference for a residence in this country, [869] and not a decided intention to abandon his native land and take up his sole residence here.

I am not inclined to pay much more attention to the descriptions of the deceased in the legal proceedings in France; for it may have been necessary, as the proceedings related to real property, that he should describe himself as of some place in that kingdom. I am inclined also to pay very little attention to the statements as to his exercise of political rights in France, or to his being registered as a voter here: being a house-keeper he was registered here as a matter of course.

It is stated that he resisted with success the contribution to some of the French rates, which a person resident in France was liable to; but the grounds are not stated, and it is too loose a reasoning, that because all French subjects are liable to such rates, and he successfully resisted them, therefore he was not domiciled in France. It must be shewn that the question came regularly before the French tribunals, and he was held to be not a domiciled subject of France.

I am, therefore, of opinion that the deceased continued a domiciled French subject to the time of his death, and consequently that the validity or invalidity of his will must be determined by the French tribunals, and not by this Court. The precise form in which the Court must pronounce its sentence is this: that the deceased, at the time of his death, was a domiciled subject of France, and that the Courts of that country are the competent authority to determine the validity of his will and the succession to his personal estate; and, [870] as in the case of *Hare v. Nasmyth* (2 Add. 25), the Court suspends the proceedings here, as to the validity of the will, till it is pronounced valid or invalid by the tribunals of France.

DORMER, FALSELY CALLED WILLIAMS *against* WILLIAMS. Consistory Court of London, Nov. 16th, 1838.—The marriage of parties under a license from “a person not having authority to grant the same” is not void by 4 G. 4, c. 76, s. 22, unless both parties knowingly and wilfully intermarry by virtue of such license.

This was a question as to the admissibility of the libel in a suit of nullity of marriage, brought by Mrs. Williams, proceeding as Maria Teresa Dormer, of the parish of St. George, Hanover Square, against Mr. William Henry Williams of the same parish.

The libel pleaded:

1st. That by the statute 4 Geo. 4, c. 76, it is, among other things, enacted “that if any persons shall knowingly and wilfully intermarry in any other place than a church, or such public chapel wherein banns may be lawfully published, unless by special license as aforesaid, or shall knowingly and wilfully intermarry without due publication of banns, or license from a person or persons having authority to grant the same, first had and obtained, or shall knowingly and wilfully consent to, or acquiesce in, the solemnization of such marriage, by [871] any person not being in holy orders, the marriage of such person shall be null and void to all intents and purposes whatsoever,” &c.

2nd. That the said William Henry Williams, being a bachelor, of the age of twenty-one years, paid his addresses to the said Maria Teresa Dormer, a spinster, of the age of nineteen years and upwards, that they agreed to be married, that the father of Mr. Williams, as also the aunt and other relatives of Miss Dormer, with whom she was then residing at Swinnerton, in the county of Stafford, severally were averse to the said intended marriage, but that the parties, nevertheless, determined to effect the same.

3rd. That it being agreed between the said parties (in order to effect their said

marriage clandestinely) to be married by license at the parish church of Swinnerton, Mr. Williams undertook to procure a license for the celebration of the said marriage at the said parish church, but that, instead of obtaining such license from any person or persons having authority to grant the same, he procured a pretended license, as for the celebration of the said marriage in the parish church of Swinnerton, from a person having no authority to grant such a license, such pretended license being granted as by the authority and under the seal of the Lord Bishop of St. Asaph, whereas the party alleged that the parish of Swinnerton is in the county of Stafford, and in the diocese of the Lord Bishop of Lichfield and Coventry.

4th. That the said William Henry Williams, immediately after having obtained the said pretended license, finding that the same was null and inoperative, [872] but fearful that, in the event of any delay occasioned by the procuring of a new license, or otherwise, the relatives of the said Maria Teresa Dormer might interfere and prevail on her to forego her determination to be married to him, persuaded and induced her to consent to the celebration of the said intended marriage at the parochial chapel of Halston, in the county of Salop, and diocese of St. Asaph (described as the parish of him, the said W. H. Williams, in the said pretended license), provided he could procure a clergyman who would perform the ceremony at the said parochial chapel under, and as in virtue of, the said pretended license, &c.

5th. That W. H. Williams, accordingly, on the 22nd December, 1836, proceeded to the village of Ellesmere, and there obtained the consent of the Rev. J. F. to celebrate a marriage between himself and the said M. T. Dormer, in the parochial chapel of Halston (in the absence, as previously ascertained, of the regular officiating minister), as in virtue of the pretended license aforesaid for the celebration of the said marriage in the parish church of Swinnerton.

6th. That the said M. T. Dormer, as had been pre-arranged between her and the said W. H. Williams, secretly left Swinnerton, where she was then residing with her aunt, early in the morning of the 23rd of December, 1836, and proceeded in a carriage of the said W. H. Williams, accompanied only by a female servant, to Ellesmere, and there joined the said W. H. Williams. That the said parties were on the said 23rd of December in fact, though unlawfully, married by the said Rev. J. F. [873] at the parochial chapel of Halston, as in virtue of the said pretended license.

Seventh. That the parties were so married after the 18th of July, 1823, when the act received the royal assent, that they "knowingly and wilfully intermarried, to wit, in the parochial chapel of Halston aforesaid, without due or any publication of banns, and without a license for such marriage from any person or persons having authority to grant the same, first had and obtained," by reason whereof such their marriage was and is null and void.

Eighth. In supply of proof, annexed a copy of the affidavit made on obtaining the license.

Ninth. Pleaded a copy of the entry of the marriage in the register of marriages in the chapel of Halston.

Burnaby and Haggard opposed the admission of the libel, on the ground that the facts did not shew that both parties had a guilty knowledge that the licence was an illegal one; that although this was the first case of nullity of marriage under a license, still the clause of the act had been under consideration in the cases with respect to publication of banns, and the same rule must apply in both instances; further, that under the present libel there can be no proof of the license itself; it is not exhibited.

The Queen's advocate and Addams in support of the libel. The 22nd section of the statute of 4 Geo. 4, c. 76, enacts that if any persons shall knowingly and wilfully intermarry without due publication of banns or license from a person or persons having authority [874] to grant the same first had and obtained, the marriage of such persons shall be null and void to all intents and purposes whatsoever. The libel states that this marriage was celebrated by virtue of a pretended license granted by a person not having authority to grant the same, and that the parties intermarried by virtue of such license knowingly and wilfully. It is said that the license cannot be proved, because it is not in existence, but the affidavit is pleaded, which is always followed by the license.

They cited *Balfour v. Carpenter* (1 Phill. 204).

Judgment—*Dr. Lushington*. It has been truly stated that this is the first occasion on which a question has arisen as to the construction of the act of parliament with respect

to a marriage had in virtue of a license granted by a person without authority to grant the same, and I think it therefore, in the first place, incumbent upon me to apply my attention to the clause in the act, in order to ascertain its true construction generally, and to see whether the facts stated in the libel bring the case within that construction.

The question has arisen on former occasions with respect to the due publication of banns, and it has been settled by the superior tribunal (*b*) that, in order to render a marriage null and void, under the 22nd section of the act, both parties must have acted knowingly and wilfully; for it is not sufficient that the parties intermarry without due publication [875] of banns; they must have known that there was no due publication, and must have wilfully intended to disregard and defeat the law.

Now, with respect to the words in the clause in question, "a license from a person or persons having authority to grant the same," the following considerations arise:—Whether they mean authority to grant a license at all, or authority to grant the particular license required on the occasion. I am willing, for the present purpose, to take it that they mean the particular license requisite on the occasion; then, in my judgment, the whole question turns upon this: whether the facts and circumstances are such as to prove that both parties knowingly and wilfully intermarried without a license from a person having authority to grant that license.

I must observe that I do not think that much light is thrown upon the question by the case of *Balfour v. Carpenter*, which occurred at a time when the former marriage act was in operation; because it is specially provided by that act (26 Geo. 2, c. 33, sect. 8) that marriages "solemnized without publication of banns, or license of marriage from a person or persons having authority to grant the same first had and obtained, shall be null and void to all intents and purposes whatsoever:" so that there was a specific enactment compelling the Court to hold such marriages null and void. The present act is very different from Lord Hardwicke's Marriage Act. By that act it was intended to enforce with the utmost rigour the form and mode in which all marriages should be solemnized, by the serious [876] penalty of nullity if the very words of the statute were not complied with. By the present act in order to render a marriage null and void, both the parties to the marriage must have wilfully violated the act with a full knowledge of the consequences; here is, therefore, a striking difference between the two statutes, and what may have been done with reference to the former marriage act can have little effect with regard to the construction of the present act.

By the construction put upon the present act I take it that the facts pleaded in any libel for avoiding a marriage must be sufficient for either of the parties; that if Mr. Williams had been the party promoting the suit instead of Miss Dormer (or Mrs. Williams) he would have been entitled to a sentence declaring the marriage a nullity, as well as Mrs. Williams; and I am also to recollect that the circumstances must be so stringent as, if (instead of there being no issue, as happens to be the case here) there had been children, would compel me to bastardize the issue, and deprive them of any property to which they would be entitled if the marriage were not declared null and void. Taking this view of the case, I conceive the intention of the legislature to have been that the facts and circumstances under which the 22nd section of the statute shall have operation must be perfectly conclusive; by which I mean that the plea should be such that, if all the facts and circumstances stated therein were satisfactorily proved, I should be compelled to hold that both parties to the marriage had a guilty knowledge of the violation of the law; and the task I have now to perform is to examine the allegations [877] set forth in the libel, and see whether the case comes within the construction of the act, according to my view of it.

The libel begins by pleading the act of parliament, the courtship, and that the parties agreed to be married, but that the relations were averse. What I am now looking for is whether, supposing fraud to have been contemplated, Miss Dormer, the party proceeding in the cause, knew that she was about to be married in virtue of a license granted by a person who had no authority to grant it. The third article alleges, "that it being agreed between the parties, in order to effect the marriage clandestinely, to be married by license at the parish church of Swinnerton." I assume (though it ought to have been pleaded more in detail) that the parties determined

(b) See *Tongue v. Allen*, ante, p. 38, and 1 Moore's P. C. Cases, 90.

to effect a clandestine marriage, and so far as the presumption goes, of an intention to proceed clandestinely, I give the party the full benefit of it; but according to the plea itself, there was no intention to violate the law, for it is pleaded that they intended to be married in the parish of Swinnerton, where the lady resided, and by a license—"Mr. Williams undertook to procure a license for the purpose; but instead of obtaining it from any person having authority to grant the same, procured a license as for the celebration of the marriage in the parish church of Swinnerton, under the seal of the bishop of St. Asaph, Swinnerton being in the county of Salop and diocese of Lichfield and Coventry."

Now, in the first place, looking at the case as regards Mr. Williams himself. Am I to suppose [878] that Mr. Williams, being cognizant of the marriage law, went to the diocese of St. Asaph for the purpose of procuring a license from a person who had no right to grant a license at all? But in order to give the party the fullest possible benefit, I will presume that he had such fraudulent intention to procure a mock license; the surrogate, who granted it, must have been ignorant or grossly negligent of the duty he had to perform. But I will take it that the surrogate did grant such a license, not being aware that he was violating the law. Mr. Williams then having obtained a license wholly insufficient to celebrate the marriage from a person not having authority to grant it, as pleaded in the fourth article, "persuaded and induced Miss Dormer to consent to the celebration of the intended marriage at the parochial chapel of Halston, in the county of Salop, and diocese of St. Asaph, provided he could procure a clergyman who would perform the ceremony at that chapel, by virtue of the said license." What am I to infer from this? He persuaded her to consent to be married in the parochial chapel of Halston; but it is not stated that she was told that the license was an illegal license, or that she was aware of the illegality of the license. If I were to stop here, how can this be a violation of the law, which requires that both parties shall knowingly and wilfully intermarry without license from a person having authority to grant the same? And could I say that such a state of facts would justify me in bastardizing issue, and depriving them of some title of honour, the act itself requiring that there must have been a wilful [879] violation of the law, with a full knowledge of the consequences, before so extreme a penalty can be inflicted?

The fifth article pleads nothing but the fact of the marriage, and here again I observe that, if there has been any illegality, through a wilful disregard of the law on the part of Mr. and Mrs. Williams, here is a clergyman of the Church of England, who ought to have read, and who must have read, the license, who, in neglect of his duty or in ignorance of the law, celebrated this marriage in virtue of a license which, on the face of it, was no authority at all.

In *Tongue v. Tongue* the Judicial Committee were agreed that there must be evidence to establish a disregard of the law knowingly and wilfully by both parties. The facts stated in this libel do not afford any reason to conclude that the party proceeding in the cause had a guilty knowledge that the law was violated; without evidence of which the marriage cannot be declared null and void. And I must not lose sight of this, that, although in this case the lady avails herself of the law for her protection, that law, if not administered with caution, might, under similar circumstances, have been wrested against her and against the innocent offspring of the marriage.

I think it my duty not to admit the libel.

[880] THE OFFICE OF THE JUDGE PROMOTED BY BREEKS *against* WOOLFREY. Arches Court, Nov. 19th, 1838.—Prayers for the dead are not prohibited by the Church of England.—In a criminal proceeding it is not competent to the promoter to set forth in the articles an offence not contained in the citation. The articles must agree with the citation.

[Referred to, *Flamank v. Simpson*, 1866, L. R. 1 Adm. & Ecc. 281; *Martin v. Mackonochie*, 1868, L. R. 2 Adm. & Ecc. 201; *Sheppard v. Bennett*, 1870, 39 L. J. Ecc. 8; *Keet v. Smith*, 1875, L. R. 4 Adm. & Ecc. 406. Discussed, *Egerton v. All Saints, Odd Rode*, [1894] P. 15; *Pearson v. Stead*, [1903] P. 66.]

This was a question as to the admissibility of the articles in a cause of office promoted by the Rev. John Brecks, the vicar of the parish of Carisbrooke, in the Isle of Wight, against Mary Woolfrey, widow, for "having unduly and unlawfully

erected, or caused to be erected, a certain tombstone in the churchyard of the said parish of Carisbrooke, to the memory of Joseph Woolfrey, late of the said parish, deceased, and a certain inscription to be made thereon, contrary to the articles, canons and constitutions, or to the doctrine and discipline of the Church of England." (The above were the words of the decree or citation.) The proceeding was by letters of request from the chancellor of the diocese of Winchester.

The articles were in substance as follows:—

First. We article and object to you, the said Mary Woolfrey, widow, that by the laws, customs and usages of this realm, it is forbidden to erect, or cause to be erected in the churchyard of any parish or place any tomb- or head-stone or other monument, without the consent of the rector or vicar of such parish or place first had and obtained, or without a [881] faculty for the purpose first granted under the seal of the proper Court: and, further, that it is by the twenty-second article of the Church of England, agreed upon by the archbishops and bishops of both provinces, and the whole clergy in the convocation holden at London, in the year 1562, declared that the Romish doctrine concerning purgatory, pardons, and other things therein mentioned, is a fond thing, vainly invented and grounded upon no warranty of Scripture, but rather repugnant to the word of God. And we further article and object to you, that, by reason of the premises, all persons erecting or causing to be erected in the churchyard of any parish any tomb- or head-stone or other monument, without the consent of the rector or vicar of such parish first had and obtained, or without a faculty for the purpose first granted under the seal of the proper Court, ought to be peremptorily monished immediately to remove the same; and, further, that if such tomb- or head-stone contain any inscription contrary to the doctrine and discipline of the Church of England, and to the articles of the said Church hereinbefore recited, the person or persons erecting, or causing to be erected, the same, or the person or persons making such inscription thereon, ought not only to be peremptorily monished immediately to remove the same, but also to be duly corrected and punished according to law for their excess and temerity therein, &c.

Second. Also, that notwithstanding the premises, you, the said Mary Woolfrey, widow, did on or about the 8th day of February now last past, erect or cause to be erected in the churchyard of the said parish of Carisbrooke, a certain tomb- or head-[882]-stone to the memory of your husband Joseph Woolfrey, deceased, without the consent of the said Rev. John Breeks, clerk, who was then and still is the vicar of the said parish, first had and obtained, and without any faculty for the purpose under the seal of any Court whatever, and that upon such tomb- or head-stone there are contained, among others, the following inscriptions, namely, "Pray for the soul of J. Woolfrey," and, "It is a holy and wholesome thought to pray for the dead," both which said inscriptions we do further article and object to you to be contrary to the doctrine and discipline of the Church of England, and to the articles, canons, and constitutions thereof, and particularly to the said twenty-second article hereinbefore recited, &c.

Third. The third exhibited a copy of the writing and figures upon the stone—they were, "Spes mea Christus." "Pray for the soul of J. Woolfrey." "It is a holy and wholesome thought to pray for the dead."—2 Mac. xii. 46. "J. W. obiit 5 die Janⁱ. 1838, æt. 50."

Addams opposed the admission of the articles. The grounds on which the party is proceeded against in the articles are two. First, the erection of a tombstone without leave of the vicar of the parish; and, secondly, placing thereon an inscription contrary to the articles, canons, and constitutions, or to the doctrine and discipline of the Church of England.

Sir H. Jenner. Is it stated in the citation that it was done without leave of the incumbent?

[883] Addams. No.

Sir Herbert Jenner. They are separate and distinct offences, but there is no mention in the citation of the leave of the incumbent; the articles ought to agree with the citation.

Addams. I am not disposed to take the objection.

Sir H. Jenner. But must not the Court take the objection, this being a criminal suit? If it was intended to proceed on the ground that the erection was without leave of the incumbent, it should have been stated in the citation.

Addams. The offence of erecting a tombstone is laid as a separate offence, and a

certain position of law is laid down as applicable to that state of things, and the articles then go on to plead as an aggravation of the offence, the inscription. If they are separate offences, then the proceeding ought to have been in a different form; if they are not to be separated, then all that part of the articles charging the inscription to be contrary to the articles and doctrines of the Church of England ought to be expunged, and the offence ought to be confined to the erection of the tombstone without leave of the incumbent. In that case the party ought not to have been proceeded against in this Court by articles, but a proceeding in the civil form should have been adopted, namely, a monition taken out in the Diocesan Court; the first article sets forth that [884] persons erecting such monuments without leave of the incumbent ought to be "peremptorily monished immediately to remove the same;" that is, by a civil proceeding. But the article goes on to lay down, which I admit to be law, that if any such stone contained an inscription contrary to the doctrine and discipline of the Church of England the person causing it to be erected ought to be monished to remove it, and also to be duly corrected and punished. I admit that if parties erected such stone with an insulting design they should be punished for their proceedings.

The second article then sets forth the inscriptions, and alleges them to be "contrary to the doctrine and discipline of the Church of England, and to the articles, canons, and constitutions thereof, and particularly the twenty-second article." He then denied that any offence had been committed, and argued that prayers for the dead were not necessarily connected with the Romish doctrine of purgatory; that many eminent divines of the reformed Church were favourable to the practice of praying for the dead, and some had had similar inscriptions placed upon their tombs. The argument on this point is not inserted, as the judgment of the Court proceeded upon the same grounds.

The Queen's advocate and Curteis, in support of the articles, contended that the form of proceeding, namely, by articles, was the usual and the proper mode. *Bardin v. Calcott* (1 Hagg. Con. 14), *Seager v. Bowle* (1 Add. 541), *Hopper v. Davis* (Cases before Sir Geo. Lee, 1, 640).

[885] That it was competent to the promoter to set forth in the articles the offence of erecting the stone without leave of the incumbent; that although those words were not contained in the citation, yet the citation in the præsertim calls upon the party to answer to articles, &c.—"for having unduly and illegally erected" such stone—the citation, therefore, gave the party notice of the charge, and it was time enough to allege the offence more specifically when the articles were brought in.

With regard to the inscription, they contended, first, that the request to "Pray for the soul of the deceased," must be taken to be with reference to the Romish doctrine of purgatory, which is condemned by the twenty-second article. The inscription is, "Pray for the soul of J. Woolfrey. It is a holy and wholesome thought to pray for the dead." (2 Maccabees, xii. 46.) The book from which this quotation is taken being one of the Apocryphal books, according to the doctrine of the Church of England, although not so by the Romish Church; and the reference being not to the authorized version (in which there are not so many verses), but to the Douay Bible: and the passage being that upon which the doctrine of purgatory is mainly founded, it is to be inferred that the invitation to pray for the soul of the deceased was connected with that doctrine.

But, secondly, admitting, as had been stated by Dr. Addams, that prayers for the dead were not necessarily connected with purgatory, and that such prayers had been in use long before the doctrine of purgatory had been broached, still the Church of England, although it does not in words condemn such prayers, yet practically it discounts—[886]—tenances and discourages them. The thirty-fifth article declares "The second book of Homilies, the several titles whereof we have joined under this article, does contain a godly and wholesome doctrine, and necessary for these times," &c. And among the titles given is that "of prayer," the third part of which, after treating of purgatory, and quoting St. Chrysostom and St. Cyprian, concludes, "Let these and other such places be sufficient to take away the gross errors of purgatory out of our heads, neither let us dream any more that the souls of the dead are anything at all holpen by our prayers."

In the primer of Henry the 8th, and in the first Prayer Book of Edward 6th, prayers for the dead were admitted; but this book being revised in 1552, and

exceptions made against it on account of these prayers, they were altogether expunged, as being inconsistent with the doctrine of the Reformed Church.

They cited—

Comber's Companion to the Temple.

Wheatley's Rational Illustration of the Book of Common Prayer.

Shepherd's Critical and Practical Elucidation of the Book of Common Prayer, &c.

Nicholls on The Book of Common Prayer.

Palmer's Origines Liturgicæ.

L'Estrange's Alliance of Divine Offices, &c.

Whitgift's Defence of the Answer to the Admonition against the Reply of T. C. Cartwright, tr. 21, p. 729.

Hammond's Examination of the New Divines and Ancient Liturgy Vindicated.

[887] Mede's Sermon on The Righteous shall be had in Everlasting Remembrance. book i. s. 22.

Dec. 12th.—*Judgment*—*Sir H. Jenner*. This case was very fully and elaborately argued, and the Court thought it due to the arguments which were addressed to it, to take time to consider of its judgment, and to look into the authorities which were cited. It is a cause in which the office of the judge has been promoted by the Rev. John Breeks, vicar of the parish of Carisbrooke, in the Isle of Wight, against Mary Woolfrey, of that parish, widow, citing her to answer to certain articles "touching and concerning her soul's health, and for the lawful correction of her manners and excesses," which is the usual style and language of the proceedings of the Court—"and more especially for having erected, or caused to be erected, a certain tombstone in the churchyard of the same parish, to the memory of Joseph Woolfrey, late of the parish, deceased, with a certain inscription thereon contrary to the articles, canons, and constitutions or to the doctrine and discipline of the Church of England."

The cause is brought by letters of request from the diocese of Winchester (this Court having no original jurisdiction) the chancellor of that diocese having referred the matter to this Court, as he had a right to do. The offence is one clearly of ecclesiastical cognizance, and it was not denied, nay, it was admitted, that, if the inscriptions were of the character attributed to them in the citation, no person had a right to erect a tombstone with such inscriptions [888] impugning the doctrine and discipline of the Church of England, and that a person so offending is liable to be punished, and the tombstone to be removed. The question then is whether the inscriptions have been properly described in the citation; the additional offence laid in the articles, that the stone was erected without leave of the incumbent, does not, in my opinion, arise on the face of the citation; the question is, therefore, confined to the legality of the inscriptions. The inscriptions set forth in the articles being "Pray for the soul of J. Woolfrey" and "It is a holy and wholesome thought to pray for the dead." (2 Mac. xii 46.)

This being a criminal proceeding the burthen of proving the charge lies on the promoter; and the clergyman of the parish is not an improper person to proceed in such a case, for to the incumbent belongs the superintendence of the church and churchyard, and it is his duty to take care that no inscription should be placed there which could be made the means of disseminating doctrines inconsistent with those of the established religion.

The articles purport to state the law, and the facts to which the law is to be applied. The first article, with reference to the inscriptions, alleges that, by the twenty-second article of the Church of England agreed upon in 1562, it is declared that "the Romish doctrine concerning purgatory, pardons, and other things therein mentioned, is a fond thing, vainly invented, and grounded upon no warranty of Scripture, but rather repugnant to the word of God." That all persons erecting, or causing to be erected, in the churchyard of any parish any tomb- or head-stone, containing any inscription contrary to [889] the doctrine and discipline of the Church of England and to the articles of the said Church, the person so doing ought not only to be peremptorily monished immediately to remove the same, but also be duly corrected and punished; and this proposition has not been denied by the other side. The second article sets forth the facts that, notwithstanding the premises, Mrs. Woolfrey did erect a tomb- or head-stone with the inscriptions before mentioned, which it alleges to be contrary to the doctrine and discipline of the Church of England, and to the articles, canons, and constitutions thereof, and particularly to the said twenty-

second article, that due notice has been given to her to remove the same, but that she refuses so to do.

The third article annexes a copy of the inscriptions, and the articles conclude with praying that she be peremptorily monished to remove the stone, and be canonically corrected and punished and condemned in the costs.

The law then principally relied on is the twenty-second article, although there is a general reference to the other articles, canons and constitutions of the Church, and it is competent to the promotor to refer to the other articles, and reference was made in the argument to the thirty-fifth article on the homilies, the first book of which was published in the reign of Edward the 6th, and the second in that of Elizabeth, and particular reference was made to the seventh homily on prayer.

In the argument in support of the articles it was argued that the twenty-second article, in declaring that the Romish doctrine of purgatory is repugnant to the word of God, did, in effect, declare that the [890] offering of prayers for the dead was also opposed to the word of God, as constituting part of the doctrine of purgatory; for that the two were so intimately blended together that it was impossible to separate the one from the other, consequently that an inscription, inviting passers-by to pray for the soul of the deceased, and containing the passage from the Maccabees, was an illegal inscription.

The point, then, upon which the whole question turns is whether praying for the dead is so necessarily connected with the doctrine of purgatory as to form a part of it. It is no doubt true that the doctrine of purgatory includes the practice of praying for the dead, but it does not necessarily follow that the converse of the proposition is true—that is, that prayers for the dead necessarily constitute a part of the doctrine of purgatory, as held by the Romish Church. If that point could be made out there would be an end of the case, and the Court would be bound to monish the party to remove the stone, and to punish her with ecclesiastical censure and with costs. This was the point to which the counsel directed their arguments, and many authorities were cited, to some of which the Court will presently advert.

The counsel very properly abstained from entering into the theological part of the question; and it would not be proper for the Court to take upon itself the duty of inquiring whether the doctrine of purgatory, as received by the Romish Church, is or is not supported by any warranty of Scripture. The law—that is, the twenty-second article—has expressly stated that that doctrine is “grounded upon no warranty of Scripture, but is rather repugnant [891] to the word of God,” and by this law I am bound to govern myself.

The question then shortly is this, Is praying for the dead involved in the doctrine of purgatory? Now, with a view to deciding that question, the first thing to determine is, what is the doctrine of purgatory as received in the Romish Church? This may be best ascertained by a reference to the decrees of the General Councils and to authors who have written on the subject. As far as I have been able to learn, it does not appear that there was any declaration of the doctrine of purgatory by any general council until that of Florence, in 1438, which contained the first allusion to the doctrine. This was followed up by a decree of the Council of Trent, in 1563, which was a year after the articles of religion were set forth by royal authority in this country.

When I state that no mention was made of the doctrine of purgatory in any general council previous to that of Florence, I do not mean to say that the doctrine was not received at an earlier period; it would appear, according to the best authorities to which the Court had access, that the notion of purgatory was first introduced about the fifth or sixth century. Bishop Tomline, in the second volume of his *Elements of Christian Theology*, states that “the practice of praying for the dead began in the third century, but it was not till long afterwards that purgatory was ever mentioned among Christians. It was at first doubtfully received, and was not fully established until the papacy of Gregory the Great, in the beginning of the seventh century.” The doctrine then so in-[892]-troduced, and which is declared by the twenty-second article of our Church to be repugnant to the word of God, is thus described in the catechism of Trent, “*Est purgatorius ignis, quo piorum animæ ad definitum tempus cruciatur, ut eis in æternam patriam ingressus patere possit, in quam nihil coinquinatum ingreditur,*” it was also a part of that doctrine that the pains of purgatory may be alleviated or shortened by the prayers of the

living, by masses and by thanksgivings. This doctrine being declared by the Church of England to be without warranty of scripture, the question is whether prayer for the dead falls under the same condemnation. Now the first argument that suggests itself against this supposition is, that prayer for the dead is a practice of a much earlier date than the introduction of the doctrine of purgatory; it clearly appears that the practice of praying for the dead prevailed amongst the early, if not the earliest, Christians, who at that day had no notion of the doctrine of purgatory. It would be a waste of time to travel through all the authorities which might be referred to, to prove not only the prevalence of the practice of praying for the dead long prior to the introduction of purgatory, but also that the prayers by the primitive Christians for the souls of the departed were offered with a different intention from those who profess the Romish religion. The object of such prayers with the latter was to relieve the souls of the departed from the pains of purgatory; that of the former was, that the souls might have rest and quiet in the interval between death and the resurrection; and that at the last day they might receive the perfect consummation [893] of bliss, but certainly such prayers had no reference to a state of suffering, in which the souls were supposed to be during the intermediate time. With reference to this point, it will be right to state one or two passages from authors on the subject. Bishop Taylor, in his *Dissuasive from Popery* (in the tenth volume of Bishop Heber's edition), says, "There are two great causes of their mistaken pretensions in this article from antiquity. The first is, that the ancient Churches in their offices, and the fathers in their writings, did teach and practise respectively prayers for the dead. Now, because the Church of Rome does so too, and more than so—relates her prayers to the doctrine of purgatory, and for the souls there detained—her doctors vainly suppose that whenever the holy fathers speak of prayer for the dead they conclude for purgatory; which vain conjecture is as false as it is unreasonable; for it is true the fathers did pray for the dead—but how? 'That God should shew them mercy, and hasten the resurrection, and give a blessed sentence in the great day.' But then it is also to be remembered that they made prayers and offered for those who, by the confession of all sides, never were in purgatory, even for the patriarchs and prophets, for the apostles and evangelists, for martyrs, and confessors, and especially for the blessed Virgin Mary." And he cites authorities—Epiphanius, St. Cyril, and others. "Upon what account," he adds, "the fathers did pray for the saints departed, and, indeed, generally for all, it is not now seasonable to discourse; but to say this only, that such general prayers for the dead as those above reckoned, the Church of England never did condemn by any [894] express article, but left it in the middle. But," he adds, "she expressly condemns the doctrine of purgatory, and consequently all prayers for the dead relating to it." And in vol. xi. p. 58, he shews, that though the ancient fathers of the Church did sanction prayers for the dead, they did not even know the Romish doctrine of purgatory. Again, Archbishop Usher, whose opinions upon the subject have been recently reprinted in the *Tracts for the Times*, says, "Our Romanists do commonly take it for granted that purgatory and prayer for the dead be so closely linked together that the one doth necessarily follow the other; but in so doing they greatly mistake the matter; for howsoever they may deal with their own devices as they please, and link their prayers with their purgatory as they list, yet shall they never be able to shew that the commemoration and prayers for the dead used by the ancient Church had any relation with their purgatory."

Without reference, then, to any other authorities, which are numerous on the point, it is clear that prayers for the dead are not necessarily connected with the doctrine of purgatory, since they were offered up by the primitive Church long antecedent to the doctrine of purgatory being received by the Church of Rome.

But it was said that, whatever might have been the case in the early ages with respect to the practice of praying for the dead, the Church of England had taken a different view of the subject, and with reference to what had taken place in the earliest time of the Reformation; and, subsequently, that though prayers for the dead were not considered, in the first in-[895]stance, contrary to the principles of the Christian religion, yet that in later times they had been considered as opposed to the principles and doctrines of the Church, as had been shewn by the alterations made at different times in its liturgy. In the primer of Henry 8th, in the burial and communion services, such prayers were used, and in the Formula of Faith in the time of Henry 8th, prayers for the dead were enjoined as "a pious and proper work." In the first Prayer

Book also, of Edward 6th, prepared by persons of great eminence and learning, called together by the King to consider the alterations necessary to be made in the public service of the Church, in consequence of the progress of the reformation of the established religion, such prayers were retained. It is not immaterial to see the manner in which this Prayer Book had been compiled, and I cannot refer to more satisfactory authority than the act of parliament, by which the book was established, namely, the second and third Edward 6th, c. 1, which is entitled "An Act for Uniformity of Service and Administration of the Sacraments throughout the Realm," in the preamble of which it is stated that, "with the intent that a uniform, quiet, and godly order should be had, his Highness had appointed the Archbishop of Canterbury, and certain of the most learned and discreet bishops and other learned men of the realm, to consider and ponder the premises, and thereupon having as well eye and respect to the most sincere and pure Christian religion taught by the Scripture, as to the usages in the primitive Church, should draw and make one convenient and meet order, rite and fashion of common and open prayer and administration of the Sacra-^[896]ments to be had and used in his Majesty's realm of England and in Wales;" and with reference to these principles the first Prayer Book of Edward 6th was drawn up, and in this book prayers for the dead were inserted, although in some degree different from those in the primer of Henry 8th, such prayers, therefore, were not considered by those learned persons as connected with the Romish doctrine of purgatory; but the second Prayer Book of Edward 6th was afterwards drawn up, in which these prayers were omitted, and it was argued that they were inconsistent with the doctrine of the Church as then established, and various authors were referred to to shew that they were omitted on that account; and several writers do take that view of the subject. But it is agreed that there is no express prohibition of such prayers; it must, therefore, be shewn that they were prohibited by necessary implication. It appears, however, from writers and historians, that these alterations in the liturgy in the second Prayer Book of Edward 6th were acceded to principally at the instance of Calvin and Bucer, though on what grounds precisely I have not been able to learn. But there is one authority at least to shew that it was not, because in the opinion of the majority of the persons employed in its revision they were inconsistent with the doctrines of the Church of England. The act of parliament by which the second Prayer Book of Edward 6th was established, the fifth and sixth Edward 6th, c. 1, also entitled "An Act for the Uniformity of Service and Administration of Sacraments throughout the Realm," in its recital, which must be taken to express the sentiments of the ma-^[897]jority of the legislature, states: "Where (whereas) there has been a very godly order set forth by the authority of parliament for common prayer and administration of the Sacraments, to be used in the mother tongue within the Church of England, agreeably to the word of God and the primitive Church," adopting the words of the former act, which enjoined "a regard to the religion taught by Scripture, and to the usages in the primitive Church;" "very comfortable to all good people desiring to live in Christian conversation, and most profitable to the estate of this realm, upon the which the mercy, favour, and blessing of Almighty God are in nowise so readily and plentifully poured as by common prayers, due using of the Sacraments, and often preaching of the Gospel with the devotion of the hearers;" and it goes on to state that "yet, notwithstanding a great number of people do wilfully abstain and refuse to come to their parish churches, and other places, where common prayer, the administration of the Sacraments, and preaching of the word of God is used;" and in the fifth section it sets forth, "and because there hath arisen in the use and exercise of the aforesaid common service in the Church heretofore set forth divers doubts for the fashion and manner of the ministration of the same, rather by the curiosity of the ministers and mistakers than of any other worthy cause; therefore, as well for the more plain and manifest explanation thereof, as for the more perfection of the said order of common service, in some places where it is necessary to make the same prayers and fashion of service more earnest and fit to stir Christian people to the true honouring of ^[898]Almighty God;" and it goes on to set forth that the King and parliament had caused the Book of Common Prayer "to be faithfully and godly perused, explained, and made fully perfect." This act was repealed by the first of Mary, which was itself repealed by the first of Elizabeth, c. 2, which restored the fifth and sixth Edward 6th. Now, up to this period of time, it seems that at least there was not any express prohibition

of prayers for the dead, nor any notion that they implied a necessary belief in the doctrine of purgatory, though, in consequence of professors of the Romish religion taking advantage of the practice as an argument to support their own doctrine of purgatory, it was thought proper that the form of prayer should be altered, and those prayers omitted in the public service of the Church as not being enjoined (which is admitted) or sanctioned by any warranty of Scripture.

The authorities seem to go no further than this—to shew that the Church discouraged prayers for the dead, but did not prohibit them; and that the twenty-second article is not violated by the use of such prayers. The ground on which the Church consented to the omission of these prayers could not, perhaps, be better stated than by Mr. Palmer, in his *Origines Liturgicæ*, to this effect: “When the custom of praying for the dead began in the Christian Church has never been ascertained. We find traces of the practice in the second century; and either then or shortly after it appears to have been customary in all parts of the Church. The first person who objected to such a prayer was Aërius, who lived in the fourth century; but his [899] arguments were answered by various writers, and did not produce any effect in altering the immemorial practice of praying for those that rest. Accordingly, from that time, all the liturgies in the world contain such prayers. Some persons will perhaps say that this sort of prayer is unscriptural; that it infers either the Romish doctrine of purgatory or something else, which is contrary to the will of God, or the nature of things. But when we reflect that the great divines of the English Church have not taken this ground, and that the Church of England herself has never formally condemned prayers for the dead, but only omitted them in her liturgy, we may perhaps think that there are some other reasons to justify that omission.” And then this learned writer proceeds to state the probable reason of the omission of these prayers in the liturgy of the English Church—namely, that they might be abused, to the prejudice of the uneducated classes, to the support of the Roman Catholic doctrine of purgatory. I am, therefore, of opinion that in this case there has been no violation of the twenty-second article of the Church, so as to call for punishment by ecclesiastical censure. The twenty-second article does not prohibit prayers for the dead, unless so far as they necessarily involve the doctrine of purgatory; and the inscription has not been shewn to be a violation of that article. But it is said that other articles of the Church have been violated, and reference was made to the thirty-fifth article, which is to this effect: “That the second book of homilies contained a godly and wholesome doctrine, and necessary for these times, as doth the former book of homilies, which were set forth in [900] the time of Edward 6th, and therefore we judge them to be read in churches by the ministers diligently and distinctly, that they may be understood of the people.” And it was said that in the seventh homily on prayer the practice of praying for the dead is declared to be an erroneous doctrine, and therefore, as the homilies are directed to be read in churches for the edification of the people, it must be necessarily inferred that they are forbidden and prohibited by the Church of England. Now, if this were clearly so, it would seem somewhat extraordinary that many divines of the Church should, in the face of these articles and of the homilies, have fallen into the error of believing that the Church of England had not prohibited prayers for the dead, but merely discouraged them; but it is still more extraordinary that, considering the violent disputes which had occurred with respect to this point, there had been no express prohibition of the practice in the Articles of 1562. If it had been the intention of the Church to have forbidden the practice, surely there would have been an express and distinct prohibition of it. In looking to the homily it must be considered what was the purpose for which it was composed, namely, to discourage the practice of praying for the dead as connected with the doctrine of purgatory; but in no part of the homily is it declared that the practice of praying for the dead is unlawful—merely, that it is useless; that prayers for the dead could have no effect in altering the condition of the dead, and that in the word of God we have no commandment so to do; and referring to St. Chrysostom and St. Cyprian, it is said, “Let these and such other places be sufficient to take [901] away the gross error of purgatory out of our heads, neither let us dream any more that the souls of the dead are anything at all holpen by our prayers.” It seemed clearly to have been the intention of the composer of the homily to discourage the practice of praying for the dead; but it does not appear that in any part of the homily he declares the practice to be an unlawful one. But supposing he had been of opinion that such

prayers were unlawful, it is not to be necessarily inferred that the Church of England adopted every part of the doctrines contained in the homilies. If it had been the opinion of the framers of the articles and canons of the Church that prayers for the dead were opposed to the Scriptures, they would have expressly declared their illegality. On this part of the case, then, I am of opinion that there has been no violation of any of the articles of the Church. No other articles have been referred to specifically to make out the proposition that the Church considered prayers for the dead as an illegal practice. But it was urged in this case that the person by whom the tombstone was erected being a Roman Catholic, it must be supposed that the invitation contained in the inscription, to pray for the dead, has a necessary reference to the doctrine of purgatory as received by the Church of which she is a member; and that the inscription must be taken in a Roman Catholic sense, because the quotation from the Maccabees was taken from the Roman Catholic version of the Bible, and not from that authorized by the Church of England. Now I do not think this argument sufficient to authorize me to put any other construction on the inscription than the words will bear, according to [902] their plain meaning. It is true that the version does not agree with the English translation (in fact, in our translation, there is not a 46th verse in the 12th chapter of Maccabees); but the question is not, whether the version is correct or not, but whether the meaning is or is not inconsistent with that contained in the English version. Now it is impossible to read the English version and not see that the sense of the quotation is the same in both; and that the reconciliation spoken of by Judas meant a reconciliation of the dead, with a view to the resurrection. Whether the doctrine is taken from the text according to the Romish or English version, the question is whether it is a violation of the articles, canons, and constitutions of our Church. That is the view I must take of the case, sitting here as an ecclesiastical judge. If anything arose from the circumstance of the party being a Roman Catholic, or from the sense in which the words of the inscription are understood by the Romish Church, it should have been specifically pleaded; for the Court has no judicial information of the existence of a Roman Catholic Bible. I shall conclude this part of the case with one observation—What has been the practice of eminent divines of the Church of England? It was correctly stated in the argument that an inscription was placed on the tombstone of Bishop Barrow, in the cathedral of St. Asaph, in 1680, to this effect; “O vos, transeuntes in domum Domini, in domum orationis, orate pro conservo vestro, ut inveniat misericordiam in die Domini.” It is not possible to conceive that Bishop Barrow would have suffered such an inscription to have been placed upon his tomb if he [903] had believed that it was contrary to the doctrine and discipline of the Church to which he had belonged.

I am, then, of opinion, on the whole of the case, that the offence imputed by the articles has not been sustained; that no authority or canon has been pointed out by which the practice of praying for the dead has been expressly prohibited; and I am accordingly of opinion that, if the articles were proved, the facts would not subject the party to ecclesiastical censure, as far as regards the illegality of the inscription on the tombstone. That part of the articles must, therefore, be rejected.

The other branch of the case is subject to different considerations, namely, the erection of the stone without the consent of the incumbent, which is an ecclesiastical offence. It has been suggested in the argument that the proceeding on this branch of the case should have been in the civil form, by monition; but it seems to me that this is the proper form of proceeding; I am not aware of any case in which a different form has been followed. But this offence was not specified in the decree or citation served on the party. The only ground of illegality on the face of the citation consisted in the inscription; the erecting, or causing to be erected, a monument, without the leave of the incumbent, is a distinct and separate offence, which should have been set forth in the citation, in order that the party cited might know what she was called upon to answer. I am clearly of opinion that, according to the law and practice of the Court, the citation was insufficient to raise the question whether the consent of the incumbent had been [904] obtained or not; and on this part of the case, likewise, I am of opinion that the articles are inadmissible. The Court, therefore, on this view of the case, is bound to reject the articles altogether, and to dismiss the party, and with costs.

ISABELLA STEWART, Deceased. Prerogative Court, Jan. 17th, 1838.—Administration of the effects of a party deceased, domiciled in Scotland, granted according to the law of Scotland, on proof of the law by affidavit from a Scotch solicitor.
[Applied, *In the Goods of Earl*, 1867, L. R. 1 P. & D. 450.]

On motion.

Isabella Stewart, of Dundee, died intestate, a spinster, on the 29th of May, 1837, without a father, leaving her mother, and James Stewart, her brother, her surviving, and no other brother or sister.

Jenner prayed administration of the effects of the deceased to be granted to the brother, upon an affidavit from J. A. Cameron, of Banff, solicitor, stating that by the law of Scotland, in case of a brother or sister dying intestate, and leaving either father or mother, the personal property of the deceased descends to his or her brothers or sisters equally, or if one, to that one alone, to the exclusion of both or either of the parents.

The Court granted the administration as prayed.

[905] IN THE GOODS OF GILES SHAW, Deceased. Prerogative Court, May 15th, 1838.—A will torn by the testator when in a delirious state not revoked. Probate of such will granted on motion.

Giles Shaw died on the 10th of April last, leaving a widow and one child; he executed a will in 1833 in which the whole of his property was given to his wife. In March last, when in a state of delirium, he snatched his will from his wife, and tore off a part of it; afterwards, when he recovered his senses, he declared to a person who sat up with him his regret at having torn the will, and that he wished his will should operate.

Upon affidavit of the above facts Blake prayed probate of the will.

Sir Herbert Jenner. The deceased, in this case, died in April last, leaving a will, executed by him in 1833, in which he gave all his property to his wife absolutely; he left a daughter of the age of six years, who was, therefore, born before the date of the will. It appears that, when delirious, he tore off a part of the will; now, the presumption from this act, if unexplained, would be against the instrument, but it appears that the deceased, when restored to his senses, expressed his regret at having torn the will, and his wishes that it should operate; and his reason for having excluded the daughter, because she was provided for by her grandmother, and he had adhered to the will for five years. There being sufficient to satisfy the Court that the act was done by the deceased when in a state of incapacity, it will allow probate of the will to pass.

[906] IN THE GOODS OF JOHN LIVOCK, Deceased. Prerogative Court, May 29th, 1838.—A testator, after the 1st of January, 1838, having obliterated the word three or five, and substituted the word one, in a will made in 1837, the alteration not being attested as required by stat. 1 Vict. c. 26. Probate granted in blank.

The deceased left a will, dated the 22nd of February, 1837, in which there had been a legacy of three or five hundred pounds to John Bennett; in March, 1838, the deceased erased the word three or five (whichever it was), and inserted the word one. This alteration was not attested as required by the 21st sect. of the stat. 1 Vict. c. 26.

Blake prayed probate of the will with the legacy of one hundred pounds, contending that the Court, under the 21st section of the act, might so decree the probate, that section enacting that "no obliteration, interlineation, or other alteration, made in any will, after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, &c.," which was precisely this case, as it is impossible to say what the word was before the alteration, and unless the Court would grant probate with the word one as it stood, the legacy would be entirely lost.

Addams, *amicus curiæ*. That construction would amount to a repeal of the act.

Sir Herbert Jenner. It is impossible to maintain that the word one, which has been substituted, can stand.

The 34th section is also worthy of consideration, which declares that the act shall not extend to wills [907] made before the 1st of January, 1838; now, the interpreta-

tion which the Court puts upon this clause is this, that the act shall not extend to any will made between the passing of the statute (the 3rd of July, 1837) and the 1st of January, 1838, but that in any alterations made after January, 1838, to wills previously executed, the requisites of the act must be complied with.

Probate to pass of the will in blank without the word one.

IN THE GOODS OF SAMUEL JOSEPH, Deceased. Prerogative Court, June 12th, 1838.

—Administration of the effects of a Jew granted to the secretary of the Great Synagogue, for the use and benefit of the next of kin (a Jewess), who was of unsound mind, during her lunacy, her next of kin having been first cited.

Haggard prayed administration of the effects of Samuel Joseph, deceased, to be granted to the secretary of the Jewish Synagogue, under the following circumstances:—The deceased died on the 16th of April, 1838, a bachelor, without parent and intestate, leaving a sister, Sarah Joseph, spinster, his only next of kin, the only person entitled to his personal estate.

Sarah Joseph was of unsound mind, and her next of kin were her cousins, Samuel Barnett and Hyam Barnett.

The parties were all Jews, and the wardens of the Great Synagogue, in order that the property of the deceased might be applied to her benefit, had requested and authorized Moses Ansell, their secretary, to apply for letters of administration of the deceased's effects for that purpose, during her in-[908]-capacity. Samuel Barnett consented to the administration passing as prayed; but Hyam Barnett had declined to consent. The Court refused to grant the administration until Hyam Barnett had been first cited.

A decree was afterwards taken out against Sarah Joseph, the sister of the deceased, and Hyam Barnett, calling upon the former to accept or refuse the administration, and upon the latter, in the event of her refusing, declining, or being incapable of taking upon herself such letters of administration, to shew cause why the same should not be granted to Mr. Moses Ansell, the secretary of the Great Synagogue, for her use and benefit during her lunacy.

Nov. 14.—This decree being duly served, and no appearance given, the Court granted the administration as prayed, upon an inventory being exhibited, and the sureties justifying. The property of the deceased amounted to about 212l.

IN THE GOODS OF CORNELIUS REGAN, Deceased. Prerogative Court, August 7th,

1838.—The signature to a will, if acknowledged by the testator in the presence of two witnesses present at the same time, &c. is sufficient, whether the signature be made by the testator or by another for him.

The deceased in this case died on the 26th of March, 1838. Upon the previous day a will was drawn up in writing, giving the whole of the deceased's property to his wife, and which he signed in the presence of one witness only.

After the will had been so signed it was read over to the deceased by Elizabeth Smith, in the presence and hearing of John Regan, his brother, and Elizabeth Miller; the deceased then expressed [909] his approbation of the same, and acknowledged the signature thereto to be in his handwriting, and then requested the three persons to attest the same as witnesses, which they did in the presence of the deceased and of each other.

Addams prayed administration to the widow, the universal legatee, there being no executor named; some difficulty had arisen as to whether this was a due execution under the stat. 1 Vict. c. 26.

Sir Herbert Jenner. The deceased died in March last; he made his will, and signed it in the presence of one witness; he afterwards acknowledged his signature in the presence of three witnesses present at the same time, who attested it in his presence; the 9th section of the act 1 Vict. c. 26 enacts, that a will shall be signed at the foot or end thereof by the testator or by some other person in his presence, and by his direction; and that "such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time;" it has been suggested that the word "acknowledged" refers only to a signature when made for the testator by another person: but I am of opinion that the acknowledgment by the testator of his own signature or the signature made by some other person in his presence, and by his direction, is sufficient, if attested as required by the act.

Administration with will annexed, granted.

[910] IN THE GOODS OF PETER URBANUS SARTORIS, Deceased. Prerogative Court, August 7th, 1838.—Administration for the use and benefit of minor children of a Frenchman, deceased, granted to their guardian, appointed by the French authorities.

Peter Urbanus Sartoris, late of the city of Paris, banker, died on the 30th of November, 1833, a widower, intestate, leaving him surviving Edward John Sartoris, Eliza Henrietta (wife of the Count de l'Aigle), and four other children, who were minors.

Edward John Sartoris being in Egypt, and the Countess de l'Aigle having renounced her right to the administration of the deceased's effects, a decree was extracted at the instance of John Lewis Greffulhe, who had been duly appointed guardian to the minors by the lawful authorities of the city of Paris, citing the said Edward John Sartoris to accept or refuse administration of the goods of the deceased, otherwise to shew cause why the same should not be granted to the said J. L. Greffulhe, for the benefit of the said minors. This decree having been duly served on the exchange holden at the Guildhall of London, and no appearance given,

Haggard moved the Court to grant the administration to the guardian of the minors, and

The Court decreed the administration as prayed, an inventory to be exhibited, and the sureties to justify.

[911] IN THE GOODS OF THE REV. BARTON SHUTTLEWORTH, Deceased. Prerogative Court, Nov. 6th, 1838.—The executor and universal legatee, being by mistake described in the will in the wrong name. Probate granted to him in his proper name, upon consent of the parties interested.

[Referred to, *In the Goods of Chappell*, [1894] W. N. 16.]

The Rev. Barton Shuttleworth died on the 21st of October, 1838, a bachelor, leaving a brother and sister his only next of kin. In September, 1837, the deceased, being seriously ill, sent for a solicitor to make his will. Upon the arrival of the solicitor the deceased stated that he wished to bequeath the whole of his property to his nephew, Barton Nicholas, who resided with him as a companion, and that he had no other bequest to make.

The disposition of the property being very simple, and the deceased being very ill, the solicitor forthwith in the deceased's presence drew up the will in writing, and from the deceased's dictation inserted the name of the deceased's nephew, Barton Nicholas, but being unacquainted with the nephew's surname, through misapprehension of the deceased's description, inserted the names Barton Nicholas Shuttleworth instead of Barton Nicholas Bayley, Bayley being the proper name of the nephew. The nephew was also appointed sole executor. The will with such mistake in the surname was executed by the deceased on the 29th of September, 1837, and the mistake was not discovered until after the deceased's death.

Upon an affidavit of the above facts from the solicitor who drew the will, and from the brother of the deceased, who deposed that the deceased had no nephew at any time who resided with him, saving Barton Nicholas Bayley, and that the de-[912]ceased had no other nephew of the name of Barton Nicholas; and upon an affidavit from a third party of declarations from the deceased that he had made his will, and left his nephew Barton Nicholas Bayley the whole of his property,

Gostling moved the Court to decree probate to the said Barton Nicholas Bayley, through error in the will written Shuttleworth, the next of kin were consenting, and

The Court granted the probate accordingly.

IN THE GOODS OF WILLIAM MILWARD, Deceased. Prerogative Court, Nov. 6th, 1838.—Probate refused of a paper not signed at the end.

William Milward died on the 9th of June, 1838. He left a will which was written upon two sides of paper; at the bottom of the first side the deceased signed his name, and his signature was attested by two witnesses, that side of the paper ended with an unfinished sentence, and the will concluded on the second side, "dated this 11th of April, 1838," but there was no signature.

Addams prayed probate.

Sir Herbert Jenner. The deceased having unfortunately omitted to sign the will at the foot or end, as required by the 9th section of the statute, the instrument is void.

Motion rejected.

[913] IN THE GOODS OF JAMES AYLING, Deceased. Prerogative Court, Nov. 14th, 1838.—Where there is a will with the signature of the deceased at the foot thereof, with the names of two witnesses subscribed to it, the Court will not, on motion upon affidavit, *ex parte*, that the will was not duly executed, decree the deceased to be dead intestate.

The deceased in this case left a will dated the 15th May, 1838, which he signed at the foot, and there were the names of two witnesses on the will, as having attested the execution; but the attestation clause not being full, an affidavit was required by the registrars (agreeably to the directions of the Court) to shew that the statute had been complied with, when it appeared that the witnesses were not present at the same time, as required by the 9th section of the act. Under these circumstances, Robertson prayed the Court to decree administration of the effects of the deceased as dead intestate.

Sir Herbert Jenner. The Court cannot decree administration to pass of the effects of the deceased as dead intestate, unless the will has been propounded.

Although, from what appears in the present case, it is clear that this will is invalid under the statute 1 Vict. c. 26; yet this is only on affidavits *ex parte*; there might, therefore, be collusion. All that the Court will do in such cases is to reject the prayer for probate, leaving the parties to take out administration if they think proper; as, notwithstanding the Court declines to grant probate, the will might be propounded and established.

[914] IN THE GOODS OF THOMAS NEWMAN, Deceased. Prerogative Court, Nov. 30th, 1838.—Probate of a codicil signed by the deceased in the presence of two witnesses present at the same time, but not attested in the presence of the testator, refused under 1 Vict. c. 26.

The deceased died on the 11th of September, 1838. He left a will with a codicil thereto, dated in 1834. On the day of his death he executed a second codicil, by signing the same in the presence of two witnesses present at the same time, but the testator being very ill, they removed into another room, where they subscribed their names as witnesses.

Robinson prayed probate of the will and two codicils.

The Court refused to grant probate of the second codicil, the same not having been attested in the presence of the testator, as required by the 9th section of 1 Vict. c. 26.

IN THE GOODS OF JOHN BAILEY. Prerogative Court, Dec. 21st, 1838.—A will signed for the testator by one of the witnesses who attested the execution, valid, under stat. 1 Vict. c. 26, s. 9.

John Bailey died on the 30th of November, 1838, having executed his will on the 8th of that month, in the following manner, namely: the name of the deceased was signed by Robert Harvey, one of the subscribed witnesses, at the foot thereof, by the deceased's direction, in his presence, and also in the presence of Matthew Smith, the other subscribed witness, who was present at the same time, and who, as well as Robert Harvey, attested the will in the presence of the deceased.

[915] Phillimore, upon the affidavit of Robert Harvey, stating the above circumstances, prayed probate of the will.

Sir Herbert Jenner. The question is whether this will is duly executed under the 9th section of the act, 1 Vict. c. 26, which enacts that a will "shall be signed at the foot or end thereof by the testator, or by some other person, in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator." In this case the person who signed the testator's name at his request was one of the witnesses who attested the execution of the instrument; all that the act requires is, that the will shall be signed by the testator, or by some person for him, in the presence of two witnesses, who shall attest the same; there is nothing which prevents the person making the signature for the testator being one of the witnesses to attest and subscribe the will. I am of opinion that this is a good execution under the statute.

REPORTS of CASES ARGUED and DETERMINED
in the ECCLESIASTICAL COURTS at DOCTORS' COMMONS. By W. C. CURTEIS, LL.D., Advocate. Vol. II. Containing Cases from Hilary Term, 1839, to Michaelmas Term, 1841, inclusive. London, 1842.

[1] REPORTS OF CASES ARGUED AND DETERMINED IN THE ECCLESIASTICAL COURTS AT DOCTORS' COMMONS.

GEORGE *against* RIELLY. Prerogative Court, Hilary Term, Jan. 16th, 1839.—A power in a married woman to dispose of personalty by will “to be signed and published by her in the presence of, and to be attested by, two or more credible witnesses,” is not duly exercised by an instrument signed and sealed in the presence of two witnesses, the attestation clause being—Witnesses to the execution hereof.—Evidence aliunde that publication took place not being admissible.

This was a question as to the admission of an allegation propounding a paper as the will of Ann Watkins, wife of Thomas Watkins.

The deceased, under her marriage settlement, had a power of disposing of certain sums of money “by her last will and testament, or any codicil, or codicils thereto, or any writing or writings of a testamentary nature, to be signed and published by her in the presence of, and to be attested by, two or more credible witnesses.” The paper propounded, after referring to the settlement, and giving certain [2] legacies, concluded, “In witness whereof I have hereunto set my hand and seal, this 22d day of January, 1834.”

“The mark of ✕ ANN WATKINS.

“Witnesses to the execution hereof—Edward Salvage, Ch. E. Smith.”

Addams opposed the allegation, and contended that under the case of *Allen v. Bradshaw* (1 Curt. 110), and the cases there referred to, this was not a due execution of the power.

Curteis in support of the allegation. The allegation pleads that Ann Watkins, the deceased, having the power of making a will, to be signed and published by her, in the presence of two witnesses, who are to attest her so doing—did sign and publish her will accordingly, and that the witnesses attested that she did so—and the question is whether the attestation clause is sufficient to let in proof of the facts. The case differs from that of *Allen v. Bradshaw*; in that case, signing and publishing were required by the power, but the witnesses only attested the signing; the attestation clause was “witnesses to the signature,” thereby excluding the other requisite, publication, as *expressio unius est exclusio alterius*; but in the present case the attestation is in general terms, “witnesses to the execution hereof;” that must include all that [3] was necessary to the execution; the execution thereof must include publication, as without publication there could be no execution: and in the case of *Doe dem. Spilsbury v. Burdett* (4 Ad. & Ell. 1) the Court of Queen’s Bench held that the simple attestation witness, A. B., &c., was sufficient to include publication, as well as signing and sealing, and it is submitted that the present is a similar case.

Sir Herbert Jenner, after stating the contents of the allegation, proceeded. The paper concludes, “In witness whereof I have hereunto set my hand and seal, this 22d of January, 1834;” then follows “the mark of Ann Watkins,” and a mark, stated to be

in the handwriting of the deceased, and two witnesses sign their names, as attesting "the execution thereof." What do the witnesses purport to attest by this clause? The execution thereof. What is the execution thereof? The setting of her hand and seal by the deceased to the paper. But setting hand and seal does not include publication; there must be some act to denote publication, beyond the mere signing and sealing. Is there anything in the manner of execution which takes this case out of the principle which applies to such cases? I am of opinion that there is not. All that the witnesses attested was the execution, and that does not include publication, and, according to all the cases here and elsewhere, where the execution is on the face of it defective, the defect cannot be supplied by parol evidence. The case of *Spilsbury v. Bur*-[4]-*dett*, in the Court of Queen's Bench, is somewhat different from the cases in the other Courts; but in that case the deceased, in the beginning of the will, published and declared it to be her last will and testament, and the whole reasoning of Lord Denman is founded upon the terms of the instrument itself; on the face of the will the Court held that there had been a publication, and, consequently, a due execution of the power; but in this case there is no notice of publication, but a mere signing and sealing; there is, therefore, a distinction between the cases, even if that case had the effect of a decided case, whereas it remains to be determined, it being under appeal to the Exchequer Chamber.(a)

I am of opinion that it would be to no purpose to admit this allegation, because, there being no evidence of publication under such an attestation clause, the will could not be pronounced for.

Allegation rejected.

[5] *SPRY against THE DIRECTORS AND GUARDIANS OF THE POOR OF ST. MARYLEBONE.* Consistory Court of London, Hilary Term, Jan. 18th, 1839.—Libel for subtraction of burial fees rejected. The fees not being ancient customary fees; nor having been "settled and fixed" by the vestrymen of the parish (Marylebone) under the local stat. 51 Geo. 3, c. 151, sec. 49.—Held, that, as the vestrymen had not exercised the power given them by the 49th section of the Act to settle and fix a rate of fees for the new burial-ground of the parish (being the fees in question), there were no fees legally existing; although the 50th section of the Act declares that the vestrymen shall not be enabled to reduce the rate of fees for the new burial-ground below that for burials in the (then) present cemeteries of the parish.

This was a question as to the admissibility of a libel in a suit for subtraction of burial fees or dues, brought by the Rev. J. H. Spry, D.D., the rector of St. Marylebone, against the directors and guardians of the poor of the parish.

The libel pleaded:

First. The institution and induction of Dr. Spry to the rectory and parish of St. Marylebone, &c., that he was entitled to all the burial fees payable in and throughout the said parish, with the exception only of such as are payable on interments in vaults for the burial of the dead, constructed under two of the district churches built in the same.

Second. That a customary fee of one shilling and sixpence to the minister, of one shilling to the clerk, and of one shilling to the sexton, of the said parish, had been payable out of the poor-rates, on the interment of every pauper buried at the expense of the said parish, in the then cemeteries or burial-grounds of the parish, for at least upwards of a century prior to the making and passing of the [6] Act of the 51st of Geo. 3, chap. 151, after mentioned.

That, in and by a table of burial fees for the said parish, settled in vestry, in 1733, and duly confirmed by the then vicar-general and official principal of the diocese. Such fees are recited to be due to the minister, clerk, and sexton, on pauper interments, respectively, as in and by the said table now affixed up in the church or vestry-room (to be produced, if necessary, at the hearing of the cause) will appear.

Third. That the fees due, &c., as aforesaid, were from time to time paid to the several persons entitled thereto, by the churchwardens or overseers of the poor of the said parish, until superseded in the management of the poor, by a board constituted

(a) The judgment was afterwards reversed in the Exchequer Chamb., 9 Ad. & Ell. 936.

for that express purpose, to be directors and guardians of the poor of the said parish, under and in virtue of the Act, 35th Geo. 3, c. 73. That ever since the passing of that Act the said fees have been paid by the directors and guardians to the several parties entitled to such fees, instead of by the churchwardens and overseers, as before the passing of the Act, and until the period hereinafter mentioned.

Fourth. That a new cemetery or burial-ground for the parish was provided in virtue of the stat. 46th Geo. 3, c. 124, and 51st Geo. 3, c. 151; that ever since the consecration thereof the interment of all paupers who are buried at the expense of the parish has been in such new cemetery or burial-ground. That the vestrymen of the said parish are empowered (but which power they have hitherto not exercised) by the 49th section of the 51st Geo. 3 to settle and fix the rates of fees for [7] burials of the dead in the new cemetery, but nevertheless with a proviso, under the 50th section of the Act, that such their power should not extend to any reduction of the rates or fees, payable for every burial in such new cemetery, below those payable for burials in the then present cemeteries of the said parish.

Fifth. The refusal by the board of directors and guardians to pay Dr. Spry the amount of fees sued for.

Sixth, seventh, eighth. The usual articles.

The admission of the libel was opposed on the 18th of December, 1838, by

The Queen's advocate and Phillimore. In the first place, this Court has no jurisdiction; the fees are claimed under the local act, but that act gives no power to the Ecclesiastical Court to enforce payment of the fees.

The fees in question are stated to be customary fees, but on the face of the libel, which alleges that the fees had been paid out of the poor-rate (which originated at the end of the reign of Elizabeth), the custom is not an immemorial one, and, therefore, is not legal and valid; and the table of fees referred to cannot carry the case further, for the parishioners in vestry had no power to bind their successors, nor had the vicar-general or chancellor authority to confirm such new fees. When the legislature gave the directors power to settle a rate of fees not below those payable at the old cemetery, they must have meant fees legally payable—fees which might be demanded and enforced, not fees paid under a [8] misapprehension. Further, if the fees now claimed were legal, they ought to be paid to the person who actually performs the service.

Addams and Curteis in support of the libel. The first question is as to the jurisdiction.

The Court has jurisdiction to enforce payment of a burial fee, an accustomed fee, not claimed under any act of parliament, by reason of its nature; and the local act here recognizes Dr. Spry's right to the fee. The whole question turns upon the word "payable" in the act of 51st Geo. 3. Were these fees payable at the time the act passed?

We plead that they had been payable for upwards of a century before the passing of the Act, and that, in a table of fees, confirmed by the then chancellor in 1733, these fees are recited. It is said that the chancellor had no authority to establish new fees—but these fees were payable before; they were not then made for the first time. The chancellor, however, has some authority with regard to fees, for, in the *Holborn case*, (a)¹ Lord Stowell dealt with burial fees, and settled a table after much consideration. These fees being payable before the act of 51st Geo. 3, that Act empowers the vestrymen to settle and fix a rate of fees for the new cemetery; such rate, however, not to be lower than that for the old burial-ground, the vestrymen never having fixed any rate of fees (or rather not having increased the fees as the Act enabled them [9] to do), it must have been intended by the Act that, until that was done, the old table of fees should be in force. The Court might, possibly, have some difficulty in enforcing the fee, (a)² but if pronounced for, the directors, it is hoped,

(a)¹ *Gilbert v. Buzzard and Boyer*, 2 Hagg. Con. 333, S. C. 3 Phil. 335.

(a)² The citation in this case was taken out against "The directors and guardians of the poor of the parish of St. Marylebone, in the county of Middlesex." The citation having been returned, an appearance was entered as follows:—"Fielder appeared for Thomas Thorne, the nominee, or substitute, of the directors and guardians of the poor of the parish of St. Marylebone (constituted under the provisions of a certain act of parliament, passed in the 35th year of the reign of Geo. 3, chap. 78), the parties cited

would relinquish their conscientious scruples, and pay it, as they have paid the clerk's and sexton's fees.

Judgment—Dr. Lushington. The first question is, What jurisdiction has the Ecclesiastical Court over the subject? It is clear that these Courts have been permitted to exercise some jurisdiction, because the Courts of Common Law, in cases where prohibition has been moved for, have not granted such prohibition, on the general ground that the Ecclesiastical Courts were wholly incompetent to hold pleas of the subject-matter; but on especial grounds, as, because no [10] service was rendered as the foundation of a fee: as in *Burdeaux v. Lancaster* (1 Salk. 332), where a christening fee was claimed when the child was not baptized in the parish; and in *Topsall v. Ferrers* (Hob. 175), where a burial fee was sued for when the corpse was not buried in the parish. Prohibition has been also granted, because the fee was not accustomed and certain, and the Ecclesiastical Court could not try the custom where it was denied. The granting prohibition for such especial reasons establishes the jurisdiction, admits it to exist, and avoids the particular exercise of it, for special reasons. This is shewn by *The Dean and Chapter of Exeter's case* (1 Salk. 333). Some jurisdiction is recognised by the statute *Circumspecte Agatis*. Court fees, and fees to proctors, stand on a different foundation, and payment cannot be enforced in the Ecclesiastical Court.

It is necessary, therefore, that I should look to the limitations affixed to this jurisdiction, and see whether the particular fees sued for fall within any of the restrictions prescribed by Courts of Common Law. So far as I can discover from the cases and the authority of Mr. Justice Blackstone (3 Com. b. 3, c. 7), this Court is allowed to enforce payment of ecclesiastical dues—that is, fees due to the clergy for spiritual duties—such fees being due by custom, and the duty being actually performed. By customary fees are meant such fees as have existed so long that the origin cannot be traced; it need not be shewn that they commenced before the time of legal memory; it is sufficient to shew that they have existed, so far as [11] can be discovered. The foundation of all such fees is that they were originally given voluntarily. Customary burial fees of this nature, therefore, may be sued for here, at least, until the custom has been denied, and prohibition moved for propter defectum triationis; I do not consider that the Court is bound, under such circumstances, to prohibit itself. The whole subject, however, is not without difficulty; for it is admitted that no such suit has been brought for a hundred years last past, and I can find nothing in the books as to who are liable for these fees—whether the legal personal representative of the deceased, or any one else.

Having thus endeavoured to ascertain the extent of jurisdiction conceded to this Court, I am next to inquire whether the fees in question fall within the limits which the Courts of Common Law have prescribed.

The first consideration is whether these fees can be considered as ancient customary fees; or whether, by reason of the Acts of Parliament, they can be brought within the same principles.

To proceed step by step: suppose that the fees sued for were for burial in the ancient burial-ground, received for about one hundred years, are these ancient customary fees within the definition applied to them by the Courts of Law? I apprehend not; for, in the first place, they are not even alleged to be immemorial fees; and, secondly, they are alleged to have been paid out of the poor-rates, which disproves their ancient origin.

Then, could the approval of the existing chancellor bestow on these fees a legal character, so as to make them recoverable here? I think that the [12] whole of the authorities shew that no such power exists, I mean, a power in the chancellor of a diocese to create new fees for common burial. How far such authority could constitute fees in cases not of common burial is a question I am not called upon to discuss: all

and exhibited proxy under the hands and seals of Alfred Daniel, Sylvester Sapsford, William Kinsitt, Thomas Langham, Thomas Potter, Stephen Grange, Charles Skinner, William Artand, and Julius Anderson, the committee of the said directors and guardians duly appointed for the purpose of nominating and appointing such nominee or substitute, at a special general meeting of the said directors and guardians for the purposes of this suit, and the said Fielder then brought in extract from the general minutes of the said directors and guardians of the appointment of the said committee, and of the substitution of the said Thomas Thorne, and prayed a libel."

I say is that a chancellor cannot, by his own authority, create a new fee for common burial.

But there is another ground which, if I rightly understood the argument of one of the learned counsel, was much insisted upon; it is said that this demand rests specially on the Acts of Parliament. Let us consider how this part of the case stands.

The ground in question appears to have been purchased under an Act passed in the 46th Geo. 3, since repealed. In this Act I do not find anything which could apply to the question. The Act which governs this case appears to me (for I do not pretend to be conversant with the code which forms the special constitution of the parish of St. Marylebone) to be the 51 Geo. 3, c. 151. I have looked through this Act carefully. By the 33d section the ground, which had been purchased under the 46th Geo. 3, when consecrated, is to be a burial-ground for the parish. By the 41st section a minister is to be appointed for the burial of the dead in this ground. The 49th section is in these words: "It shall and may be lawful, to and for the said vestrymen, at any of their meetings, to be held in pursuance of this Act, to settle and fix the rates and fees of burial of the dead in the vaults of the said new church, and of all and every the chapels to be erected and built, by virtue of this [13] act, and in the said intended cemetery, or burial-ground, and in the vaults under the same; and shall and may, from time to time, make such rules, orders, and regulations, relative to and concerning burials, and for keeping the said new church, chapel, and vaults, and the vaults of the said cemetery, or burial-ground, and any other buildings, works, and conveniences to be erected and provided by virtue of this Act, in good and sufficient repair and amendment; and may from time to time alter and amend the said rates and fees, and make such other rules, orders, and regulations, in and concerning the premises, as to the said vestrymen shall appear reasonable, necessary, and convenient." The power, however, of thus settling and fixing the rates and fees for burial of the dead is not given without some limitation, for the 50th section provides, "That nothing herein contained shall extend, so as to enable the said vestrymen to reduce the rate or fees to be payable for every burial in the vaults of the said new church and chapels, and in the said intended cemetery, or burial-ground, or in the vaults under the same, to less sums than are now payable, according to the classes or divisions of the said vaults, cemetery, or burial-ground, for burials in the present cemeteries of the said parish; but the same shall be due, and payable to, and may be demanded, and taken by the person or persons entitled thereto."

Now it is expressly pleaded in the libel that the vestrymen have never exercised the power conferred by the 49th section. If so, what then are the fees now legally payable? This appears to me to dispose of the whole question. Does it necessarily follow that, on the vestrymen neglecting to [14] exercise their power, the fees taken in the ancient burial-ground are the fees to be taken in the new? The Act does not say so; it does not provide that, if no fees be settled and fixed, the old fees of other grounds shall be the legal fees of the new. The burial-ground itself, the fees for burial, everything belonging to it, all are the creation of the Act of Parliament; where the Act is silent or defective, this Court cannot supply the absence of enactment, except where legal consequences necessarily follow, from something done by the Act, which is not the present case. The Act of Parliament has provided a proper mode of proceeding, and the vestrymen have neglected to comply with it. In case of non-compliance, the Act does nothing: on what principle, then, could the old fees be considered legal for the new burial-ground?

Under these circumstances I cannot say that there are any fees legally existing at all. The matter, I apprehend, is not without a remedy; if the vestrymen have neglected to exercise the power given them by the 49th section of the act a mandamus may issue to compel them to fix the rates and fees.

If the case rested here I should feel that there was an insuperable bar at present existing to my enforcing payment of these fees; but this is not my only difficulty.

The Act does not, directly or indirectly, give this Court jurisdiction; it does not even say how payment is to be enforced. This Court having jurisdiction only over ancient and customary fees, I should feel great difficulty in extending that power [15] to the present case. I observe, also, that it would not be without some embarrassment that I should come to the conclusion who is the person entitled to receive the fees; for, by the words of the Act, a minister was to be appointed specially to perform the burial service. Here is no specification of the person who is to take the fees, except

that they are due and payable only for the actual performance of the service. I do not give any opinion against Dr. Spry's right; I only say that the Act has left the subject, in some degree, vague and doubtful.

For these reasons I am under the necessity of dismissing the defendants from the present suit; but I cannot do so without noticing a point of an entirely different description; I mean the form of the suit, and the parties cited. The suit is against the directors and guardians of the poor; but it is not pleaded that they are a legally constituted corporation, and I can find no clause in the Act which allows them to be sued in the name of their clerk. I find, indeed, that by the 12th section of 51 Geo. 3 the vestrymen may sue or be sued in the name of their clerk; but the vestrymen are not the directors. The present is a most anomalous proceeding in every respect. The party defendant in the cause is the nominee of a committee; suppose I were of opinion that the fees were due and that I had jurisdiction to compel their payment, how could I enforce my decree against such a defendant? It is not necessary that I should decide this point, but I should take a long time to pause and consider before I went the length of pronouncing this gentleman in contempt if he refused to pay the fees, and cause a significavit to issue, in order that he [16] might be taken and confined. This objection was not taken in the argument, but it is one of no small weight.

For these reasons I feel bound to reject the libel and to dismiss the defendants; but I give no costs: it is not a case in which costs ought to be given, for the matter appears to have been left in so unsettled a state by the parish itself that the clergyman was compelled to come before a Court to ascertain his rights.

GRANT v. GRANT. Arches Court, Hilary Term, Jan. 21st, 1839.—Divorce for adultery.

—No direct proof, but proof inferred from the conduct of the wife and the person with whom the adultery was alleged to have taken place, and from the letters of the wife to him found in his repositories.

This was a suit brought by letters of request from the commissary of the Bishop of Winchester, for the parts of Surrey, by Captain Alexander Grant, of Brighton, in the diocese of Chichester, against Maria Theresa, his wife, of St. Mark, Kennington, in the county of Surrey, and diocese of Winchester, for a separation by reason of adultery.

The libel pleaded the marriage of the parties, on the 20th of August, 1825, at Madras, in the East Indies, their cohabitation in India, China, and England, till February, 1838, and the birth of six children. It pleaded that Captain Grant and his wife sailed from Macao, in China, on board the ship "Lord Lowther," of which he was the owner, but the command of her was given by him to Arthur Vincent, formerly [17] in the service of the East India Company; that shortly after the ship left Macao Captain Vincent (who previous to taking the command of her had been only slightly acquainted with Captain Grant and his wife) began to pay particular attention to Mrs. Grant, who encouraged and appeared pleased therewith, so that they soon became upon a very intimate and familiar footing with each other; that frequently, during the voyage, from such time, Captain Vincent and Mrs. Grant sought occasions of being alone, and were alone together, unknown to Captain Grant, in the cuddy, and also in the dressing and sitting cabins of Mrs. Grant, and in other parts of the ship, particularly at times when Captain Grant was walking the deck, which he was in the daily habit of doing for hours at a time, or had retired to sleep (as was also his daily habit) in his sleeping cabin, after dinner; that on some occasions, when alone together, Captain Vincent and Mrs. Grant were observed sitting close to, and in earnest conversation with, each other, and appeared much embarrassed and confused on finding that they were so observed; that on other occasions Captain Vincent was seen kissing and taking personal liberties with Mrs. Grant, and that the whole conduct and demeanour of the parties towards each other soon became, and was such, as to attract the notice of, and be the topic of conversation amongst, the mariners and others on board the ship: and that on some such occasions they committed adultery. It further pleaded that a day or two previous to the ship's arrival off Brighton, in November, 1837, Mrs. Grant said to Captain Vincent, in the presence of Margaret Jamieson, her nursery maid, that she [18] should like to hear from him how he found his intended bride (he being engaged to be married on his return to England) when he got on shore, and that shortly after Mrs. Grant told Jamieson that Captain Vincent had promised to write her a letter containing the required information, but that as

Captain Grant did not like Captain Vincent, she had begged him to enclose such letter under care to her, Jamieson; that whilst at the Norfolk Hotel, Brighton, where Captain and Mrs. Grant stayed for a few days after landing, previous to their occupation of a house in Regency Square, Brighton, Margaret Jamieson received a letter addressed to Mrs. Grant, enclosed in a blank cover addressed to herself, and delivered the same to Mrs. Grant, which letter came from Captain Vincent, as Mrs. Grant afterwards admitted to Jamieson, and that it was unknown to her husband. It further pleaded that Captain Vincent went to Brighton on the 20th of December, 1837; that he slept at the Albion Hotel there, and about eleven or twelve o'clock on the following day proceeded to the house of Captain Grant, in Regency Square, he being absent therefrom, in London; that Captain Vincent being so told, inquired for Mrs. Grant, and was shewn up into the drawing-room, where she was; that from such time until dinner time (six o'clock) on that day the parties were for the most part alone together, either in that room, or in the back drawing-room adjoining thereto, and communicating therewith by folding doors, into which back drawing-room a sofa, which usually stood in the front drawing-room, was removed by Mrs. Grant's orders, between one and two o'clock on that day; and it pleads that [19] on that occasion they committed adultery. It pleaded further, that about four o'clock in the afternoon of the same day, the footman, going up stairs with a lighted lamp, saw Captain Vincent, Mrs. Grant, and her youngest child (aged four years) in Mrs. Grant's bed-room, the door being open, and about half an hour before dinner he went into the front drawing-room to see that the fire and lamp were burning, when Captain Vincent and Mrs. Grant were not in that room, but were seen by the servant sitting together on the sofa in the back drawing-room, where there was neither fire nor lamp, Captain Vincent's arm being round the waist of Mrs. Grant; that Captain Vincent dined at the house that day, spent the evening and slept there, and, for the purpose of his so doing, Mrs. Grant hired a French bed for the night, and had it put up in the dressing-room of Captain Grant, which was below stairs; and that they then committed adultery. It pleaded that next morning Captain Vincent and Mrs. Grant breakfasted alone together in the back drawing-room, where they remained till about two o'clock, when Captain Vincent left Brighton for London; and that on this occasion the parties committed adultery. It further pleaded that Captain Grant, on his return to Brighton, a few days afterwards, was informed that Captain Vincent had dined at his house, but not that he had slept there, and that Captain Grant being about to settle an account with the person from whom the French bed had been borrowed, Mrs. Grant sent word to her not to include it in her account, promising to pay for its hire herself, which she accordingly did. It pleaded that on or about the 18th [20] of January, 1838, Mrs. Grant, with the consent of her husband, wrote, and sent by the post, a letter (No. 1) to Captain Vincent, congratulating him on his recent marriage, which letter was addressed to him at the Jerusalem Coffee House, Cornhill; that on the 8th of February, Captain Grant being at the said coffee house, on business, in consequence of receiving no answer to the aforesaid letter, examined the pigeon-holes, and therein found the said letter, with three others (Nos. 2, 3 & 4), addressed to Captain Vincent in the handwriting of his wife; that he took possession of them and, upon opening and perusing them, he was astonished and distressed at their contents, and was observed to be in a state of great agitation. The four letters (with a notarial translation of such parts as are in the French language) were annexed to the libel; they are as follows:—

EXHIBIT, No. 1.

5 Regency Square
January 1838

My dear Captⁿ Vincent,—I am very much rejoiced to hear of your marriage and wish you and your Wife all the happiness that it is possible to possess in this world, my husband participates in my feelings towards you, and I need not say how happy I should be to give you a comfortable room if you could make it convenient to pass through Brighton, *accompagner de votre Epouse*.

[21] I feel my late bereavement very severely, it is indeed a very trying dispensation but I trust the Almighty will enable me to bear it with fortitude.

My health is very delicate at this time indeed I feel myself very weak and I am ordered not to go out at all.

You will I am sure be glad to know that the Children are quite well they are

rejoiced to hear of your wedding and desire their best love to you and Mrs. Vincent, avec les respects de la bonne Margaret qui s'imagine que dans ses souhaits vous n'avez pas accompli ce qu'elle vous a demandé du Wedding Cake pour elle, je pense qu'elle fera quelques songes à ce sujet—your little friend Lowther is growing a very fine boy.

Fortune still smiles on Captⁿ Grant you will be glad to hear that he is connected with some of the highest people in England in the way of business.

I hope my young friend E. Vincent is well and that our separation will not make him forget me, as you are better acquainted with his mother than myself I trust you will prevail on her to allow him to pass a fortnight here as Brighton is a very healthy place and I think he would be happy with my children and his sincerest friend. With very best wishes for yourself and kind love to Mrs. Vincent I remain my dear Captⁿ Vincent—Yours very sincerely

MARIA GRANT.

(Superscribed) Cap^t Arthur Vincent,
Jerusalem Coffee House, Cornhill, London.



[22] EXHIBIT, No. 2.

Brighton Dec^r 23rd 1837

Twelve o'Clock at Night

My dearest Arthur,—Those only who have suffered them can tell the unhappy moments of separation—ô my Arthur let me speak in a language so well entendu par vous et cela m'étant plus familier je veux vous exprimer les sentiments de mon cœur oppressé—Depuis que vous avez disparu devant mes yeux J'ai éprouvé la sensation la plus cruelle exactement je peux avec la simplicité de mon cœur vous dire que la comparaison is absolument comme ci vous aviez apparu à moi comme ce bel astre qui dans la nature donnent la vie aux plantes mourantes par son influence et qui dans l'absence voit flétrir et détruire ce qu'il-y-a de plus brillant—je pensent Arthur que nous étions former dans le ciel pour être unis si étroitement dans cette vie, car en vérité par la sympathy et les sentimens sublimes que nous ressentons l'un pour l'autre combien la vie aurait passer délicieusement entre nous oui my beloved Arthur votre Maria est vertueuse et possédent un cœur qui vous aurait rendue heureux pour toujours—Jamais nous n'aurions vue un nuage s'approcher de nos têtes—toute ma joie aurait été de penser qu'à vous prouver de jour en jour combien la vie s'écoulet avec deliees quand les cœurs et la délicatesse des sentiments sont unis aussi bien que deux creatures ensemble peuvent être—a present je me considerent dans le silence de cette nuit seule comme the dove solitaire (dont notre amour est l'emblème dans la fidelité de nos cœurs embrasés d'un sentiment délicieux qui nous a fait éprouver ce que [23] les couronnes des souverains ne peuvent posséder autant avec cette Idée votre fidelle Maria jusqu'à son tombeau ne cessera de vous chérir et respecter: prenez ô mon Arthur de ne pas negliger votre amie; more than that) soyez le Docteur qui doit me guérir avec prudence car ma vie est attachée à vous—vous êtes tout pour moi dans ce monde ceci n'est pas seulement l'idée d'un amour exalté mais c'est très sérieux prenons nos précautions soyons prudent ensemble ecrivez moi a la fin de cette semaine sous l'enveloppe et adressez à Margaret Jamieson, 5 Regency Square, c'est mieux parce que la bonne Margaret vous aime et comme elle reçoit beaucoup de lettres de ces amis de l'Ecosse cela ne donnera pas de soupçons prenez patience et avec prudence nous serons toujours en dépit des Jaloux bien favoriser—Je souhaiterai que je pourrai, a mon dernier Soupir recevoir ces flammes brûlantes que vous avez laisser dans mon sein.

Adieu my dearest Arthur—I sincerely hope to hear something soon from you—I am so wretched that I am sure God will have pity on your poor and devoted Fri (torn off with the seal)—Believe me yours ever most affect^y

M. G.

Pray do kindly excuse my handwriting but I am so nervous that I cannot do anything well, it is a madness adieu.

(Superscribed) Cap^t Vincent,
Jerusalem Coffee House, Cornhill London.

(Post Mark)



[24] EXHIBIT, No. 3.

Brighton Dec^r. 29 1837

My dearest Arthur,—Je ne pourrai pas passer ces jours solennels sans vous exprimer tous les souhaits de ce cœur si dévoué à vous, dans tout ce que l'amour a de plus exalté—Je ne puis songer, sans une extrême émotion à l'état où j'étais quand vous m'avez dit adieu this very day last week I may say—fix'd in her choice, and faithful but in vain, see me neglected on the world's rude coast, the dearest companion of my voyage lost!

O my Arthur, quand pourrai-je espérer de vous revoir si cela était possible dans votre journey seulement pour un demi jour, comme l'éclair brillant qui éclairent les pas incertains du voyageur.

Je rends grâces à cette divine Providence si infinie pour toutes les profusions de blessings upon my sweet family—Mon époux est très bon et attentive pour tout ce qu'un autre que moi devraient apprécier mais je ne suis pas digne mais je n'ai pas de pouvoir—vous seul saura me donner de la raison : mais à présent toute ma fragile nature est absorber que dans vous seul. Adieu—Believe me yours ever most affect^y

M. G.

Pray do excuse this in haste

(Superscribed) Captⁿ Arthur Vincent,
Jerusalem Coffee House, Cornhill.

(Post Mark)

30 Dec 30
1837

[25] EXHIBIT, No. 4.

Brighton New Years day

My dearest Arthur,—I begin this day in offering my heart to God to bless yourself and my blessed Family.

I am obliged to go to London to-morrow for a week, you will be sorry to hear that your Maria has received two days ago the most afflicting intelligence that has reached her—I pray God to comfort me and enable me to sustain this heavy stroke with that resignation to His will which none but Himself can give.

I may say à my Arthur with the Poet—Doom'd as I am, in solitude to waste the present moments and regret the past, depriv'd of every joy I valued most (my love torn from me) and I have lost my blessed Mother—la semaine prochaine doit faire une impression bien mélancolique sur mon cœur quand je réfléchis dans l'amertume de ce cœur opprimer que votre infortunée et trop fidelle Maria sera dans les lugubres vêtements d'un deuil sombre et n'ayant pas l'esperance d'entendre votre voix chéri pour la consoler ; ah, Arthur, think of your own devoted Maria.

Je vous fait part de mes chagrins parce que je connais votre cœur précieux

Je suis obligée de finir ma lettre car ma tête est très confuse,

Je dois prendre garde à moi car je suis encore délicate.—Believe me yours ever most affect^y

M. G.

(Paid)

(Superscribed) Captⁿ Arthur Vincent,
Jerusalem Coffee House, Cornhill, London.

(Post Marks)

Brighton
JA 2
1838Paid
3 JA 3
1838

[26] The libel went on to plead that the day following the discovery, Captain Grant communicated it to his friends, by whose advice, in the evening of that day, he proceeded to Brighton, accompanied by Mr. Macvicar, one of such friends, and Mr. Bolton, his solicitor, and, on the ensuing day, they all went to Captain Grant's house, when Captain Grant and Mr. Macvicar proceeded up-stairs into Mrs. Grant's bed-room, and other rooms, to search for any letters from Captain Vincent, whilst Mr. Bolton remained alone with Mrs. Grant in the drawing-room, when Mr. Bolton, in answer to inquiries by Mrs. Grant, informed her of the detection of her correspondence with Captain Vincent, upon which Mrs. Grant, repeatedly, with much vehemence, denied that she had ever written more than one letter to him, and that with her husband's consent, and that any other pretended letters were forgeries, or a conspiracy against her ; that on Captain Grant and Mr. Macvicar joining them (when the former stated

that he had first discovered that Captain Vincent had slept in his dressing-room on the 21st of December) the letters No. 2, 3, and 4 were shewn to Mrs. Grant, who exclaimed, "Oh, I thought all these letters had been received:" after which she no longer denied having written them, only declaring that she had never committed the crime with Captain Vincent. The remaining articles of the libel pleaded that Captain Grant brought an action in the Court of Common Pleas against Captain Vincent, for criminal conversation with his wife, in which judgment went by default, and the damages were assessed at 500l.

[27] Upon this libel fifteen witnesses were examined.

On behalf of Mrs. Grant, an allegation was admitted, which counter-pleaded the allegation respecting the behaviour of Captain Vincent and Mrs. Grant towards each other aboard ship, and pleaded that their whole conduct and demeanour towards each other was decorous and proper. It pleaded that Mrs. Grant, on the morning of the 21st of December, received a letter from her husband, informing her that Captain Vincent was to go to Brighton, and would call at his house, and directing her to invite him to dine, and to shew him every attention and civility in her power—which letter was destroyed, in pursuance of a general injunction by Captain Grant; that when Captain Vincent came to the house he came without any other previous knowledge of his visit by Mrs. Grant, who was then attended by her music-master, who remained at the house, and in the same room with Captain Vincent and Mrs. Grant, for a considerable time after Captain Vincent arrived at the house; that in pursuance of Captain Grant's injunctions, on many occasions, to shew every respect and attention to Captain Vincent, she invited him to spend the day there, and engaged some friends to pass the evening at the house; that Mrs. Grant, with Captain Vincent and her three eldest children, drove in a hired carriage about Brighton, and on their return Mrs. Grant went to her bed-room to dress for dinner, and did not go downstairs till a few minutes before the dinner-hour; that before Mrs. Grant, her son (twelve years old), and Captain Vincent had risen from the dinner-table, the friends who had been invited arrived, and continued in [28] the house till eleven o'clock, and that from their arrival Mrs. Grant and Captain Vincent were never absent from the drawing-room during the evening; that Captain Vincent, having mentioned that he was staying at the Albion Hotel and that it was very expensive, Mrs. Grant informed him that she would endeavour to provide accommodation for him at the house, and, consulting with Jamieson, it was arranged that a French bedstead should be hired, which was put up in the dressing-room of Captain Grant—a back-room adjoining the parlour on the ground-floor; that there was a spare bed-room ready for occupation on the second floor, which Mrs. Grant would not allow Captain Vincent to occupy, as it adjoined her own bed-chamber; that she did not mention to her husband that Captain Vincent had slept there, in order (as he was very particular and rigid in looking over, and criticising, her accounts) that she might avoid complaint of the expense; but that the fact was well known to the servants and others; that, on the night of the 21st of December Mrs. Grant retired to her bedroom soon after eleven o'clock, attended by her maid, and her daughter, nearly seven years of age, slept with her, and that she did not leave her room during the night; that the sofa was frequently moved from one drawing-room to another, there being folding-doors between them, which usually remained open, and that it was so removed on the 21st of December to afford greater space in the front drawing-room for dancing, which the servants and others well knew was to take place in the evening; and it denied that Captain Vincent sat on the sofa with his arm round Mrs. Grant's [29] waist, and pleaded that, during the visit of Captain Vincent, he and Mrs. Grant were never alone together, save for a short space of time in the morning of the 22d, just prior to his departure, during part of which time they were at breakfast, and during the remainder she was engaged with her music, the doors of the drawing-room being open or unlocked, and it denied any act of adultery.

Upon this allegation eight witnesses were examined.

Addams and Curteis for the husband. On the face of the letters the Court can come to no other conclusion than that, if the parties had an opportunity to commit adultery, they did commit it. As they were living on board the same ship during a long voyage, opportunities must have offered, and the witnesses state that there were familiarities between them which afforded matter for observation to the mariners and others on board. There is proof of an arrangement for a clandestine correspondence

between them before they left the vessel, and there is no counterplea on this point on the part of the wife. The letters from Captain Vincent were not before the Court, but those from Mrs. Grant were, and they shew that adultery had been committed, which creates a distinction between this case and that of *Hamerton v. Hamerton* (2 Hagg. Ecc. 8). The evidence of Jamieson shews that Captain Vincent's visit on the 21st of December was unexpected by Mrs. Grant; that she evinced surprise at seeing [30] him, which disproves her plea that she had been advertised of his visit by Captain Grant. The indecent familiarities between the parties on that occasion, the concealment from Captain Grant of the fact that Captain Vincent slept in the house; the denial of Mrs. Grant that she had written more than one letter to Captain Vincent, and her exclamation, when they were produced, that "though her mind might be contaminated, her body was pure," and that "no one had seen her in his arms," the expressions in the letters from a married woman to a young man, and the result of the action at law, were conclusive proofs of the guilt of the wife.

Phillimore and Haggard for the wife. There is no case where, in the absence of all proximate acts, and where the oral evidence failed, a wife has been convicted of adultery on letters written subsequently to any act charged, and which, though they contain some remarkable expressions, do not allude to the commission of the crime; only one witness is produced, who deposes to a belief that adultery was committed on board the ship, and several persons depose to the contrary. The only passenger saw nothing but polite and respectful conduct on the part of Captain Vincent towards Mrs. Grant. Captain Grant was an austere man (according to the evidence), and his wife, being a lively woman (a French Creole of Mauritius), was desirous of cultivating an acquaintance with Captain Vincent, which accounts for his employing the intervention of the servant. There is not a single letter of Captain Vincent, and in *Hamerton v. Ha-[31]-merton*, the letters per se, were held to be no evidence of guilt. As to the action at law, Lord Stowell, in *Elwes v. Elwes* (1 Hagg. Con. 290, n.), said, "How can that be evidence against the party which has passed in a suit to which she was not privy?" And in *Williams v. Williams* (1 Hagg. Con. 306), where a verdict went by default, Lord Stowell pronounced against the divorcee.

Judgment—*Sir H. Jenner*. The facts of this case lie within a narrow compass. The parties, in 1835 or 1836, went from this country to the East Indies, on board the "Lord Lowther," the property of Captain Grant, and at that time under his command, accompanied by two of their children (they having five children at this time), three of their children being left at Brighton. They proceeded to several places, and, on the 8th day of May, 1837, being then in China, left that country on board the same vessel, on their return to England, and landed at Brighton about the 10th or 11th day of November, and remained for a few days at the Norfolk Hotel, and then took up their residence at No. 5 Regency Square, where they continued to reside till the separation on the 10th or 11th day of February. On the homeward voyage Captain Grant did not continue in command of the vessel, but had appointed to its command a gentleman of the name of Vincent—Captain Grant and his family being in the situation of passengers on board the vessel; and Captain Grant appears to [32] have been also owner of a moiety of the cargo on board. It is with Captain Vincent during this voyage, and also during two days in December, 1837, after the vessel had arrived, that the adultery is alleged to have taken place; and it is clear that, if adultery did take place at all, it must have been on board the vessel during the voyage, or during the 20th and 21st days of December, or one of those days; for the parties scarcely seem to have had any acquaintance with each other till they were on board the same vessel: and, after the vessel had arrived at Brighton, and Captain Grant and his family had left her, it is clear that there was no other interview between Captain Vincent and Mrs. Grant than on the 20th and 21st of December. On board the vessel, besides Captain Grant and his family, there was another passenger, Mr. Anderson, and also a Mr. Cockerell, who came on board as a passenger, but who subsequently acted as purser of the vessel. The situation of the rooms and cabins occupied by Captain Grant and his family, consisting of sleeping-cabins for the children and themselves, and a sitting-cabin for the use of Captain and Mrs. Grant, appears to have been in the after-part of the vessel, and nearer to the stern than the cuddy-room, which was common to all the passengers and to the officers of the ship; but no person who had not occasion to go to the cabins occupied by Captain and Mrs.

Grant had any right of access there whatever ; so that, to a certain extent, they were cut off from communication with the other persons on board the vessel, except those who were immediately connected with the family of Captain and Mrs. Grant.

[33] It seems to be the general result of the evidence that Captain Vincent, a short time after their embarkation, and particularly (as one of the witnesses states) after they left Saint Helena, paid attentions to Mrs. Grant, of such a nature as to attract the notice and excite the observation of persons who saw those attentions ; not, as it appeared to Mr. Cockerell and Mr. Anderson, that there was anything improper in them, or that they were paid with any improper motive or object ; but still there were particular attentions paid by Captain Vincent to Mrs. Grant, beyond what were necessary on his part, as the captain of the ship, and which seem rather to have been encouraged by her. They were in the habit of walking together on deck in the absence of Captain Grant, and were observed sitting together when Captain Grant was walking on the deck, as he was accustomed to do for some time together, and when he was asleep in the cabin, which he was in the habit of doing every day after dinner. It is very true that no impropriety is considered to attach to the conduct of these persons on board the vessel in the opinion of Mr. Cockerell and Mr. Anderson ; but still, as I have stated, it did attract their observation and attention.

It may be proper for the Court to refer to some parts of the evidence of these witnesses, and of another person on board the vessel—Jamieson, the nursery-maid—for the purpose of pointing out that, although she was a personal attendant of Mrs. Grant's children, and probably of herself too (though there was another female servant), she saw nothing in the conduct of Mrs. Grant and Captain Vincent which created a suspicion in her mind of [34] anything improper between them ; and also that she did not observe any indecent familiarity in the manner in which they conducted themselves towards each other on board the vessel. All this is material in coming to a conclusion as to the charge against Mrs. Grant.

Jamieson says, "I saw nothing particular in the attention of Captain Vincent to Mrs. Grant in the voyage home ; at first they seemed as strangers ; by degrees they seemed to become better acquainted ; but there was nothing that I observed in the attentions which he paid more than a gentleman would pay to a lady. I did not observe that she encouraged his attentions ; nor that she and Captain Vincent appeared to be on a very intimate or familiar footing with each other. I could not say that they were much or frequently alone together ; I never saw them alone, but in places which were open to other persons ; in the cuddy I have seen them alone, he sitting on one side of the table, and she on the other. I never saw them together in her dressing-cabin. I have seen them in a sitting-cabin, but it was not Mrs. Grant's, for she had not one ; it was a sitting-cabin open to other persons ; and when I saw them in it the door was open." I do not quite understand the evidence of this witness here, when she says it was a sitting-cabin open to other persons. As far as I can collect from the other evidence the rooms they occupied were situated in the after-part of the vessel, through the cuddy, and it was necessary to go through the cuddy to get to the sitting-room, and that this room (situated in the after-part of the vessel) was specially appropriated to Captain Grant and his family, and [35] no other person had a right to go there unless he had business with him. "I cannot say, when they were alone together, whether it was or was not unknown to Captain Grant : he might have known it, as I did know it ; any person might have seen them. I did not observe that it was particularly whilst Captain Grant was walking the deck, or sleeping after dinner, that Captain Vincent and Mrs. Grant were alone. Captain Grant was in the daily habit of walking the deck for an hour and more at a time, and he every day after dinner used to retire into his cabin to sleep. I could not say that I ever observed Captain Vincent and Mrs. Grant in particularly earnest conversation ; nor that they were sitting close to each other. I never observed in them any appearance of embarrassment or confusion. I never saw Captain Vincent take any personal liberty with her. I never observed in the conduct or demeanour of either of them anything to attract notice. I never heard their conduct made the subject of conversation or remark but once, when one of the young midshipmen, Mr. Steward, said to me, 'Margaret, I wonder what those two gets to talk about.' I had no idea that in that he meant to say that there was any impropriety in their conduct, and I never saw any." Now, certainly, as far as her evidence goes, she entirely negatives having

seen anything particular in the attentions paid to Mrs. Grant by Captain Vincent, or anything particular in their conduct to each other, or that any other person in the ship made mention of anything passing between them; and, therefore, it does not support, but rather negatives, the allegation as to any particular at-[36]-tentions being paid by Captain Vincent to Mrs. Grant, and as to their being encouraged by her.

Another witness who has been examined on the same article of the libel is Mr. Cockerell, who, by the tenour of the interrogatory put to him on behalf of Mrs. Grant, it was supposed was likely to have spoken as much as he could to her disadvantage, but it seems to me that Mr. Cockerell has given his evidence with great candour and fairness. He states that he has known Captain Grant for many years, and Mrs. Grant only from the time of her coming on board the ship, on the 8th day of May, when the "Lord Lowther" left Macao Roads for England, and he thus deposes, "I should say that, at first, there appeared to be but a slight acquaintance between Captain Vincent and Captain Grant and his wife. I thought that, soon after the commencement of the voyage, Captain Vincent paid more particular attention to Mrs. Grant than was necessary as the captain of the ship; and I should say that she seemed to encourage and be pleased with his attentions. It did not appear to me that there was any improper object in his attentions; they were particular; and knowing, as was commonly known on board, that Captain Vincent was an engaged man, and, looking to Mrs. Grant's position in the vessel, I considered Captain Vincent's attention to her such as one would pay to a superior, and that he was making his court to Captain Grant through his wife, with a view to his future interest. I put no other construction on his or Mrs. Grant's conduct. So far as I have said, they became on an intimate and familiar footing." It does appear, then, that he observed particular at-[37]-tentions paid to Mrs. Grant by Captain Vincent, more than was required from the captain of the ship, though he saw no improper object in them; and, considering the position of Captain and Mrs. Grant, having their children and servants on board the vessel, there was everything to lull suspicion; he could not suppose that anything improper could be intended, although the attentions of Captain Vincent were beyond those usually paid by the captain of a vessel to the female passengers on board. "They were a good deal together in the evenings, but I cannot say that they sought occasions for being alone; they were rather thrown together; and I cannot say that it was unknown to Captain Grant. He was in the habit of going to sleep after dinner, and at that time Captain Vincent was more at leisure from the duties of the ship. There did not appear to me to be any design in their being alone together. It was in Mrs. Grant's sitting-cabin that I saw them mostly alone together, and whilst Captain Grant was in his sleeping-cabin, after dinner." So that Mr. Cockerell says they were sitting alone together in Mrs. Grant's sitting-cabin; whereas Jamieson says it was an open room, and that there was no sitting-cabin belonging to Mrs. Grant. "I have seen them sitting on the sofa together. Captain Grant walked the deck daily for hours together. Being not only owner of the ship, but of about half the cargo, he naturally took a great deal of interest in the progress of the vessel, and was a great deal on deck." He states, "There was only one occasion on which I observed anything so particular in the situation of Captain Vincent and Mrs. Grant as to raise a [38] suspicion in my mind, but that I did not think of afterwards. It was one evening after the cuddy was lighted up. I went into it rather suddenly, and they were sitting at the further end of the table close together, and they certainly seemed surprised at my entrance, and embarrassed and confused." Now, what was the exact situation of the parties on this occasion we are not precisely informed, only that "they were sitting quite close to each other at the corner of the table." There was nothing in the situation of the parties which admits of a conclusion that any indecent familiarities were taking place at this time; but there was something in their conduct which made them appear embarrassed and confused. "I never saw Captain Vincent kissing Mrs. Grant, nor taking the slightest personal liberty with her. I had no idea of anything of the kind. I never heard their conduct made the subject of conversation or remark; nor was it likely I should hear it, for Captain Grant was my principal associate on board, and I was a good deal with him, and, not having much intercourse with the other persons on board, they, seeing my intimacy with Captain Grant, were not likely to make his wife's conduct the subject of conversation or remark to me. I had not any reason to believe that there was any improper intercourse between Captain Vincent and Mrs. Grant; I did not observe any thing to lead

me to suspect it." So that the evidence of this gentleman goes to this: that he saw Captain Vincent and Mrs. Grant, on some occasions, sitting close together, when Captain Grant was on deck or in his sleeping-cabin, to which he retired [39] after dinner; and though on one occasion what he saw may have created some suspicion in his mind, there is nothing from which the Court can infer that adultery had been committed between the parties, as far as what was seen by Mr. Cockerell. There is nothing, as to what is pleaded in the libel, of Captain Vincent taking indecent liberties with Mrs. Grant.

Three other persons have been examined from on board the vessel. Wilkins, one of them, who was cooper on board the vessel during her voyage between China and this country, says that Mrs. Grant and Captain Vincent were not well acquainted before the vessel left Macao. He says, "Soon after the voyage commenced Captain Vincent was very attentive to Mrs. Grant, and she seemed very affable with him. It was not very long before they got on very intimate and familiar terms; I observed that not long after we left Batavia; the manner in which she took hold of his arm on deck, and being so very close to him, made me think that there was something; that was my opinion. Until I became captain's steward I could only see them on deck; and I noticed their being so much together, and that there was that in her manner towards him from which any person could see that she had a leaning that way, and particularly as it was so different when Captain Grant was on deck." That is a circumstance, undoubtedly, which is calculated to awaken the attention of the Court—the difference in the conduct of Captain Vincent and Mrs. Grant to each other when the husband was present and when he was absent. It has been said that the witness, Wilkins, is a person on whom no reliance [40] can be placed—that he has deposed untruly. I think not; for although this difference in the conduct of the parties may not have been observed by Mr. Cockerell, or by Jamieson, the fact may have occurred to the observation of a person who was on deck; and he is confirmed by the evidence of other witnesses. "After I became captain's steward, I saw them together alone in the cuddy, and also in the inner cabin; and I saw him going into the nursery, where I heard Mrs. Grant's voice, talking or singing. It was not every day I saw them alone, but I saw them frequently alone, and it was at that time when Captain Grant took his morning walk on the poop. I am quite certain it was unknown to Captain Grant, and I was afraid to discover it to him, for I stood like between two fires; and therefore I did not like to see more than I could help—though I did sometimes make an errand into the cuddy to wipe or dust, just to see what was going on. I never saw them in a dressing-cabin. Captain Grant used mostly to retire to sleep after his dinner; and then, also, I noticed that Captain Vincent and Mrs. Grant were alone: they used to sit quite close together, sometimes playing at a game, I think they called chess. I cannot say that they seemed confused or embarrassed when I entered the cabin and found them together, but on seeing me they would shift their positions a little, or ask for something as an excuse. I cannot say that I ever saw Captain Vincent kissing her, but I have seen his face two or three times, or more than that, so close to her bonnet that I had no doubt about it. I have also seen his hand upon her thigh twice or thrice, or more; this was in the sitting-[41]-cabin." Now, if this witness is to be believed, he proves an act of gross familiarity occurring within his own observation; and I see no reason to distrust his evidence because this was not seen by other persons. "They must have seen me, but not, perhaps, that I observed what they were about. Their whole conduct was the talk of the ship's company. I did not mention what I saw to any one; but the free manner in which Mrs. Grant behaved, and her bearing towards Captain Vincent, was quite the subject of jokes, and of the coarsest jokes, of the ship's company; and they could only see what passed on deck; they could not see what passed in the sitting-cabin; and what I saw there could not have been without taking some little pains, going round the cuddy and looking into the cabin. Any person coming up the cuddy to the cabin would have been heard. On these occasions Captain Grant was on deck. I do really believe that, on some of the occasions on which I saw Captain Vincent and Mrs. Grant alone in the sitting-cabin, they committed adultery." He says, "I could not be deceived as to where his hand was—on the inside of her thigh; it was as clear as possible. And they could always tell where Captain Grant was by his tread above on the deck; and there was no other person who would have any right to enter the cabin: the children, if they had come down, would have gone into the nursery; and if they had not, they

made such a frisking and noise that there was plenty of time to separate." The evidence of this witness, then, goes to prove that certain familiarities passed between these parties, which, though they may not lead to the conclusion [42] of adultery having been committed between them, shew that there was something more in the attentions paid by Captain Vincent to Mrs. Grant than was supposed by Mr. Cockerell, who considered them as nothing more than a paying court to Captain Grant through Mrs. Grant.

Smith, another witness, who was a midshipman on board the vessel, states that he observed that Captain Vincent paid particular attention to Mrs. Grant during the voyage, and he thought that Mrs. Grant encouraged his attention and seemed pleased with it. "They got, not long after the commencement of the voyage home, on very intimate and familiar terms; they used to be whispering and smiling together on deck, when Captain Grant was asleep below in the evening, about dusk. From six to eight o'clock in the evening Captain Grant used to be in his sleeping-cabin, and then Mrs. Grant and Captain Vincent used to be on deck, whispering and smiling together; and she used to be sitting on deck sometimes by his cabin-window, which looked upon the quarter-deck, whilst he talked to her through the window. They were always talking in that way, as if they did not wish to be overheard. I never saw them alone together in the cuddy; they used to sit together there, but then any person almost might go into the cuddy. I never saw him in her sitting or sleeping-cabin, or dressing-cabin; I never noticed that they cared about being seen or observed when they were together; I never saw Captain Vincent kissing or taking any personal liberty with Mrs. Grant; I never saw anything particular in their conduct or demeanour, except this low whispering [43] and talking in the evening when Captain Grant was below in his cabin; and they behaved so differently towards each other when he was about." Here, again, is a difference of manner spoken to in these persons when it was likely to fall under the observation of Captain Grant, the husband. He says, "Their conduct was very much talked of on board the vessel; the men at their work used to make their remarks about it, and we, in our berth, used to talk about it, more in joke than anything else, for we did not think that there was anything in it at the time, though we did talk about it, and think it very odd that Mrs. Grant, as a married woman, should be so very particular with Captain Vincent. I never saw anything to give me reason to believe that they were criminal together; I did not think that, though their conduct was so odd." So that here is another witness who says that the conduct of these persons on board the vessel was such as to attract the observation of the ship's company; that the ship's company used to make remarks upon it, and the midshipmen in their berth used to joke upon the subject; though this witness, at the same time, under all the circumstances under which they were on board the vessel, did not conceive that there was any actual criminality between them.

The witness Pyle speaks much to the same effect, as to the general conduct of these persons towards each other. He describes himself as being a carpenter and joiner; he says, "Soon after the commencement of the voyage I thought that Captain Vincent was paying great attention to Mrs. Grant. They used to be walking the deck in the evening, [44] and laughing and talking together; and she used to be sitting at his cabin-window talking to him. It was very particular, and became the talk of all hands upon the gun-deck, who were continually jeering about it. It was more particularly so after we left St. Helena. Any person might have heard the men jeering about the intimacy between Captain Vincent and Mrs. Grant. It was common for my messmates to say to me, when I had been in the cabins for any job, 'How is your mistress by this time?' alluding to her being with Captain Vincent—for they were together every evening almost, either walking the deck, or at his cabin-window, or under the poop-awning. And it was in the evening that Captain Grant was either asleep in his cabin or reading there, at the time when his wife and Captain Vincent were together, as I have said. I have also seen them together in the sitting-cabin alone; on one occasion she was reclining on the sofa and he was sitting on it. I went in to fetch a guitar to clean; it was in the evening; and I saw Captain Grant on his sofa in his sleeping-cabin asleep. I have, on other occasions, seen Captain Vincent and Mrs. Grant sitting alone together in the sitting-cabin; on one occasion I saw Captain Vincent go across the cuddy from his own cabin to Mrs. Grant's sitting-cabin; it was in the morning, and Captain Grant was walking the deck at the time. I saw Mrs. Grant standing at the folding-doors, between her sleeping and sitting-cabin, and

she spoke to Captain Vincent in answer to his inquiry, how she was that morning. I left the cuddy at the time, and don't know what took place afterwards. Captain Grant took his regular walks [45] on deck, and walked a good deal at times. My chief work on board the vessel was in the cuddy and cabins, and that was how I came to see Captain Vincent and Mrs. Grant there; but, some how or other, it happened, and it seemed strange to me, that after Captain Vincent had the command I was not near so much wanted in the cabins as I had been before, and I only went there when he ordered me. I can't say whether they tried to be alone unknown to Captain Grant, but they were very different to each other when he was present." So we have the opinion of three witnesses to the same effect, that the behaviour of these persons to each other was such as to excite the observation of the persons on board: that the ship's company jeered; and that there was a considerable difference in their behaviour when Captain Grant was likely to observe it. He says: "And that was commonly said on board; for when, in the evening, Captain Grant was below in his cabin asleep, or reading there, they were on deck together, close in conversation, or she sitting under his window." He says that, "Although I thought and saw that they were very intimate, and that her conduct was not what it should have been as a married woman, I never saw any kissing or personal liberty between them; and I did not form any belief myself whether they had or had not committed adultery together. I did not see enough to feel that I could say that I believed that they had or had not so. I saw them alone on deck and in the cabins, and thought their conduct very strange; and the men used to talk freely and say what they thought; but I did not say anything myself, for I was chaffed so much by [46] the men about what I saw in the cabin, and how Mrs. Grant and Captain Vincent were getting on, that I held my tongue."

The evidence of these three persons, then, clearly shews that some intimacy subsisted between these parties, whether improper or proper. When I say improper intimacy, there can be no doubt, if these witnesses speak truly, that the intimacy was of a nature totally inconsistent with propriety, considering the situation of Mrs. Grant on board this vessel, being with her husband, and children, and servants. It does not, certainly, go to the extent of proving the commission of the crime of adultery between them; yet there can be no doubt that an intimacy of very considerable strength had grown up between them from their courting each other's society so much during the voyage, and from other circumstances; their seeking so many opportunities of being alone together during the time that Captain Grant was asleep or on deck: all which was not consistent with propriety in a married woman.

But there have been some witnesses examined on the allegation given in on behalf of Mrs. Grant, to the benefit of whose testimony she is entitled; and one of those witnesses is Mr. Samuel Anderson, who was a passenger on board the vessel. He says he never observed that Captain Vincent paid any attention of a particular nature to Mrs. Grant. "I observed nothing more than civility and politeness on his part towards her. He was particularly attentive to her, but no more than appeared to me proper. She seemed pleased with the civility of his attentions. I did not observe that they sought occasions of being alone together. I saw them [47] occasionally sitting together on the deck in conversation; they appeared in confidential conversation, not to say in earnest conversation. I never witnessed any occasion on which they exhibited any embarrassment or confusion. I never saw any personal liberty pass between them. I had no reason to believe, from anything which I witnessed, that they had committed adultery together. As far as I saw, their conduct and demeanour throughout the voyage was decorous and proper." Mrs. Grant is entitled to the benefit of this gentleman's testimony.

Now, if the case on behalf of Captain Grant had terminated with the voyage—with the landing of his family at Brighton—although there are circumstances spoken to which appear to be entitled to considerable weight, I do not think any of those circumstances, if they stood alone, sufficient to justify the Court in coming to a conclusion, on this evidence, that adultery was committed on board the vessel between these parties.

But, unfortunately, it does not terminate there; because, soon after the arrival of these persons at Brighton, an arrangement was made between them that some correspondence should take place between them, the letters to Mrs. Grant being addressed, under cover, to Margaret Jamieson, who speaks to this fact. She says

that a day or two before their arrival Mrs. Grant said to Captain Vincent, in her presence, that she should like to hear from him, to know how he found his intended bride, on his arrival in England; and she told the witness that Captain Grant did not like Captain Vincent; and that, therefore, the letters from Captain Vincent to Mrs. Grant would be addressed [48] under cover to her; and it appears that one letter was so addressed from Captain Vincent to Mrs. Grant; for Margaret Jamieson deposes that, whilst they were at the Norfolk Hotel, a letter came, addressed to her, and that she was disappointed on opening it to find that it was not from her own relations, but for Mrs. Grant, who afterwards told her that it was from Captain Vincent. This is a circumstance which the Court cannot look at without a considerable degree of jealousy and suspicion—that she, a married woman, should wish to hear from Captain Vincent, a person with whom during the voyage she had been so often alone, sitting on the deck in confidential, if not in earnest, conversation together—walking about the deck, and sitting in the cabin in the absence of Captain Grant—their conduct being different when Captain Grant was present from what it was at other times—all these circumstances do create in the mind of the Court a suspicion that it was not so much with a view of hearing of the bride of Captain Vincent, as for some other object, that Mrs. Grant was so anxious to hear from him on his arrival in England. It was of no importance to her whatever how he found his bride; and if it was, it could not be necessary to resort to this contrivance, of the letters from Captain Vincent being addressed to herself, under cover to Jamieson.

But though it certainly appears that one letter passed, there is no evidence of any other letter; and it does not appear from the evidence that Mrs. Grant wrote to Captain Vincent in return: it may or it may not be the case. It was not communicated to Jamieson, and it was not necessary to do [49] so; it was not necessary that the letters sent to Captain Vincent should be communicated to Jamieson, for there were plenty of opportunities of conveying a letter to the post office by Mrs. Grant herself, without the intervention of another person, so as to make this an unnecessary part of the machinery.

But Captain and Mrs. Grant leave the Norfolk Hotel, and proceed to Regency Square, Captain Vincent going round with the vessel (I presume) to London; and nothing more is heard of Captain Vincent till the 20th day of December, when he appears at No. 5 Regency Square, and inquires for Captain Grant; and, finding that he was not at home, he inquires for Mrs. Grant, and is shewn up stairs into the drawing-room, and he continues there during that day, and till twelve o'clock on the following day. There is nothing to shew that Mrs. Grant informed Captain Vincent of the absence of Captain Grant; and therefore it must be considered to have been a visit paid to Captain Grant, without any knowledge on the part of Captain Vincent that Captain Grant was absent from Brighton. Being informed that he was absent, he inquires for Mrs. Grant. There are no means of ascertaining for what purpose the visit was paid; be the occasion what it was, Captain Vincent seems to have arrived at Brighton on the night preceding, and to have slept at the Albion Hotel, and he appeared in Regency Square between ten and eleven o'clock in the day, according to one witness, and rather later, according to another. The parties were for some time alone together in one of the drawing-rooms which communicated with each other by [50] folding-doors; and there they remained, for some period of time at least, alone together: for, supposing Captain Vincent to have arrived between eleven and twelve o'clock, it should seem that, at that time, or shortly after (at twelve o'clock), the children went out to walk, and Margaret Jamieson and Miss Robinson also went out with them on this occasion, and therefore none but the servants were at home. What passed between these persons on that occasion, or what length of time they were together, the Court has no means of knowing. But about twelve o'clock (unfortunately there is a little doubt as to the time—the stated time was about one o'clock), Mr. Croft, who was in the habit of giving lessons in music and singing to Mrs. Grant and her daughter, arrived. He says he believes he was there from about one to two o'clock; but he gives no particular account of what he observed at the house; he has no precise recollection on the subject; he has some impression of having seen Captain Vincent on that day, and the Court cannot be certain that during the early part of that day Mr. Croft had been at the house. Between three and four o'clock the children went out for a drive in Brighton. There were two flies, and Captain Vincent Mrs. Grant, and some of the children went in one fly, and Jamieson and the other

children in the other; and they were driving about till near five o'clock in the afternoon, when it was almost dark. When they returned home, and the children (I presume) were away, Captain Vincent and Mrs. Grant were observed, soon after their return home, in the back drawing-room, between five and six o'clock, sitting on the sofa together, [51] Captain Vincent's arm being round her waist. Now, this is said to be a trifling circumstance, considering the relation of each of these persons to the other; but that persons who had so conducted themselves on board the vessel during their voyage from China to this country, should be found on an evening, in the month of December, in the dusk of the evening, sitting without fire or light, on a sofa, the arm of Captain Vincent being round the lady's waist, I cannot think is a circumstance so very unimportant; and if persons will so conduct themselves in such situations they cannot expect that conclusions will not be formed as to their conduct when they are not so immediately under observation as where persons might have access to the places where they are together. I cannot but think that it is a circumstance which must be taken into consideration by the Court, in looking at the probable course of conduct of these parties towards each other on this and the following day.

But the case does not rest here; for on the same day (Captain Grant being absent from Brighton) Captain Vincent is to sleep in the house, and some machinery is set in motion for the purpose of his continuing in the house during the whole of the night; and I cannot think it a trivial circumstance, the finding these persons in the room together, his arm being round her waist, though there is no proof of anything else being observed, when all this machinery is to be contrived to keep Captain Vincent in the house.

About the time of going out in the fly (about three o'clock in the afternoon) it was proposed by Mrs. Grant that Captain Vincent should sleep in [52] the house. It is suggested in the interrogatory that Jamieson had proposed that he should sleep in a room adjoining Mrs. Grant's bed-room, on the second floor, where the eldest son, a youth twelve years of age, was in the habit of sleeping, and which was ready for use at the time; but that Mrs. Grant declined acceding to the proposal, and said that it would be improper, Captain Vincent being an unmarried man, that he should sleep in a room adjoining her own, and proposed that a bed should be hired and put up in Captain Grant's dressing-room, on the ground-floor; and, accordingly, a bed was hired from Mr. Stead, to whom the house belonged, for the occasion, and put up; and in that bed Captain Vincent was to sleep. The circumstance itself—of Captain Vincent's sleeping in the house—cannot but, under the circumstances of the case, strike the mind of the Court as something extraordinary, even on the supposition urged by the advocate of Mrs. Grant, in the endeavour to get rid of this circumstance, that it is the custom in the country of which Mrs. Grant is a native (the Mauritius) that gentlemen, coming to visit, should sleep in the house—and it may very possibly be so; and, if nothing occurred before or after, calculated to excite suspicion, it might be a sufficient explanation. But the Court must not be confined to any particular time or place, but must take the whole of the circumstances into its consideration, as well before as after. Supposing it had been the custom in the country where Mrs. Grant has been in the habit of living, Is it the custom of that country to hire a bed, or to conceal the fact from the husband who may happen to be absent? to repre-[53]sent to him, on his return, if a gentleman visited the house under the circumstances that Captain Vincent did, that he did not sleep there? Is it the custom to conceal the fact of a bed being hired for that person's accommodation? or is it the custom also that the charge should not be made in the bill, but paid by the wife? Surely all these circumstances are sufficient in themselves to excite the suspicion, and to arouse the jealousy, of the Court as to the conduct of the parties; and the Court cannot but think that, in conjunction with the circumstances which took place on board the vessel, they afford strong grounds for believing that an improper intimacy subsisted between them. It has been suggested that Captain Vincent could not afford the expense of a bed at the Albion Hotel for a second night; and so, out of compassion for his impoverished circumstances, Mrs. Grant proposed that he should sleep in the house, and hired the bed; and that it was on that account not paid for by her husband, but by her without his knowledge. I cannot think that the setting up this defence does much for Mrs. Grant, or that it affords a justification of her concealing the fact from her husband. And I must look to the situation of

the parties, to what had occurred before, to what occurred that day, and to the concealment afterwards: I must look to all the circumstances which occurred, and to the whole of the facts at the time this visit was paid.

In the afternoon of this day Captain Vincent dined with Mrs. Grant, and her eldest son was present. They dined about six o'clock, and about eight o'clock Mrs. Grant had a small party, at [54] which were present Mr. Croft, his wife, and Miss Robinson. They amused themselves with music and singing from eight o'clock till eleven, and the children exhibited their proficiency in dancing the gallopade and mazourka. During this time, between eight o'clock and eleven, it does not seem that there could have been any improprieties passing between Captain Vincent and Mrs. Grant, for Mr. Croft and his wife have deposed that, during that time, Captain Vincent and Mrs. Grant were never absent at the same time, so as to afford the opportunity of committing adultery together. About eleven, or between ten and eleven, the persons at the party took their leave, and Mrs. Grant and Captain Vincent retired to their respective rooms shortly after, Mrs. Grant having in her bed-room one of the children (about six years of age) to sleep with her: this is proved by Jamieson, who states that she put the child into her bed, and took the child away on the following morning, when Mrs. Grant was in bed; and one of the maid-servants, who took up coffee to her on that morning, states that she was then in bed with her child; and there is no evidence to shew that Captain Vincent left his room after he retired to bed; and it appears that he got up about seven o'clock on the next morning: the man-servant states that he took up coffee to him in his bed-room at that hour. Mrs. Grant slept one story above Captain Vincent; the four maid-servants slept in the attics, and Jamieson, with the children, slept in the nursery, which was immediately over Mrs. Grant's room, and the two men-servants slept in a room down stairs, under the dining-parlour. During the night it does not [55] appear that any person heard Mrs. Grant go from her room, or Captain Vincent go from his, to any part of the house; and the circumstances, suspicious as they are, would not be sufficient alone to justify a conclusion that adultery took place between the parties; and, therefore, suspicious as the conduct of the parties may have been, the Court could not, unless it was actually certain that an act of adultery had taken place, pronounce the sentence of separation which the husband seeks at its hands. It has been said that the evidence of the maid-servant, a personal attendant of Mrs. Grant, shews that it is not probable that an act of adultery could have taken place between the parties after their return from the drive in the fly, for that she dressed Mrs. Grant. I cannot say that, from the evidence of this witness, any such necessary inference arises; for she says she was but a very short time with Mrs. Grant on that occasion; and, therefore, between the time of returning from the drive and the time of dressing for dinner, there is no reason why these persons should not have been alone together in the drawing-room for a considerable time, when they were seen sitting on the sofa, Captain Vincent's arm being round her waist, and that an act of adultery might not have been committed. It is true there is no evidence to shew that the door of the drawing-room was locked, or that there was anything to prevent a person from entering the room who thought proper to do so; but still, whether this was the case or not, the parties were alone together for a considerable period of time, and were observed on the sofa in the situation I have stated: the sofa stood usually in the front drawing-room, but it had been removed into [56] the back drawing-room, for the purpose of affording more room for the exhibition of the children at the party on the evening of the 20th of December.

On the morning of the 21st Captain Vincent breakfasted with Mrs. Grant. The children were all down stairs in the parlour, where they received their lessons. Captain Vincent left the house about twelve o'clock in the day, the children being brought to take leave of him; and it is suggested that there could have been no improprieties between the parties on this occasion: but Captain Vincent had been alone with Mrs. Grant during a considerable time in the morning, and during breakfast in the back drawing-room; for the governess states that she came to instruct the children for the first time on that day, and that they were occupied from ten till twelve o'clock; so that the parties were together some time during the morning of the 21st. But no person saw them in a situation from which the Court could infer that adultery had been committed. On that day Captain Vincent left, and went to London about one o'clock; and here the parol testimony ends. No personal inter-

course took place between Mrs. Grant and Captain Vincent from that time till the separation between her and her husband.

Now, as far as the parol evidence goes, there is quite sufficient to satisfy the mind of the Court that there was an intimacy and attachment between Mrs. Grant and Captain Vincent entirely inconsistent with the duty which a virtuous married woman owes to herself and her husband. On one occasion Captain Vincent sitting on the sofa, and she reclining; on another occasion some liberties [57] were observed to be taken by Captain Vincent with the person of Mrs. Grant, which would not be tolerated by a virtuous married woman from a person in the situation in which Captain Vincent was on board the vessel. I cannot but think that the circumstances are such as must raise jealousy and suspicion in the mind of every person; and the Court must look at them in conjunction with other circumstances which have been deposed to; for the Court is to look to all, and not to one or two isolated circumstances.

The principle applicable to cases of this description, where there is no direct and positive evidence of an act of adultery, at any particular time or place, is laid down in a variety of cases, to which it is not necessary for the Court to advert. It is not necessary to prove an act of adultery at any one particular time or place; but the Court must look at all the circumstances together, and form its own opinion whether they lead to a fair and natural conclusion that an act of adultery has taken place between the parties at some time or other. Whether the circumstances already deposed to are sufficient to lead to such a conclusion in this case it is not necessary for the Court to say, because there are other circumstances which do appear to me to leave no doubt that an act of adultery has been committed between the parties, though it is difficult to come to a certain conclusion as to the particular period of time. I allude to the letters which have been produced in the cause, and which, unfortunately for Mrs. Grant, came into the possession of Captain Grant.

Captain Vincent was engaged to be married on [58] his return to England; and it should seem that the letters addressed to Captain Vincent by Mrs. Grant (the first being dated the 23rd day of December, the last the 18th day of January) had not been called for by Captain Vincent, but had been left in the box in the coffee-house till they were found and taken possession of by Captain Grant. On the 10th or 11th of February he goes to his house in Regency Square, and accuses his wife of adultery with Captain Vincent, and then, taking a key which hung on her neck, he proceeds to search amongst her boxes for any letters which might have been addressed to her by Captain Vincent; but he found none whatever. During the interval of the search Mr. Bolton remained in the room in company with Mrs. Grant; and he describes what took place during that interview with Mrs. Grant. He says: "Captain Grant came to consult my partner and myself on the subject of certain letters which he had discovered, purporting to be written by his wife to a Captain Vincent. The result of his consultation with me was that he should proceed with me and Mr. Macvicar to Brighton. I went with Mr. Macvicar and him to Brighton on that same night. On the following morning I went with him and Mr. Macvicar to his house. On our arrival at the house I went with them into the drawing-room, where Mrs. Grant was. There was a music-master, as we were told, in the room when we arrived; the servant was told to desire him to leave, and the child he was teaching, and then we went into the drawing-room and saw Mrs. Grant. Captain Grant, in some excitement, took from Mrs. Grant a key which was attached to a riband [59] round her neck, and then left the room with Mr. Macvicar, saying, 'All has been discovered!' I was left alone with her for a long time, in the course of which she asked me what it meant—her words were, 'What does all this mean?' I told her in answer to that question that the intimacy between her and Captain Vincent had been discovered, and that Captain Grant had found her letters to Captain Vincent. She said that she had never written more than one letter to Captain Vincent, and that Captain Grant was aware of her having written that letter. She asserted that positively; and I said, 'It is a pity you should deny it, for I have the letters at this moment in my pocket;' and which, in fact, I had. But she still persisted most vehemently in denying having written more than one letter, and said that, if I had such letters as I asserted, they must be forgeries; and she also said there must be a conspiracy against her. At an early part of the interview she asked me who I was, and I told her I was Captain Grant's solicitor; and in the course of her denial of the letters she asked me if it was possible that she, the mother of six blessed children, would have been guilty of such a crime; and she

vehemently denied having been guilty of adultery with Captain Vincent: 'I never commit adultery with Captain Vincent—I never commit that crime with him—no person ever saw me in his arms.' This seems to her to be the criterion or proof of the crime of adultery committed by her. "Those were her precise words, and they struck me, from the peculiarity of her accent, she being a French Creole; and she repeated the words many times. She entered into [60] a great deal during the hour and a half I was with her, protesting it was a conspiracy against her. After some time Captain Grant and Mr. Macvicar returned to us, and Captain Grant said, 'Good God! that fellow Vincent actually slept in the house.'" This was the first time Captain Grant heard of it; and it appears from the evidence of Jamieson that she communicated it to him whilst he was up stairs searching for letters. "She said, 'Well, Captain Vincent very kind to me and my children, and I give him bed in the house.' Afterwards, Captain Grant asked me to produce the letters; I said that he had better not have them produced; but he persisted, and I produced them; and on her seeing them she said, 'Ah, I thought they had all been received,' or words to that effect. And she said a great deal, and with such rapidity that I could not follow; nor can I recollect all she did say, but it was to the effect—'My mind may be contaminated—my body is pure.'" And he says that she always throughout protested her innocence. Here is, therefore, a denial of adultery committed by her, as there had been a denial, as long as she could possibly continue it, that she had written any more than one letter to Captain Vincent: but when the letters are produced—when it is impossible to persist any longer in that averment—she then has recourse to this story, "My mind may be contaminated, but my body is pure." Still she denies an act of adultery with him; but she shewed by her admission what was her sense of the letters, and that her affections and mind had been given up to Captain Vincent; for she admits that her mind was contaminated, though her body was [61] pure. Upon the denial of this lady of any act of adultery, the Court places no reliance whatever: but here is an admission of the letters; and her assertion with respect to them is, that though contaminated in mind, in body she is pure; and this reluctant admission must be taken in conjunction with all the other circumstances, which may not be sufficient of themselves to entitle Captain Grant to a sentence of separation from his wife: but he is clearly entitled to the benefit of a fact which she admits; and it has been so held by my learned predecessor, in the case of *Hamerton v. Hamerton*: and there is nothing in the letters which is not consistent with the supposition that during the voyage from China to England, and during the night between the 20th and 21st, or on the morning of the 21st day of December, an act of adultery had been committed between the parties: if taken in conjunction with all the circumstances, the letters lead to the supposition and inference that adultery had taken place on some of these occasions.

These letters it is necessary for the Court to advert to. The first in date is No. 2, dated "Brighton, December 23rd, 1837," the day but one after Captain Vincent had left the house. It is written partly in English, and partly in French. It begins, "My dearest Arthur,"—a pretty strong expression from a married woman to a gentleman about to be married to another person, and who had recently left her under the circumstances I have stated—"Those only who have suffered them, can tell the unhappy moments of separation. O my Arthur, let me speak in a language so well"—then follows a passage in French, which is translated to [62] this effect: "understood by you, and which, being more familiar to me, I wish to express to you the sentiments of my oppressed heart. Since you have disappeared from before my eyes I have experienced the most cruel sensation. Exactly, I can tell you, in the simplicity of my heart, that the comparison absolutely is as if you had appeared to me like that beauteous star, which in Nature gives by its influence life to the dying plants, and in whose absence that which is most brilliant is seen to wither and decay. I believe, Arthur that we were formed in Heaven to be so closely united in this life; for, in truth, with the sublime sentiments and the sympathy which we feel towards each other, how delightfully would our lives have passed together! Yes, my beloved Arthur, your Maria is virtuous;"—what Mrs. Grant's notion of "virtuous" is, after these sentiments, coming from a person who is the mother of six children, and after twelve years' marriage, is somewhat difficult to understand; "and possesses a heart which would have rendered you for ever happy. Never should we have seen a cloud approach our heads; all my joy would have been in thinking how to prove to you from day to day how delightfully life flows on when hearts and delicacy of sentiment

are united as much as two creatures can be, the one with the other. Now, I consider myself, in the silence of this night, lonely as the solitary dove, of which our love is the emblem, in the fidelity of our hearts, inflamed with a delicious sentiment, which has made us experience that which the crowns of Sovereigns cannot in an equal degree possess. With this idea, your faithful Maria will, while life [63] endures, never cease to cherish and respect you. Have a care, O my Arthur, not to neglect your friends, (a) more than that; be the physician who ought to cure me with prudence, for my life is linked to you; you are all to me in this world. This is not alone the idea of exalted love, but it is very serious. Let us take our precautions; let us be prudent with each other. Write to me at the end of this week, under cover, and address to Margaret Jamieson, 5 Regency Square; it is better, because the good Margaret likes you; and, as she receives many letters from her friends in Scotland, it will not cause any suspicion. Have patience, and with prudence we shall, in despite of the jealous, be favoured. My wish will be that I may at my last sigh entertain those ardent flames which you have implanted in my breast. Adieu, my dearest Arthur; I sincerely hope to hear something soon from you. I am so wretched that I am sure God will have pity on your poor and devoted friend. Believe me yours, ever most affectionately, M. G." Now, I cannot but think, looking to the circumstances under which this letter was written, the expressions used in it, and the reference in it to the sentiments between these two persons that they do shew a great deal more to the mind of every person who has heard it than could have passed, as the facts are pleaded, during the visit of Captain Vincent to Mrs. Grant on the 20th and 21st days of December. What is suggested with respect to Captain Vincent's visit? That he came down to take leave of the children; and that during that [64] time there was no possibility of any opportunity being afforded of committing the act charged in the libel. Now, if that be the case, it does appear to me very extraordinary that such a letter as this should have been produced by such a visit; that it should have been written immediately after a visit which was not calculated to excite any such extraordinary warmth in the mind of Mrs. Grant, but which did produce in her the sentiments I have read. If nothing passed on the occasion which could give rise to expressions of so ardent a nature, I should be glad to have had some explanation of the meaning of the letter, which could give it any construction and interpretation consistent with what is alleged to have passed between these persons. Under what circumstances did Captain Vincent appear on the 20th day of December, and go away on the 21st, that he should have excited such an image in the mind of this lady, as that he appeared to her "like that beauteous star, which in Nature gives by its influence life to the dying plants, and in whose absence that which is most brilliant is seen to wither and decay?" To be sure, it is a most improbable supposition that this refers to his presence to see the children's performance under the tuition of a dancing-master and professor of music. Something else must have passed during that visit, in order to have raised such images immediately after his departure. "Now I consider myself, in the silence of this night, lonely as the solitary dove, of which our love is the emblem, in the fidelity of our hearts, inflamed with a delicious sentiment, which has made us experience that which the crowns of Sovereigns cannot in an equal [65] degree possess." I should like to have a construction of this, consistent with perfect innocence; because it has been contended, not only that the proof is not sufficient to establish the guilt of Mrs. Grant, but that it is sufficient to prove her innocence; and I should like to know how to reconcile this letter with an opinion of her innocence. These expressions proceed not from a person of sixteen, or seventeen, or eighteen years of age, but from a lady of mature years, who had been a married woman for twelve years, and was the mother of six children, who were residing at the time with her. I should like to know the meaning of some other expressions: "This is not alone the idea of exalted love, but it is very serious. Let us take our precautions; let us be prudent with each other. Write to me at the end of the week, under cover to Margaret Jamieson." There seems to have been some further communication with Captain Vincent, under cover to Margaret Jamieson. "It is better, because the good Margaret likes you; and, as she receives many letters from her friends in Scotland, it will not cause any suspicion." Suspicion of what? Of Captain

(a) Here (as will be apparent) is an error in the translation, the original is "votre amie."

Vincent's writing to inform Mrs. Grant the state in which he found the lady to whom he was about to be married? "Have patience, and with prudence we shall, in despite of the jealous, be favoured." What does this mean?—for what purposes favoured? More favoured than on the night between the 20th and the 21st of December, when Captain Vincent slept in the house, totally unknown to Captain Grant. "Have patience, and with prudence we shall, in despite of the jealous, be favoured. My wish will be that I may, at my [66] last sigh, entertain those ardent flames which you have implanted in my breast." Does not this lead to an inference of what is stated by the witnesses from on board the "Lord Lowther?"—I mean the statements of Wilkins and Pyle as to what passed in the cabin between Mrs. Grant and Captain Vincent; which is extremely probable in itself. I think it is quite idle to suppose these expressions could be called for by the circumstances stated to have taken place at the visit of the 20th and 21st of December, and that it is not consistent with the supposition that nothing more passed on that occasion.

But it does not rest here. This lady, not having heard from Captain Vincent in the course of a week, on the 29th day of December writes again a letter to this effect: "Brighton, December 29th, 1837.—My dearest Arthur,—I could not pass these solemn days"—I presume Christmas is meant, which had just passed—"without expressing to you all the wishes of this heart, so devoted to you in everything which is most exalted in love. I cannot contemplate, without extreme emotion, the state in which I was when you bade me adieu." Now, I ask whether this is consistent with the supposition that nothing more took place on the 20th and 21st days of December than is represented by Mrs. Grant? "This very day last week, I may say, fixed in her choice, and faithful, but in vain. See me neglected on the world's rude coast—the dear companion of my voyage lost." It has been suggested that this has been taken from some book she had read, and very possibly it may be so; but it is perfectly consistent with what appears in [67] the former letter—the great desire that Captain Vincent should continue to think of her. It goes on: "O, my Arthur, when may I hope to see you again! if it were possible in your journey, only for half a day—like the brilliant lightning, which illuminates the uncertain steps of the traveller. I render thanks to that Divine Providence, so infinite in all the profusion of its blessings upon my sweet family." Then follows a passage with respect to her husband. It is suggested that he was of a harsh and irritable disposition; whereas it appears from this letter that he was a kind and estimable man—she an unworthy wife. "My husband is very good and attentive in all things, which any other but myself would appreciate; but I am not worthy—I have not the power (or I am powerless). You alone are enabled to bring me to reason; but, at present, all my weak nature is absorbed but in you alone." This is the second letter written during this short interval, and it is very much to the same effect as the former letter; tending to shew that she was not backward to commit the crime with which she is charged.

Still, unfortunately, no letter comes from Captain Vincent; and on New Year's Day she again writes to him: "My dearest Arthur,—I begin this day in offering my heart to God to bless yourself and my blessed family. I am obliged to go to London to-morrow for a week; you will be sorry to hear that your Maria"—your Maria!—"has received, two days ago, the most afflicting intelligence that has reached her. I pray to God to comfort me, and to enable me to sustain this heavy stroke with that resignation to His will which none but Himself [68] can give. I may say, O my Arthur, with the poet—'Doomed as I am in solitude to waste the present moments, and regret the past,' deprived of every joy I valued most." Then follows, in a parenthesis "(my love torn from me,) and I have lost my blessed mother;" an announcement which, were it not for the seriousness of the subject, would be ludicrous. "The next week will make a very melancholy impression on my heart. When I reflect, in the bitterness of this oppressed heart, that your unfortunate and too faithful Maria will be clad in the sad garments of deep mourning, and without the hope of hearing your cherished voice to console her. O, Arthur, think of your own, own devoted Maria. I acquaint you with my sorrows, because I know your precious heart. I am obliged to finish my letter, as my head is very confused. I ought to take care of myself, as I am still very delicate. Believe me yours, ever most affectionately, M. G."

These are letters addressed to Captain Vincent by Mrs. Grant immediately after the visit he paid to Brighton on the 20th and 21st days of December; and I am to

suppose, after reading them through, on the mere suggestion of counsel, that there is nothing in them inconsistent with the innocence of Mrs. Grant; that nothing further passed on the 20th and 21st days of December, and on the morning of the latter day, than is suggested by the counsel for Mrs. Grant; that is, that it was a mere visit of civility on the part of Captain Vincent, and that they were only about two hours in company together, without any circumstance of criminality whatever. I do not know whether it is [69] necessary for the Court to say whether an act of adultery was committed in the back drawing-room on the 20th or 21st day of December, where the parties were alone together a sufficient time, or whether during the night of the 21st of December, in the room of Mrs. Grant, or in the room of Captain Vincent. It is true there is no evidence to shew that Mrs. Grant went down stairs to Captain Vincent's room, or that he went up from his own room to hers; but the Court cannot, looking at these letters, and at the conduct of the parties, and at their opportunities of being alone together, come to any other conclusion than that, at some time or other, an act of adultery did take place.

The other letter is on quite a different subject; it is written by her on the 18th day of January, with the assistance of a lady who was attending the children in the capacity of governess; and this is certainly a letter which might be addressed with great propriety by a passenger on board the vessel commanded by Captain Vincent, inviting him to pay a visit at the house when he should come that way; and it appears to have been written with the full concurrence of Captain Grant; and that is the only letter which she stated, at first, that she had ever sent to Captain Vincent after his visit to Brighton.

With this view of the case it is utterly impossible for the Court to bring its mind to believe that there has not been an improper connexion between these parties; it is impossible to conceive that Mrs. Grant would have written to Captain Vincent in these terms, unless there had been a consummation of the offence imputed to her; that is, at some time [70] or other, on board the vessel, or during the visit on the 20th day of December, or on the 21st day of December, or on the night between those two days, notwithstanding there is no positive evidence to shew that such was the fact, or to lead to the necessary conclusion that adultery was committed at any particular time. It is impossible for the Court to reconcile the expressions in the letters with a supposition that the parties had not been criminally connected together.

It has been stated that this is the first case in which the Court has been asked to come to a conclusion of adultery on letters which do not contain an express avowal and admission of the fact. But that is not a precise representation of the case as respects the letters. These letters are not to be taken as proof of the fact, independent of other circumstances; they are a proof, in conjunction with all the other circumstances during the whole intercourse of the parties. I cannot but think that all the circumstances together can lead to no other conclusion than that adultery has been committed between these parties. The letters in the case of *Hamerton v. Hamerton* were of a different description, and under different circumstances, and the parties in that case were never seen in a situation from whence it could be inferred that adultery had been committed: all depended upon the letters, and the letters were written by a person seeking to seduce the lady (Mrs. Hammerton); and, looking to the character of the gentleman by whom they were addressed to her, if the seduction had been completed, the letters would have left no doubt whatever of the fact.

[71] On the whole of the case, diffident as the Court may be as to the opinion it has formed, I must say, honestly—founding the opinion on the whole of the circumstances disclosed by the witnesses, and on the letters which have been produced—I find myself under the necessity, notwithstanding all the difficulty and reluctance I feel to pronounce a sentence which shall consign this lady to infamy, and separate her from her husband and her family, of saying that my mind is made up that this lady has actually committed the offence imputed to her; and that, therefore, Captain Grant is entitled to a separation at the hands of the Court: and accordingly I pronounce for the separation prayed.

This judgment was affirmed by the Judicial Committee of the Privy Council on the 24th of February, 1840. Present—The Most Hon. the Lord President, The Right Hon. Mr. Baron Parke, The Right Hon. Mr. Justice Bosanquet, The Right Hon. the Judge of the Admiralty (Dr. Lushington).

[72] MUNDAY AND BERRY *against* SLAUGHTER. Prerogative Court, Hilary Term, June 24th, 1839.—A. B., an executor and one of the residuary legatees under a will, on the 20th of November renounces probate of the will (but the proxy of renunciation is not recorded until the 2d of December), and on the 22nd of November by deed of gift conveys his interest in the personal estate of the deceased to C. D. (who was also an executor) in order to render himself a competent witness to support the will.—Held, first, that the proxy of renunciation took effect from its date.—Secondly, supposing the renunciation to be invalid, that, as the interest under the will was conveyed by the deed of gift, the party was a competent witness under the stat. 1 Vict. c. 26, s. 17.

This was a cause of proving the will of Thomas Chitty, who died in June, 1838, leaving both real and personal estate; of the will executed on the day of his death there were three executors, who were also residuary legatees. The will was propounded by Munday and Berry, two of the executors, and was opposed by Emily Slaughter, one of the next of kin: Henry Butterfield, the other executor, renounced his executorship on the 21st of November, 1838, but the proxy of renunciation was not recorded until the 3rd of December. He likewise on the 21st and 22nd of November conveyed by lease and release of the realty and assignment of the personalty his share of the residue to "Mr. John Munday, his heirs and assigns for ever, to the only proper use and behoof of the said John Munday, his heirs and assigns for ever," for the purpose of becoming a witness in support of the will: his competency as a witness was objected to.

The Queen's advocate and Robertson in support of the objection. The party, as executor, has a considerable bequest; in order to render himself competent to be a witness to prove the will he [73] must divest himself of all interest in the subject. The party was sworn as executor by commission, and the probate was decreed to him, and he intermeddled with the property; on the 21st and 22nd of November he conveyed his interest under the will; he must first have acted as executor, in order to take the legacy; he then as legatee assigns his interest; this was done before the renunciation of the executorship, for the proxy of renunciation, although signed on the 21st of November, was not recorded until the 3rd of December; it was not, therefore, of any effect until then. *Long v. Symes* (3 Hagg. Ecc. 776).

Secondly. The conveyance cannot operate as a relinquishment of interest, it is a mere deed of gift; the donor has an interest in supporting his gift; it matters not in principle whether the interest consist in supporting the disposition, or in retaining the subject of the disposition. To effect a relinquishment of interest the instrument should be a deed of disclaimer; moreover, it ought to be for the benefit of the estate, whereas here it is for the benefit of Mr. Munday alone, in his individual character. The conveyance is good for nothing as a release of interest.

Addams and Haggard *contrâ*. The party first renounces the executorship; he then, as a mere legatee, assigns his legacy; he has, therefore, done all he could to divest himself of any interest he might have. It may be true that the renunciation takes no effect until recorded, but when [74] recorded it is valid from the date of it. If Mr. Butterfield, by assigning his interest, has dealt with the property, and is, therefore, not allowed to become a witness, no executor, who is a legatee, can become a witness.

Sir Herbert Jenner. The question is whether Mr. Butterfield, who is an executor, to whom, *quâ* executor, one-third of the residue is given, is, by the acts he has done, compellable to take upon himself the executorship, and whether he is barred of his renunciation? On the 23rd of May a commission issued for taking the oath of the executors, under which Mr. Butterfield was sworn. It is said that there is some difference where an executor is sworn by commission; that a commissioner decrees probate; whereas, if the oath is taken before a surrogate, there is no decree; but the probate passes as a matter of course. It does not appear to me that this makes any essential difference. On the 18th of June a proctor appeared for the executors, and on the 7th of August he exhibited a proxy in the names of two of the executors; the *condidit* was given in in the names of Messrs. Munday and Berry; and on the 3rd of December a proxy of renunciation was brought in, a conveyance and assignment having been executed on the 21st and 22nd of November, which purport to convey all the interest of Mr. Butterfield to Mr. Munday, the assignment specifically reciting the pendency of this suit, with reference to which it was made. Although the proxy of

renunciation was not recorded till after the assignment, when once recorded it covered what had previously been done. [75] The only question, then, is whether, under the proxy of the 3rd of December the party can be examined as a witness. By the deed he has conveyed all his interest with reference to this cause. It does not appear why an executor should not be allowed to renounce because he has assigned his legacy. He could not assign it to the next of kin, for the property is disposed of to the executors generally; and if one of the executors be not entitled to claim, his legacy would survive over to the other executors. Supposing, however, that the instrument purporting to be a release of interest does not effect that object, still the object is attained by the renunciation of the executorship, the legacy being given to him quâ executor. I confess nothing I have heard convinces me that I should be doing an act of injustice to the other party by allowing Mr. Butterfield to be examined as a witness; but I should be doing great injustice to the party propounding the will if I were to prevent Mr. Butterfield from renouncing, whereby he divests himself of all interest. I see no reason why this gentleman should not renounce his executorship, and be examined as a witness in the cause.

. May 3rd.—The cause then proceeded, and in Easter Term came on for hearing, when the Queen's advocate and Robertson took further objections.

First. Mr. Butterfield admits, in an answer to an interrogatory, that on the death of the testator he had taken with his own hands a portion of the money found in the testator's house, for the purpose of paying the probate duty, the sum taken by him being a little more than the amount of the duty; [76] this is such an intermeddling as constituted him an executor de son tort.

Secondly. Putting the intermeddling out of the question, an executor to a will falling under the statute 1 Vict. c. 26 cannot renounce in order to become a witness; he has by the 17th section the capacity of a witness bestowed upon him—a capacity or competency which cannot be further given to him, for quod semel meum est, amplius meum esse, non potest; this maxim is illustrated by Lord Coke, 1 Inst. s. 60. Even if the executor could in this case renounce, he would not be divested of all interest, for on the will being pronounced for he might, with the consent of the parties, retract his renunciation, whereby he would be entitled to his legacy; and according to the decisions at common law and equity he might retract and claim probate at any time prior to his assenting to an administration—*Wankford v. Wankford*, 1 Salk. 307; *Arnold v. Blencoes*, 1 Cox, 426. It is clear, then, that the renunciation will not help the case; it has already been argued that Mr. Butterfield is not divested of interest by the conveyance, and as the will rests on his evidence, the Court must pronounce for an intestacy.

Sir Herbert Jenner. Had the Court been aware of the acts done by Mr. Butterfield, it would not have allowed him to renounce the execution of the will; but as he has conveyed all his interest under the will by an instrument which appears to be sufficient for that purpose, he is still a competent witness under the 17th sect. of the stat. 1 Vict. c. 26.

[77] The Court overruled the objections, and pronounced for the will, but allowed the costs of the party opposing the will out of the estate of the deceased.

CHESTERTON AND HUTCHINS *against* FARLAR. Arches Court, Hilary Term, Jan. 29th, 1839.—A party having successfully resisted payment of a church-rate, dismissed, but not with his full costs, he having put matters in plea which caused unnecessary expense.

This cause having been remitted to the Arches Court by the Judicial Committee of the Privy Council (vol. i. 371), the churchwardens declared that they proceeded no further; upon which Mr. Farlar prayed to be dismissed with his full costs: this was opposed by the churchwardens, and the question was brought before the Court on petition.

The Queen's advocate for Farlar. The churchwardens, by proceeding no farther, have admitted the illegality of the rate and the injustice of their proceeding, and they ought, therefore, to be condemned in the costs of the suit. It is said that, besides pleading that the rate was retrospective, the party put other matters in plea, to which the churchwardens had a sufficient defence. If this were so, which does not appear, still there was no ground for proceeding against Mr. Farlar, because the rate was an illegal one, which could not be enforced.

[78] Addams for the churchwardens. There is no pretence for this application Mr. Farlar opposed the rate, not only as a retrospective rate, but as a rate to reimburse, and also as an unequal rate, and put the parish to great expense to shew that it was not unequal. His plea set forth what he knew was not matter of fact; he pleaded that persons were omitted in the church-rate who were included in the poor-rate, whereas he knew that the names were inserted in the poor-rate, by virtue of a local act. The churchwardens admitted that the rate was in part retrospective, and Mr. Farlar might have gone to issue upon that point, without putting the churchwardens to the expense of examining witnesses on the libel. If churchwardens act *bonâ fide*, and not vexatiously, they ought not to be saddled with the costs.

Judgment—*Sir Herbert Jenner*. This question arises at the conclusion of a cause of subtraction of church-rate, promoted by the churchwardens of St. Mary Abbots, Kensington, against Mr. Farlar, an inhabitant of the parish. The cause originally commenced in the Consistorial Court of London, where a libel was brought in, and some witnesses were examined in support of it. Mr. Farlar brought in an allegation, pleading that the rate was illegal, because, amongst other reasons, it was unequal, persons being omitted who were liable to be rated, and that it was in part retrospective. I understand that allegation was directed to be reformed, and additional articles were brought in; the allegation was finally admitted, and the [79] answers of the churchwardens were taken upon it, who admitted that the rate was in part retrospective. In reply to this allegation a plea was brought in by the churchwardens, which stated that the rate was made under very special circumstances in the vestry, being an open vestry, pleading that the rate was not an unequal rate, and that the persons omitted in the rate were not liable, although under the local act they were assessed to the poor-rate. The Judge of the Consistory Court rejected this allegation altogether, and from that sentence the churchwardens appealed to this Court, which heard the case fully argued, and was of opinion that the Judge of the Court below had done wrong in rejecting the allegation; and admitted it, for the purpose of having all the circumstances before it, in order that the question of law might be determined, on a full consideration of all the circumstances of the case. From that decision Mr. Farlar appealed to the Judicial Committee of the Privy Council, and that Court was of opinion that a part of the allegation was properly admitted by this Court (that is, as to the omission of the names), but rejected that part of the allegation pleading the circumstances under which the rate was made, it being admitted that that part of the rate was retrospective; and the Court was of opinion that the rate could not be supported, on the ground of its being retrospective, and rejected that part of the allegation; so that a part of the judgment of this Court was right, though their Lordships were of opinion that the rate could not be sustained.

When the case came down again to this Court the churchwardens were advised (and properly [80] advised) not to proceed further in the suit, and accordingly they declared they proceeded no further; upon which an application was made to condemn the churchwardens in the costs. The Court thought at the time that this was not a case in which the churchwardens ought to be condemned in the costs of the whole proceedings, as they were successful in their appeal to the Judicial Committee upon one point. The Court proposed at the time to condemn them in a certain sum, *nomine expensarum*, but against this Mr. Farlar's proctor protested, and prayed to be heard on his petition.

It has been truly stated that where churchwardens proceed against a party for subtraction of church-rate, and fail to establish the validity of the rate, or the party's liability to it, they are subject to costs; but there are circumstances in this case, I think, which should incline the Court to the opinion that Mr. Farlar is not entitled to be dismissed with his full costs. If he had gone to issue at once upon the point as to the rate being invalid, on the ground of its being retrospective, he would have been entitled to his costs; but pleas have been given in as to other points, and witnesses have been examined as to the inequality of the rate, which made a great addition to the expense; and as this Court was of opinion that that part of the churchwardens' allegation which related to the inequality of the rate was admissible, and that part was admitted by the Judicial Committee, consequently this Court was right in admitting, and the Consistory Court wrong in rejecting, that part of the allegation; I do not think that the churchwardens ought to be condemned in the whole of the expenses [81] here. It is said that the Court had no right to assume that the churchwardens

could prove that the persons omitted in the rate were properly omitted. Undoubtedly, the Court had no right to assume that, but it could see pretty well the state of the facts, by looking at the local Act of Parliament. Under these circumstances, therefore, where the proceedings have taken this shape, it would be a hard measure to deal out to the churchwardens to condemn them in the whole costs: I think part of the costs were unnecessarily incurred by the conduct of the other party.

I am of opinion that by condemning the churchwarden in 40*l.* nomine expensarum, I shall meet the justice of the case: I accordingly condemn them in that sum.

[82] WOOD AND OTHERS *against* GOODLAKE, HELPS AND OTHERS, AND HITCHINGS. Prerogative Court, Hilary Term, Feb. 20th, 1839.—The deceased died on the 20th of April, 1836, possessed of real and personal estate, together of the value of about 1,000,000*l.* Two papers, A and B, alleged to have been found, at the deceased's death, in his fast-locked repositories, annexed together by wafers, and sealed up in an envelope, indorsed, "The will of James Wood, Esq., 2nd and 3rd December, 1834," were propounded as together containing the will. A, which was headed "Instructions for the Will of me, James Wood, Esq., of Gloucester," was dated 2nd of December, 1834, and was signed by the deceased, but not attested, purported to appoint four gentlemen by name executors, to desire them to take possession of his personal estates, subject to the payment of debts and "such legacies as I may hereafter direct," and to declare he would dispose of his real estates by writing indorsed thereon—Paper B, a separate paper, dated 3rd December, 1834, signed by the deceased, and attested by three witnesses, began, "I, James Wood, Esq., do declare this to be my will, for disposing my estates, as directed by my instructions," gave all his real and personal estates "which I may not dispose of," and "subject to my debts, and to any legacies or bequests of any part thereof, which I may hereafter make," &c. "to my executors" not naming, or otherwise describing them. Both papers were very informal, were in the handwriting of one of the executors (the deceased's attorney), and ultimately appeared to have been, by such attorney, annexed together, sealed up in the envelope, indorsed, and locked up in the deceased's bureau during his last illness, and without his directions or knowledge, held that the presumption of law, that instructions are superseded by the execution of a will, was not repelled, that the two papers not being published together, as the will of the deceased, nor annexed with his knowledge; and A, not being unequivocally referred to in B, A formed no part of the deceased's will, that consequently the interest of the four parties named in it as executors was at an end, and that there was no party before the Court with an admitted interest, who could propound B, pray probate of it, or administration with it annexed: the Court, therefore, pronounced against A, made no decree as to B, and condemned the parties propounding A, and B in the costs of one of the next of kin.—Another paper propounded as a codicil, by legatees named in it, opposed by the asserted executors, and by all the next of kin, dated July, 1835, alleged to be an holograph of and signed by the deceased, and to have been sent in an anonymous note by the threepenny post to one of the legatees, leaving legacies, amounting altogether to 210,000*l.*, and referring to a legacy in another codicil, not forthcoming, which paper was partially torn, and partially burnt, and was alleged to have been so done, and other testamentary papers, to have been destroyed, after the deceased's death, or in his lifetime unknown to him, held that as the evidence of handwriting was contradictory, though the affirmative preponderated, and the disposition was probable, the Court could not judicially pronounce the codicil to have been the act of the deceased, and consequently would not inquire whether it were cancelled or not, or, if cancelled, whether such cancellation was the act of the deceased.

Judgment—*Sir Herbert Jenner*. This case comes before the Court under very extraordinary circumstances, whether it be considered with reference to the character of the deceased party himself, the immense amount of property which is at stake, the manner in which that property is alleged to have been disposed of, the instruments by which that disposition is said to have been [83] carried into effect, the manner in which, and the persons by whom, they or some of them were prepared, the manner in which they were kept after the alleged execution of them by the deceased, the place, or the places, rather, in which they were deposited, the manner in which they appear

to have been dealt with, not only during the deceased's lifetime, but after his death, the steps which were taken to obtain probate of them in this Court, and the manner in which that probate was prevented from issuing, and, finally, the mysterious appearance of a further testamentary paper, in a subsequent stage of the proceedings, together with the change in the character of those proceedings which was necessarily introduced by the production of that latter instrument, the part which has been taken by the several persons who are interested in establishing or setting aside those instruments, together with the nature and extent of the evidence which has been produced by them in support of their respective cases. All these circumstances taken together form a case of such a complicated nature as has scarcely ever been presented to the notice of the Court at any anterior time.

It is true that the long and elaborate arguments which were addressed to the Court at the hearing of the cause, by all the counsel who advocated the cases of their respective clients,^(a) have tended to elucidate the case, and to free it from some part of the difficulties by which it was originally sur-^[84]-rounded; but there was still enough remaining behind to call for, and I hope to have obtained, the serious and attentive consideration of the Court to all the circumstances that are connected with it.

The question which the Court has to determine arises with respect to papers which are propounded as containing the will of Mr. James Wood, who died upon the twentieth of April, one thousand eight hundred and thirty-six, at the age of about eighty years. The testamentary papers before the Court are three in number. Two of them, which bear date respectively upon the second and third of December, one thousand eight hundred and thirty-four, are propounded as containing together the will of the deceased; and both those papers are in the handwriting of Mr. Chadborn, the confidential solicitor of the deceased, who appears to be named in one of them as an executor and one of the universal legatees. That paper purports to appoint four gentlemen executors, and to desire that they would retain to themselves all the deceased's ready monies, securities, and personal estate, subject to the payment of his just debts, and such legacies as he might hereafter direct; and it is described, "Instructions for the will of me, James Wood, Esq., of Gloucester." That paper purports to have been signed by the deceased, but it is not attested by any witnesses.

The second paper bears date upon the third of December, that is, the day following in the same year, one thousand eight hundred and thirty-four, and was executed by the deceased in the presence of three witnesses; and it purports to dispose of all the estates, real and personal, of which the deceased ^[85]was possessed, to "go amongst his executors and their heirs, in equal proportions, subject to my debts, or to any legacies or bequests of any part thereof, if any, which I may hereafter make." That, therefore, is a will complete, as far as disposition goes, by disposing of the whole real and personal estate of the deceased to his executors, though the executors are not named in that instrument.

The third paper bears date in the month of July, one thousand eight hundred and thirty-five; it has no day of the month affixed to it, but simply bears date in July, one thousand eight hundred and thirty-five. That paper is alleged to be all in the handwriting of the deceased; it is stated to have been signed by him, and it bears, or purports to bear, the signature of the deceased at the conclusion of the instrument; but it is not attested by witnesses, and the purport of it is to give legacies, to a very large amount, to certain individuals who are therein named, and also to the Corporation of Gloucester, to which body it recites that the deceased had, by a former codicil, given a very large sum, namely, one hundred and forty thousand pounds; and it directs that sixty thousand pounds, in addition, should be given to that body, for the same purposes as he had before expressed. To the particular contents of these instruments it may be necessary for the Court hereafter to advert more minutely; at present it is quite sufficient merely to state their general purport, and the manner in which they appear to have been executed by the deceased.

There are traces in the evidence of other testamentary papers having been executed

(a) The cause was argued on the 10th, 13th, 15th, 17th, 18th, 20th, 21st, and 22nd of Dec., 1838, by the Queen's advocate and Addams for the executors; Phillimore and Haggard for Mrs. Goodlake; Burnaby and Jenner for the codicil; and Curteis for Mr. Hitchings.

by the de-[86]-ceased, independently of that codicil which is recited in the paper of July, one thousand eight hundred and thirty-five, to have been executed by him, but which is not forthcoming. I mean a will which was executed, as stated, in the year one thousand eight hundred and twenty-three, or one thousand eight hundred and twenty-four, and is spoken to by a witness of the name of Smith, which he saw; and also another paper, which is spoken to by a witness of the name of William Moore, junior, which he saw in the year one thousand eight hundred and thirty-three; but those papers are not forthcoming, nor are their contents, with the exception of one or two particulars to which the Court must advert, at all before the Court. With respect to those papers, it is mentioned by Mr. Smith, and also by Mr. Moore, and I think also by Mr. Higham, that the deceased complained that he had lost certain papers, that they had been taken away without his knowledge, and that they were not forthcoming.

Now, the history of the deceased, which it is necessary to advert to, for the purpose of understanding and making more apparent the grounds upon which the Court has formed its opinion as to the decision which it ought to pronounce in this case, is shortly this: He appears to have been a native of Gloucester, and to have carried on business there as a draper and a banker for many years, as his father and grandfather had done before him. He was a man of some peculiarity and eccentricity of character; extremely parsimonious, as it seems; and by his parsimony, by strict attention to his business, and by certain adventitious circumstances, [87] namely, the bequests of property to him from parts of his own family and from other persons, he had, at the time of his death, amassed property to the amount, both real and personal, of nearly a million of money. The amount of the property is stated differently by the parties in this cause; one of them states the personal property to amount to a million of money, and the real property to two hundred and fifty thousand pounds, or thereabouts; the other parties state that the personal property amounted to about eight hundred thousand pounds, subject to a deduction of seventy-five thousand pounds for debts, and that the real and copyhold property amounted to about ninety-eight thousand pounds. But it is immaterial whether it amounted to nine hundred thousand pounds, or eight hundred thousand pounds, or a million of money; it is enough to say that it was to an extent which would render the interest of the several parties concerned in these proceedings of great importance to them.

The testator was unmarried. He had had two sisters, both of whom had died during his lifetime; one of them, an unmarried lady, in the year one thousand eight hundred and twenty-four, and the other, Mrs. Willey, who died in the month of April, in the year one thousand eight hundred and thirty-three, a widow, without children. His nearest relations, it should seem, at his death, at least so far as the Court has the means of knowledge, were two second cousins, both of them parties in this suit; no persons claiming to be related in a nearer degree, or in the same degree, have appeared in the Court.

One of these is a Mrs. Goodlake, the other a Mr. [88] Hitchings. The interest of Mrs. Goodlake has been admitted by the parties who are propounding the papers of the second and third of December as the will of the deceased: but I am not aware that her interest has been admitted by any other parties in the cause. Mr. Hitchings has been admitted as a contradictor to the will by the parties who are interested in propounding and establishing that will; but his interest, as I understand, has not been admitted by any of the other parties; but being admitted to be a contradictor to the will, his interest is just as much under the protection of the Court as if he had been called upon to propound that interest, and had accordingly done so, and established it to the satisfaction of the Court; and it would be the height of injustice if it were not so, because it would prevent him from having that benefit which he would have derived from going on to propound his interest, and to establish it by proofs, putting the parties to a very unnecessary degree of expense for that purpose, and also creating considerable delay in proceeding to the termination of the cause. And in this case more particularly Mr. Hitchings would be entitled to be so protected, because he has offered to the Court an allegation pleading his relationship to the deceased, and annexing to that allegation copies of certain wills and documents, which tend strongly to establish his interest, and which are in the registry of the Court, and which would be admitted, the originals being there, as proof of the interest of the party.

It is right to state in this stage of the proceedings that Mr. Hitchings offered

that allegation to [89] the Court for admission. The Court, however, considering that the time at which it ought to have been offered had gone by, and that it did not contain that which was pleadable at that stage of the proceedings, was of opinion to reject that allegation, and did reject it. Mr. Hitchings appealed to the superior Court, to the Lords of her Majesty's Privy Council, constituting the Judicial Committee, and their Lordships were of opinion that this Court had not done right in rejecting that allegation, and therefore reversed the sentence of this Court, pronouncing, therefore, for the appeal of Mr. Hitchings, but remitting the cause, as I understand, with an intimation of their opinion that the allegation, though it ought not to have been admitted, ought not to have been rejected by the Court: but that the admission of it ought to have been suspended till the hearing of the cause, in order that if the Court thought it necessary for the ends of justice that it should be admitted, it might have the opportunity of doing so, and of permitting it to go to proof, and thereby giving an opening to the other parties to respond to that allegation, if they had any thing to plead by way of answer to it.

I have stated this, at the present moment, for the purpose of putting the parties in a situation in which they may be without prejudice, if it should be necessary for them to prosecute an appeal from the decision of this Court. I do not at present see, nor did I on the hearing of the cause, nor from what has subsequently occurred, any necessity for the admission of the allegation. I therefore make no order for its admission. I do not admit it, I do not reject it, but I retain it in the state in which it was sent back to this Court, and, therefore, the party [90] will have an opportunity, if that should be necessary, either of appealing himself, or of adhering to any appeal that may be prosecuted from the sentence of this Court. And I am anxious to put the party in such a situation that he may not be prejudiced by any act done by this Court. I think I cannot put it in a better form than that, by saying that I do not admit and I do not reject this allegation. The party will, therefore, have an opportunity of appealing to the superior Court, if it should be necessary, for their Lordships' directions as to what course should be pursued.

These two persons, then, Mrs. Goodlake and Mr. Hitchings, must be taken to be in that degree of relationship which they represent themselves to be, and in case of an intestacy, to be the only persons who would be entitled to this personal property of the deceased, amounting to at least seven or eight hundred thousand pounds. It does not appear by any of the proceedings in this cause who is the heir-at-law of the deceased, who would succeed to his real property. And that might perhaps not be a very immaterial circumstance to be considered, inasmuch as if the Court should be of opinion that the papers (A) and (B) do contain the will of the deceased, it may affect the interest of that heir-at-law, by pronouncing for those two papers as together containing the will of the deceased, and that the four gentlemen whose names appear in the paper of the second of December are the executors; the possible construction may be, I say the possible construction, for I give no positive opinion upon it, that the executors named in that first paper, though not named in the second, would, under the second paper, take the whole of the real property of the [91] deceased, that paper being executed in the presence of three witnesses, with all the necessary formalities, to pass the real estate. But it does not appear who is the heir-at-law of the deceased. On one occasion a party represented himself to be his heir-at-law, and the deceased observed that he was not his heir-at-law, for his heir-at-law was in America; but it is immaterial to consider this part of the case any further. Mrs. Goodlake and Mr. Hitchings have appeared in the cause by different proctors and by different counsel, and have not joined together in the assertion of their claims, nor have they admitted the interest of each other. They have no privity with each other, and they do not choose to join in the assertion of their claims, and there may possibly in the sequel appear to have been very sufficient grounds inducing them to take that step.

Of the two papers propounded as together containing the will of the deceased, The first, paper (A), is described as

"Instructions for the will of me, James Wood, Esquire, of Gloucester.

"I request my friends, Alderman Wood, of London, M.P.; John Chadborn, of Gloucester; Jacob Osborne, of Gloucester, and John Surman Surman, of Gloucester, to be my executors, and I appoint them executors accordingly."

So that, as far as those instructions go, supposing the paper to be the act of the

deceased, there is not only a request to those gentlemen that they will take upon themselves the office of executors, but also an express appointment of them as such.

[92] "And I desire that they will take possession of and retain to themselves all my ready moneys, securities, and personal estate, subject to the payment of my just debts, and such legacies as I may hereafter direct. And with respect to my real estate, I shall dispose of the same to such persons and in such parts as I shall by any writing indorsed hereon direct."

Not mentioning what is to become of the property more particularly than the words upon the face of it, "After the payment of the debts and legacies which he might hereafter direct," but to retain to themselves, and, therefore, as I presume, for their own benefit, there being no other directions given, the whole of the personal estate of the deceased; the ready moneys, securities, and personal estate, after the payment of his just debts and legacies; and, therefore, under that paper, so far as the intentions of the deceased are expressed by way of instructions for his will, for upon the face of that paper it purports to be nothing more, they would be the executors and universal legatees. But the paper also refers to real estate; it goes on in these words:

"And with respect to my real estate, I shall dispose of the same to such person and in such parts as I shall by any writing indorsed hereon direct.

Witness my hand, this 2d December, 1834.

"JAMES WOOD."

And there is an indorsement upon the paper,

"2d December, 1834. Mr. Wood's instructions for his will."

[93] This paper, therefore, purports to dispose of the whole of the personal property of the deceased in favour of the executors, reserving the disposition of his real estate to be made by writing indorsed upon it.

The second paper (B), that of the third of December, one thousand eight hundred and thirty-four, was originally upon a separate sheet of paper. It is not, therefore, a writing indorsed upon that sheet which contained the instructions for the will, as was intended to be the case, according to the contents of that first paper: but it was a separate sheet of paper, and was to this effect:

"I, James Wood, Esquire, do declare this to be my will for disposing my estates as directed by my instructions. I declare my wish that my executors shall have all my property which I may not dispose of, and that all my estates, real and personal, shall go amongst them and their heirs in equal proportions, subject to my debts and to any legacies or bequests of any part thereof, if any, which I may hereafter make. In witness whereof I have to this my last will set my hand, this 3d December, 1834.

"JAMES WOOD.

"Signed and published by the said testator as and for his will in our presence—Ann Lewis, Edward Swann, William Veale."

This paper, then, is described as the last will of the deceased, and is subscribed by him as such; and it disposes of the whole of his real and personal [94] estate to the executors without naming those executors. It does not give the property in the same manner to the executors as the former paper had given it, or rather purported to have given it, because by that paper they were to retain to themselves the personal estate of the deceased, being therefore joint tenants, whereas in this latter paper they are made tenants in common; that is, under the first paper, if either of the executors, universal legatees, had died during the lifetime of the testator, the benefit which was intended for him, there being no words of division or separation, would have gone, as I apprehend, to the surviving executors; whereas under the second paper, if any one of them had died during the lifetime of the testator, his property, there being those words "in equal proportions to them," would have descended to the next of kin of the deceased, as undisposed of by the will: it would, in fact, have become a lapsed legacy, and had three out of four of the executors died, the surviving executor would have taken a fourth part of the property, and the other three-fourths would have descended, the personal estate to the next of kin, and the real estate to the heir-at-law. But it is immaterial to consider those circumstances any further, because the four executors named in the first paper have all survived the testator, and therefore there is no lapse, and nothing to descend to the next of kin or to the surviving executors; but the circumstance having been noticed in the argument, the Court thought it right to advert to it.

This latter paper, as I have already stated, names no executors, it merely says,

"My wish is [95] that my executors shall have all my property which I may not dispose of;" and therefore, standing by itself and alone, it is clear that it can have no practical effect whatever; there are no persons named who can take the estate, either real or personal, of the deceased. On the part, therefore, of those gentlemen who are named as executors in the former paper, it is endeavoured, by the proceedings in this cause, to obtain probate of the two together as containing the will of the deceased, so that, by annexing them together, the persons for whom the whole property of the deceased was intended would appear by the names of those persons who are inserted in the paper of the second of December, one thousand eight hundred and thirty-four. That is the effect of those papers considered separately and together.

The third paper which is introduced into this cause bears date, as I have already stated, in the month of July, one thousand eight hundred and thirty-five; no date of the day of the month being affixed to that paper. The purport of this paper is very materially to diminish the interest which would be given to the executors if the two former papers stood alone, and were considered as established as the will of the deceased; for it gives, I think, legacies to the amount of about two hundred and ten thousand pounds; it is propounded by several of the legatees who are named in it—by the Corporation of Gloucester, to whom it purports to give sixty thousand pounds, in addition to one hundred and forty thousand pounds recited to have been given by a former paper, which is not forthcoming; it is propounded also by Mr. Phillpotts, to [96] whom a legacy of fifty thousand pounds is given; by Mr. George Counsel (whose name is spelt in this paper Council), to whom a legacy of ten thousand pounds is given; by Mr. Helps, of Cheapside, London, to whom a legacy of thirty thousand pounds is given; by Mr. Thomas Wood, of Smith-street, Chelsea, to whom a legacy of twenty thousand pounds is given; and by Mr. Samuel Wood, of Cleveland-street, Mile End, to whom a legacy of fourteen thousand pounds is given, and to whose family a legacy of six thousand pounds is given. The paper goes on to confirm all other bequests, and to give the residue of the property to the executors for their own interest. It is signed "James Wood, Gloucester City Old Bank, July, 1835," and it appeared at the time when it was brought into the Court to have been mutilated to a certain extent; that is, it was burnt at one corner, and torn in one or two places, though not quite through the paper, one tear going through and dividing the Christian name from the surname of the deceased.

In this paper also there is a legacy of twenty thousand pounds given to Mrs. Elizabeth Goodlake, mother of Mr. Surman; she does not, however, propound this codicil, but, on the contrary, opposes it.

Mr. Phillpotts, one of the legatees, appeared by a proctor and a counsel in the earlier part of these proceedings. At the hearing of the cause he appeared by his proctor, but not by counsel, and an application was made to the Court to-day that it would permit a learned counsel of the Court to offer and to read an affidavit to it, which Mr. Phillpotts had thought necessary to make for the justification [97] of his conduct, in consequence of certain observations which had been made upon it in the course of the arguments which had been addressed to the Court on the hearing of the cause, but the Court was of opinion, and still is of opinion, that it would be improper to permit such an affidavit at this time to be read, that it would be contrary to all the rules and proceedings of this Court to permit anything which had a reference to the proceedings to be heard when the arguments were all closed, and when the Court was prepared to give its opinion upon the whole case; for what would the consequence be? The Court has not seen the affidavit, nor heard the contents of it stated, but it is quite clear from what has appeared in this cause that it must have reference to some of the evidence which has been produced, for I entirely accede to what fell from Dr. Phillimore, that nothing occurred in the argument in this Court, and no observations were made to the Court, but such as were founded upon that which is stated either in the evidence or in the answers of the parties which have been read to the Court, and were made evidence in the cause. What the effect of that would be as implicating Mr. Phillpotts in any of the proceedings connected with some of these papers is a question which the Court undoubtedly must hereafter consider when proceeding to give its opinion upon the case; but in this stage of the proceedings to hear an ex parte representation which goes to affect the evidence upon the mere affidavit of a party would, I conceive, be the height of injustice to all, and would probably lead to an affidavit in reply; the Court, therefore, is clearly [98] of

opinion that it could not, with propriety or justice to the other parties, permit the affidavit to be read or the contents of it to be stated.

Now this paper of July, one thousand eight hundred and thirty-five, is opposed by the executors named in the paper of the second of December, one thousand eight hundred and thirty-four, and by Mrs. Goodlake. Mr. Hitchings, who appeared in a later stage of the proceedings, has also declared that he opposes that paper; at first there was some doubt whether he opposed it or not, but subsequently Mr. Hitchings opposed that paper, as he was absolutely bound to do under the circumstances in which it appeared before the Court. But the different manner in which these parties have conducted their opposition to the several papers propounded is somewhat extraordinary. Mrs. Goodlake certainly appears here as opposing the will, but her opposition to the will has been extremely faint, and the circumstances under which that opposition has been given in the earliest stages of the proceedings, the Court will presently observe upon. She is, however, strenuous in her opposition to the codicil. On the other hand, Mr. Hitchings, who appears as next of kin in the cause, opposing both these papers, has directed the whole force of his observations against the will, whilst the opposition on his part to the codicil has been, as in the case of Mrs. Goodlake with respect to the will, extremely faint, and the Court is placed in a situation of considerable difficulty with respect to the manner in which these parties have come forward, and the different interests, which, in fact, though not in name, they seem [99] to appear to protect and to assist. It appears, then, that there are five parties before the Court, represented by seven counsel and five proctors. There are first the executors named in the will; secondly, the general body of legatees named in the codicil as it is called; thirdly, Mr. Phillpotts, who appears by proctor, but not by counsel; fourthly, Mrs. Goodlake; and, fifthly, Mr. Hitchings, as next of kin; and all these learned counsel have been heard by the Court with great attention and with great satisfaction, inasmuch as the arguments on all sides have been most elaborate and able.

Having now stated the general circumstances with respect to the papers and their contents, it will be necessary to see the course which the proceedings have assumed in bringing the whole of the case to the notice of the Court.

The death of the deceased occurred between eleven and twelve o'clock upon the night of the twentieth of April, one thousand eight hundred and thirty-six, he having been taken ill on the Sunday immediately preceding. Whether there was any illness upon the Saturday night or not seems to have been a matter of dispute in the argument, but it appears to me to be perfectly immaterial. On Sunday morning, the seventeenth, he was undoubtedly taken ill, and to such an extent as to induce Mr. Osborne, one of the gentlemen who was in the deceased's house, to dispatch a letter to London, to Mr. Alderman Wood, to inform him of the deceased's illness, and to request that he would communicate it to Mr. Chadborn also, who was at that time in London, attending upon some business he had in Parliament.

[100] The letter is annexed to the answer of the executors, marked No. 2, and is to this effect:

“City Old Bank, Gloucester,
“17th April, 1836.

“My dear Sir,—I should be obliged to you to mention to Mr. Chadborn, as he wished to be informed in case any thing happened during his absence to Mr. Wood, that he was this morning taken so poorly as not to be able to dress himself, and has such a tightness on his chest as to almost prevent him breathing.—I am, dear sir, your's very truly,

“J. OSBORNE.”

Mr. Osborne had been an assistant to the deceased in his business between thirty and forty years, and is one of the executors and universal legatees in the paper of the second of December, one thousand eight hundred and thirty-four. On the day on which this letter was received, namely, on the Monday, the eighteenth, Mr. Alderman Wood left London by the mail, and arrived at Gloucester upon the next morning.

Upon his arrival there the deceased, though still very unwell, had in some degree recovered from the attack, and in the course of that day medical assistance was called in. Mr. Cother, the medical attendant who was called in by Mr. Alderman Wood himself, prescribed some medicine for the deceased, who it seems on that day, the Tuesday, had been down stairs in his bank, and also in a room adjoining to it, and remained down stairs till [101] about ten o'clock at night, when he went, or rather

(as it should seem by the information given to Mr. Cother by Mr. Alderman Wood) was carried or dragged in a chair, up stairs to his bed, from which he never afterwards rose.

On the next morning, at about eight o'clock, Mr. Cother attended upon the deceased, and found him in a state of extreme drowsiness, which he attributed principally to the medicine, namely, a combination of calomel and opium, but at that time it was not apprehended that the deceased was in any immediate danger; but at eleven o'clock, when Mr. Cother attended him the second time on that day, the drowsiness was discovered to have proceeded from pressure upon the brain, and Mr. Cother states that at that time he considered the deceased's recovery, if not altogether hopeless, yet improbable; and it appears that from that state of drowsiness or stupor he was never roused, but continued in the same state, without any possibility of being consulted upon any business, till about half-past eleven o'clock on the same night, when he died. At this time all the executors were assembled at the house of the deceased. Mr. Alderman Wood, as I have stated, had arrived on the preceding day (the Tuesday); Mr. Osborne and Mr. Surman were resident in the deceased's house; and Mr. Chadborn, who had been prevented from leaving London by parliamentary business on the eighteenth (the Monday), having been released from the necessity of his attendance upon Parliament on the Tuesday, left London that night, and arrived at Gloucester on the morning of Wednesday, the twentieth.

[102] On the morning of the twenty-first Mr. Phillpotts, who is described as an intimate friend of the deceased, attended at the house, and in company with Mr. Osborne proceeded up stairs to a landing-place, or lobby, which adjoined the room where the deceased slept, and where Mr. Osborne slept, where they found a bureau which was locked up, the keys of which were in the possession of Mr. Osborne, and which he opened, and from which Mr. Phillpotts took a sealed packet, which he carried down stairs to the room where the executors were assembled together. The seal of that packet was broken, and it was found to contain the two papers of the second of December and the third of December, one thousand eight hundred and thirty-four. The Court, at the present moment, does not stop to inquire how or when the papers were deposited in this bureau, as that must necessarily form a subject of observation in a subsequent part of the proceedings: the Court is now merely referring to the facts in the case for the purpose of tracing the steps by which the case was brought originally to its notice.

Upon the same day instructions were given to the proctors of the executors, desiring them to send a commission for the purpose of swearing them, preparatory to obtaining probate of these two papers. This commission, as I understand, was forwarded upon the night of Saturday, the twenty-third, to Gloucester, and was executed on Monday, the twenty-fifth, when it was returned to the proctors in London, with the testamentary papers, Nos. 1 and 2, annexed to it, and also an affidavit of Mr. Phillpotts, as to the finding of those papers, and the plight and [103] condition in which they were at the time when they were taken from the bureau.

When these papers were returned to the proctors application was made for probate of them, but a caveat had been entered by Mr. Jennings, on behalf of some party whose name did not at that time appear in the proceedings, and there being no other party before the Court but Mr. Barlow, who appeared on behalf of the executors, Mr. Jennings was assigned to set forth his client's interest by the next Court. It does not appear upon the proceedings that Mr. Jennings took any further steps, the party for whom he had appeared being a nominal party.

Upon the sixth of May, no further steps having been taken, Mr. Barlow appeared before a surrogate and again prayed probate of these papers. Mr. Pulley then appeared for John Thomas, who is a nominal party in this Court, and he was then assigned to set forth his client's interest by the fourth session of that term, otherwise, according to the terms of the decree, probate was to pass to Mr. Barlow's parties, the executors.

Now the Court thinks it right here to observe that at this time the papers were not before the Court; they had not at this time been brought into the registry. The commission for swearing the executors had not then been returned, and therefore the nature of the papers and their character and description were not known to the registrar of the Court, and that part of the assignation, therefore, which proceeded to decree that probate should pass to the executors, in the event of Mr. Pulley not complying

with the assignation of the Court to set [104] forth his client's interest, was a mere formal assignation; it did not follow as a matter of course that probate of those papers would be permitted to pass in that form when they were seen by the Court: and I mention this that it may not go forth to the world that so much facility of obtaining probate of papers of this description would be afforded by the proceedings and practice of this Court as would seem to be intimated by that part of the assignation which is in these words—"Otherwise probate to pass to Mr. Barlow's parties."

On the fourth session (thirteenth of May) Mr. Pulley appeared for two parties—Mr. Thomas Wood and Mr. Thomas Helps—and alleged them to be two of the next of kin of the deceased, exhibiting a proxy from Mr. Helps, and praying an answer to his client's interest. Mr. Barlow then exhibited a proxy from the executors, and denied Mr. Helps's interest, and Mr. Pulley was then assigned to declare whether he would propound his client's interest or not by the first session of the next term. Then comes the assignation, which clearly shews that the papers were at that time in the possession of the proctor, and not of the Court or the registrar; for it is to this effect: "Longden (proctor for the executors) returned commission, with affidavit of John Phillpotts, and also affidavit of the said John Phillpott's and William Price, and also affidavit of Matthew Wood and of the said John Phillpotts, with scripts, marked (A), (B), and (C), annexed." That is the first time, as I apprehend, that the papers were brought to the notice of the court or of the registrar, and then it would be that an inspection of the papers would be made, to [105] see whether they were in such a state as to be entitled to probate in common form: if they had been brought into the registry without notice to the registrars, the papers would not have been examined in that stage, to see whether probate should pass or not.

Now on this occasion (on the day when an appearance was given for Mr. Wood and Mr. Helps) an appearance was given by a proctor for Mrs. Goodlake, alleging her to be a second cousin of the deceased and his only next of kin; and he prayed an answer to his client's interest. The interest of Mrs. Goodlake was immediately admitted by the proctor for the executors, and I presume that that admission was made in consequence of special instructions from the parties, as I find that the proxy only authorizes the proxy to deny the interest of the asserted next of kin, and that he had no authority to admit the interest of any party claiming to be next of kin. I mention this circumstance because, in conjunction with others, it satisfies me that Mrs. Goodlake was before the Court as a mere nominal opponent, doing, in fact, all she could to further the interest of the executors; that it was a mere formal opposition, to enable the executors to obtain probate of these papers. That Mrs. Goodlake was a party likely to offer any effectual opposition to the papers is impossible to be predicated of her: seeing the steps taken by her and by the executors, it is clear that her wish, up to the hearing of the cause, was that the executors might succeed in establishing the papers before the Court.

At this time, then, the papers were first brought before the Court, and annexed to the commission [106] was the affidavit of Mr. Phillpotts, which was to shew that the papers were found in the repositories of the deceased on the day immediately succeeding his death, sealed up in an envelope, the envelope being indorsed, "The will of James Wood, Esq., 2nd and 3rd December, 1834;" and the seal upon the packet inclosing them bearing the impression of the deceased's initials, "J. W.," and to shew that these papers were found precisely in the same state and condition in which they were brought before the Court, with certain exceptions, such as breaking open the seal, and one or two other slight circumstances; but that there was no alteration made in the substance or appearance of the papers. Now this affidavit is a very material affidavit. It is dated the twenty-fifth of April, and it expressly states that the deponent, as a confidential friend of the said deceased, in searching amongst the deceased's papers of moment and concern, found in the private drawer of a bureau, which was locked up in a closet adjoining the bedroom in which the said deceased died, the envelope marked C, hereunto annexed, indorsed, "The will of James Wood, Esq., 2nd and 3rd Dec. 1834;" that indorsement being (as it subsequently appeared) in the handwriting of Mr. Chadborn; "Which envelope, being sealed up, was then opened by this deponent; and upon opening the same he, this deponent, found the paper-writings now hereunto annexed, and respectively beginning and ending as aforesaid, enclosed therein. And this deponent, having now perused and inspected the said several papers, marked (A), (B), and (C) respectively, saith

that the said paper-writings are now [107] in every respect in the same plight and condition as when so found by him as predeposed; save only that the seal of the said envelope was broken open by this deponent at the time of finding the same." And he further makes oath that no other paper-writing of a testamentary nature of or belonging to the deceased was found by him.

Now nothing could be more satisfactory to the Court than the facts stated in this affidavit. The appearance also of the papers, which are sworn to have been in the same plight and condition as when found by him in this bureau of the deceased, still locked up, coupled with this affidavit of Mr. Phillpotts, seemed to exclude the possibility of any doubt that these papers did contain, as they were afterwards alleged to contain together, the will of the deceased, notwithstanding one of them, upon the face of it, purported to be instructions only, and notwithstanding the latter was a regularly executed will, purporting to dispose of the whole property, real as well as personal, although it did not name the persons to whom that property was to go.

These two papers appear to have been written upon two sheets of foolscap paper, separate at one time, but when brought into Court carefully attached together by wafers at the top and bottom. The first side of the sheet of paper contains the instructions for the will, and occupies a great portion of one side of the paper. The next side of the paper is blank, that is, the second side of the first sheet of paper. The next side, being the first side of the second sheet of paper, contains the will of the deceased, dated the third of December, and occupies the greater portion of that side of the [108] paper. The remaining sides are blank, with the exception of the last side of the first sheet, which forms the outside cover of the whole, which is indorsed, "2nd December, 1834. Mr. Wood's instructions for his will." At one time, therefore, these two papers were not in the state in which they are now.

When the papers were brought into the Court they were described as having been found in the repository of the deceased, locked up, enclosed in an envelope, sealed with a seal bearing the impression of the deceased's initials: and being so brought in, they had every appearance of being one instrument, authenticated by one attestation; and, under these circumstances, it is stated by the counsel for the executors that probate in common form was applied for on the affidavit of Mr. Phillpotts, and was only stopped by caveats which had been entered against the passing of that probate. The appearance, however, of the papers, and the affidavit of Mr. Phillpotts, would not, as I presume, have been considered in the registry as sufficient to entitle them to probate in common form, without at least the directions of the Court; because, when a paper appears upon the face of it to be mere instructions for a will, the mere annexation of that paper to another which purports to be a will, and an affidavit of their being found in the plight and condition in which these were found in the repositories of the deceased, are not, *primâ facie*, sufficient to entitle such papers to proof without special application to the Court; and I am quite certain that, if probate had been applied for in that form to the registrars of the Court, they would have referred the matter [109] to the Court: and if a motion had been made for probate in common form to pass upon the affidavit of Mr. Phillpotts, coupled with the appearance of the papers, and if urgent cause had been shewn why probate should pass without any unnecessary delay, in order to prevent inconvenience to persons who might have deposited cash with the deceased at Gloucester, the Court would not, even under those circumstances, have decreed probate to pass, unless it had had the consent of the next of kin, even if, under such circumstances and with that consent, it would have suffered it to pass. Looking at the vast amount of property to be disposed of, and the interests of the persons that might be affected by it, the Court, under all these circumstances, would not have decreed, and ought not to have decreed, probate to pass in common form, but would have required at least a decree to be taken out to be served upon the next of kin, including a general citation to all persons who might have an interest in the effects of the deceased; guarding, therefore, as far as the forms of the Court can guard, against any imposition or attempt at imposition that might be made.

That application, however, did not become necessary; for probate, in the first instance, was stopped by the caveat entered by Mr. Jennings; and, secondly, by that entered on behalf of Mr. Thomas Helps and Mr. Thomas Wood by Mr. Pulley; and then another party, Mrs. Elizabeth Goodlake, appearing as the next of kin of the deceased, her interest being immediately admitted, it was deemed advisable that the

executors should propound the [110] will, and prove it by witnesses in solemn form of law.

At this time the only other parties before the Court were Mrs. Goodlake and the executors; the one opposing the will, the other propounding it. Mrs. Goodlake, as I have already stated, was considered not to be a very formidable opponent upon the part of the executors. Her interest was immediately admitted; and, looking at the proceedings in the cause, it is quite clear that, if the case had gone on as against her, no inconvenient interrogatories would have been addressed to the witnesses with regard to the plight and condition of the papers at the time when they were executed by the deceased, for the Court finds that not a single interrogatory has been addressed to any one witness on her behalf; and it is apparent that she was acting under the directions and with reference to the interests of the executors, because, by referring to the proxies which have been exhibited in this cause, the Court has every reason to believe that they are all from the same office; they are precisely similar so far as the Court is able to judge by reference to them; they are in a form not usual in this Court, and are headed "In the Prerogative Court of Canterbury;" the other proxies in the cause have no such heading, nor am I aware that it is usual to head the proxies exhibited in this Court by the name of the Court for whose use and in whose registry they are to be deposited; and, besides this, I observe that Mrs. Goodlake's affidavit as to Scripts is sworn in the presence of John Cox and John Surman Cox, of No. 2 Bath Street, Cheltenham, soli-[111]-citors, which Mr. John Surman Cox is proved by several of the witnesses in the cause to be the solicitor of Mr. John Surman, one of the executors and universal legatees named in the paper of the second of December. He also appears to have been present at meetings and consultations on behalf of the executors, all which proves, beyond possibility of a doubt, that Mrs. Goodlake is but a nominal party as opposing the interests of the executors.

This being the state in which the cause and proceedings were at this time, and with a nominal opponent, the executors propound these instruments. They bring in an allegation, propounding the papers (A) and (B) nearly in the form of a common condidit, so far as the circumstances of the case allowed, in effect pleading that the paper-writing of the second of December, described as "Instructions for the will of James Wood," was drawn up and reduced into writing, and was, after being so drawn up, read over and approved by the deceased; that in testimony whereof he signed his name thereto; that, on the third of December, he being then also of sound mind, memory, and understanding, and having a mind and intention to complete his said intended will, gave directions and instructions to that effect; that pursuant thereto, the paper-writing marked (B) was drawn up and reduced into writing and that after the same was so drawn up and reduced into writing the same was, to wit, on the third day of December, one thousand eight hundred and thirty-four, being the day of the date thereof, read over by the said deceased, who well knew and understood the contents thereof, and liked and approved of the same, [112] and in testimony of such his good liking and approbation set and subscribed his name thereto.

So far, therefore, the factum of these two papers is alleged. The allegation then goes on to plead that he published and declared paper (B), together with the paper (A), to be his last will and testament, in the presence of three credible witnesses, whose names are thereto subscribed as attesting the execution thereof. It then pleaded, in the usual form, the capacity of the deceased.

The allegation further pleaded the subscription to the paper of the second of December, and to that of the third of December, to be in the proper handwriting and subscription of the deceased, and that after the death of the deceased the paper-writings were found in his repositories, sealed up in an envelope, now in the registry of this Court, marked (C), annexed together in manner as now appears.

This then was the statement of the executors in their allegation; and all that was necessary to prove was the drawing up of the instructions and the signature to those instructions by the deceased, the drawing up of the paper of the third of December, the subscription to that, the execution of it in the presence of three witnesses, the annexing the papers together in the manner in which they now appear before the Court, and the finding of those papers so annexed together in the repositories of the deceased, sealed up in an envelope. Those were the necessary facts to be established, and if established by witnesses, if the executors had examined the three subscribing witnesses to the paper of the third of December, and if they had examined [113] Mr.

Phillpotts and a second witness to the handwriting of the deceased as to the paper of the second of December, and Mr. Phillpotts also to the finding of these papers in the condition in which they are represented by him in his affidavit to have been found, and to which it is probable he would have adhered when examined as a witness in the cause, and it being clear, from what has subsequently happened, that no interrogatories would have been addressed to the witnesses in the cause by way of elucidating the facts which might throw any doubt upon the integrity of the proceedings. Under these circumstances, it is quite impossible but that the Court must have pronounced for the validity of these papers as together containing the will of the deceased, notwithstanding one of them contained instructions and the other a regularly executed will.

It is clear that that must have been the course which this proceeding would have assumed; but it did so happen, that before the cause arrived at its termination, and before the commission for the examination of witnesses had been completed, a paper was produced, which not only stopped the cause as between the executors and Mrs. Goodlake, their nominal opponent, but gave a different character to the whole case, and has been the occasion of these long proceedings, and the mass of evidence before the Court. The circumstances attending the production of this paper are stated in the affidavit of Mr. Helps; whence it appears that, on the eighth of June, he received by the threepenny-post a packet containing the paper-writing now propounded as a codicil; that on the receipt of the paper he immediately communicated it to the exe-[114]-cutors, and produced the original to them, and left a copy with them; that on the ninth, having endeavoured, with the assistance of Mr. Wilde, his solicitor, to obtain an interview with Mr. King, the solicitor of the executors, and Mr. Phillpotts, a counsel learned in the law, acting on behalf of the executors, it was not till the tenth that the interview took place; and that on the thirteenth of June the codicil was brought into the registry of this Court, accompanied by an affidavit of Mr. Helps, stating the circumstances. There was also a pencil-writing accompanying this paper to this effect:

"The enclosed is a paper saved out of many burnt by parties I could hang. They pretend it is not J. Wood's hand; many will swear to it. They want to swindle me. Let the rest know."

This is not subscribed by any name, nor has the writer been discovered. The paper accompanying this writing is sworn to have been received in the same state as it is now before the Court, that is, torn, but not entirely through, but a part of the corner of the paper is burnt; and it has been argued from these circumstances that, whether the paper be or be not a codicil, whether it be in the deceased's handwriting or not, and whether subscribed by him or not, are points wholly unimportant, because it is a cancelled document; and that objection was stated at the time when the allegation propounding the paper was debated; but the Court was of opinion that the cancellation was not so clear as to prevent the parties from being permitted to propound the paper, more particularly as it is represented in the anonymous letter to have [115] been saved out of many burnt by parties the writer could hang; and, therefore, if such were the case, it is evident that they could not have been destroyed by the deceased, but by some other persons who had an interest in destroying this paper.

The executors, on the appearance of this paper, were called upon to declare whether they would oppose it or not. They declared they would oppose it; and it was then propounded by some of the legatees: and, in order to bind all parties by the sentence of this Court, the executors thought it right, not only to call on the parties interested in the codicil to propound it if they thought fit, but also to take out a decree, citing the next of kin to appear and see the proceedings to establish the two papers, as together containing the will of the deceased. On the decree being returned into Court, no appearance was given on behalf of any other next of kin, Mrs. Goodlake being already before the Court. The executors then reasserted the allegation previously given in as between themselves and Mrs. Goodlake, and repropounded the papers as together containing the will. Their allegation was readmitted in the same form and shape as in the first instance, so that they reasserted all that was contained in that allegation. Witnesses were produced, namely, the three subscribing witnesses, and two gentlemen (Messrs. Hitch and Higham), as to the handwriting of the deceased. Mr. Phillpotts, who had made an affidavit in the first instance, was not produced as a witness, as he was a party named in the codicil; but his answers were called for and

brought in ; and publication of the evidence was prayed on the fifth of November, [116] one thousand eight hundred and thirty-six. An allegation was then asserted on behalf of the legatees in the codicil, which was admitted, with some slight reformations. The purport of that allegation was to propound the codicil ; to lay grounds of probability that it was the act of the testator ; and, in order to remove the presumption against the paper, arising from the appearance of burning and tearing, it pleads circumstances, insinuating, if not charging in direct terms, misconduct and mal-practices on the part of the executors—that, among other things, they had been guilty of a spoliation of papers of a testamentary nature, and also (what appears the more immediate and direct object of the parties) it pleads certain circumstances with respect to the papers of the second and third of December, one thousand eight hundred and thirty-four, which go to shew that the case set up by the executors is not a true case, as the papers were not originally annexed together as they now appear, nor were produced in that state to the witnesses at the time of execution ; and it also pleads that the papers had not been sealed up in their presence, and that they were not deposited in the envelope in the bureau, in which they were discovered on the twenty-first of April, with the privity, consent, and approbation of the deceased, or in the same plight and condition as when found ; and that the annexing these papers together and enclosing them in the envelope were entirely unknown to the deceased. It goes on to allege that the papers had been deposited in the place where they were found a short time only before they were discovered, and that the bureau and repositories of the deceased [117] were accessible to different persons in the house ; and it pleads that the deceased had executed other papers of a testamentary nature, which had been deposited by him in his bureau, and which had been abstracted from thence without his privity and consent ; thereby laying a foundation for a suspicion, or a suggestion at least, that other papers might have been abstracted by persons in the deceased's house, or in his employment, or who visited there, without his privity ; and it pleads, in order to shew the facilities that existed for this purpose, that the deceased was careless of his keys.

These charges were, certainly, of a most serious kind, and, if true, would awaken the jealousy and suspicion of the Court, for they go to a direct falsification of the case set up by the executors ; they impute to them the destruction of one or more testamentary papers of the deceased ; and they insinuate that they, or some person with their privity, had attempted to destroy the codicil of July, one thousand eight hundred and thirty-five, which had been rescued by some person. These imputations, considering the parties against whom they were directed, appeared to the Court so highly improbable, I may say almost incredible, that it was with the greatest astonishment I found it to be admitted, in the answers of those parties, that a great part, and a material part, was founded on fact ; for it does appear that the two papers were not originally annexed together when executed by the deceased ; that they had not been in company together from the time they were executed until the morning of the twentieth of April, the day on which the deceased died, at a time when it is admitted that [118] he was utterly incapable of being spoken to upon any business whatever. It is also admitted that the paper of the second of December, described as "Instructions for the will of the deceased," had remained in the custody of Mr. Chadborn, the drawer of both papers, and one of the executors ; and that it was only on that morning taken from his house, immediately on his arrival from London by the mail, placed in an envelope, wafered by him, and indorsed by him, in his own house, as containing the will of the deceased, bearing date second and third of December ; the fact being that at the time the will of the third was in the repositories of the deceased at his own house ; where, if the parties are to be believed in the account they give in their answers, it had been from the time of its execution till the morning of the twentieth of April, with the exception of a few days, during which it had been in a tin box, in a closet of the room where the deceased carried on his banking business, and from whence it was removed into the bureau, where it remained till the morning of the twentieth of April, when it was removed from thence by Mr. Osborne, who took it to Mr. Chadborn ; and, in the presence of the four executors, the envelope in which it had been enclosed by Mr. Chadborn that morning, and wafered, was opened, and the paper of the third of December taken from the bureau, and attached to paper (A) of the second of December ; the two papers being carefully wafered together, as now exhibited before the Court, and then carefully sealed up by Mr. Chadborn in the same envelope which had been already indorsed by him before he arrived at the [119]

deceased's house—shewing what his intention was, namely, to enclose them in an envelope; and the papers being so enclosed and attached together, the envelope is sealed with a seal, bearing the impression of the deceased's initials; the papers are then replaced in the bureau, from whence paper (B) had been taken. And it is said that all this was done by them under the advice and at the suggestion of Mr. Phillpotts, who was at that time acting, and continued for some time subsequently to act (till the discovery of the codicil), as the legal adviser of the executors.

The admission of these startling facts (for that they are such must be acknowledged) implicates not only the executors themselves, but Mr. Phillpotts, in the charge of having attempted to deceive the Court, and to obtain probate of these papers on a false representation of facts; for though the affidavit of Mr. Phillpotts does not expressly aver that the papers were in the same plight and condition as when executed by the deceased, it is clear that the impression attempted to be conveyed to the mind of the Court was that they were in the same plight and condition as at the time of execution; and that they were so placed with the privacy, and knowledge, and approbation of the deceased. It is quite impossible to read that affidavit and not to see that such was the impression meant to be conveyed.

I have already stated that, but for the mere accident of the production of the paper of one thousand eight hundred and thirty-five, this attempt would probably have been crowned with success; for nothing but the appearance of the codicil could have prevented it. If the subscribing wit-[120]-nesses had been produced, and Mr. Phillpotts had been examined to prove the finding of the papers in the state in which they were, no suspicion could have been raised in the mind of the Court as to the bona fides of the transaction. The real state of the facts could not have appeared, and the Court could have had no alternative but to pronounce for the validity of the instruments; and, under these circumstances, the Court feels very strongly that it has been unfairly and improperly treated by those who, in the first instance, set up a totally false case, and attempted to surprise it into pronouncing for these papers, as together containing the will of the deceased, by a misrepresentation of facts, and by setting forth a false statement of circumstances, in order to procure probate of the papers in common form.

But the case is much stronger against the instructions when it is found that there was a will executed on the following day; for nothing can be more clear, according to all the doctrines and principles of this Court, than that a paper of instructions, or a draught, though signed by the deceased, is superseded and done away with by the execution of a will; that it is contrary to the practice of the Court to pronounce for instructions, as part of a will executed after the date of the instructions, though, under certain circumstances, it is competent to the Court to permit omissions, which may have occurred through inadvertence, negligence, or mistake, to be supplied by shewing that, notwithstanding the will itself contains a complete disposition of the property, and does not present any ambiguity on the face of it, yet there are some [121] omissions, some legacy, or residuary clause, not inserted. But the Court has always required that, in order to supply the deficiency in the executed instrument, it should not depend upon parol evidence, but be established by written documents. I am not aware of any case in which the Court has permitted a paper of instructions to be annexed to a regularly executed paper, the paper of instructions bearing date before the execution of the will.

It was stated in the argument that cases have occurred in which the Court has pronounced for twenty papers as together containing the will of the deceased; but that has been only where the papers contain a partial disposition; neither being intended to be a complete will, and neither revoking the other. If it had been alleged in this case that it was through error and mistake that the names of the executors had been omitted in the second paper, the Court, if it had full and satisfactory evidence on this point, might have permitted the omission to be supplied, by inserting the names of the executors, as they stand in the paper of the second of December, in that of the third. But the Court could not have done so without a perfect satisfaction that it was carrying into effect the real intentions of the deceased. And whence could the Court obtain this information? Only from the person who himself knew what passed at the time, namely, Mr. Chadborn; for he, as the deceased's confidential solicitor, was employed by him to draw up these two instruments, under which he is to take so large a benefit—to the amount of two or three hundred thousand pounds.

But this is not the case set up, the case set up is, not that there has been [122] any omission, but that it was the intention of the deceased to give effect to these papers as they stand, by incorporating both together, as containing his will. There was, therefore, no surprise upon the deceased, or upon Mr. Chadborn, or upon any person cognizant of the preparation and execution of the two instruments. Under these circumstances, nothing but the clearest and most unequivocal evidence that the paper of instructions was intended by the deceased to form part of his will could justify the Court in pronouncing for it, in conjunction with the will; and unless the witnesses examined to prove the execution of the paper do prove that the deceased did publish the two papers as together containing his will, it is quite impossible for the Court to pronounce for the validity of the paper of the second December, entitled "Instructions."

It was asked, in the argument, what possible purpose of fraud could be answered by annexing these two papers together; because, at the time they were first brought forward, there was no dispute as to their validity? The answer is that that is the very reason why the annexation was to be made, to prevent opposition; for it is quite impossible, if the facts were as stated in the allegation of the executors, that any party would raise an opposition that must have been fruitless, unless he could shew that the representation of facts in the affidavit of Mr. Phillpotts, and the appearance of the paper, were false and untrue; it would have been utterly useless, therefore, to have entered into an opposition against the papers, and probate would have passed almost as a matter of course, on the examination of the [123] witnesses upon the *conduit*: for there was no doubt as to the capacity of the deceased, and the papers were stated to have been found in his repositories.

It has been said that Mr. Phillpott's affidavit might have been incautious; that it was a mere formal act, and that no care or attention was used in drawing it. I am of a different opinion. I consider that it was drawn with much care and attention, and I consider it a most important affidavit, and one best calculated to carry into effect the avowed intention of the parties; that is, to obtain probate of the papers in common form. If Mr. Phillpotts was cognizant of all the facts disclosed in the answers of the parties, and if, with a knowledge of this state of facts, he advised that the two papers should be attached together and deposited in the bureau where they were to be found by him on a subsequent day, and if he knew the facts as stated by Mr. Chadborn in his answer, I am very much afraid that the plea of incautious swearing would not exonerate him from a serious imputation. The terms of the affidavit are calculated to insure the passing of the probate in common form, and no person skilled in the proceedings of this Court could have framed an affidavit better adapted to secure the object. I cannot, therefore, admit the plea of want of caution, if Mr. Phillpotts was cognizant of what passed; but as the fact of that gentleman's knowledge entirely depends upon the answer of Mr. Chadborn and the other executors, looking at the conduct of these parties, it would be too much to hold that Mr. Phillpotts is proved to have advised the parties to act in the manner suggested. I think Mr. Phillpotts could not have been cognizant of what was done; that he must have advised them in ignorance of the real state of the facts, and considering that Mr. Chadborn himself is a solicitor of long standing, having practised in Gloucester for twenty-five years, and having been the confidential solicitor of the deceased, it could be hardly necessary for him to have had recourse to Mr. Phillpotts for advice, as to what he should do with these two papers, in the situation in which they are stated to have been up to the morning of the 20th of April, 1836; and I, therefore, do not feel myself called upon to say that, in my apprehension, there is any charge proved against Mr. Phillpotts of having made this affidavit with a knowledge of the circumstances which actually took place, as to the mode in which the papers were annexed together, and sealed up in the envelope, and deposited in the bureau. The utmost extent to which, on the answers of the executors, Mr. Phillpotts can be considered implicated in the transaction is that, in the morning of the 20th of April, or the night of the 19th, during their journey from London, Mr. Chadborn might have communicated to him that he had a paper in his possession which formed part of the deceased's will, the other part being in the deceased's possession, and he might have thrown out, "if they are to form parts of the deceased's will, they ought to be together;" that is the utmost extent to which, on the face of the answers, I can consider any charge proved against Mr.

Phillpotts—a suggestion thrown out without a knowledge of the real state of the facts, but acted on by Mr. Chadborn, in the presence, if not with the sanction, of all the other executors.

[125] As far as Mr. Chadborn is concerned, he at all events knew all the facts; he knew that the paper of the 2d of December was in his own possession, and that that of the 3d was in the possession of the deceased; he knew that the papers had never been annexed together; he knew (his own conduct shews that he did) that there was a necessity for the two papers being annexed together in such a form as to shew that they were parts of the will of the deceased. He accordingly proceeds to the deceased's house, on the morning of the 20th of April, knowing that the deceased was extremely ill, if not in great danger. On his arrival at his own house he had taken the paper of the 2nd of December from his own writing-desk, and enclosed it, as he states, in a sheet of paper; he wafers that paper up; he indorses it at his own house (as he states in his answer), as "the will of James Wood, Esq., 2nd and 3rd Dec. 1834;" having arrived at the deceased's house, and having ascertained (as stated in his answer) that the deceased was in a state in which he was not capable of being communicated with on any matter of business, he desires Mr. Osborne to fetch down the paper of the 3rd of December from the bureau in which he had deposited it, and, having done so, he opens the envelope in which the paper of the 2d of December was enclosed, and annexes (as he expressly states) the two papers together, places them in the envelope, and seals them with the deceased's seal, which, he says, accidentally lay there, a candle being upon the table, and then it is that the papers are deposited in the bureau.

Now, was Mr. Osborne or Mr. Surman im-[126]-plicated in this transaction? Mr. Osborne is the person by whom (as stated in the answers) the paper of the 3rd of December had been removed from the box in which it had been deposited, after execution, by Mr. Surman, and he, therefore, knew that paper (B) was not at that time annexed to paper (A). He also knew that, at that time, they were not enclosed in an envelope; and he also knew that on the morning of the 20th of April all this took place, for it was his hand that removed the packet from the bureau where he had deposited it. Mr. Surman had deposited the paper (so he swears) in a tin box, in a closet in the parlour of the deceased, where he kept the current cash and notes; and he must, therefore, have been aware that the paper, at that time, was not enclosed in an envelope, and that it was not connected with the other paper of the 2nd of December; and, therefore, when he saw, on the morning of the 21st of April, the packet broken open, and containing the two papers, he knew that they were not in the same plight and condition as when deposited by himself and Mr. Osborne; and his first inquiry would naturally be, "How came this change to take place in the condition of the papers?"

With regard to the fourth executor, he does not appear to have been cognizant of the principal part of the proceedings (so far as we may presume from his answers) which took place. He says he understands now that what is represented by the other executors did take place in his presence; but he expressly swears that, being otherwise occupied, he was totally ignorant of it; that he knew nothing of it till the allegation of the executors was given [127] in; that, as far as the paper of the 3rd of December is concerned, he was not aware of it, and never inspected or read it till it was taken out of the envelope on the 21st of April, 1836. Whether he knew till then that there was such a paper as that of the 2nd of December does not appear. Now, it may possibly be that this gentleman (the fourth executor) was ignorant of what did take place; but whether ignorant or cognizant of the proceedings, and however morally acquitted of the guilt of assisting or participating in this fraud, he must be legally responsible for the acts of the other executors. I must, therefore, hold that all the executors were (for the purpose of this question) cognizant of what took place, and that all are bound by the consequences of their conduct, be they what they may.

The result then of this part of the case is, that the papers were not annexed together with the knowledge of the deceased. Now, what effect ought this conduct to have on the mind of the Court? I have dwelt longer upon this stage of the proceedings because I think it is that upon which the whole of this case must eventually turn. The effect which it ought to produce upon the mind of the Court is to place it on its guard, at least, against receiving explanations from parties who have conducted

themselves in this manner for that which I must consider to have been an object of advantage to themselves. For though it be true that Mr. Chadborn swears, and the other executors swear that they believe what he states to be true, that he had no improper motive in annexing together the two papers and placing them in the envelope [128]-loose; "on the contrary, that he took therein the course which at the time he believed the fittest and properest course under the circumstances to be taken, in respect to the said two papers;" the Court cannot but feel convinced that it was to facilitate the obtaining probate of these papers, and thereby to put himself into the possession of the property of the deceased on a false representation of facts which the Court had no means whatever of detecting; and so far from this being a case in which the Court ought to presume anything in favour of the executors, it is precisely a case in which it ought to presume everything against them; for it is not one of those cases which are of common occurrence, where a party draws up an instrument which confers an advantage upon himself: for here the Court is called upon to pronounce for the validity of a paper which is not signed in the presence of witnesses, which is drawn up by a solicitor who is one of the executors, and where the Court can have no information but what comes from him.

The state and condition of these papers, subject to the observations of the Court as to the conduct of the executors, must be considered as that in which they were on the nineteenth of April, before they were annexed together by Mr. Chadborn; and the question is whether the evidence is sufficient to satisfy the Court that the papers were intended to form together the will of the deceased; for, notwithstanding the conduct of the executors, it is still competent to them to prove that, at the time of execution, they were published by the deceased as together containing his will; and, therefore, that [129] the presumption of law, that by the execution of the latter instrument the former was superseded, is rebutted.

What is the character of the paper of the 2nd of December? It merely purports to be instructions for a will, as far as relates to personal property only, and as to the appointment of executors. But the paper of the third disposes of both the real and the personal estate, and therefore embodies within itself the contents of the paper of the former day, with a certain variation which I have referred to, as to the mode in which the executors were to take the property; and, therefore, it must be considered, *prima facie*, as a revocation of the instructions, the effect of which (after they had performed their duty) was at an end. It is true that the paper of the 3rd of December is utterly useless by itself, and it has been contended that, therefore, it never could have been intended to supersede the former. But I do not agree in this conclusion. In the first place, there is a difference between the two papers as to the manner in which the executors are to take the property; and the latter paper disposes of the personal property, which had been disposed of by the former, and, *prima facie*, therefore, it could not have been the intention of the deceased that the two papers should operate together; and though paper (B) can have no effect by itself, it by no means follows that it was the deceased's intention that the other should have effect as a part of his testamentary disposition; that must be proved by other circumstances than what appears upon the paper itself. I do not think that what appears in the latter paper, "I declare this to be my Will for [130] disposing of my estates, as directed by my Instructions," necessarily refers to the paper of the 2d of December only; for, under the circumstances, it is quite impossible for the Court to know what may have taken place between the deceased and Mr. Chadborn, and it is no necessary consequence that, by "my Instructions," he meant "my Instructions which I gave the preceding day to Mr. Chadborn for drawing my will." But supposing it to be so, and that paper (A) is referred to, it was superseded by the execution of the will, and it shews that the deceased considered the first paper as instructions and nothing more; and, looking to the character of the deceased, it appears that he had great difficulty in making up his mind as to the disposition of his property. Mr. Horner (who had been clerk to Mr. Chadborn) states that in 1831, 1832, and 1833 he consulted him frequently about making his will, when he talked of giving such and such things to particular individuals; but that he concluded with saying, "I have so much to dispose of that I do not know what to do with it." And I am not prepared to say from the evidence that the deceased was not of that vacillating disposition as to render it probable that he should alter his mind in this respect from day to day; and looking at the papers themselves, which are most extraordinary papers to come out

of the hands of a professional gentleman, to dispose of property of such an amount, it appears not improbable that they were written for a temporary purpose, to satisfy persons who had deposited cash in his banking-house, that after his death there would be no difficulty in receiving such portions of their property as re-[131]-mained in his hands, as he had made a will and appointed executors; and that he might have departed one day from the intentions he expressed at another.

I now proceed to the evidence in support of the instruments. With respect to the first paper, dated the 2nd of December, there is no evidence whatever as to the time when it was written, further than appears on the face of it; nor is there any direct evidence from persons present that the signature is that of the deceased. There is the evidence of two persons, who depose to their belief that the signature is in the handwriting of the deceased; but as these witnesses, when examined, had no reason to suppose that these papers had not come out of the repositories of the deceased united together, no suspicion was raised in their minds, and it may be doubtful, after what has taken place, whether such proof ought to be accepted as sufficient evidence alone of the authentication of this paper, as in the deceased's handwriting; because, though there has been no attack made upon the genuineness of this signature, either in plea or interrogatory, enough, I think, appears in evidence to shew that some doubt may exist as to its being the signature of the deceased; for it does appear from the evidence of several persons that this signature is less like the deceased's usual mode of signing than that in the paper propounded as a codicil, and which is alleged to be a forgery. This point is the more important, because on this paper depends the whole interest of the executors; for their names do not appear in the other paper, which is a will regularly executed and attested. [132] All the circumstances of the case were in the knowledge of Mr. Chadborn (though he did not think fit to disclose them), and he knew that the test usually applied where the validity of a paper depends upon handwriting, that the paper was found in the repositories of the deceased, and therefore was *prima facie* placed there by him, or with his knowledge, could not have availed: and, therefore, he ought to have been particularly careful to have produced the most full and satisfactory evidence of the execution of the paper, for there is no direct recognition of it, and the whole depends upon the evidence as to the signature being that of the deceased.

The three witnesses examined on the *conduit* are the attesting witnesses, one being a clerk to Mr. Chadborn, another his coachman, and the third (Lewis) a person resident in the deceased's house, being an old servant of his sister's: not exactly the class of witnesses the Court would have expected to find attesting a document like this, conveying so large a benefit. These witnesses state the circumstances under which the execution took place: that between eight and nine o'clock at night of the 3rd of December the deceased, who had a cold, sent Ann Lewis to Mr. Chadborn's office to desire that he would come to him on business he wished to complete that night; whence it has been argued that something had been begun which he wished to finish; and that this must have been the will, for which he had given instructions the preceding day. But, assuming this to be the case, it only proves that that which was to be completed was his will—not that he intended those instructions to [133] form part of his will. Lewis went to Mr. Chadborn, who had a party to dinner, and on receiving the message he proceeded to the deceased's house. The general result of the evidence of the subscribing witnesses is that, when they went to the deceased's room, they found him and Mr. Chadborn together, the latter (it should seem) being employed to write the attestation clause. It does not appear that either of the witnesses heard any part of the will read, or that anything passed between the deceased and Mr. Chadborn, as to the instructions; they all concur in stating that when they went into the room the deceased appeared to read the paper twice over; that some conversation took place between him and Mr. Chadborn as to a power of altering the will, and being satisfied by Mr. Chadborn's pointing out the clause in the will to that effect, that he had such power, he signed his name, and declared he published this as his will, in the presence of the witnesses who attested the execution, and then left the room. They know nothing of what passed as to the custody of the will, or the place of its deposit. But they say nothing in their depositions in chief as to paper (A), or as to any other paper being before him at the time; and, as I have before remarked, if the paper of July, 1835, had not made its appearance, nothing would have appeared in the evidence of these witnesses beyond what they state in their depositions in chief;

for not a single interrogatory would have been addressed to them by Mrs. Goodlake, the only other party before the Court when the allegation was first given in. The evidence might have [134] appeared equivocal, seeing that there were two papers; yet, looking at Mr. Phillpott's affidavit, as to the plight and condition and finding of the papers, the Court on this evidence would have had no hesitation in pronouncing for their validity. But when the legatees in the codicil came before the Court they administered interrogatories to the witnesses on the condidit; though a good deal of difficulty was made as to the right of the legatees to administer such interrogatories as it was said they had no interest in invalidating the will, their interest being confined to the codicil: this was true, but still the legatees had an interest in shewing that, under the circumstances in which the will was executed, it was unlikely that the deceased would have adhered to a disposition which gave his entire property to the persons named as executors in the first paper, so little connected with him by relationship; and that he might very probably have given large sums to other individuals. But so it was—the right of the legatees to interrogate these witnesses was objected to: whether from a misgiving or suspicion on the part of the executors, that the witnesses would not stand the test of cross-examination by those who had an interest in disclosing the conduct that had been pursued, though they had, perhaps, only a glimmering of light; yet from that glimmering of light something might be elicited which would have the effect of shewing that the conduct of the executors with respect to these papers had not been what it ought to have been. But it was not a mere common objection to the cross-examination of these witnesses; an act on [135] petition was entered into, and, when the commission issued, it was prayed that the commissioner might be named by the executors only. The objection was afterwards waived by the proctor for the executors, and the interrogatories were administered, though, instead of executing the commission at Gloucester, the witnesses were brought up to London to be examined.

Now the witness Swann, in answer to the interrogatories with respect to the paper (A) (of the 2nd of December), states that it is in Mr. Chadborn's handwriting; the signature he believes to be Mr. Wood's. He never, to his knowledge, saw the paper before—the allegation on which he was examined expressly pleading that the deceased published that paper, together with paper (B), as his will, in the presence of this witness; so that the paper must have been before him at the time that his attention was called to it, and that he published it as part of his will; whereas this witness expressly swears that the deceased did not, and that he had never seen the paper, as he believes, till the time of his examination. And in answer to another interrogatory he swears, "There were many other papers lying on the table at the time, but I did not observe any other written paper; there was not any other paper produced, certainly." He has, therefore, as far as his evidence goes, negatived on interrogatory the plea of the executors which he was called upon to prove, namely, that the paper was published by the deceased as part of his will. Veale, the coachman of Mr. Chadborn, says, on interrogatory, that he never saw the paper (A) before, nor knew anything concerning it; that he [136] did not notice that any other papers were produced at the time Mr. Wood signed his will: he, therefore, negatives the plea, as far as his observation went. Ann Lewis states that she never saw the paper (A) before, to her knowledge; that all she knows is that the paper (B) was lying on the table written when she entered the room, and that she saw Mr. Wood sign it: she says, "I cannot say whether there might not be some written paper upon the table at the time the will was signed; but I did not observe any other than the will."

If any witnesses can negative the important fact pleaded by the executors, of the publication of the two papers as together containing the will, these are the precise witnesses for the purpose, for they state, one and all, that there was no other paper they knew of but that which was signed and attested by them; and we now know for certain that they could not, at that time, have been annexed together as they now are.

But it is said that, as the witnesses have declined to go to the full extent of the plea, the Court may be secure in believing that theirs is a true account, and that they have not been tampered with by Mr. Chadborn; and I am inclined to believe that it is a true account, and that the paper (B) would, if it stood alone, be entitled to probate. But with respect to the paper (A), not a single syllable comes from them as to the existence of that paper; and therefore I do not believe that the witnesses

have been tampered with, or if tampered with, that it has been successful. Their evidence goes to negative the publication of both papers, and therefore the paper (A) does not appear, from anything that [137] has yet occurred, to have been a part of the deceased's will at that time, or to have been intended to have any effect or operation whatever.

But it is said that the paper (A) must have been present at the time with the deceased, because paper (B) conveys, by itself, no interest to any person whatever. But that affords no direct presumption that the other paper was present at that time. On the contrary, the presumption is that it was not there. Mr. Chadborn came from his dinner-party in a hurry, and it is not probable that he brought the paper of instructions in his pocket. But on the face of the paper (B) itself there is no corroboration of the suggestion that the other paper was present; for the words are all in the singular number—there is no reference to a plurality of papers: "I do declare this to be my will," not "this paper and the paper I gave to Mr. Chadborn yesterday." And "in witness whereof I have to this my last will set my hand," &c. Therefore, as far as the contents of the paper itself go, the presumption in my mind is strong that paper (A) was not present when paper (B) was executed by the deceased.

But there is another circumstance arising out of the former part of the case. What would have been the conduct of the parties if the papers had been together? For what possible reason should they have been separated? Why should they have been deposited in different places? The only suggestion I have heard is that the deceased might not choose to have his papers deposited in places where other persons had access, and who would see who were to have his property. But what was to [138] prevent Mr. Wood from telling Mr. Chadborn, his confidential solicitor, to seal up the two papers together in an envelope? But from whom are these papers to be concealed? Who are the persons who had access to his repositories and could ascertain his testamentary disposition? No persons but Mr. Osborne and Mr. Surman, who are described as having been present at the time, and the others as having been in and out of the room, and they heard the deceased declare who were to be his universal legatees and devisees. There was, therefore, no secret to be kept from them; and the whole tenor of the case of the executors is, that the deceased was constantly declaring that those were the persons to whom his property was to go, recognizing them over and over again (some of them to one person and some to another) as the persons who were to take his property after his death; and, therefore, the suggestion entirely fails to satisfy my mind; and I have no other evidence but the answers, and I cannot take the explanations given by parties who are so deeply interested, and who have so conducted themselves, against the evidence of persons called to prove, what they have negatived, that the deceased executed these papers and published them as together containing his will.

The evidence of these witnesses (with that of the two witnesses to the handwriting) is all the direct proof we have as to either of the two papers; and as this direct evidence fails to establish the fact that the two papers were intended to operate together, recourse is had to another species of proof; and what is that? Why, that the disposition contained in the papers is extremely probable, considering the [139] persons to whom the property is given—Sir Matthew Wood, Mr. Chadborn, Mr. Osborne, and Mr. Surman. The three first are not in any degree related to the deceased; the fourth is a second cousin once removed, being the son of Mrs. Goodlake, having changed his name, so that he is a distant relation. It is true that Alderman Wood appears to have been a very intimate friend of the deceased, and that the deceased had a great regard and affection for him. The origin of their acquaintance was a political event which occurred in 1820, in which Mr. Alderman Wood took a very conspicuous part, which introduced him to the acquaintance of the deceased's sister, under whose will, I believe, he acquired a house in Gloucester. On going down to attend the sister's funeral, in 1824, he was introduced to the deceased, and a degree of intimacy took place between these persons, which would render it extremely probable that a very considerable proportion of the deceased's property would have been given to Mr. Alderman Wood. A bequest of two hundred and fifty thousand pounds is not so improbable as to lay any ground of suspicion, if the act is brought home to the testator. Mr. Wood, in 1831 or 1832, accepted the alderman as a tenant of a house at Hatherley, or he suffered him to occupy it without paying rent. The deceased had also been a trustee for his daughter, on her marriage with Dr. Maddy, of Gloucester,

and stood godfather to the children of the marriage; so that there was a friendship between them which subsisted down to the latest period of the deceased's life. On the passing of the Reform Bill he wrote to Lord John Russell, [140], describing Alderman Wood as his "esteemed friend," and praying that he might be appointed a magistrate under the Reform Act. These are all circumstances from which it is apparent that the deceased did entertain a sincere regard for Alderman Wood, which is corroborated by the evidence of several witnesses in the cause; and a witness produced by the legatees states that he should have thought it extremely odd if Alderman Wood had not had a considerable part of the deceased's property.

With respect to Mr. Chadborn, too, nothing could be more probable than that the deceased would have appointed him an executor. He had been his confidential solicitor for many years, and had had for some years the management of his whole estates in the country; and it is in evidence that the deceased declared, on several occasions, that Mr. Chadborn had given his services gratuitously, and that he would "put him in a corner of his will;" that "everything would be his Honour's;" that "his Honour would be a great man one day;" so that nothing was more probable than that Mr. Chadborn would be a legatee in his will. But it does not appear that the benevolent feelings of the deceased towards Mr. Chadborn were founded upon very solid grounds; for though he did not make out any bill of charges against the deceased, the deceased was allowed to believe that he was acting disinterestedly, doing all as a friend, without making any charge (though on some occasions he did receive some small fees on law accounts), yet it does appear from his books (which were produced with considerable reluctance) that he kept regular [141] entries of his attendance on and services for the deceased, and thus had all the materials for making out a bill; and it does appear that Mr. Chadborn has claimed to set-off against certain advances a charge for legal services rendered to the deceased, to the amount of between two and three thousand pounds. But the deceased was ignorant of this fact; he believed that all was done out of friendship for him, and these are grounds which rendered it probable that Mr. Chadborn would have a large portion of his property.

With respect to Mr. Osborne, nothing could be more natural than that the deceased should make a large provision for him, from the time he had been with him in business, between thirty and forty years; and the deceased had always spoken highly of him: and he also declared that he would make a handsome provision for him, and on one occasion said that he deemed it his duty to provide for him.

Mr. Surman stands in one respect upon superior ground, as he was related to the deceased. At his death his apprenticeship had not expired; but he had been some years in the employ of the deceased, who declared that he had a regard and affection for him, and intended to benefit him.

With regard to these four individuals, therefore, nothing could be more natural than that the deceased should have left them a large share of his property; and if he had executed a will carrying that intention into effect, and had made no codicil diminishing their interest, there would have been nothing to render the disposition improbable; though it would have been somewhat extraordinary if he had excluded other persons with whom he was [142] also on terms of intimacy. But these are general grounds of probability—they go no further; they go no way to set up paper (A) as part of the will. They are circumstances leading to the probability of the disposition, but not to the act of disposition. There must be something more to shew that paper (A) was intended to form a part of the deceased's testamentary papers.

Now several declarations have been pleaded to have been made by the deceased, both before and after the execution of this paper; those which were made before, as leading up to the probable execution of it; those which were made afterwards, for the purpose of shewing a direct recognition of the instrument itself to be collected from those declarations, from a reference to the contents of this paper to which, and to which alone, it would allude.

Several witnesses have been produced in support of these different declarations; and I may generally observe that not one of them goes to the admission of the paper itself as an existing paper; there is a mere reference to circumstances which seem to connect themselves with the paper, but have no direct reference to the existence of any such paper, as made by the deceased himself. The witnesses who have been examined in support of these declarations are, first, Mary Williams, who deposes, upon the 17th article of the allegation, that in a conversation which she had with the

deceased at Michaelmas, 1832, with respect to some property which she occupied under the deceased, and had underlet to another tenant who refused to give up possession of it, that having consulted with the de-[143]-ceased as to what was to be done, and the deceased having advised her to go to Mr. Chadborn, she said she had no money to go to law; he said, "Never mind, go to Mr. Chadborn; do you think a man will not take care of his own?" and it was argued from this that it shews an intention on his part to give part of his property to Mr. Chadborn, and, as connected with other declarations, that he meant either to give the whole to Mr. Chadborn, or to give it to him conjointly with other persons.

There is another declaration spoken to by this witness on the 10th article as occurring at Christmas, 1835, in which the deceased told her that Mr. Alderman Wood would have a part of his property, and upon the 13th, in which she speaks to Mr. Chadborn's intimacy with him, and having conducted his business, she says, that from the expressions he made use of to her she thought that Mr. Chadborn would have the whole of his property after his death, and that no person was to share with him.

Again, in February, 1836, she says that in a conversation with the deceased upon the probability of her continuing to occupy the house in which she resided, having held out as an inducement to her to repair it at her own expense (for it appears that the deceased was very much in the habit of encouraging the tenants to do repairs by the idea that they would be continued as tenants, or that they might succeed to it themselves), he said to her, "Never mind, if I do not live, my friend Chadborn and the alderman will never turn you out." This is said to be a clear recognition of this paper, that [144] Mr. Chadborn and the alderman, who are two of the devisees, would not turn her out.

Another recognition spoken to by this witness is that on the 16th of April, 1836, the day before he was taken ill, he said to her that his friend Chadborn and the alderman would have the main of his property and the management of all of it after his death. I have already stated that two others of the four who were appointed executors—Mr. Osborne and Mr. Surman—would have as much the management of his property as Mr. Alderman Wood and Mr. Chadborn would have had.

To the 26th interrogatory she says that he said a year or two before he died, "My farm is as good as yours; you will never be turned out." "I did sometimes fancy that he would leave us the farm;" and that seems to have been a very prevalent notion of some of the tenants, and to have had a good deal of currency in the city of Gloucester, that it was the intention of the deceased to give his farms to the tenants by whom they were occupied; and yet she says, in answer to one of the interrogatories, that she supposed that everything would be Mr. Chadborn's after his death; and she says that two or three times afterwards he said that his friend Chadborn and Alderman Wood would have the main of his property, and that he never named any one else as intended to be benefited by him.

That is the evidence of the witness Mary Williams as to those declarations. None of them go to a recognition of the paper as an existing paper, and none of them go directly to the contents, because they only speak of Mr. Alderman Wood [145] and Mr. Chadborn, either separately or together, inheriting the main of his property, which property, according to paper (A), would be taken in the same proportions by Mr. Osborne and Mr. Surman.

Mary Davis, another tenant of the deceased, says, upon the 13th article of the allegation, that he never in express terms said to her who were to be his executors, nor, except upon one occasion, did he say to whom he intended to leave his property.

Upon the 14th and 15th she speaks to the great regard which he had for Mr. Surman and Mr. Osborne, and upon one occasion, namely, in the month of April, 1833, which was before the will bears date, and which, therefore, is not a recognition but only a circumstance of probability to lead to the inference that such a paper would be made; she states that after Alderman Wood had become the occupier of the house at Hatherley, which was in the early part of 1833, she had a conversation with the deceased upon the subject of her rent, and upon that day she paid him forty pounds as part of what was due to him. The conversation that took place is this: he said that the alderman would make me a very good landlord and a good neighbour, and would do a great deal of good in the parish. Now the effect of that is simply this, that Mr. Alderman Wood would make her a good landlord. A good landlord of what?

Why, of that farm which she occupied at Hatherley, being part of that property on which the deceased permitted the alderman to live either rent-free or occupying it as his tenant. This would only lead to the supposition that it was extremely probable that the deceased would, by his will, leave that part of his [146] estate to Mr. Alderman Wood, but it goes no farther than that; it cannot have any reference to the general devise afterwards made of this property, because there is no more reason why Hatherley, under those circumstances, should be the property of Mr. Alderman Wood than that it should have belonged to Mr. Chadborn, or to Mr. Osborne, or to Mr. Surman. But he goes on to say in that conversation that he would leave something handsome to Mr. Surman; and then there is a conversation as to some charities, in which he said that he would never leave anything to charities. He said, "That is exactly what my father said, I will never leave anything to charities."

So much for that conversation. But she also goes on to depose to a conversation which she had with him in February, in the year 1835, in which he said, upon some reference to him upon the subject of the farm which she occupied, that he had given up the management of his affairs to Mr. Chadborn. It appears upon the face of these proceedings that in the latter part of his life he had not paid so much attention to the management of his property as he was accustomed in the early part of his life to bestow. He said, "That he had given up the management of his affairs to Mr. Chadborn, and as Mr. Chadborn would have the greater part of his property after his, the deceased's, death, Mr. Chadborn must do as he pleases about it." Now supposing the witness is precisely accurate in her recollection of what did pass upon this occasion, it would only shew that the deceased had given to Mr. Chadborn the greater part of his property after his death. Whether he said "a great part" of his [147] property, or "the greater part," may be a matter of some question or some doubt, but it is perfectly immaterial, because it does not go to recognize the existence of a paper, or of the precise contents of that paper; for Mr. Chadborn has no more part of that property, under the paper of instructions than the other legatees would have under it.

This witness is asked by an interrogatory whether she had ever mentioned this circumstance, and to whom and when she had mentioned it. She says that about twelve months ago, that is, before the time of her examination, she had, after the deceased's death, mentioned the conversation to Mr. Kendall (Mr. Kendall was employed after the deceased's death as an accountant, to manage the property of the deceased); and she says, "When I got home I set about recollecting, and I got my daughter to write it down." And a fortnight afterwards she gave the paper written by her daughter to Sir Matthew Wood. That the witness should have taken upon herself to recollect all that passed between herself and Mr. Wood twelve months after his death (this taking place in the month of February, 1835) appears somewhat extraordinary. I think it is too much to suppose that any great reliance can be placed either upon the accuracy of this witness's recollection in stating the terms in which the conversation passed, nor do I think that we are bound to suppose that the deceased was perfectly sincere in those declarations of his intentions at the time he made them.

She says, in answer to the 26th interrogatory, that "The deceased has several times said to me, speaking of my farm, it will be yours by and by; [148] but I never heeded it, because I knew that he only said so to get his repairs done at my expense." Now he may most undoubtedly have endeavoured to impress her with the notion that she would have the property. He had, as is stated by many of the witnesses, a great deal of low cunning, and was anxious to save and to have everything done for him free of expense. He wished to get the repairs done at the expense of his tenants, and in order to induce them to lay out their own money he intimated to them that probably the property would be theirs after his death; either that they would never be turned out by the executors, or that the farm would be theirs; and, therefore, it is quite impossible not to see that this gentleman was extremely insincere in the declarations he made, and that he had a purpose of his own to be answered by suffering his friends to believe that they were to have a great part of his property. It shews that the Court can place very little reliance upon declarations that come from such a testator as this.

Another witness, Elizabeth Timbrell, who is the daughter of one of the former witnesses, says, upon the 29th article, that on the 11th of July, 1835 (the very month in which the codicil is dated), she had a conversation with the deceased, and that she paid upon that occasion thirty pounds rent due to Mr. Chadborn, and she inquired of

the deceased whether she had done right in so doing, and that he told her that she had ; that Mr. Chadborn—not Mr. Alderman Wood, and Mr. Osborne, and Mr. Surman, but Mr. Chadborn—will be your brother's landlord after a bit ; that is produced as a recognition of the disposition contained in these papers. [149] Now, if in these papers he had given that part of his property to Mr. Chadborn, this declaration would lead to a probability that he should have done so ; but in these papers there is nothing said about this Drew's farm, in the parish of Bulley, as being given to Mr. Chadborn, more than any other part of the property of the deceased. Therefore his saying that Mr. Chadborn would be her landlord after his death proves nothing as to the disposition of the property contained in these papers of the second and third of December.

But she deposes, upon the thirty-first article, to a circumstance that occurred at the funeral of her husband. This lady is thirty-five or thirty-six years of age, and married an old man, who died at about the age of eighty-eight, and upon that occasion the deceased attended the funeral and conducted it. He kept a small haberdasher's shop with a bank attached to it, and he was in the habit of attending to conduct the funerals of persons when employed to do so. She states that he attended her husband's funeral on the 25th of February, 1836, and that a conversation passed between her and the deceased to this effect : Said the deceased, "Have Mr. Timbrell left a will ?" She replied, "Yes ; and I hope, sir, you have settled your affairs." The deceased said, "I have ; and I have left Alderman Wood and Mr. Chadborn the bulk of my property. They two are my executors." I answered, "I am very glad of that, sir, and that you have thought of Alderman Wood, because he had taken the Queen's part." Now, recollect, this is a conversation passing in the year 1836, and Mr. [150] Alderman Wood's exertions in favour of the Queen must have taken place in 1820, a period of sixteen years preceding this, and I cannot but look upon that style of declaration of her gratification that the deceased had remembered Mr. Alderman Wood because he had taken the Queen's part, with some degree of suspicion, because it is upon that special ground that Mr. Alderman Wood became acquainted with any part of the deceased's family, namely, the deceased's sister first, and then afterwards with himself. It looks, therefore, too much as if a ground had been suggested by something that passed at some other period than the conversation itself ; it is hardly likely that this lady, being at the time of the examination of the age of thirty-six years, should have felt so extremely gratified that the deceased had remembered Mr. Alderman Wood's services which had occurred sixteen years before this conversation took place. I cannot but think, therefore, that but little regard is to be paid to a witness who comes forward to give her testimony in such a form as this, and more particularly when you come to look at the nature and form of the declaration : "Has your husband left a will ?" "Yes, sir ; I hope you have settled your affairs." Now it appears very extraordinary that he should disclose to a tenant in occupation of one of his farms that secret which he was so anxious to preserve, that he would not even permit the paper which contained the names of his devisees and executors to be in the same place of deposit as the other paper in which they were merely described as executors. That he should make this disclosure of his intentions to [151] tenants of his upon these several occasions when they went to him for the purpose of consulting him about their farms, it appears difficult to understand.

There is another declaration spoken to by this witness, in which she states that he had a great regard for Mr. Alderman Wood, and I have no doubt that he had a great regard for him ; she states that in a conversation respecting the property which he had derived under the will of the sister of the deceased, he said, "It will be all in the family after a bit." That is a recognition of a disposition in favour of Mr. Alderman Wood. But when did this sister die ? When did Mr. Alderman Wood get possession of the property under her will ? Why, in the year 1824. It would, therefore, be an allusion to an event long past. The thing is improbable upon the face of it.

This witness also states, upon the 13th article, that the deceased frequently said that Mr. Chadborn was a great friend of his, that he never charged him anything, and that she always thought and expected that Mr. Alderman Wood and Mr. Chadborn would have his property, and that she was quite surprised to hear the contrary. Now that does not at all recognize the existence of this will in any other manner than as shewing that his intention was that Mr. Chadborn and Mr. Alderman Wood should have a part of his property, not that he had disposed of it in equal parts to them and the other persons I have mentioned.

Then there is Mr. Abell, who was an articled clerk to Mr. Chadborn from 1816 to 1822. Mr. Abell states that in the year 1825 he bought a [152] stable of the deceased, and in consequence of some demur which had arisen as to the transfer of the conveyance of this property he threatened to file a bill against him, and in the course of conversation, talking upon this subject, the deceased says to him, "Here is my friend, Mr. Chadborn, he will have a good part of my property after my death, and he will not mind spending a thousand pounds before Bowden shall have it." Now, really, when a conversation in 1825 is brought forward to shew a probability of disposition in the year 1834, and afterwards continued to 1836, it is a very slight circumstance indeed from which to infer an intention to benefit Mr. Chadborn. At this time also the deceased sister, Mrs. Willey, was alive; she did not die till 1833.

A witness of the name of Woodcock, who is postmaster at Gloucester, speaks of the great confidence the deceased had in Mr. Chadborn. He says, "You know he is my lawyer, and makes me no charges; I shall remember him for it. I cannot depose that I have heard the deceased say that Mr. Chadborn would be his principal legatee or his executor, although it was my opinion that Mr. Chadborn would be so." He expected that he would be the executor, and would be the principal legatee in the will; but there is nothing precise in this declaration. It is much too general and indefinite to satisfy the Court that, even supposing these declarations had been made after the date of the will, they had any reference to the papers of the second and third of December.

Then another conversation takes place in 1833 with respect to a part of his property, which there [153] was a dispute about, called Wood's Mill. In consequence of some claim made by a person of the name of Bowden, some difficulty as to the title arose, and he says that he urged the deceased to make his will, or his money would be spent amongst lawyers, which he would not like, and the deceased expressed immediate assent to that observation. (But unfortunately it does so happen that, in this case, whether the deceased liked it or not, a large portion of the property will be spent for the benefit of the lawyers.) He says, "He desired me to send for Chadborn, and we'll see if we can't cut him out of it," referring to Mr. Thomas Wood; who Mr. Thomas Wood is does not exactly appear. I think it is not improbable that that led to the execution of a certain deed, which appears to have been burnt after the death of the deceased by Mr. Chadborn, as it is suggested, under the advice of Mr. Phillpotts.

Now, in the month of March, 1835, Mr. Samuel Hitch, a surgeon of one of the hospitals, has a conversation with the deceased, in which he adverts to Mr. Chadborn as being a very good man, that he never charged him anything for law business; that he had sold some land for him for a thousand guineas an acre, which his father had bought for a few pounds. So far as that goes there is no recognition whatever of the will. In March, 1836, however, he says there was a conversation relating to his farm, with reference to some alteration of his rent; in consequence of some expense he had incurred the deceased referred him to Mr. Chadborn: he said, "I must consult his Honour; that it would be all his Honour's; that his Honour would [154] be a great man some day; but he never made any more specific declarations as to who were to be the principal legatees and executors." That was what occurred upon this occasion; to be sure, nothing can be more loose and indefinite, when it is attempted to sustain the actual dispositions contained in the paper which is headed "Instructions for a Will."

Again, he says, in November, 1834, he referred him to Mr. Chadborn about a farm, and at Christmas, 1834, this witness has a conversation with him with respect to a report which was prevalent in Gloucester as to the deceased's intention to devise his farms to his several tenants; that upon that occasion he told the deceased what he heard, and the deceased said, "Aye, aye, you be a nice man—people will say anything—I have made my will—his Honour knows all about it—it is all his Honour's." This circumstance can have no effect. It would tend to shew, not that he had given his property to these four gentlemen, but that he had given all his property to Mr. Chadborn. It is clear, however, that the deceased's intention was to get rid of the solicitation of Mr. Hitch to have some allowance made in consequence of the money he had expended in the repairs on his farm. That is proved, by the evidence in the case, to have been the usual course pursued by the deceased, who was extremely glad to avoid any references of that kind which were made to him. He goes on to state

that, in the month of March, 1836, he requested him to abate a year's rent: "He referred me to Mr. Chadborn, and he said, go and talk to my friend Chadborn about it; he may do as he [155] likes about it;" and he was desired to pay his rent to Mr. Chadborn. This only shews that the collecting part of his rent and the management of his property were given to Mr. Chadborn, and that he acted as an agent for him.

In the month of April, 1836, it appears there was a year's rent abated; that upon that occasion he had a conversation upon the subject of his farm, and particularly a coppice called the Ash Coppice, which was a part of it; that he was in conference with the deceased about an hour respecting it; that he talked about coming to see it in the following summer, and then he goes on to say, "I must talk to his Honour about it—it would be all his Honour's;" but he did not say who were to be his executors. This evidence shews that the deceased was not making any sincere declaration of what he had done in his will; but he said that, amongst other persons who were to be benefited, or, rather, not amongst other persons, but that the person who was to have the sole benefit, was to be Mr. Chadborn, that "it would be all his Honour's."

Therefore, so far as these declarations have gone hitherto, there cannot be derived from them anything to support the disposition contained in these papers. Still less do they prove that it was ever the intention of the deceased, when he executed the paper of the 3d of December, that the other paper of the 2d of December should form a part of his will. Nothing can be so wide of the mark as these declarations are of that fact. They refer to persons who were, as he said, to have the whole of his property, which was by this will to be equally shared by them with other persons, and they have nothing [156] at all to do with the dispositions contained in the paper headed "Instructions for his Will."

There is another witness of the name of Sutton, a respectable gentleman, who came to reside at Gloucester in the year 1830, and who appears to have been upon very intimate terms with the deceased. He says the deceased entertained a high respect for Mr. Osborne, who was an assistant in his business for between thirty and forty years, and that he often expressed himself in terms of high approbation of him, saying, "Jacob is an honest man, and I will leave everything to him." That is a strange declaration to make, for he had about the same period of time intimated to those other persons that it would be all his Honour's—that is, Mr. Chadborn's; that Mr. Chadborn or that Mr. Alderman Wood would have the greater part of his property. But Mr. Sutton states that he said, "Jacob is an honest man, and I will leave everything to him;" and he frequently repeated those expressions within the last two years of his life—that is, from 1834 to 1836—that he would leave everything to Mr. Osborne. Now, to be sure, if this had any reference to this paper, by which he has left his property to four individuals, it would shew at least that he did not recognize it as an existing intention, but that he meant to alter it, and, at all events, that he meant to leave everything to Mr. Osborne, and not to Mr. Chadborn, Mr. Surman, and Mr. Alderman Wood.

Upon the 13th article he says that he very often mentioned Mr. Surman. "He spoke of him in terms of regard—that is, in the manner in which the deceased was wont to express regard. He said [157] that he (Surman) was his nearest relation by the women's side, but that he never heard him express his testamentary intentions respecting him; that he was too guarded for that." Now, I am at a loss to understand what this gentleman means, he having, with respect to Mr. Osborne, declared that he would leave him everything, but that, with respect to Mr. Surman, he was too guarded for that. I do not understand why he should be cautious in mentioning his intentions with respect to Mr. Surman, when he declared them so fully with respect to Mr. Osborne. But be that as it may, there is some misunderstanding on the part of this gentleman in giving this deposition. He could not have meant to say that he was too guarded to express his testamentary dispositions with respect to Mr. Surman when he had declared it so fully with respect to Mr. Osborne. It is immaterial.

But now we come to something which is much more definite, and much more important, with respect to the period in which the declaration was made. He says, upon the 39th article, that in the month of December, 1834, the deceased complained that his bank deposits were diminishing, although, as he said, there was plenty of

property to secure all his customers, as he had proved by a letter, stating the property of which he was possessed, and entering into some particulars of the manner in which that property had been acquired. He could not understand why this diminution of the deposits took place. Mr. Sutton says, "I reminded him that, unless the public mind was satisfied that, in the event of his death, their moneys would be immediately receivable, it would [158] follow that his banking business must diminish, 'notwithstanding the security which his large property afforded.'" He says that upon the first of December, 1834, he was at the deceased's house, and had upon the occasion some conversation with Mr. Surman upon the propriety of the deceased making his will. Mr. Surman said they were anxious that he should make his will; and that, upon that occasion, he proposed to Mr. Sutton to speak to the deceased about it, and that accordingly, at six o'clock upon the same day, he called upon the deceased, and, entering into conversation with him, he told him that he thought it was high time that his will should be made: he says, "Aye, aye, I must;" upon this he dropped the subject, and soon after took his leave. He says he made a note of this visit on the 2d of December. Upon the 4th of December he says, "I again called on the deceased, and going with him into his parlour I reverted to the subject of making his will, rather, as I believe, hinting at it than mentioning it in direct terms; the deceased rapidly comprehended me, and said, 'I have settled my affairs—my debts will be paid when I die.'" That is the expression which the deceased made use of. Now, how does this recognize anything in the shape of paper (A)? It might be said to be a recognition of paper (B), which had been executed on the 3d of December, but how is it to have reference to paper (A), which is "instructions?" Does that go to prove that it was his intention that this paper should form part of his will?

What is the impression made upon the mind of Mr. Sutton? It was said that the impression upon [159] the mind of the witness is nothing, that the Court only wants to know what the deceased said; but unfortunately the Court can scarcely ever get from witnesses the precise words made use of upon particular occasions. He says, "The impression made upon my mind was too powerful to be forgotten. It struck me as remarkable that he did not say that he had made his will; he only said that he had settled his affairs, an expression which," he says, "struck me forcibly." He goes on to state, "The impression made on my mind by what the deceased said on the fourth of December, namely, 'I have settled my affairs, my debts will be paid when I die,' was that he had not made a will, that is, a will by which he had bequeathed his property in the way of legacy." Therefore, there is here no recognition of this will of the second of December, but only a general recognition that he has made his will, and that his debts will be paid when he dies, which is as well satisfied by the will of the third of December as it would be by reference to that of the second. I do not think, therefore, that the evidence of Mr. Sutton goes further than to shew that, at this time, the deceased declared to him that he had settled his affairs, and that the debts would be paid; and this with direct reference to the cause which had led to the diminution of the deposits in his banking concern, namely, the apprehension that if it was known that he had not made his will some apprehension might be entertained that the money would not be forthcoming at his death.

But the witness principally relied upon is a gentleman of the name of Stevens, a paper manufacturer, in partnership with his father, who, in the [160] month of June, 1835, had a conversation with the deceased respecting his affairs generally; and he states that, in the course of conversation, Mr. Chadborn was alluded to, and the deceased said that he had been his attorney, and that he, Mr. Stevens, was recommended by the deceased to employ him as his solicitor. The deceased said, "Mr. Chadborn is my attorney; he has done my business for many years, and has not charged me anything." Upon this I said, "You ought to remember your friend, and put him in a corner of your will;" to which the deceased answered, "Aye, that I have," or "that I will." The recollection of the witness does not serve him to that extent, whether it was "I have," or "I will, put him in a corner of my will;" that being in the month of June, 1835, after the date of the will. That, however, is very immaterial; it is a very loose and a very equivocal declaration of the deceased, not recognizing the contents of the will, or the amount of benefit to be conferred upon Mr. Chadborn, but only that he had or would put him in a corner of his will.

But the declaration upon which the greatest reliance has been placed is to this effect: The witness deposes that early in the month of September, 1835, either the

fourth or the sixth of that month, in consequence of a report that the deceased had not made his will, he said to him that he ought to satisfy people that he had made a will. That he went in consequence of a communication between him and his father as to the probability of the money being paid at the deceased's death, and he went with a letter from his father authorizing him to withdraw the balance from the deceased's hands [161] if he was not satisfied that he had made his will. He says that he told the deceased that he ought to satisfy him upon that point. The answer of the deceased was this: "I respect your father very highly; do you tell your father that I have made a will, and that I have left my property to four individuals," or to "four good men." Now here he is coming nearly to the contents of this paper of instructions; he does not name the whole of those four gentlemen, but he says, "They are my executors, and they will pay you and your father, and every one else," or words to that effect. The deceased, as one of his executors, said, "Two of them are Alderman Wood and Jacob."

Now, that certainly does go pretty precisely to the contents of the will. But it must be recollected that it is a declaration standing alone, the only one made to any of the witnesses in which a reference is made to four persons, as sharing in his property, and with reference to an expression which is made use of, and which is said to have fallen from the deceased at the conclusion of that conversation, when he said, "Two of them are Alderman Wood and Jacob; I am much more composed in mind since I have settled my affairs;" I think that is hardly referable to a will which had been made in December, 1834, this taking place some nine or ten months after, namely, in the month of September, 1835. I cannot but think that there is some reason to suppose that the deceased, in the intermediate time, was referring to some other document which he had made. It was a much more natural observation to be made by him with reference to an instrument recently executed than to one made [162] nine or ten months before. And, supposing that the deceased was at the time contemplating any disposition of his property different from that which he had made by this former paper, then this declaration, that he was much more composed in mind since he had settled his affairs, would have much more direct reference to that than to a paper which was made nine or ten months before. Considering the report which prevailed, that he had not made his will, and the desire which he had to satisfy persons that he had, and that their money would be forthcoming, and that persons were appointed who would pay any demands upon his house, this does, I think, rather look like an endeavour to get rid of importunity, and to satisfy the minds of his customers without acknowledging any direct and positive act as having been done by which that object could be accomplished; and I think it does not at all necessarily support the supposition that he had given his property to the executors for their own use and benefit, but that he had given the management of his property to persons who would pay his debts after his decease, and satisfy any demands upon his house. This is a single declaration, whatever may be the effect of it, made by a man, evidently an insincere man, wishing to lead persons to believe that everything was done that was necessary for their benefit and advantage. It was observed by the counsel, in arguing this case, that even what he had done was rather with reference to his own convenience and his own profit than with a desire to benefit those to whom he was speaking; and it is impossible to place such reliance upon the evidence of one single witness, under these [163] circumstances, as to hold that that is sufficient to establish this paper as, in the opinion of the deceased, an existing and operative document, forming part of his will.

There are some other declarations which are of minor importance. Those to which I have referred are the great strength of the case on the part of the executors. These are the declarations upon which they most rely for the establishment of their case, for the paper itself does not purport to have any other connected with it as forming part of itself. The evidence negatives the publication of this paper as part of the will, and therefore it is only by declarations and by recognitions that they can establish that case which they have set up, namely, that paper (A) is entitled to probate, as forming part of the will of the deceased.

In the month of March, 1836, Mr. Need, who was a tenant of the deceased, enters into conversation with him, apparently for the purpose of eliciting his intentions with respect to the disposal of his property after his death. Now, it is remarkable that Mrs. Davis, Mrs. Timbrell, and Mrs. Williams all make these inquiries of the deceased,

and the deceased answers them without the least hesitation and reserve—such a person will have a part, and another person will have a part. There was no concealment on the part of the deceased, and it is extraordinary that if these declarations were made to these parties there should be any doubt whether the deceased had made his will or not, for his object was to let the world know that he had made a disposition of his property. Mr. Need goes on to say, “I asked him in so many terms what he [164] meant to do with his landed property;” Mr. Need was his tenant; I presume that he had heard some intimation that he might have some part of that property which he occupied, “as I had heard that some of his tenants were to have some part of it, I said that I hoped that he would leave it so as to do good;” and the observation which the deceased makes is this, so late as the month of March, 1836, a very short period before his death, that Mr. Surman would have part of it, and Mr. Chadborn would have part of it; Mr. Chadborn had done his law business for many years, and that he supposed that he must leave him part of his property. The deceased spoke in praise of Mr. Chadborn and Mr. Surman, and said he would have part of his property. That is the utmost extent to which this gentleman goes—that he would have part of his property.

These are the principal declarations and supposed recognitions of this will which are spoken to by the witnesses examined on the part of the executors; and it appears to me that they fall infinitely short of that which the law would require to repel the presumption arising from the execution of a paper of posterior date to that of the instructions for it.

Some witnesses, however, examined by the propounders of the codicil, speak to certain declarations made by the deceased. One of them is Mr. Stanley, who, in the spring of the year 1835, has a conversation with the deceased on the subject of his will. He tells him that he has made his will, and that his business would be carried on by those in the shop. The question was—How is the business to be conducted? How am I to assure my cus-[165]-tomers that they will be paid after my death, in order to prevent a further diminution of the amount of deposits? Accordingly he says, “My business will be carried on after my death by Surman and by Jacob.” No allusion is made to Mr. Chadborn or to Mr. Alderman Wood as being executors, either for their own benefit or for the purpose of carrying on the business, but Surman and Jacob are the two persons who he says are to carry on the business.

Again, there is a person of the name of Webb, who states a conversation with the deceased a week before his death; that he said to the deceased, meeting him in the garden, “Sir, I have heard that you have made your will, and given all your property to three or four persons.” The observation which the deceased makes is, “Who told you so?” He does not say that he had done so; “Well, if I go first, I think you will find that I have given satisfaction;” and that is the utmost extent to which that declaration goes. He merely says that there was a general impression at his death that he had left his property to those four executors, and very probably it was so; for it was the interest of the executors that that report should obtain as much circulation as possible.

I have already adverted to the evidence of Mr. Daniel Smith, with respect to the probability of a disposition in favour of those persons. Mr. Smith does not speak to anything like a recognition of these papers. He says that the deceased possessed great confidence and regard for Mr. Osborne and Mr. Surman, and also Mr. Alderman Wood and Mr. Chadborn, and that he was not surprised that [166] he had left his property to those four individuals, but that he was surprised that he had left all to them; and, considering the vast extent of property of which he was possessed, it must have been a matter of surprise to the inhabitants of Gloucester that he should have left the whole of his property to them.

Then Mr. Charleton, the master of the Blue-Coat School of Gloucester, also speaks of what was the impression at Gloucester—that it was considered extremely probable that Mr. Chadborn would benefit considerably under the will of the deceased. “It certainly would have very much surprised me if he had made a will without therein giving some considerable benefit to Mr. Chadborn.”

These appear to me to be the only declarations which can by any possibility be considered as affording a ground for suggesting that this paper (A) was recognized by the deceased as an existing and operative instrument. Now it is to be observed, with respect to all these conversations, that, with one exception only, he never mentions

all the executors together. Sometimes it is that Mr. Chadborn is to have it; sometimes "Chadborn and the alderman;" sometimes "John and Jacob"—that is, Mr. Surman and Mr. Osborne; sometimes that it is "all his Honour's;" sometimes that "Mr. Chadborn would have the greater part of his property;" sometimes it is that "Mr. Alderman Wood and Mr. Chadborn are to have the main of the property; they two are my executors;" and at other times that "Mr. Surman would have part of the property, and Mr. Chadborn part." They are all loose and very vague declarations, with the [167] exception of that one made to Mr. Stevens, which is more precise and definite, but still not sufficient to satisfy my mind as amounting to a recognition of that paper as a subsisting instrument.

These, and the rest of the declarations in the case, appear to me to shew rather that the deceased had not made up his mind as to the appointment of executors, or the final disposition of his property. They shew that his mind was vacillating; that he was weighing what was right and proper to be done; that he found a great difficulty in determining how to dispose of that vast property which he possessed, which weighed upon his mind and prevented his making his will in 1831, 1832, and 1833, when he was in communication with Mr. Horner, the clerk of Mr. Chadborn. The property, he said, was so large that he did not know what to do with it, and upon that occasion he offered his sister a part of his property; and there seems no reason why the same difficulty which then existed in his mind should not have prevailed up to the time of his death, and thus have prevented him from making a final disposition of his property. It is plain that, in 1832 and 1833, he had not made up his mind that the bulk of his property should go to the persons whom he named as his executors, though he might intend to give them considerable portions of it, to provide handsomely for them, but still the very extent of the property was that which induced hesitation and made him unwilling to execute his will.

It appears also, in the evidence of Mr. Higham, a very respectable witness, who has been produced upon the condidit, that he urged the deceased to [168] make his will, and that the deceased at that time put it off upon the ground that he had lost two wills, and that when he found his will he would make another. It appears that he required to be urged on to make a disposition of his property; he could not finally make up his mind how to do it; he vacillated from day to day as to the manner in which it should go; and if instructions were given on the 2d of December it is impossible, from the manner in which the transaction was conducted, to have any explanation of what passed between him and Mr. Chadborn, because Mr. Chadborn was the writer of the instruments, both of the 2d and of the 3d of December.

Therefore I am not satisfied in my own mind that the deceased did intend that this paper of the 2d of December should form any part of his will; still less am I satisfied that the presumption arising from his having executed a subsequent will disposing of the whole of his property is repelled; nay, I am very much inclined to think that all the circumstances, when taken together, rather fortify than weaken the presumption of law, namely, that the execution of a will of later date does supersede the instructions for that will. Nor do I think at all that the case of the executors is strengthened by the means which have been resorted to to facilitate the obtaining probate of this paper. It argues in my mind a diffidence of their own case. It shews that they did not dare to trust to the cross-examination of the witnesses as to the publication of the will at the time of the execution. It shews that their feeling was that though it might have done very well to have trusted to the evidence of those wit-[169]-nesses in the deposition in chief, coupled with the appearance of the papers, yet that they had a diffidence in their own case, by attempting to fortify it by an alteration in the condition, character, and situation of these papers at that period of time, without any communication with the deceased, and when communication with him was rendered impossible.

Upon this part of the case, therefore, I am of opinion that the executors have failed in establishing paper (A) as a part of the testamentary dispositions of the deceased; I consequently pronounce against the validity of that paper. Paper (B) depends on very different considerations. That paper is proved to have been the act of the deceased. It is proved to have been executed by him after having twice carefully perused it. It is executed by him, and is found in his own custody, in his own possession; that paper, therefore, would be entitled to probate if it were not that at present there are no parties before the Court who have an interest in propounding it,

because the whole interest of the executors depends upon the establishment of the paper of instructions of the 2d of December; and as the Court is of opinion that that paper cannot be supported as part of the will of the deceased, the interest of the executors is disposed of, and there is, therefore, no person who has an admitted interest before the Court, who is entitled to propound that paper, or who would be entitled to have administration with the will annexed.

It is true that the interest of Mrs. Goodlake has been admitted by the executors; but they are now no longer parties to the cause. The admission [170] would not prejudice Mr. Hitchings, and Mr. Hitchings might choose to deny her interest. Mr. Hitchings is not admitted before this Court as the next of kin of the deceased by any person whatsoever. He is admitted as contradictor to the will by the executors, but, as I have said, they are no longer parties—they are no longer interested to sustain that opposition to this paper which is afterwards propounded as a codicil. It does seem to me that the Court must content itself, therefore, with pronouncing against the validity of paper (A), but that it must withhold any expression of its opinion with respect to paper (B). It is not necessary that the Court should pronounce further at present.

To the observations I have made there is one which I wish to add, and it is with respect to the declarations and recognitions of the paper, as made by the deceased, by mentioning all four of the executors at one time. Now, I have adverted to the evidence of the witnesses in the cause, but I have not adverted to the answers of Mrs. Goodlake. I thought that it would be more convenient to reserve that for separate observation, because I do not intend to lay any stress whatever, or to place any reliance, upon the answers of Mrs. Goodlake, which have been made in this cause. It is true that, in addition to what is spoken to by Mr. Stevens, as to the four persons named as executors, Mrs. Goodlake states that upon the day before the deceased's death, having come to attend upon him in consequence of his sickness—that is, upon the Monday before his death—she had some conversation with him respecting the disposition of his property, and that upon that occasion he referred by name to those, [171] four persons as those who were likely to manage his property, speaking of them in terms of approbation, and mentioning all their names, and therefore as recognising, to a certain extent, at least, the disposition contained in this paper of the 2d of December, 1834. But, as I have already said, I must decline to pay any regard whatever to the answers of Mrs. Goodlake, as against any other party but herself: she has a right, if she thinks proper, to sacrifice her own interest by making, as against herself, admissions to any extent she may think proper; but, under the circumstances in which she stands with reference to these proceedings, I cannot consider her in any other light than as, in point of fact, a party with the executors to support the will propounded by them. She is, undoubtedly, in name an opponent; but, looking at the circumstances to which I have adverted in the early part of my observations, and looking at the affidavit of Scripts, as attested by Mr. Surman Cox, who is the solicitor of her son, Mr. Surman, in these proceedings, and who is in communication with the solicitor for the other parties in the cause on behalf of the executors; looking also at the execution of the proxy and the admission of her interest, without any special proxy from the parties authorising such an admission; looking also at the fact that she has not examined a single witness, or addressed a single interrogatory to any of the witnesses who have been examined in the cause, I say, looking at all the circumstances in the cause, I am of opinion that she is not a real opponent to the will. It was said, in the course of the argument, that there was no doubt that she had a fellow feeling with the execu-[172]-tors in the cause. One of the witnesses, I think Mr. John Kendall, says that he has no doubt she is not opposing the executors in their endeavour to obtain probate of this will; I, therefore, consider her as, in point of fact, identified with the executors, and therefore I cannot place any reliance upon her answers, not meaning at all to say that she is perjured in the admissions she has made, but declining to enter into the inquiry whether she has made such declarations or not—I will not prejudice either the case of the legatees under the codicil by any declarations she may have made, and still less will I prejudice the interests of Mr. Hitchings, the other next of kin, by taking her answers and her admissions as operating against him. To admit the answers of such a party to be read against any other individual would be unjust. There is, in point of fact, no means by which the real truth of what did occur between her and the deceased can

be elicited. There is no mode of cross-examination of this party; she is taking part apparently in opposition to the will, but in fact she is supporting and doing all she can to serve the cause of the executors. Under these circumstances, therefore, I am disposed to say that I will not enter into any inquiry as to what those declarations which were made to her by the deceased were, or what effect they ought to have. I reserved these observations to the latter part of this branch of the case, as affording the reason why I have not adverted to it before I came to the conclusion to which I have arrived with respect to the validity of the will.

Having thus expressed my opinion as to the two papers which are propounded as together containing [173] the will of the deceased, I now proceed to consider the remaining part of the case, namely, the effect of the evidence in support of the paper propounded as a codicil. Its contents are certainly somewhat unusual with reference to the amount of the property disposed of, as compared with codicillary dispositions in other cases; but there is nothing in the codicil so startling in the amount of the bequests as to raise any great degree of astonishment; because, considering the situation of the deceased, how distant the relations were who had any claims on his property, it was probable that he would select those particular friends and companions for whom he had the greatest regard. The codicil is as follows:—

“In a codicil to my will, I gave to the Corporation of Gloucester 140,000l. In this I wish my executors would give 60,000l. more to them, for the same purpose—as I—have before named. I w^od also give to my friends, Mr. Phillpotts, 50,000l., and Mr. Geo. Council, 10,000l.; and to Mr. Thomas Helps, Cheapside, London, 30,000l.; and Mrs. Elizabeth Goodlake, mother of Mr. Surman, and to Mr. Tho. Wood, Smith-street, Chelsea [“each” interlined] 20,000l.; and Sam Wood, Cleveland-street, Mile End, 14,000l.; and the latter Gentl Family, 6,000l.; and I confirm all other bequests, and give the rest of my property to the Execs, for their own interest.

“Gloucester City Old Bank,

“JAMES WOOD.

“July, 1835.”

[174] The paper is burnt at one corner and torn in two places; but it is not deficient in any part of the writing. The amount of property bequeathed by it is two hundred and ten thousand pounds, and the one hundred and forty thousand pounds it recites as having been given to the Corporation of Gloucester by a former codicil (which is not forthcoming) would make the whole three hundred and fifty thousand pounds—a very large sum undoubtedly, with reference even to the deceased's property, being nearly one-half; but there is nothing on the face of the paper which, in this respect, should render it a subject of suspicion. It is very possible, if another codicil was executed, the names of other parties would have appeared among the legatees—Mr. Higham, for instance, the omission of whose name in this codicil is one of the grounds of suspicion in respect to its genuineness in the mind of Mr. Sutton. But there is no trace in the evidence of such a codicil having been executed; and, therefore, before the Court can enter into the inquiry by whom that codicil was destroyed, it must be satisfied that such a codicil was once in existence, of which there is no proof whatever, beyond what appears in this paper. The paper itself was produced in a very mysterious manner. It was sent through the threepenny post to Mr. Helps, and communicated to the executors at the earliest period. And although very large rewards have been offered, the writer and transmitter of the letter has not thought proper to come forward. The case, therefore, labours under a burden which it is difficult to remove, of having no person to give any account of its execution by the deceased. The letter which [175] accompanies the paper contains undoubtedly a charge against some person or other of a most atrocious character, namely, an attempt to burn the paper, along with others. Who are the persons alluded to in this letter the Court has no means of exactly ascertaining; but from the nature of the plea given in it is impossible not to see that the executors, or some or one of them, or some person or persons connected with them, and acting under their directions, are supposed to have some knowledge, at least, of the alleged destruction, if not themselves the immediate agents. The Court will not stop to inquire whether or not it is in a cancelled state; or, if it be so, whether it was the act of the testator himself; because there is no clue to this fact, and the Court must be satisfied, in the first place, that the paper was ever executed by him; and, secondly, if it was so executed, how it was obtained from his possession and treated so as to give it the appearance it now presents.

The testator died on the 20th of April, 1836; the large property he possessed, and the reports which prevailed in Gloucester as to its disposition, created a great sensation and interest in that city; a great number of inquiries were made as to whether there were any other testamentary papers discovered or forthcoming. On the receipt of this paper an appointment was made, and it was communicated by Mr. Helps and Mr. Wilde, his solicitor, to the legal advisers of the executors Mr. King and Mr. Phillpotts on the 10th of June, and it was deposited in the registry of the Court on the 13th. Mr. King and Mr. Phillpotts, as was natural, immediately communicated the circumstance [176] to the executors, who met in London on the 13th (the day on which the paper was deposited in this Court), and it was inspected by them. The same day a communication was made to the Mayor of Gloucester; and another letter was written to him on the 17th of June; and advertisements were inserted in the papers, offering a large reward (ten thousand pounds) for the production of the codicil referred to, and also for the writer of the paper enclosing the codicil of July, 1835.

It must be admitted that those who undertake to propound such a paper have a difficult task to perform; for the factum of the instrument has nothing to depend upon but the evidence of handwriting; and it is admitted that the Court cannot pronounce on such evidence alone for the validity of a testamentary paper; in all cases there must be something to connect it with the supposed testator. The principles upon which the Court acts with respect to such papers have been repeatedly laid down, and are to be extracted from various cases: *Machin v. Grindon* (2 Lee's Cases, 406), *Saph v. Atkinson* (1 Add. 213), *Crisp and Ryder v. Walpole* (2 Hagg. 513), *Rutherford v. Maule* (4 Hagg. 213), and *Bussell v. Marriott* (1 Curt. 9). The principle is this, that it is a rule of law absolutely binding on the Court that evidence of handwriting alone is not sufficient to establish a testamentary paper (I am now quoting the words of Sir John Nicholl in the case of *Crisp and Ryder* (2 Hagg. 539) without something to connect the act with the deceased, and this rule is founded on the facility of imitating handwriting so nearly as to deceive persons who [177] are best acquainted with that of the deceased; it is, therefore, required, either that it should be found in the deceased's repositories at his death (it unfortunately happens, in the present case, that the repositories of the deceased were not very secure places), or that there should be some direct recognition by the deceased, or some other circumstance of strong probability, leaving no moral doubt on the mind of the Court. This rule must be binding on the Court; for though the legatees are under some disadvantages which have not occurred in other cases, and though the manner in which the attempt is alleged to have been made to destroy this paper, and in which it was preserved, may induce the person who transmitted it not to come forward, the Court cannot act on conjecture only, or on any principles which do not apply to every case where the circumstances were of a similar nature.

There are circumstances pleaded in the allegation which are certainly of some importance (supposing the Court could arrive at the conclusion that this paper is the act of the testator) with respect to the destruction of the instrument, and create a distinction in favour of this case, which induced the Court to allow a latitude of plea, namely, that the parties interested in the suppression of this paper (supposing it to be the deceased's act) were in possession of the deceased's house; his papers were in their custody and under their control; they had access to his repositories, both during his lifetime and after his death, and they had, therefore, a full opportunity of destroying or suppressing any papers which they might not wish to see the light; and it was alleged, and is now [178] admitted, that one paper, having something of a testamentary character, was destroyed a day or two after the deceased's death by Mr. Chadborn, acting under the advice of Mr. Phillpotts. The allegation pleads that the legatees had been refused access to the servants in the deceased's house, unless in the presence of an agent of the other parties; and they were not likely, under such circumstances, to elicit any information as to the destruction of this or the other codicil. These and other circumstances led to the admission of this allegation, which, under ordinary circumstances, would not have been entitled to admission. The allegation was, therefore, necessarily, in some respects, what is termed a "a fishing" allegation; the parties had some intimation of what had occurred, but not sufficient information of other facts (which were within the knowledge of the other parties) to enable them to frame their plea so specifically as is expected when the facts are or

ought to be in the possession of the parties pleading. This allegation went to impeach the conduct of the executors, not only with respect to the codicil of July, but also as to the former papers propounded as the will. A responsive allegation was given in by the executors, in which they replied to some of the imputations against them; but other points were left to be explained by their answers.

In this part of the case, as in the other, the probability of the disposition has been discussed at considerable length. The amount of the deceased's property, the absence of any persons in a near degree of relationship to him, the friendship and regard he entertained for certain of the legatees, [179] were strongly urged, and various declarations were pleaded in favour of some of the legatees, and the continuance of friendship and regard for them to the latest period of his life, so as to lay a ground of probability for such a codicil. The allegation also pleaded that the executors, having access to the deceased's repositories, might, as others had done, have abstracted the codicil referred to in this paper of July, and also have got possession of this codicil itself, and might have attempted to destroy it; and this was rendered the more probable, as wills had been on former occasions abstracted from the possession of the deceased, of which he had complained. This is pleaded in order to repel the presumption of law that the paper was destroyed by the deceased himself. The allegation then went on to plead the handwriting of the deceased to be proved by the evidence of persons who had seen him write.

Now by far the greatest part of the evidence which has been taken upon this allegation goes to the question of handwriting: I think no fewer than twenty-three witnesses have been examined upon one side, and nineteen or twenty upon the other, and very long and very numerous interrogatories, some of a hypothetical or of an argumentative nature, have been administered to those several witnesses. I am sorry to say that the result which has been produced by this evidence is that to which the Court has been led upon all other occasions in which it has had the necessity of considering evidence upon controverted handwriting, namely, to place it in such a situation as not to be able judicially to satisfy itself whether the hand-[180]-writing is or is not the handwriting of the supposed testator. It may be true in this case, as has happened in many others, that the preponderance of the evidence upon the side of those who have affirmed it to be the handwriting of the deceased is so great as would justify the Court, if it were called upon to pronounce an opinion one way or the other, abstractedly from all other considerations, in favour of the affirmative, as in the case of *Bussell v. Marriott*, but it is not such as to carry judicial conviction that this paper so propounded is the act of the deceased himself. It must be established by some other circumstance than the mere handwriting that the act proceeded from the deceased.

It is certainly not the intention of the Court in this case to enter with any degree of minuteness into the examination of the evidence which has been taken upon this point, because it would not in this case, as it has not done in any other case, lead to any satisfactory result, and also because the learned counsel who argued this case on behalf of their several clients appear to have considered it their duty to refer only in a somewhat cursory manner to some of the leading witnesses on one side and the other. And another reason why the Court abstains in this particular case from doing that, is the great interest which has been excited on behalf either of the will or of the codicil in question, which renders it almost impossible for the witnesses on either side to come forward totally unprejudiced and unbiassed. But I must say that in this case there is, on the part of those who sustain the affirmative side of the proposition, this favourable circumstance, that they do not appear to have [181] entered into much discussion with each other as to the particular points on which their evidence should be grounded. They have a prejudice undoubtedly on their minds in favour of the instrument; they believe it to be, and I have no doubt conscientiously believe it to be, the act of the testator himself, and they depose almost uniformly in concurrence with that belief and with that impression upon their mind. But still that impression is created in a considerable degree by the circumstances of the case, or from thinking that the paper itself is a natural disposition as connected with the individuals purporting to be benefited by it, or from some other circumstances which induced them to believe that it is the act of the testator himself.

Upon the other side I must say that the same degree of avoidance of discussion, as between the witnesses themselves, does not appear to have been practised, for almost all those witnesses have come up to inspect this paper with their minds already

impressed with the notion that it was, as Mr. Chadborn described it, an atrocious forgery; and, with respect to many of the witnesses, an impression had been made upon their minds by the exhibition of what was said to be a fac-simile copy of this codicil, made by persons employed upon their behalf, and further than this, by meetings together of those persons who were called upon to depose to the handwriting, discussing the minute particulars in which it was supposed to differ from the deceased's general character of handwriting, pointing out to each other the difference of formation of certain letters, as compared with some letters in other papers [182] written by the deceased himself, and upon those minute particulars many of the witnesses found their belief that this is not a genuine instrument but a forged one.

Under these circumstances the Court can place no reliance upon the evidence of persons so differing amongst themselves, who have formed this opinion after having met together to discuss the particulars in which they have, as they fancy, discovered discrepancies; having, as I have already stated, had their minds impressed in the first instance with the notion of the invalidity of this paper by hearing it said that it is a forgery, and also by the exhibition of this fac-simile copy, from which they took their first impressions as to the handwriting not being that of the deceased.

Now, with reference to the particulars in which they say this differed from the handwriting of the deceased in other documents alleged to be in the handwriting of the deceased, some of them say that his usual way of forming the letter (C) for the word city, as in "Gloucester City Old Bank," was not, as it appears upon the face of this codicil, with a loop to the (C) before the letter (i), but that it was continued to the next following letter, the vowel (i). That is one ground upon which the Court is asked to consider that this is a forgery, that in the words "Gloucester City Old Bank" the letter (C) is formed with a loop or bow at the end, separated from the vowel (i) which follows it; whereas they prove, in many of the documents exhibited, that the usual course of the deceased was to connect the letter (C) with the other letter without making any loop.

[183] Another instance is, that the deceased was in the habit, in signing his name, of making the final (d) in his name with a straight stroke turned up at the bottom, whereas in this codicil, where he is leaving a sum of fourteen thousand pounds to Mr. Samuel Wood, he finishes it with a turn or a loop at the end. And, again, another objection is, that the lines are more or less uneven, and there are many other particulars adduced of that description. But one principal ground of difference which was relied upon was, that in the word "executors" he has made a cross for the (x), whereas his usual practice was first to make the letter (s), and then to cross that letter (s). Another objection was, that he makes use of a different formation of the letter (e) in some part of these papers, and that that is to be a ground of suspicion of forgery. But, upon looking at the books which have been brought into Court, very reluctantly, by the executors, it appears to me that most of these objections are very satisfactorily removed.

It appears by one of the documents which is annexed to the deposition of Mr. Sutton that the final (d) to the word "Wood" is in that made with a tail; his usual mode of signature was by an upright stroke. In that very letter the formation of the (e) is different in the same word, and with respect to the formation of the letter (C) in the word "city," there are three or four instances in those books of the same form and shape as the letter (C) contained in this codicil. It shews how impossible it is for the Court to rely upon any minute differences or discrepancies of this kind, [184] more particularly when all the witnesses concur in stating that they never recollect to have seen a person whose handwriting differed so much as this gentleman's did in the different instruments he has executed, and the different ways in which he has signed his name, so as to render it extremely difficult for them to say whether such a particular signature is, or is not, the handwriting of the deceased.

With respect to the word "executors," upon looking through a vast number of papers which were copies of wills made by the deceased, which are in his handwriting—wills of his relations and friends—the Court does find that the (x) is generally made in the manner represented on behalf of the executors, yet that there are one or two instances at least in which it is made in the same form in which it appears on the face of this instrument, namely, by a cross, instead of originally forming an (s), and afterwards making a stroke to convert it into the letter (x).

There are also two witnesses who state that as much unevenness is to be discovered

in the handwriting of the deceased as is apparent upon the face of these papers, and that the deceased, when he had once began to write in a particular direction, afterwards continued to write in that direction. It is impossible for the Court to form a decided opinion upon a circumstance of that description, unless it was assured that it had all the documents that were ever written by the deceased, or at least so many as to satisfy the Court that he never deviated from that particular method. It is impossible for any [185] person to form a decided opinion whether this is a circumstance which ought to create suspicion or not.

It is also stated, as an objection founded upon the evidence of Mr. Daniel Smith, a witness in support of the codicil, namely, that the figures which the deceased had used upon this occasion were contrary to his usual custom, for that he was never in the habit of expressing large sums by figures, but that he always expressed them by words at length, and he says that it was the advice which he always gave to persons who communicated with him never to express large sums by figures, because they were so easily altered. But it appears, upon the face of these proceedings, in the letter to Mrs. Raikes, which is annexed to the allegation of the legatees propounding this codicil, that he had three or four times over expressed by figures certain large sums, for instance, "60,000l. to his two daughters," and "10,000l. a-year in landed property," though he had, in the same letter, expressed one hundred thousand pounds in words at length, and there is also the expression "some hundred thousand pounds." This shews that he did not invariably adhere to that practice, though he might, on particular occasions, in papers which he sent out of his own possession, have expressed by letters and words that which he, in other instances, expressed by figures.

But there is another circumstance which I think would weigh very much in this case if that had been his ordinary habit, namely, that there are here large sums to be repeated no less than seven or eight times over. This was a paper which was in-[186]-tended to be kept in his own possession, assuming, as I now do, that it was the act of the deceased himself; and therefore I think it was natural that, upon this occasion, he should have expressed those sums by figures, and not by words.

Some other observation was made upon a circumstance appearing upon the face of the paper, namely, that there were greater spaces left for certain words than those words would naturally occupy; and that consequently the words were extended so as to occupy a greater space than the same word would have occupied if it had been written at one and the same time with the rest of the instrument. Therefore blanks were left for certain words to be inserted, and, amongst others, was pointed out the word "more," which follows the gift of sixty thousand pounds to the Corporation of Gloucester. All those have been pointed out with great particularity by the witnesses who have been examined in support of the genuineness of the instrument, but they all concur in stating that though this does appear, and though there may be certain discrepancies in it, yet that they are so satisfied that it is the handwriting of the deceased that their opinion is not shaken by any of those distinctions, and that they still remain, as they were at first, of opinion that this is the handwriting of the deceased; and consequently, as far as their belief would go, tending to establish the genuineness of the instrument.

But it does not depend upon the evidence of the witnesses who have been examined in support of this instrument; because there are many other of the witnesses who have been examined who, when [187] they come to be pressed upon the interrogatories, admit that the signature to this paper is infinitely more like the deceased's usual signature than the signature to paper (A), which is the paper of the second of December, 1834. There is the evidence of a gentleman of the name of Fulljames, which goes particularly to that effect; so far is he impressed with the notion in favour of it that he says, if the paper of the 2nd of December had come from a questionable quarter he should very much have doubted whether the signature was that of the deceased himself; and almost all the witnesses who have been examined, and who express their conscientious belief in their examination in chief as to the want of genuineness of this signature and of the body of this instrument as being the handwriting of the deceased himself, are compelled to admit, when they refer to certain signatures of the deceased which are admitted to be his, and which are annexed to the allegation or the interrogatories, more particularly when they refer to a book which has been brought into Court, called the Claim-Book, upon the authenticity of which there can be no doubt whatever, they are all bound to admit, and do admit to the

full extent, that there are an infinitely greater number of signatures which resemble the signature to this codicil than that of papers (A) and (B).

Now to advert to one or two of those gentlemen who have been examined upon the other side to prove that this is not the handwriting of the deceased. It has always been an observation in this Court, and necessarily so, being founded in reason, that evidence to prove that the handwriting [188] is not the genuine handwriting cannot have the same weight attributed to it as that which goes to maintain the affirmative, that it is the genuine handwriting of the deceased, for reasons which it is not necessary for the Court to advert to, but which are stated in the cases. Here is a gentleman of the name of Layton, who is called in on behalf of the executors to examine the codicil which is now propounded. He is an engraver, and is called in by Mr. Kentish, who is also an engraver, employed by the executors to make a fac-simile copy of this instrument. I have already stated, in the course of the arguments on the hearing of this cause, that I hope such an expedient will never again be resorted to, and I must again impress it strongly on the minds of the registers (though I have no doubt they would observe what was pointed out to them upon the former occasion), that it is extremely improper that a paper, and more particularly a paper of this description, should be placed in the power of the parties so as to enable them to make a fac-simile copy; because it may very materially alter the paper itself; it may lead to the abstraction and the destruction of the instrument, because some time must necessarily be occupied in making a fac-simile copy of it upon the transparent paper which is used for the purpose; and, above all, I think it is very injurious to the purposes of justice, because it is impossible to suppose that a person who has seen the fac-simile copy, which evidently must be more stiff and formal than the original, can give a perfectly fair and unbiassed opinion. They say that the reason why they believe this is not genuine is because it is more stiff and formal than [189] the handwriting of the deceased. It is impossible, therefore, that persons that had such fac-simile copies exhibited before them, being necessarily different in appearance from the original itself, having that first impression made upon their minds, could come forward to pronounce a fair and unbiassed opinion upon the genuineness of the instrument upon which they were called upon to pronounce.

There is Mr. Layton, to whom I have already adverted; he has examined this paper very minutely—I do not go into the particulars of his evidence, but merely to state the substance of it—he says he considers this paper to be an imitation—one of the best imitations he ever saw. Here is a gentleman, equally skilled with others who have been called upon the same side, who differ from him, and who have no hesitation in saying that they believe it to be, and I have no doubt they sincerely believe it to be, a genuine instrument.

What reliance can the Court place upon evidence of this description, arising upon a comparison of handwriting? What reliance also can be placed upon the evidence of witnesses who come also to speak to a comparison of handwriting, who come from the post-office or from the bank, and whose business it is, in the common course of their engagements, to assist in the detection or to endeavour to detect forgeries? Here are two or three gentlemen, produced from those offices, who declare this paper to be a forgery in their opinion. There are other gentlemen of the same department who declare that they believe it to be a genuine instrument, and that they would have acted upon it in [190] their several departments if it had been presented to them, they knowing the general signature of the deceased. Where witnesses of this description differ, how can the Court act upon the evidence? It is impossible, therefore, to doubt the soundness of the principle laid down in this Court, that the comparison of handwriting is the most unsatisfactory of all unsatisfactory evidence to proceed upon. It only shews the fallacy of the grounds upon which gentlemen act in discovering forgeries and impositions, though, in the ordinary course of business, they may be sufficient to put the parties upon their guard against acting upon those signatures produced before them.

The only evidence produced upon this subject, upon which the Court would be inclined to rely, according to the principles to be observed in this Court, is the evidence of the witnesses who were acquainted with the manner and character of the handwriting of the deceased, from having seen him write upon more or less frequent occasions. But still this evidence is always liable to this objection, that it is, after all, mere matter of opinion, and it is proved by many witnesses in this cause, to whom

the interrogatory has been addressed, that so closely may the handwriting of an individual be imitated that it may deceive, not only persons best acquainted with his usual character of handwriting, but it may even deceive the party whose handwriting it purports to be; and it is a reason why the Court should not have felt quite so satisfied with the bare examination of Mr. Higham and Mr. Hitch to the paper of the 2d of December, 1834.

Now the witnesses, as I have already stated, are [191] very numerous on both sides. They are almost equally numerous, having almost equal opportunities of seeing the deceased write, and thereby becoming acquainted with his manner of handwriting, and there is a great deal of difference of opinion between the witnesses. Here is Mr. Higham, who is examined upon the *conduit* to prove the handwriting of the deceased to the paper of the second of December, which he says he has no doubt is the deceased's. Mr. Higham, in answer to the twentieth interrogatory upon the *conduit*, says, in respect to this codicil which is shewn to him, "I hardly know what answer to give when I am asked in whose handwriting it is; it is so like James Wood's, the deceased, that if it had been presented to me, without any suspicion previously excited, I should have acted upon it; but I have seen it twice before and examined it minutely, and I find some words in it so unlike his writing that I can scarcely believe it to be his, and yet I do not like to express myself so strongly as that, and the truth is, that I cannot say whether it is his handwriting or not, notwithstanding there are some discrepancies about it; part of the flourish of the letter J in the signature is so very unlike." He says it is so like in so many particulars that he does not like to say that it is not his. But why is this? Why, from the impression made upon his mind that this is a forgery; he has been called upon to discover discrepancies between the handwriting of the deceased and the paper exhibited, in order that he might pronounce that this is a forgery. But still he states that, with all his suspicions excited, he does not come to any other con-[192]-clusion than that it is extremely difficult to say whether it is the handwriting of the deceased or not. He says that if his suspicions had not been excited he should have acted upon it, and that is the way in which witnesses ought to come forward—without doubts being excited by the persons in whose behalf they are called upon to give evidence.

Mr. Fulljames I have already adverted to as one of the witnesses who cannot say that he does not believe this to be the handwriting of the deceased. He is called to prove that it is not. He had opportunities of seeing the deceased write, he became acquainted, therefore, with his manner and character of handwriting in a legitimate manner, and he says that though there are discrepancies, which he points out, which lead him to doubt, though not entirely to disbelieve, that the codicil and the endorsement are the deceased's handwriting, yet the conclusion to which he comes is this, that it is a very difficult matter to say whether it is the handwriting of the deceased or not. And I think he is one of the witnesses who says that he cannot dismiss from his mind the mysterious circumstances under which the codicil made its appearance, and, therefore, he has not given his opinion simply from the discrepancies in the character of the handwriting of this paper, as compared with other writings of the deceased, but from the circumstance of the mystery under which this paper made its appearance, which throws a doubt and suspicion upon it.

There are many other witnesses examined against this paper who depose to their belief that it is not a genuine signature, for different reasons which they assign. But when the Court comes to ex-[193]-amine the witnesses who are produced on the other side, they have no doubt whatever about this paper, and they are equally respectable with those upon the other side. Mr. Walker and Mr. Stanley, who, though they are connected with the Corporation of Gloucester, and therefore might be supposed to have some interest in supporting the validity of this paper, are yet not disqualified as witnesses, are produced as witnesses upon this subject, and no objection is taken to them. They appear to have deposed in a manner which is entitled to the attention of the Court. There are the two Mr. Moores also, and the younger of those gentlemen has some doubt as to the endorsement upon it.

Then there is Mr. Poole; also Mr. Smith, to whom I have already adverted as to the general character of the handwriting, who has expressed his doubts upon it, from the circumstance of the deceased having used figures upon this occasion instead of expressing the sums in the codicil given to the legatees by words at length; there

is also Mr. Charleton. But there is another witness who comes from the same banking establishment as Mr. Higham, who had equal opportunities with Mr. Higham of being acquainted with the handwriting of the deceased, namely, Mr. Lawrence, who is a clerk in Sir John Lubbock's establishment, through whose hands the correspondence of the deceased passed, and who had also opportunities, upon some occasions, of seeing the deceased write and sign his name; and he states that he has no hesitation in deposing to his belief that it is all in the handwriting of the deceased.

Looking then at this evidence in the cursory view [194] of it, which is all that the Court, in these cases, can, by possibility, find itself called upon to take, it does appear to me that the result is at last to leave it as a matter of doubt—that the Court cannot safely and with security pronounce upon the question, either for or against the genuineness of the signature, where the witnesses differ so materially from each other. As I have already said, it is here mere matter of opinion—strong—undoubtedly it is very strong, for the affirmative of the proposition; and, as I said in the former case, if the Court were called upon, abstractedly from all other considerations, to pronounce for or against the validity of this codicil, upon the evidence of handwriting, I should feel bound to say that the great preponderance is in favour of the genuineness of the paper; but, fortunately, the Court is not at liberty to pronounce upon any such opinion.

Now, the probability of the disposition was referred to, as in the former part of the case. It is said, on the one hand, that the bequest to the city of Gloucester is extremely improbable, that he hated and detested the Corporation of Gloucester, that though he was a member of the corporation, and was in the habit of attending their public meetings, he was treated with disrespect and neglect, that jokes were practised upon him, and that he entertained so decided an aversion to the members of the corporation that it was the height of improbability that he should have left anything to that body. And then, with respect to charities, it is said that it was quite out of the question that he should ever have thought of giving anything to charities, his father having always told him that to [195] leave money to charities was making a nursery for rogues, for that they were always abused, and that he would never leave anything to charities. On the other hand, there is very satisfactory proof in this case that he had occasionally made declarations of a different kind; that he had made declarations in favour of Gloucester—that he would do great things for Gloucester—that he had not forgotten poor old Gloucester—that he talked of building almshouses—that he talked of building a hospital—and it is in evidence, in such a manner as to leave no doubt of the truth of the evidence, that Mr. Daniel Smith had, in 1823 or 1824, or in the following year, seen a will of the deceased by which he had in fact given a legacy of twenty thousand pounds for the purpose of endowing an hospital at Gloucester, but that the money was not to be paid until after the hospital had been built; but this, it is said, renders the story improbable, that a man should make such a bequest as this, to leave twenty thousand pounds for an hospital, and yet that the money was not to be paid till the hospital was built. But this shews how fallacious all conclusions founded upon such arguments as that are, for it does so happen that in that which is called the Will Book there is a copy of a will of a gentleman of the name of Chetwynd, in the handwriting of the deceased, in the year 1824, by which he had left twenty thousand pounds for the purpose of endowing an hospital, and that the money was not to be paid till the hospital was built.

There is another circumstance arising out of the evidence of Mr. Smith, which is relied upon against the codicil. He states that though he has no [196] doubt as to the handwriting of the deceased, the bequest to the Corporation of Gloucester does, in his opinion, make against the genuineness of the codicil, because he says he thought he had been slighted by the Corporation of Gloucester. He declared that they had used him ill, and that they stood in their own light, and prohibited him from doing what he wanted to do for them; and, therefore, that leads Mr. Smith's mind to a conclusion that makes against the genuineness of the bequest in their favour. It is very true there may have been expressions of that kind; he may have been angry at the withdrawing of the custom of the corporation for supplying the Blue-Coat Hospital with clothing; and he may by possibility have absented himself from the meetings of this Blue-Coat School for some time; but, then, by the books in his own handwriting, it appears that upon several occasions he did, after these circumstances are supposed to have occurred, attend at the meetings of the corporation; almost all their

dinners are recorded in his own handwriting, and the entertainment he met with there, and the articles of which the dinner was composed, of which he seemed to speak in many cases with great glee; and it is proved beyond all doubt that he did, in the year 1835, attend as an alderman of the city of Gloucester; that he rather took a pride in discharging the duties belonging to that office; and as to the slight of having been passed over as a mayor, it appears rather to have been at his own suggestion that he was passed over.

Then again Mrs. Whalley says that in 1825 he talked of building almshouses, and said that he [197] should do great things for old Gloucester. Then in 1836 Mr. Hopkins says that he made a remark, "I have not forgotten poor old Gloucester."

I merely allude to these circumstances in a cursory manner, as they appear to me too slight to place much reliance upon them in support of the probability of this disposition, or as a recognition of the disposition in favour of Gloucester, as contained in this paper. They appear much too slight for the Court to act upon them with any degree of safety; but still less can the Court act upon the declarations which are supposed to be made by the deceased contrary to the intentions thus expressed in this codicil. They carry very little weight with them, they only shew that he was a man of that character, extremely insincere in the declarations which he made, either for or against particular individuals; but certainly they remove all suspicion of the genuineness of this codicil, so far as that suspicion may be supposed to have arisen from the amount of benefit supposed to be given to the Corporation of Gloucester.

With respect to charities, it appears by reference to these books that he was a subscriber to a lying-in-charity; and that the deceased was not very exact in his orthography, for in entering the subscription to the lying-in-hospital it is written "lien-in-hospital," which; therefore, removes any suspicion arising from his having spelt Mr. Counsel's name as he ought to spell the "Council Office" of Gloucester, and in this book it does most frequently appear that "Council Room" is spelt as the name of Mr. Counsel ought to be spelt, with the addition [198] of an l; "Counsell" is the manner in which it is quoted in these papers.

Now with respect to the bequest to the city of Gloucester, is it improbable that, at so late a period of his life, extending to eighty years, he being a native of the city of Gloucester, he having made the greater part of his property in it as a tradesman and banker in that town, his father and grandfather having been inhabitants of that town for many years, is it at all improbable that he should have forgotten at the end of his life the little grievances which he supposed he had reason to complain of on the part of the corporation, and determined to give a part of his large property to that city, in order to relieve, in some degree at least, his fellow-citizens from the burdens which they had incurred from the improvements which had taken place in the city, by the opening of the canal, which seems to have plunged them into debt to a very large amount, and with respect to which an application was made, on behalf of the persons interested in that canal, the corporation or some of the trustees, by Mr. Alderman Wood, for an advance of money upon loan, but which the deceased declined to accede to, saying that he did not like water security?

Therefore I cannot consider that there is any great suspicion arising upon the genuineness of this paper from the bequest to the city of Gloucester. But after all, the probability of the disposition in such a case as this goes but a very little way in proving the act done. In those cases where the question is whether the deceased was of sufficient capacity to execute the will, which is acknowledged [199] to have been executed by him, in all such cases the probability of disposition is important; but where the question is whether the act propounded is the act of the deceased, the argument founded upon probability is of very little weight indeed, for it would be the most unsatisfactory of all reasoning, to come to a conclusion that a certain act has been done because it is not improbable that the act might have been done. The Court cannot act upon any such reasoning as that.

Then what are the probabilities with respect to the other legatees?

Mr. Phillpotts has a legacy of fifty thousand pounds, the intention of which, it is said, was to make up the loss he had sustained in a contested election at Gloucester. Mr. Phillpotts, it appears, had been for many years a very intimate friend of the deceased, and I do not think it more improbable that Mr. Phillpotts should be a legatee to the amount of fifty thousand pounds than that either of the gentlemen named in the paper of the second of December should have been a legatee. There

is no ground of suspicion against the paper with reference to Mr. Phillpotts being a legatee, or to the sum given to him. Unfortunately, however, the declarations of the deceased, with respect to Mr. Phillpotts, are extremely vague and indefinite; shewing, however, that if the deceased did make any future testamentary disposition of his property it was very likely that he would be benefited by it.

As to his regard for Mr. Helps there is little or no evidence whatever. Mr. Helps has pleaded that he is a relation of the deceased, and that he was on terms of intimacy with him; it is not denied that [200] Mr. Helps used to go and see the deceased, who received him with kindness and attention, and I see no reason why the deceased should not have left a legacy of thirty thousand pounds to Mr. Helps.

With respect to Mr. Thomas Wood there is something more; he had a legacy of one hundred pounds under the will of the deceased's sister, and the deceased acknowledged him as a relation, and he is stated to have said he should not forget his relations.

As to Mr. Samuel Wood, it is in evidence that the deceased inquired into the number of his family, and was told that he had six children; and it is a strong circumstance that in the codicil there is a bequest of fourteen thousand pounds to Mr. Wood, and of six thousand pounds to his children, which would be one thousand pounds each; one of the strongest arguments in favour of the genuineness of the codicil, as respects the probability of the disposition; but there it ends.

Mr. Counsel was also a most intimate friend of the deceased, and, considering the intimacy which subsisted between them, and their families before them, a bequest of ten thousand pounds to him would be a very natural bequest.

It can hardly be doubted that the bequest to Mrs. Goodlake was a natural bequest; she was his second cousin; she was kindly received by him, and went to Gloucester to attend him in April, 1836; so that it appears they were intimate. But this carries the case no further than a probability that there would have been a disposition in her favour if the deceased had executed a testamentary act.

[201] The question, then, on this part of the case is whether these declarations, and the probability of the disposition, should impress the Court with a moral conviction that this was the genuine act of the deceased; taken together with the evidence of handwriting, I am clearly of opinion that they are not sufficient for that purpose. It is very possible that the deceased may have intended to make such bequests, and yet did not do it. Again, if it be a fabricated instrument, it is probably the work of a person acquainted with the deceased's connexions, and (as it was observed by this Court in the case of *Crisp and Ryder v. Walpole*) no person would set about fabricating an instrument without endeavouring to give the disposition some marks of probability; so that probability carries very little weight with it when the question is whether it be the act of the deceased or not.

The remaining question is as to the supposed destruction of the codicil recited in the paper propounded. The suggestion is that the codicil was destroyed after the death of the deceased, or during his lifetime, by some persons who had access to his repositories; and it has been pretty strongly thrown out that it was done by the executors, or by their direction. But, supposing the facts to be so strong as to lead to a plausible suspicion that such an act has been done, suspicion is not a sufficient ground for the Court to hold that a paper had been destroyed, of whose existence there is no evidence whatever. But suspicion in this case does arise out of the answers of the executors to certain articles of the allegation; for it is admitted by Mr. Chadborn that a paper was destroyed by [202] him in the presence of Mr. Phillpotts, and under his advice; that it was a useless paper, and might be put in the fire; that is as Mr. Chadborn states; whether it be the fact or not is another question. But must not the bare destruction of such a paper create great suspicion in the mind of the Court, especially where the parties have not conducted themselves with good faith in other parts of the transaction? What security can the Court have that the paper was of the description Mr. Chadborn has given of it—"a memorandum to the effect that he (Mr. Chadborn) was to take possession of his deeds, and manage his concerns after his death"—and that it did not contain any bequest, or gift of any property of the testator, to any person whatever, or appoint any executors? How is the Court to be satisfied that it did not contain a disposition of any property, or an appointment of executors, or that it was not a will of a later date, or some codicillary disposition? It is quite impossible that the Court can take it, on the answer of Mr.

Chadborn, that it was such a paper as he has described. The facts are not pleaded by the executors; but they observe a studied silence till their answers are given in. Had the facts been pleaded, Mr. Phillpotts might have been called upon to give in his answers, and we should have had the benefit of his account of the transaction, and have heard from him the advice he gave, and the nature of the papers. If he did give such advice (and I take it upon the answers of Mr. Chadborn and Mr. Osborne that he did), I think he must have known, and Mr. Chadborn must have known, that such papers ought not to have been destroyed, even [203] before the swearing of the executors. Neither Mr. Phillpotts nor Mr. Chadborn could be so ignorant in their profession as not to know that in the absence of other documents this paper might, and I have no doubt from the description given of it would, have constituted Mr. Chadborn executor, according to the tenor, so far as related to the estates; and if it had been before the Court, it might have explained certain circumstances stated in the evidence as to Mr. Chadborn's having the management of the estates, and the observations made by the deceased to different tenants that all would be "his Honour's," and "his Honour knows all about it." I cannot, therefore, help saying that there is a considerable degree of suspicion attaching to the conduct of Mr. Chadborn; at all events, he acted very indiscreetly in following the advice of any person in destroying that paper.

Then is there no suspicion attaching to Mr. Chadborn with respect to his visit to the house of the deceased on the morning of the 21st of April? When his answer on this point was objected to as not sufficiently explicit, the objection appeared to me somewhat hypercritical; and it shews how careful the Court should be in forming an opinion as to the relevancy of objections at an early stage of a cause by those who are more intimately acquainted with the circumstances than the Court can be. The Court, however, did call for a more specific answer; and when his answer, stating that he was at the house "at eight o'clock," was objected to as insufficient, and he was required to answer whether he had been there "before eight o'clock," in his [204] further answer he says that he "was there at eight o'clock, and not before;" so that there could be no excuse on the ground of inadvertence. Now, what is the evidence on this point? Three witnesses, whose evidence the Court has no reason to disbelieve, have sworn that they saw Mr. Chadborn go into the house at between six and seven o'clock in the morning; and Ann Lewis, their own witness, on interrogatory, says that he was there at seven o'clock in the morning, and not (as Mr. Chadborn states in his answer) to communicate with Mr. Osborne and Mr. Surman respecting the funeral, or any such purpose; for she says that when he came there Mr. Osborne and Mr. Surman were not up. What passed on that occasion it is not possible for the Court to conjecture; but when a party has his attention drawn to a fact, and he is specifically called upon to declare whether he was there before eight o'clock or not, and he says that he was there at eight o'clock and not before, it does create a suspicion that he was there for a purpose that will not bear to be disclosed. What that purpose was the Court has no means of ascertaining, but it is a circumstance which, with others, leads to a suspicion that a paper may have been destroyed by him at that time of a testamentary character—either this codicil or some other paper.

Again, there is another circumstance which throws a certain degree of suspicion upon the executors, which is this: Ann Lewis and Ann and Maria Nicholls, who were in the deceased's house, are pleaded to have been cognizant of, or had reason to believe the fact, that the deceased had executed testamentary papers of a later date than [205] those of the 2d and 3d of December; that they knew who the person was who sent the paper to Mr. Helps, and had rescued it from destruction, and that they were aware that a paper of a testamentary nature had been burnt since the death of the deceased. Generally speaking, it is the duty of persons who vouch witnesses to produce them; but that the legatees should not have produced these witnesses, who were in the custody of the executors, and with whom they had no opportunity of communicating, except in the presence of an agent of the executors, is not very extraordinary. But when an imputation was thrown out against the executors of having destroyed testamentary papers, or of knowing such papers had been destroyed after the death of the deceased, and persons in their employ were able, if such a transaction had taken place, to give an account of it, or, if not, could negative the fact, as far as their knowledge went, it does appear to me a most extraordinary circumstance that, with a view

of relieving themselves from such an imputation, they should not have produced these persons. Why should they be content with answering upon oath that they knew or believed that no such transaction took place? What had they to apprehend from the cross-examination of such witnesses? When these witnesses are not called to disprove the charge, does it tend to remove suspicion? It tends in some degree to strengthen the suspicion sought to be attached to these parties, that they have not produced these persons and subjected them to cross-examination. If they had nothing to disclose there could be no danger of their saying anything [206] prejudicial to the interests of the executors. And more especially the Court cannot think that this conduct has the effect of removing suspicion, when it calls to mind the endeavours made to prevent the cross-examination of the witnesses on the *condidit* by the legatees in the codicil, which brought out such important facts.

These are circumstances, I say, which lead to suspicion; but they lead to nothing more; they do not establish the fact that a paper of this description was executed by the deceased, or that it was destroyed by these parties. And the question in this part of the case is not between the executors (whose conduct is impugned) and the legatees, but between the legatees and the next of kin, who were no parties to any of these proceedings, and who cannot, therefore, be prejudiced by their acts, unless the actual destruction of the paper can be brought home to the executors.

Now, looking at all the circumstances of the case, though the evidence in affirmation of the genuineness of the paper, as far as handwriting is concerned, is extremely strong; so strong that, if I were bound to pronounce whether it was or was not the handwriting of the deceased, I should have little hesitation in saying that I believed it to be his handwriting; yet it is impossible for the Court to pronounce a judicial opinion upon that ground alone. I am also of opinion in favour of the probability of the disposition contained in the paper; but probability, coupled with the evidence of handwriting, is not sufficient to enable the Court to pronounce judicially that the paper is proved to be the act of the deceased. I, therefore, pronounce [207] also against the validity of the paper of July, 1835, which is propounded by the legatees as a codicil.

There is a further part of the case, and that is the question of costs. Generally speaking (I now refer to the codicil), persons who undertake, for their own interest, to establish a paper of this kind, if they fail, are liable to the costs of those to whose prejudice the paper is propounded; and although I entirely acquit Mr. Helps and the other legatees who have propounded the codicil of any participation in the fabrication of the paper (if it is a fabrication), or of any knowledge of the fabrication of it, yet that would not have prevented the Court from following the precedents in other cases. But there are very peculiar circumstances in the present case which induce the Court not to adhere to these precedents. But for the propounding of this paper the will of the deceased would have been pronounced to be contained in the papers of the 2d and the 3d of December, 1834; and it is more than probable that, but for the production of this paper, the executors named in that of the 2d of December would now have been in possession of the property of the deceased, to which the Court is of opinion they are not entitled. It is, therefore, through the agency of these gentlemen that the case is brought (so far as the decision of this Court goes) to the present conclusion, that the parties entitled to the property are the next of kin of the deceased, who are now put in possession of rights, which they would otherwise have lost. Against these parties, therefore, it is clear that Mr. Hitchings cannot press for costs. The executors cannot press for their condemnation in costs, because their [208] own case has not been established, and it is through the agency of the legatees that their case has been disproved. Mrs. Goodlake might press for costs, because she opposes the codicil as well as the will; but when I look at the part she has taken, nominally opposing the will, but endeavouring by all the means in her power to obtain for the executors a sentence in favour of it, I think she is not entitled to have her costs paid by the parties who have propounded the codicil. As against these parties, therefore, the Court does not think itself called upon to pronounce anything as to costs.

But a further question arises as to costs with respect to the executors. They have propounded two papers as together containing the will of the deceased; they brought them forward in a shape which they were not entitled to assume, for the purpose of facilitating the obtaining probate, and which, if obtained, would probably

have had the effect of preventing any persons from questioning the validity of the will. The executors having failed in establishing their case, and having brought it forward under such circumstances, the Court would be bound to condemn them in costs; but the difficulty is, in whose costs are they to be condemned? The legatees have failed in establishing their paper, and Mrs. Goodlake has supported the case they set up, and it is not asked that the executors should be condemned in her costs. The only party, therefore, who would seem entitled to costs, as against the executors, is Mr. Hitchings; and the Court sees ground on which, for the sake of public justice, and for the prevention of such experiments for the future, it should condemn these [209] parties in the costs occasioned to Mr. Hitchings, not in order to reimburse Mr. Hitchings, because, under the sentence of this Court, he will be put in possession of a considerable sum of money—but to mark its disapprobation of the manner in which this case has been brought forward, and probate endeavoured to be obtained by a suppression, if not a misrepresentation, of facts. I am, therefore, of opinion that the justice of this case will not be satisfied unless I pronounce that the parties who propounded the papers of the second and third of December, 1834, are condemned in the costs which Mr. Hitchings has incurred by his opposition to these papers; and I therefore condemn the executors in the costs of Mr. Hitchings.

The Court is aware of the great responsibility which a case of this description, involving interests to such an immense amount, imposes upon it. I have endeavoured to form an impartial opinion as to the real merits of the case, and I have bestowed my best attention upon it. I have endeavoured to do my duty conscientiously between the parties; and I have the consolation of knowing that, if I have failed, there is a tribunal to which the parties may resort, and to which in all probability they will resort, whose decisions are much more satisfactory, as coming from the eminent persons of whom it is composed, than can be the opinion of any single judge, far less the humble individual who sits in this Court to dispense justice as far as he can.

[210] *ANICHINI against ANICHINI*. Consistory Court of London, Hilary Term, Feb. 22nd, 1839.—A suit for restitution of conjugal rights being commenced by the wife, the husband pleaded her adultery in bar, and prayed a separation; the wife then charged the husband with adultery, and prayed a separation. The Court being of opinion that the wife had been guilty of very gross adultery, and that the husband's adultery with one person long anterior had been fully condoned, pronounced for a separation, at the prayer of the husband.

[Approved, *Goode v. Goode and Hanson*, 1861, 2 Sw. & Tr. 253. Discussed, *Lantour v. Queen's Proctor*, 1864, 10 H. L. Cas. 685. Referred to, *Morgan v. Morgan*, 1869, L. R. 1 P. & D. 645; *M'Cord v. M'Cord*, 1875, L. R. 3 P. & D. 240; *Gooch v. Gooch*, [1893] P. 105; *Symons v. Symons*, [1897] P. 167; *Evans v. Evans*, [1906] P. 128; *Woltereck v. Woltereck*, [1912] P. 202.]

The proceedings in this case commenced by a suit for restitution of conjugal rights by Mrs. Anichini against her husband, who, by way of answer, set up a charge of adultery against the wife with two persons, namely, Wm. Ayling, in 1835, and with Henry Morton in 1836. The wife then charged the husband with adultery with a Madame Malenchiné in 1825, and with her servant Ann Bishop Blake, in 1831; and she pleaded that the former adultery did not come to her knowledge until after the proceedings in this cause had commenced. The husband expressly denied the adultery with Malenchiné; he admitted that with Blake, but alleged that it had been condoned by Mrs. Anichini.

The Queen's advocate and Addams for Mr. Anichini. The adultery of the wife is fully established in proof. The alleged adultery of the husband with Malenchiné is not only not proved, but is disproved: the adultery with Blake is admitted, but that was condoned by the wife, with a full knowledge of all the facts, and the parties cohabited together afterwards, and the wife even commenced [211] this suit for restitution of conjugal rights. Condonation is a conditional forgiveness of everything known that had previously passed. If the husband offends again the former adultery revives; but it never can be contended that the condonation of an act of adultery is to operate as a bar to the husband's remedy against an offending wife; that it is to be a license to her ever afterwards to commit the same crime. Can the wife

say, "I forgive you, but I am now at liberty to commit adultery when I please, and you can have no remedy?" Such a doctrine would be extremely injurious to society, and can never be upheld by the Court.

As to the effect of condonation, where both parties have been guilty of adultery, they cited *Sanchez de Matrimonio*, lib. x. disp. 7, s. 1.

Burnaby and Curteis contra, submitted first that there was not sufficient proof of the wife's adultery, and that the condonation amounted to nothing, as Mrs. Anichini had not a complete knowledge of the whole misconduct of her husband, it being now proved that he had in addition to the adultery with Blake also committed adultery with Madame Malenchiné. In order to effect condonation there must be full knowledge of all the misconduct—*Durant v. Durant* (1 Hagg. Ecc. 733). But, secondly, supposing it to be proved, as is contended on behalf of the husband, that Mrs. Anichini has been guilty of adultery, and that there has been a complete condonation of his adultery, still the conduct of Mr. Anichini is such that the Court will not grant a [212] separation at his prayer. In *Beeby v. Beeby* (1 Hagg. Ecc. 789) Lord Stowell refused to grant a divorce at the suit of a husband who had himself been guilty of adultery, although his adultery had been condoned by the wife. Independent of his adultery, the conduct of the husband here is such as to amount to connivance. He has, indeed, given his wife license to do as she pleased, and the rule *volenti non fit injuria* applies to him. There are four witnesses who depose to declarations by the husband that Morton might take Mrs. Anichini away and intrigue with her where he pleased, provided he did not do it in Anichini's house.

Coupling this with what is admitted in answer to the 17th interrogatory, by Agnes Templeton, a witness produced by Mr. Anichini, the Court will not grant the husband's prayer. She is asked whether Anichini did not declare that he was not the father of Mrs. Anichini's children, and that as to Frederick the youngest that Mr. Singleton was his father. She answered, "He did not say that he was not their father." "But now that the conclusion of the interrogatory is put to me respecting the youngest boy Frederick, it does bring to my mind that I have heard the producent express himself to some such effect as suggested, not in the very words suggested, but to some such effect. When they lived in Wells-street he has said he had his doubts about Frederick, whether Singleton was not his father. I do recollect that Mrs. Anichini had gone to France, and met a person of that name there; and a temporary separation took place be-[213]-tween the producent and ministrant, and it was after their reconciliation that this boy was born, but in their subsequent quarrels the producent certainly said as I have deposed."

Judgment—*Dr. Lushington*. Before considering the question of law which may arise in this case I must first ascertain what the facts are to which the legal principles are to be applied. (The learned Judge, having considered the evidence, was of opinion that Mrs. Anichini had been guilty of gross and barefaced adultery—that both charges were fully proved—that the adultery alleged to have been committed by the husband with Malenchiné was not proved, and that the adultery with Blake (which was admitted) had been completely condoned.) He then proceeded: But it was said that the husband had given the wife license to commit adultery: now such a case, if proved, would on the well-known principle of law, *volenti non fit injuria*, be a bar to any separation at the suit of the husband. There are certainly expressions used which are of this tendency; but looking at the whole *res gestæ* of the case, the sort of affection, though somewhat strange, and the jealousy of Mr. Anichini, I cannot think those expressions amount to any proof of the husband's sanctioning the adultery of his wife. There are circumstances, I must admit, which make it probable that he was too forgiving a husband, but to bar relief in such a case there must, I think, be a clear collusion or connivance. To say that adultery with Mr. Singleton had been proved, and connived [214] at or forgiven, however probable the fact might be, would be assuming as proved that which is not proved.

The case then comes to this, and it is a point which I do not find has been directly decided, whether a husband having committed adultery, which has been condoned by the wife, is debarred by such a circumstance from obtaining a divorce from a guilty wife. Dr. Nicholl has been kind enough to give me an opportunity of perusing the notes of Dr. Arnold relative to two cases—*Raibould v. Raibould* (Cons. 1788), and *Kirby v. Kirby* (Arches, 1801-2)—which, though decided by the same learned Judge

(Sir William Wynne), do not exactly cohere, and afford little assistance or light in the present question.(c)

[215] In *Beeby v. Beeby* (1 Hagg. Ecc. 789) and *Dance v. Dance* (1 Hagg. Ecc. 794, n.) some observations were made as to the effect of [216] condonation; but in both cases Lord Stowell held the fact of adultery not proved, and after consider-[217]-ing those cases with great care, it appears to me that Lord Stowell had not made up his mind on the question; it was not necessary he should do so; I do not, therefore, say that he evaded the point; he was not called upon to decide it, and he did not. In *Beeby v. Beeby* he says: "What is the effect of condonation? In general, it is a good plea in bar: it is not fit that a man should sue for a debt which he has released; but here the plea in bar is compensatio: and condonation is not in bar of the action,

(c) Dr. Arnold's notes of these cases are to the following effect:—

Raibould v. Raibould. Consistory, 27th Feb. 1788.

The suit commenced with a citation for restitution of conjugal rights on the part of the wife against the husband: the husband pleaded the wife's adultery as a bar to her suit, and prayed a separation; an allegation was now offered on the part of the wife, charging the husband with adultery, and praying a divorce.

Dr. Scott objected to the admission of this allegation, on the ground of its being inconsistent with the citation.

Per Curiam (Sir William Wynne). The citation was for restitution of conjugal rights; an allegation in bar was given by the husband, and a separation prayed: though not regular, it is held that a sentence may be given for separation. But on the recriminatory allegation, if the husband fails in proving the wife's adultery, and the wife proves her recriminatory allegation, what sentence shall the Court pronounce? I must decree restitution: this is inconsistent. It is impossible to give such an allegation in this state of the case.

Kirby v. Kirby. Arches, 7th July, 1801.

[Discussed, *Brooking-Phillips v. Brooking-Phillips*, [1913] P. 86.]

This was originally a suit by the wife for restitution of conjugal rights: the husband pleaded adultery by the wife in bar; an allegation was now offered by the wife, denying her adultery, and recriminating. Sir John Nicholl opposed the admission of this allegation as to the recriminatory part as follows:—Such a charge in such a suit is not admissible; it would be strange to engraft a recriminatory charge in such a case. Where there is an original suit brought by the husband for adultery she may deny it, and say, therefore, that the husband is not entitled to a separation, or may say if I am guilty you are also, and therefore not entitled to a separation; but here it is inconsistent: she first prays restitution; the husband charges her with adultery; she denies it, and charges him with adultery; and what does she now pray?—separation. If she confesses the charge it may be consistent to recriminate, and say, therefore, we may live together. I am not aware of any precedent, and it is contrary to principle.

Dr. Swabey on the same side. The wife cannot change the issue; she must drop her suit for restitution, and then plead the adultery, but not while continuing this suit. Against a suit for divorce by reason of adultery by the husband it is relevant for the wife to plead his adultery, as it creates a bar, but in such a suit as this it is not, as it does not apply to the issue before the Court.

Dr. Laurence in support of the allegation. It is possible that the allegation of the husband may not be proved; there would then be an end to his bar. He has changed the issue and prayed separation; on what principle may not the wife plead adultery coming subsequently to her knowledge,* to obtain ultimately a sentence on that ground, in nature of reconvention—if both fail in proof the original suit remains.

Dr. Croke. No case has been adduced to shew that recrimination may not be pleaded; any responsive plea destroying the assertions of the husband is admissible.

Sir William Wynne, after some observations as to the six first articles proceeds: The seventh introduces charges of adultery against the husband: this is, undoubtedly, a very singular case, and I cannot say that I remember anything like it. The suit

* The editor has had an opportunity of examining the original allegation in the Registry of the Arches Court, but there is no averment therein to this effect.

but a counter-plea. Here the wife does not pray relief, but prays to be dismissed. It does not follow that the same act, which will bar the remedy, will operate on the other side, and unless it is an universal rule that whatever is a plea in bar, and disables a party from bringing the suit, likewise destroys the defence, the present attempt cannot avail the husband. A man, it is true, who has forgiven adultery, cannot bring a suit; but when he complains of his wife, will her forgiveness of his previous misconduct make him a proper person to receive the sentence of the Court? If both are equally guilty, will her condonation make him [218] *rectus in curiâ*, and enable him to procure a sentence? Lord Stowell here raises the point directly in question; does he solve it? "There may be cases," he continues, "where a wife may, by forgiveness, by cohabitation, by the reformation of her husband, be so barred, that an obsolete fact shall not be a defence. This bar would not, however, be effected so

is for restitution of conjugal rights; adultery is pleaded by the husband in bar, which is usual; the issue is changed, and there may be a fallacy in the argument, to take it, as if the husband prayed only not to receive his wife, but he prays also separation and she pleads *compensatio criminum*; the husband would be entitled on proof of his allegation to a sentence of separation, to this the wife is not bound to submit; she may follow where he leads. It is not a condonatio to bring a suit for restitution, suppose both fail, she may repeat her original prayer; it is not, therefore, entirely inconsistent with her original prayer. Suppose she proves adultery against the husband, she is not obliged to pray separation, and he could not set up his own adultery in bar. If both prove adultery, it is not necessary to say now what would be the consequence; perhaps the Court might say it would give no sentence. I apprehend the wife has a right, being led to it by the allegation of the husband charging her with adultery, to charge adultery against him; what may be the effect, is for future consideration.

The cause afterwards came on for hearing, and on the 19th of July, 1802, judgment was given to the following effect:—

Sir William Wynne. This is a suit for restitution, commenced in the archdeaconry of Berks, by Anne Kirby. A libel was admitted, and witnesses examined; an allegation was offered by the husband, charging adultery, and praying a separation: three articles were rejected, and the rest admitted; from that there was an appeal on both sides to the Court at Salisbury, where the whole was admitted; there was then an appeal to this Court, which affirmed the sentence, and retained the cause. An allegation was afterwards admitted on the part of the wife, charging the husband with adultery, and an allegation exceptive to the witnesses examined by the husband (the learned Judge, having gone minutely through the evidence, was of opinion that the allegation charging the wife with adultery was not proved, and then continued), "But she gave an allegation, pleading adultery by the husband. That was admissible, I think, under the circumstances of the case, as it then stood: he had given an allegation pleading adultery, on which there might be separation: a sentence of separation is often given in such suit of restitution, on such a plea; against this the wife might set up adultery by the husband, without admitting the fact against herself, pleading as in bar, or by recrimination. But that the husband failing in proof of her adultery, the wife can obtain separation in such a case on such plea, is what I have never heard. Condonation extinguishes adultery, the wife brings her suit for restitution, on having gone to the husband's house, and been rejected; it cannot be stronger; there may, possibly, be cases where the wife might so obtain a separation, if the fact of adultery took place after the suit was commenced, or came to the knowledge of the party after, but that is not this case" (the Judge then considers the evidence as to the charges made in the wife's allegation, and concludes), "I think the husband has clearly failed in proving adultery, and that the wife has likewise failed. What is the Court to do? The party might have reverted to the suit and prayer originally made; but she does not so pray; * therefore, having reconvened each other, and she not so praying, and the party so declaring, she will proceed no further in that suit, the Court can do nothing but dismiss both parties.

* Dr. Arnold adds this note:—

It was declared by special proxy, now exhibited on the part of the wife, that she would not pray restitution.

much by condonation, as by the general state between them of the consequent impossibility of reviving former follies," &c. I regret that it falls to my lot to decide what is to be done.

If I were, though I think it would be unjust to Lord Stowell, to draw an inference solely from his language, it appears to have been the impression of his mind that, where a husband has committed adultery, which is condoned, and the wife commits adultery, he would not be able to obtain a separation: that would seem (if I look to the words only of Lord Stowell) to have been the bearing of his mind. But we must not look at his words without reference to the facts and circumstances of the case; he was speaking of a case in which there was repeated misconduct on the part of the husband, and he says that cases might arise in which he might come to a different conclusion.

It is difficult and dangerous to attempt to lay down any general rule; but I cannot go the length of saying that the adultery of the husband, followed by condonation, would debar him from a remedy against his wife, under any circumstances which I can suppose. Take the case of a husband who had been guilty of adultery ten or twelve years before his wife's misconduct, under circumstances which might render it comparatively venial; that the wife [219] was fully aware of the adultery, had condoned it, had continued to live with him, and had had children by him; that ten or twelve years after she is guilty of adultery herself—would it be consistent with any principle that, under these circumstances, the husband should be entitled to no remedy at all? On the other hand, there is no doubt that, in a case like *Beeby v. Beeby*, where the husband, after his offence is once condoned, repeats it, and shews himself utterly regardless of the marriage-vow, he does not come into Court with clean hands, or anything like clean hands. It would, as the Queen's advocate observed, be dangerous to hold, as a general principle, that a wife, having condoned the adultery of her husband, should thereby be placed in such a situation that she might commit adultery herself without her husband having any control over her. I next look at the consequences of such a principle of law. If a husband be not entitled to a separation from his wife, he is bound to cohabit with her, and how difficult would it be to enforce such a principle of law. I know no authority which states that, whatever be the guilt of both parties, if the Court does not pronounce for a separation, they are not, according to the law of this country, bound to live together; and I think such a principle would be dangerous to society, and to public morals.

Where a condonation has taken place with a full knowledge of the facts, it is said to be a conditional forgiveness. Conditional on what? On the future conduct of the husband. Suppose he fulfils the condition, and never after violates the obligations of the marriage-bed, is the condonation to have no [220] other effect than to bar a suit against him? I think the effect is to make him *rectus et integer*, except that his past transgression may be revived by subsequent misconduct.

I, therefore, have come to the conclusion that, under the circumstances of this case, I am bound to grant the husband the remedy he prays; and the last point in the case is what that remedy should be.

The adultery of the husband occurred in 1831; so far as appears, from all the evidence in the cause, the husband never otherwise deviated from his marriage-vow, nor broke its obligations in any instance but this: so that it is the case of adultery with a single person. It was several years antecedent to the adultery charged against the wife, and it is proved to have been forgiven at the time it was committed. I think I am bound to say that this was the only adultery, and to divest the case of all other circumstances. I must not trust my mind to go into the circumstances of the affair with Mr. Singleton; because if that elopement had been proved, and the forgiveness of the wife's adultery by the husband had been proved, I should be of opinion that that circumstance, coupled with his own adultery, would disentitle him to a remedy. Considering that the wife's condonation of his adultery with one person was several years antecedent to her adultery, which was as gross, profligate, and abandoned as in any instance which has ever come under the consideration of the Court—she, the mother of five children, carrying on a criminal intercourse with a young man, twenty-four or twenty-five years of age, cohabiting with him in the house where her husband was living with her, [221] during part of the time, and then going off with him—I think, under all the circumstances, I am bound to pronounce for a separation, and to pronounce it at the prayer of the husband.

WALTERS against METFORD. Prerogative Court, Hilary Term, Feb. 26th, 1839.—A power in a married woman to dispose of certain property by will, to be signed and published by her in the presence of two witnesses, is not duly exercised by a paper purporting to be signed and sealed as a will in the presence of two witnesses, omitting to state in the attestation clause that it was published; but as the power did not require that the will should be attested, parol evidence was admitted to shew that publication had taken place; the evidence, however, on that point being insufficient, the Court pronounced against the paper.

This was a question as to the execution of a will by a married woman, under the following circumstances:—

The deceased, Mrs. Hannah Nickleson Watson, married in 1823, when the sum of 2000*l.* bank stock was settled upon certain trusts during the life of herself and her husband, and upon the death of the survivor, &c. “upon trust for such person or persons for such ends, intents, &c. as the said Hannah Nickleson Watson at any time or times, and from time to time, notwithstanding her said intended coverture by any deed, &c. or by her last will and testament in writing, or any writing in the nature of or purporting to be her last will and testament, &c. to be signed and published by her in the presence of two or more credible witnesses, shall direct or appoint.”

Shortly after the marriage, namely, on or about the 10th of May, 1823, the deceased proceeded with her husband, Lieutenant-Colonel Samuel Watson, to the East Indies, where she died on the [222] 9th of July, 1837, leaving her husband surviving, who died on the 19th of February, 1838. Previously to her departure, some time between the 13th of March and the 10th of May, 1823, the deceased signed the will propounded, which was to the following effect:—

“I, Hannah Nickleson Watson, leave to my beloved husband, Samuel Watson, the whole and sole power and control over all I possess, or have it in my power to leave by will.” The will then went on to give certain legacies, and concluded—“and I request the said James B. Coles, with my brother William Metford, will see this my last will and testament duly complied with.

“HANNAH N. WATSON.

The
Seal.

“Signed and sealed by the said Hannah Nickleson Watson, in presence of us, who at her request, and in her presence, have subscribed our names—Sam. Compton, Winchmore Hill, Middlesex; William Sansum, 139 New Bond-street.”

The whole of the will and the attestation clause were in the deceased's handwriting, and it was pleaded in the allegation propounding the paper that “the deceased did set and subscribe her name thereto, and did seal and publish and declare the same as and for her last will and testament, in the presence of divers credible witnesses, two of whom, at her request and in her presence, and in the pre-[223]-sence of each other, set and subscribed their names as witnesses thereto, all in manner and form as thereon now appears.”

This allegation was opposed, and it was contended that the will was not duly executed, as it did not appear upon the face of the instrument that the terms of the power had been satisfied, and that parol evidence in such a case was not admissible; but the Court being of opinion that, as the power did not require that it should be attested, that the will was signed and published, parol evidence was admissible, and admitted the allegation; and the surviving attesting witness (with three others) was examined, but he could not remember any words of publication, and could only depose to a belief that at the time of execution Mrs. Watson placed her finger on a seal affixed to the said paper, “Such,” he said, “is my present belief; but it is an event of so long time ago that I cannot undertake to depose more accurately;” and on interrogatory he said that at the time of the execution of the paper he did not know what was the nature of the paper he attested, and that knowing that Captain and Mrs. Watson were at the time of executing such paper about to proceed to India, he had taken up the idea that the said paper was a power of attorney. “But,” he continued, “I had no ground for believing so, it was merely an idea of my own. I will not swear that Mrs. Watson did in my hearing publish and declare the said paper writing as her will.”

The other witnesses could not depose upon this point.

Burnaby and Addams in support of the paper [224] contended that there was sufficient to shew that publication had taken place; that what would be equivalent to publication under the statute of frauds would suffice here; and they cited *White v. The British Museum* (6 Bingham, 310).

Phillimore and Haggard contra, cited *Allen v. Bradshaw* (1 Curt. 110), and *George v. Rielly* (ante, p. 1).

Judgment—Sir Herbert Jenner. The paper, on the face of it, does not say that it was published in the presence of the witnesses, and the question is, whether the evidence is sufficient to prove that the power was duly executed? I should be inclined to hold that delivery was equivalent to publication; is there, then, evidence of delivery? The surviving attesting witness cannot depose to any words of publication, he can only speak to his belief that the deceased placed her hand upon the seal at the time of execution. He did not hear the paper called a will, and his impression was that it was something else. The other witnesses carry the proof no further. Possibly the witness's memory may fail him, but the onus of proof is on the party who propounds this paper, and I am of opinion that the evidence is not sufficient to shew that the will was published by the deceased, in conformity with the terms of the power. I therefore pronounce against it.

[225] DURLING AND PARKER *against* LOVELAND. Prerogative Court, Hilary Term, March 19th, 1839.—The will of an aged person of doubtful capacity prepared by a solicitor, who was appointed an executor and one of the residuary legatees, pronounced against, and the parties propounding it condemned in costs.—Bare execution in such a case is not sufficient.—The principles of law applicable to such cases.

This was a business of proving the will of Francis Petworth, a publican, of Chiselhurst, Kent, who died on the 7th of April, 1838, a widower, without children, aged 76, leaving property to the amount of about 1850l. The will was propounded by the executors, and was opposed by Charlotte Loveland, the niece, and only next of kin of the deceased.

The will in question, which was dated on the 8th of March, 1838, and was executed in due form, purported to give the whole property, real and personal (there being a small real estate, but the bulk of the property being in the public funds), to the executors, in trust, to pay three annuities of 10l. each, to Mary Cross, who had been the deceased's housekeeper from the period of his wife's death, about twenty years back; to John Jupp, the brother of the deceased's wife, and who had been employed by him for many years as ostler, till he became incapable of work; and to the widow of his deceased brother, to whom he had given that sum annually since her husband's death; the remainder of the property, real and personal, was left to the two executors, Mr. John Durling, the landlord of a public-house at Bexley, a friend of the deceased, and Mr. John Frederick, a solicitor (the drawer of the will), a partner in a firm at Lewisham, in Kent, this firm having been on former occasions employed by the deceased.

[226] The Queen's advocate and Phillimore supported the will, which was opposed by Haggard and Jenner for the next of kin.

Judgment—Sir Herbert Jenner. Before I consider the circumstances of this case connected with the preparation of this paper it may be necessary to allude to a question which arises in this case, and in all cases where the drawer of a will takes a benefit to a very considerable extent under it, that is, considerable with reference to the amount of the property which is the subject of the disposition.

In the argument addressed to the Court by the Queen's advocate, in support of the paper propounded, its attention was called to a recent judgment of the Judicial Committee of the Privy Council in the case of *Barry v. Bullin* (1 Curt. 637), in which it became necessary for that Court to consider the doctrine and principles to be acted upon with reference to the circumstance I have stated, where the drawer of a will takes a considerable benefit under the instrument. It would seem that in that case the doctrine with reference to this point had been carried, in argument, to a somewhat larger extent than their Lordships were inclined to assent to, and it was proper, therefore, to ascertain the real doctrine and principles to be acted on; and Mr. Baron Parke, in his judgment, takes care to state with great accuracy and precision the principles which ought to be followed. But I [227] must say that, in

reading that judgment, though I accede to every one of the doctrines and principles laid down in it, I am not aware that this Court has ever acted on any other or different principles; that it has ever held that, in any individual case, or unless where the particular circumstances of the case require it, where the drawer of a will takes a considerable benefit under it, he was bound to do more than shew that the deceased had a knowledge of the contents of the will; it never has been the doctrine of this Court that it is necessary in all cases to prove that the will was read over to the deceased, or that it was drawn from instructions given by him. It never was the doctrine of this Court, whatever may have fallen from this chair, that, without reading over or without instructions, it is impossible to pronounce for such a will. I never understood the doctrine of this Court to go beyond this, namely, that it is a circumstance which should awaken the vigilance and jealousy of the Court to watch and see whether, by some means or other, a knowledge of the contents was brought home to the deceased, or it was shewn that it was the intention of the deceased to make such a disposition of his property, which the Court would accept as sufficient proof, notwithstanding that the drawer of the will took a considerable benefit under it. I do not apprehend that there is any technical rule which requires proof that a will has been read by or to the deceased, or that it was prepared from instructions given by him. Even in *Paske v. Ollatt* (2 Phill. 323) it was not laid down that such [228] proof was necessary; but if the Court was satisfied that the instrument did contain the real intentions of the testator, although there was no proof of reading over, and no proof of instructions, it would grant probate of it.

Nothing can be more clear and distinct than the law as laid down by Mr. Baron Parke as to the doctrine and principles applicable to cases where any person, solicitor or not, draws a will under which he takes a benefit—that, generally speaking, it is a circumstance of suspicion, greater or less, according to the circumstances of the case, namely, the capacity of the deceased, the amount of the legacy given to the drawer of the will, the amount of the property to be disposed of, and the claims which different individuals had upon the testator; and it is with reference to these principles that the Court proceeds to consider the circumstances of this case; and I again say I do not understand that there is any difference between these principles and those which have been acted upon in this Court.

Now in this case the property amounts to about 1800*l.*, out of which annuities are given to three persons of 10*l.* each. Of the value of those annuities there is no distinct constat before the Court, but it appears, from the evidence, that Cross, the house-keeper, came into the deceased's service shortly after his wife's death; though her age does not appear, she cannot be less than forty; she may be sixty. Another of the annuitants, Mrs. Petworth, the widow of the deceased's brother, appears to have been about sixty-eight; and Jupp, the brother of the deceased's wife, is described as old and [229] infirm, and past work, and, therefore, not junior in age than Mrs. Petworth, probably much older. Neither of the annuities, I conceive, can be taken at more than seven years' purchase; but supposing they were worth ten years' purchase, it would take 300*l.* to purchase these three annuities, which would leave more than 1500*l.*; and assuming that the debts and expenses of proving the will would amount to 500*l.*, there would then remain 1000*l.* to be divided between the two executors; and even if it were only half the property, 900*l.*, or 450*l.* each, I should say that this is a large proportion of the property to be given to two persons who are entire strangers in blood to the deceased, and to the prejudice of his blood relatives, one of these two persons being a friend of the deceased, and the other a solicitor, whose father had been employed by the deceased in acts of business. Here, then, is one of those circumstances of suspicion to which I have referred, that is, when the drawer of the will takes a considerable proportion of the property which is the subject of the disposition, and it is a circumstance to arouse the vigilance and jealousy of the Court, to weigh the evidence, and see that there is proof that the deceased executed the will with a knowledge of its contents, either by instructions from the deceased, or by the will having been read over to him, or by any other mode by which his intentions can be collected.

There is another circumstance which should excite a degree of vigilance in the mind of the Court, namely, the capacity of the alleged testator. Where a person is in the full possession of his intellects the mere act of execution would lead to the [230] inference that he knew the contents of the instrument he signed; where the

person is of a lower grade of capacity, owing to age or intemperance, a very different degree of proof is required to satisfy the Court that the instrument contained the real intentions of the deceased.

The testator appears to have been a person of coarse and low conversation, from the expressions he made use of, and of vulgar manners, though he possessed a kind heart, as is exemplified by his supporting his wife's relation after he became incapable of work. He possessed also a considerable degree of shrewdness; but in the latter years of his life he became addicted to excessive drinking, beginning at ten o'clock in the morning, and continuing during the whole day, drinking one glass of brandy and water after another, till he became "just like a madman." One of the witnesses says, "He was always at it, and when tipsy he was mad." When he was not drunk, he says, "he was of sound mind—perfectly so, and at the time the will was executed he was in bed." When he was confined to his bed the use of spirits had been prohibited by his medical attendant, Mr. Johnson, who says that, although he did not altogether abstain from spirits, he never saw him afterwards under the influence of liquor; on the contrary, whenever he saw him he was rational and sensible. So that, when he was in the habit of indulging in liquor he was in a state of utter incapacity; but when sober he was rational and sensible. But though these habits of intemperance, in conjunction with age, may not have produced imbecility, yet it is impossible not to see that these two causes must necessarily have [231] impaired very considerably his mental faculties, and, according to the evidence of the witnesses, his memory was most particularly affected; he would forget a thing he had just done, or that was to be done; he would forget that bills had been paid to him, and would demand repayment of them.

Mr. Johnson is one of the witnesses produced in support of the will; and the result of his evidence is that he was rational and sensible when not under the influence of liquor, but that his memory was extremely bad, and that between age and the use of spirituous liquors his mental faculties had become weak and impaired; and this is the evidence of almost all the other witnesses. Almost all the witnesses examined in opposition to the will state that for the last twelvemonth of his life his memory was so impaired and confused that he was continually making mistakes in giving change; that he forgot orders that had been given, and payments that had been made, and that persons would not pay money to him, but paid it to Cross, the housekeeper. But although his memory and mental faculties were, to a certain extent, impaired, he could sufficiently understand matters of business when properly submitted and explained to him, and was capable of making perfectly sensible answers. The Court, therefore, takes it upon this evidence that the deceased was capable of conversing rationally and sensibly to a certain extent, and if it should appear by evidence free from all doubt and ambiguity that the deceased, either in instructions given by him, or at the time of execution, or by a subsequent confirmation of the will, knew the contents of it, the Court would be bound to pro-[232]-nounce for the validity of the will. But it will not do this without reference to the evidence on the other side, given by persons equally respectable with those produced by the parties propounding the will; and although it is said that they are disappointed persons, I cannot say that they have deposed under any bias; and I cannot help thinking that those persons, described as disappointed witnesses, because they expected some advantage from the deceased, have not been very fairly dealt with. Why should it be supposed that these persons have deposed contrary to the truth because they are disappointed? Why are they to be estimated as nothing in the scale, and almost disqualified, because they are disappointed, in comparison with Mr. Durling and Mr. Parker, who are to put 500l. a-piece in their pockets? I think I am bound to rely upon the testimony of those persons, who are of a respectable class in life, and who give it with sincerity.

The witness Dunn describes the deceased as labouring under loss of memory, as incapable of managing his affairs, or of making a will, and, latterly, quite a childish person. Willis represents him in the same calamity, and as incapable during the last twelvemonths of his life. Other witnesses speak of his silly and childish conduct in coming out of church; of his faculties having failed some time before his death; of his inability to settle an account, because he could not understand it. Charlton, who accompanied the deceased to the bank, to receive his dividends, in October, 1837, though he does not prove utter incapacity, states enough to shew that the deceased

was not in the [233] same condition as when he went alone to receive his dividends before that time. He says that his faculties had been going for the last twelvemonth. Fox, who had known the deceased for six years, saw him on the day the will was executed, and speaks doubtfully as to whether he was conscious of what he was doing, though it certainly appears, from the evidence of this witness, that the deceased on that day shewed a degree of capacity and understanding sufficient to have enabled him to make a will if proper care and caution had been used. Godson saw the deceased on the 3d of March, on which day he received some money from him, and he deposes that the deceased talked about settling his affairs; that "he was rational and sensible if ever man was;" that he (the witness) asked him if he had made his will, and he said he had, and that it was in the hands of Mr. Parker, of Lewisham, and that "he had taken care of his sister, and of old John," and had made the same provision for them that he had been in the habit of doing; it appears that he had been in the habit of making his sister-in-law a present of 10l., not a regular allowance; but with respect to Jupp there is no evidence of his having allowed him 10l. a-year. The witness then mentioned Cross; the deceased said he had taken, or would take, care of her, but intimated that his property should not be squandered away by "tobacco-chums." Now what is the meaning of this conversation? that he had a will in the hands of Mr. Parker? It is so difficult to reconcile this declaration with the facts that counsel have been obliged to conjecture that there must be a mistake of the day; but it so happens [234] that Womes confirms the evidence of Godson; he heard the deceased say that he had made his will and settled his affairs; that "Uncle Parker" had done it for him. This was before the will in question was executed, and no such will is forthcoming from the office of Messrs. Parker. If the deceased, on the 3d of March, had a will, which was in the hands of Mr. Parker, of Lewisham, he could have had no intention of making a new disposition of his property. I cannot reconcile his declaration that he had a will, and that it was in the hands of Mr. Parker, of Lewisham, with a belief that the deceased was in the perfect possession of his mental faculties. The Court, therefore, must look a little farther than a bare execution of the paper for proof of knowledge of contents, where the deceased was in this state of at least doubtful capacity, and so far unable to protect himself against the designs of the persons about him.

Now, who were the relations of the deceased, and what were their claims upon him? Mrs. Loveland, the niece and next of kin, has a large family, not in good circumstances. It is true that the intercourse between the deceased and his family was slight, and there was no great degree of intimacy between them; but it is not the degree of intimacy between such parties which the Court has to consider, but what were the feelings of the deceased towards his relations. He had not a large income (about forty pounds a-year), and his inn did not support itself, so that he had been obliged to sell out part of his stock; he had, therefore, no great command of money to administer to the wants of his relations; but there is abundant evidence to shew that, as far [235] as expressions of regard went, he did intend to benefit his relations, and that he frequently declared that his relations should have his property—that he should be a rogue and a fool if he left it from them. The evidence of Mr. Johnson, in particular, is important to shew that the deceased's relatives were uppermost in his mind; and that if he made a disposition of his property, they would probably be the objects of it, and that it is not probable that he would have excluded them in favour of persons who were strangers in blood.

Who is Mr. Durling? a publican at Bexley, and a friend of the deceased, who came, during his illness, to manage his business, though there is no evidence to shew that the deceased sent for him, though he knew he was there: there is some reason to suppose that the sending for him was the act of Cross. What was the deceased's connexion with Mr. Parker? He is a partner in a house of business at Lewisham, which the deceased had employed, though whether Mr. J. F. Parker was the person who attended the deceased does not appear. One thing is clear, that from June, 1836, to June, 1837, Mr. Petworth could have had no intercourse with Mr. J. F. Parker, because he was, during that period, out of the country, on an occasion to which it is not necessary for the Court to advert; and it is equally clear that when he spoke in terms of respect of Mr. Parker it was with reference to his father, and not to Mr. J. F. Parker; and it appears, further, that the deceased wished to appoint the elder Mr. Parker his executor, but Mr. J. F. Parker represented that his father was too

old. With respect, therefore, to Mr. Durling and Mr. Parker, [236] there is no ground for supposing that the deceased's regard and friendship for them were of such a nature as to supersede his affection for his relations; nor is there any foundation for the disposition by which so large a proportion of the property is given to them. On the morning of the 7th of March, Calcott, a person who lived in the parish of Chiselhurst, came to the deceased's house, as he says, to inquire whether he had made up his mind to quit the inn; and he had a conversation with him previous to the execution of the will. He describes him as lying in bed, a skeleton of a man compared with what he was; his mind was wandering, and his memory gone: he inquired after a person who had been dead four years. The witness said, "I hope you have settled your affairs?" The deceased answered "Yes," and pointed to an old cabinet as the place where his will was deposited; though, in the former conversation, he had said it was with Mr. Parker. Whilst the witness was down stairs Mr. Parker came; and when the witness heard it was to make his will, he mentioned the deceased's declaration shortly before, that he had a will. In a quarter of an hour the witness was sent for, and went up again to the bed-room, where Parker and Durling were alone with the deceased; Parker was standing by the bed, with the will in his hand, and said, "This is Mr. Petworth's will; he has appointed us executors; he wished to appoint my father, but I told him he was too old." This is the first time any intimation was given of an intention of making Mr. Parker, senior, executor. Nothing, however, was said about the residuary clause, or a bequest of the residue, to any of the witnesses. [237] Parker then gave the deceased a pen and ink, and he signed it; Parker repeated the words of publication, the deceased put his finger on the seal, and the witnesses signed their names to it. Mr. Calcott says he then went round to the side of the bed, and said to the deceased, "How could you say you had made a will?" The deceased replied, "So I have, and Parker has got it; they have got all my money, and that's all they care for." The witness says he repeated these words to Mr. Parker, who said, "Ah, he's just as jocular as ever: but I have searched in our office, and cannot find it." During all this time the only observation of the deceased, with respect to his will, is that Mr. Parker had the paper, adding, with an oath, "They have got all my money, and that's all they care for;" which is supposed to be a recognition of the contents of the paper. This witness says that the will was not read over by, or to, the deceased in his presence; and goes on to state, with reference to the capacity of the deceased, "I never can think that the deceased could have known what the will contained; and, if I had known it, I would not have put my name to it." It has been said that, as this witness attested the execution of the will, he is deposing against his own act: but this is not a true description; the witness says he does not think the deceased knew the contents of the paper, as he believes it was his intention that his property should go to his relations; and Womes says he would not have signed his name if he had known the contents of the will. They do not say that the deceased was incompetent to make a will; they act on the supposition that it was the intention of the [238] deceased that his property should go to his own relations. This is not like witnesses coming to depose against their own act; they relate what did actually take place at the time.

Womes, the other attesting witness, is the schoolmaster and parish-clerk; and he says he was sent for, and when called up-stairs he found the deceased in bed, Parker standing by the side of the bed, and Durling being also in the room: so that the will was made in the presence of the two executors and residuary legatees. The witness says that Parker held the paper in his hand, and gave it to the deceased, who signed his name, Parker saying something about a will: the witness and Calcott then signed it. He says he heard the deceased speaking to Calcott, but could not distinguish the words. This witness also says that the will was not read over in his presence, nor was anything said about what it contained. His belief that the deceased was ignorant of the contents of the will is founded on the frequent declarations of the deceased that he would make a will in favour of his poor relations: and he says he would not have attested the will if he had been aware of its contents. He says that the deceased's memory was completely lost, and that the most he could say of him is that he was rational.

It is said the executors labour under this disadvantage, that they cannot prove the instructions; whose fault is that? Was any secrecy necessary to be observed? Not the least. There is, therefore, nothing to lay a probable foundation for this disposi-

tion; either a dispute with the deceased's relations, or a motive to leave these two persons any part of [239] the property; and Womes expressly states that the deceased told him that he had made a will and provided for his poor relations. Is it possible, then, to hold that the principles of the law are complied with in this case, where there is no probable foundation for the disposition, nothing whatever but a bare execution? There is no conversation in which it was shewn that the deceased knew what the disposition was, or any reference to the manner in which the residue was disposed of, except the loose declaration, "They have got all my money, and that's all they care for."

If, under these circumstances, the Court could not pronounce in favour of a will of this description, supposing the case had rested here, are there any circumstances calculated to detract from the weight of suspicion? There is no other circumstance which should render it likely that the deceased would exclude his own relations than that he should have considered 1000*l.* not too large a reward to these two persons for carrying into execution his testamentary intentions.

But the case does not rest here; for it is said, here is a direct recognition of the will by the deceased to two persons, clerks in the bank, who were in the habit of frequenting the deceased's house; and were there on one occasion after the will was executed. One of these persons states that the deceased was asked by some one whether he had made his will, and he replied (as far as the witness could collect) he had, and had left Cross 10*l.* a-year, and old John 10*l.* a-year; precisely the same declaration which he had made on the 3d of March to Godson. What is there to shew that it was of this [240] will he was speaking? The other witness says he "understood" from the deceased that he had left the rest of his property after his death to Parker and Durling; but did he understand, or did the deceased know, what was the amount of the benefit he was giving away from his own relations to these two persons? On the contrary, he expressly says he understood the deceased to say that 30*l.* a-year was as much as he had to leave; so that he supposed what he had left to his executors was a mere trifle. I do not consider that the evidence of these two witnesses (and it is admitted that their object was to obtain a recognition) proves anything more than that they "understood" that what was left, after the three annuities were provided for, should go to the executors, but that the deceased believed this to be of small amount. This is the evidence which is to supply the deficiency of the execution of the will and to shew a knowledge of its contents; but I do not think there is evidence of more than a bare execution, which is not sufficient where the testator is in a state of weak and impaired capacity, to put it no higher than that.

I am of opinion, on the whole, that the evidence is not sufficient to sustain the act, and I pronounce against the validity of the will, which is not proved to be the will of a testator who knew and understood the contents, or to contain the real wishes and intentions of the deceased. And as the paper has been brought forward on the behalf of persons for their own benefit, I am of opinion that I must go further, and condemn those parties in the costs of the proceedings.

[241] *ASPINWALL against THE QUEEN'S PROCTOR.* Prerogative Court, Easter Term, May 17th, 1839.—Administration of the effects of a citizen of the United States of America, dying intestate in this country, in itinere, limited for the purpose of paying his debts, &c. and transmitting the balance to the Treasury of the United States, refused to the American consul, upon the non-appearance of any next of kin of the deceased, the Crown opposing the grant.

On petition.

John Hammond, late of Providence, in Rhode Island, and a citizen of the United States of America, died at or near Weedon Beck, in the county of Northampton, on the 7th of May, 1838, in consequence of a fall from a coach (which overturned) while travelling to Liverpool, in order to embark for the United States.

The deceased left property in this country to the amount of about 1000*l.* Colonel Aspinwall, the American consul-general, took possession of some of the effects, but Messrs. Baring and Co. declined to pay 627*l.* due to the estate of the deceased till an administration was obtained; accordingly, upon an affidavit by the consul, "That by an Act of Congress of the United States of America, passed on the 14th of April, 1792, concerning the duty of consuls and vice-consuls resident abroad, and which by the instructions they are enjoined to act upon and follow, it is by the second section

thereof, amongst other things, recited 'That it shall be their duty, where the laws of the country permit, to take possession of the personal estate left by any citizen of the United States, other than seamen belonging to any ship or vessel, who shall die within their consulate, leaving there no legal representative partner in trade, or trustee by him appointed [242] to take care of his effects; they shall inventory the same, with the assistance of two merchants of the United States, or, for want of them, of any others, at their choice; shall collect the debts due to the deceased in the country where he died, and pay the debts due from his estate, which he shall have there contracted; shall sell at auction, after reasonable public notice, such part of the estate as shall be of a perishable nature, and such further part, if any, as shall be necessary for the payment of his debts; and at the expiration of one year from his decease the residue and the balance of the estate they shall transmit to the Treasury of the United States, to be holden in trust for the legal claimants. But if at any time before such transmission the legal representative of the deceased shall appear and demand his effects in their hands, they shall deliver them up, being paid their fees, and shall cease their proceedings.' A decree issued, citing the next of kin of the deceased, if any in special, and all others in general, having, or pretending to have, any right, title, or interest in the estate and effects of the deceased, to accept or refuse letters of administration, or to shew good and sufficient cause, if they have or know any, why letters of administration should not be granted to him (the consul) limited for the purpose only of taking possession of the personal estate of the deceased within the consulate, and collecting the debts due and owing to him in this country, and of paying the debts due from his estate, and, at the expiration of one year from his decease, of transmitting the residue and balance to the Treasury of the United States of America, there to be holden in trust for the legal claimants, pro-[243]-vided no personal representative of the deceased shall be appointed, with an intimation that, in default of appearance, the judge would proceed to decree letters of administration, limited as prayed." To this decree an appearance was given by the Queen's proctor, and the question as to the grant of administration came on by petition, the Court having declined to enter into it upon motion.

Phillimore and Addams in support of the grant. In the first place, the Queen's proctor has no *persona standi*; but assuming that he has a *persona standi*, we are entitled to the administration by the general law, and by the particular law of the United States.

The deceased was a foreigner, and he had no relations in this country entitled to take administration, and by the general law the property of a foreigner dying intestate here belongs to his country. (a) The particular law of the United States requires the American consuls in foreign countries to take possession of citizens' effects, which the law of this country permits; for it is the practice of the British consuls, and those of all maritime countries, to take possession of the effects of their own countrymen dying abroad intestate. In the case of *Sidy Hamet Benamor Beggia* (1 Add. 340), a native of Fez, who died at Gibraltar, leaving effects there and in this country, a similar grant to that now prayed was made by this Court.

There is no principle in the law of nations [244] which gives a right to the Crown of this country to interfere where there is no question as to domicile, the party, as in this case, dying in itinere, on his way to his own country.

The Queen's advocate and Haggard contra. The law of the American Congress authorises their consuls to take possession of the property of citizens dying abroad intestate, only where the law of the country permits it. There is no case in which such a grant has been made by this Court. In the case referred to, the Emperor of Morocco was entitled to the property, and the administration was granted to his agent.

There is no satisfactory proof of the American law, and if there had been, we are not bound by it: and it may be a grave question whether we should adopt the principle of reciprocity upon this point. The rule of distribution is according to the *lex domicilii*, but the mode of administration, by whom and by what Court, is governed by the *lex loci rei sitæ*. The Queen's proctor appears on the ordinary ground, that where there is no person entitled to an intestate's effects the Crown takes them in trust.

Judgment—Sir Herbert Jenner. The question arises with respect to the right of

(a) Vattel, b. 2, c. viii. sec. 109, 110.

the American consul in this country to take administration of the goods of an American subject, clearly domiciled in America, who died in itinere, leaving personal property here, and money in the hands of a merchant in this town.

It appears that on the death of Mr. Hammond, [245] Colonel Aspinwall, the American consul in this country, took possession of the property about him, paid his funeral and other necessary expenses, but upon application to Messrs. Baring and Co. they declined to pay over the money in their hands until letters of administration were taken out, and they could obtain a valid discharge. An application was accordingly made to the Court to grant administration to Colonel Aspinwall, founded on an Act of Congress, authorising American consuls to take possession of the effects of citizens of the United States dying in foreign countries; but the Court was of opinion that it could not grant such an application on an ex parte motion, and some discussion took place as to the form of the decree which should go out. Eventually a decree went out against all persons, and an intimation was given that, if no person appeared to shew cause against it, the Court would grant administration to Colonel Aspinwall. The decree was served in the usual manner, and an appearance was given on behalf of the Crown, praying that the Court would reject the claim of Colonel Aspinwall. It is said that the Crown has no *persona standi*, for that the deceased, being a domiciled foreign subject, dying in itinere, the right to his property, locally situated in this country, is governed by the law of the country to which he belonged. It is true that by the law and practice of this Court the distribution in such cases is to be according to the law of the country in which the party was domiciled at his death; but the property being in this country the Court will grant administration to some person who is entitled to the custody of the property, and has au-[246]-thority to pay the debts due from the deceased; and the Court, in deciding the question whether Colonel Aspinwall is or is not entitled to the administration, must be guided by the law and practice of this Court. Now I cannot say that the Crown has no right to interfere with property belonging to foreigners, in order to protect that property; that in all cases where foreigners die intestate in this country the Crown has no right to appear and shew cause why a person claiming the administration ought not to have it. The Crown has a right to the custody of the property till a superior title to it can be shewn. This law is not peculiar to our country; it is the general law, and it cannot be the general law of the United States that British consuls are entitled to administer the estates of British subjects dying in the United States, or why was the special law of New York passed, which is mentioned in the affidavit? What is the law upon which Colonel Aspinwall rests his claim? An Act of Congress passed in 1792 for the guidance of consuls in foreign countries, giving them certain powers and authorities so far as is consistent with the law of the country to which they are accredited; that is, the power of the consuls is to be governed by the law of the country to which they are accredited, and not by the law of the country from which they are sent. There may be grave reasons why the law of the United States should be different from the law of this country, but if there is a difference, then no authority at all is given to the consuls. The question, therefore, is, not whether the law of America authorises the consul to take possession of the property of its sub-[247]-jects dying in this country, but whether the law of this country permits it, and it is upon the ground that it does so that Colonel Aspinwall applies for letters of administration.

I am not aware of any case in which it has been held that, by the law of this country, it is competent to a foreign consul to take possession of the property of a foreigner dying here, in itinere, domiciled in his own country. In the case of *Sidy Hamet*, the Emperor of Morocco claimed not the custody of the property but the interest itself; the *jus in re* was in him, and if it could be shewn that the property in this case has devolved to the American Government, the Court would be inclined to grant letters of administration to the consul. But it is only to hold it in trust, and if no claim is made to the property, then the Treasury of the United States would be entitled to take it, and it is not shewn that Mr. Hammond died without relations.

Is it, then, the law and practice of this Court that such an administration should be granted? I apprehend not, and that the Crown is the party to see that the property of any person dying in its dominions gets into proper hands.

It has been said that by the law of the United States British consuls may take possession of the property of British subjects in similar circumstances. But this is not by the law of nations, but by custom or express enactment, and it is not a law

which this country is bound to follow: this country has not adopted the principle of reciprocity in this respect.

I am of opinion that there is not sufficient evidence to shew that the administration ought to be [248] granted, as prayed, to Colonel Aspinwall, and I reject his petition. No claim is made by the Crown.

RAYNER against GREEN. Prerogative Court, Easter Term, May 17th, 1839.—An executor intermeddling with the effects of a testator to such an extent as would constitute a person executor de son tort may be compelled to take probate; the executor in this case having satisfactorily explained his conduct, the Court refused to compel him to take probate.

On petition.

Mr. James Smith, of Chippen Wickham, died 4th of November, 1823, leaving a will, whereby he bequeathed two cottages, an orchard, and a garden to his wife, her heirs, administrators, and assigns, appointing her, John Pounceford, his son-in-law, and John Green, a publican and small farmer in the neighbourhood, executors. Probate of the will was taken by Pounceford alone in February, 1824, power being reserved to Green. The widow died in July, 1824. Pounceford intermeddled with the effects, and continued to administer them till February, 1826, when he died, leaving part unadministered. Green, the surviving executor, had never taken probate of the will, but it was alleged that he had intermeddled, by taking upon himself the management and control of the cottages, orchard, and garden; receiving the rents, making agreements for letting them, giving notice to the tenant to quit, and doing acts proper to an executor, and holding himself out to the world as such; and the object of the present proceeding was to compel him to take probate of the will, in order to get a representation to carry on proceedings [249] in Chancery. On the part of Green it was alleged and supported by his affidavit that he had never acted or intended to act as executor; that he had never received his legacy of 10*l.* as executor under the will, and never intended to claim it; that all he had done was as the agent and friend of Pounceford, the other executor, who resided in London, and that he had never acted in any way with reference to the estate after the death of Pounceford, in 1826. It appeared that the cottages and appurtenances were at first supposed, from the manner in which they were devised, to be freehold, and the widow was considered by Green as the devisee of the property, which turned out to be leasehold and chattel property.

. Nicholl in support of the petition, Haggard contra.

Judgment—Sir Herbert Jenner. As the testator died in 1823 the transaction is of an antiquated date; but I do not know that this will have any effect upon the decision of the Court, if the facts shew that there has been such an intermeddling as to render Green executor de son tort, and compellable to prove the will. The acts alleged to have been done by Green are such as, without explanation, to shew in what character they were done, will render him liable to be called upon to prove the will, and he cannot escape from the burthen. But it is alleged on his part that he did not intermeddle as executor; that he had carefully abstained from acting as executor, and that [250] all he did was as the agent of Pounceford; that the cottages were believed to be, and were dealt with and treated as, freehold, and that he acted as agent of the widow, believing her to be the devisee of the property; and when the widow died he continued to act under the authority of Pounceford, the son-in-law of the testator, who had acted as sole executor, though he found Green, who resided in the neighbourhood, a convenient person to manage the property. I cannot think that what has been done by Green is of such a nature as to justify the Court in holding that he has taken upon himself the character of an executor. He expressly swears that he did not intend to act; that he has not claimed his legacy, and does not intend to claim it; that all he did was as the agent, and under the authority, of Pounceford, and this is borne out, as far as they go, by his letters. And the Court is the more inclined to pay attention to what Mr. Green has sworn, as he is corroborated by the affidavit of a clerk to a solicitor, who states that he advised him not to act as executor. After the death of the widow he continued to act as the agent of Pounceford, whom he had reason to believe to be the party in possession of the property under the will of Mrs. Smith till the death of Pounceford, and no longer. I am, therefore, of opinion to reject this petition.

The Court made no order as to costs.

[251] LLOYD *against* PETITJEAN, FALSELY CALLING HERSELF LLOYD. Consistory Court of London, Easter Term, May 30th, 1839.—A marriage between an Englishman and a domiciled French lady, at the house of the British Ambassador at Paris, by the chaplain to the embassy, is a valid marriage under the statute 4 Geo. 4, c. 91.—By the law of France the marriage of a son under the age of twenty-five years, being null and void without consent.—Query, whether an Englishman above the age of twenty-one years, but under the age of twenty-five years, contracting a marriage in France according to French forms with a French lady of full age can, in the Courts of this country, proceed for the purpose of annulling the marriage by reason of such minority and want of consent.

This was a question as to the admissibility of a libel in a suit of nullity of marriage, promoted by George Lloyd, a natural son of Sir Wm. Lloyd, against Athalie Pulcherie Clotilde Petitjean, a native of France, in which country the marriage took place.

The libel pleaded :

First. That according to the laws and customs concerning marriages, which were in force in the kingdom of France in the month of October, 1837, before the celebration of a marriage, the officer of the civil State shall make two publications, with an interval of eight days, one day being Sunday, before the door of the Town Hall ; these publications and the act which should be drawn up on the occasion shall enumerate the first names, the surnames, the professions, and the residences of the persons about to be married, their quality of majors or minors, and the first names, surnames, professions, and domiciles of their fathers and mothers (Code, art. 63).

[252] That there is no marriage where there is no consent (art. 146).

That a son who has not attained the age of twenty-five years completed, and a daughter who has not attained the age of twenty-one years completed, cannot contract marriage without the consent of their respective fathers and mothers, and in case of disagreement, the consent of their respective fathers (art. 148).

That the children of a family having attained the said respective ages are bound, before contracting marriage, to demand by a respectful and formal act the advice of their father and of their mother, or that of their grandfathers and grandmothers when their father and mother are dead or unable to signify their consent (art. 151).

That after the aforesaid ages, up to the age of thirty years complete for a son, and up to the age of twenty-five years complete for a daughter, the aforesaid respectful act, and upon which there shall not have been any consent to the marriage, shall be renewed two other times from month to month, and one month after the third act the parties may proceed to the celebration of the marriage (art. 152).

That the aforesaid requirements relative to the respectful acts which ought to be made to the father and mother are applicable to natural children legally acknowledged (art. 158).

The libel went on to plead that at the time of the marriage (which took place, in the first instance, by civil contract, before the mayor of the [253] second arrondissement of Paris, on the 26th October, 1837, and on the same day at the hotel of the British Ambassador, at Paris, by the chaplain of the British Embassy). Mr. Lloyd, who was born on the 17th October, 1815, was twenty-two years and nine days old ; that the consent of the father of Mr. Lloyd was not given to the marriage, for although a certain act of declaration signed by Sir Wm. Lloyd, specifying the age of Mr. Lloyd, and containing an acknowledgment of him as his son, was produced to and accepted by the French authorities as his father's consent to the marriage, such declaration was not intended to convey a consent to the marriage, of which Sir William was not cognizant, but as an evidence of birth for another purpose ; that the first marriage, therefore, was null and void for want of consent on the part of the father of Mr. Lloyd, he being a minor.

With regard to the second marriage, it was pleaded that neither of the parties was a member of the household or in the retinue of the ambassador, by reason whereof a marriage between such parties (one of them being a domiciled subject of France) was null and void to all intents and purposes.

Before the argument commenced, a preliminary question arose whether counsel could be heard on the part of the wife, she having been pronounced in contempt ; but the objection was waived on the other side with consent of the Court.

Haggard and Nicholl against the admission of the libel. The first question is, how far the restrictions on marriage, imposed by the law of a foreign country, [254]

for the protection of the rights of third parties, can be imported into our law, and employed by a British subject competent to contract marriage in this country, to annul by a sentence of this Court a marriage contracted in France? The incapacity of the husband under the French law is on the ground of the invasion of the father's rights. The remedy is sought by the husband, not in the French Courts, but here, where he is under no such disability, and where the father is not entitled to such rights; besides, it is not sufficiently pleaded that those rights attach to a natural father. There is no case precisely in point; but the observations of Lord Stowell, in *Ruding v. Smith* (2 Hagg. Con. 371), are not inapplicable to the circumstances of the present case. He says, "It is true, indeed, that English decisions have established this rule, that a foreign marriage, valid according to the law of the place where celebrated, is good everywhere; but they have not, *é converso*, established that marriages of British subjects, not good according to the general law of the place where celebrated, are universally, and under all possible circumstances, to be regarded as invalid in England." Again, he says, "The husband was a person entitled by the laws of his own country to marry without consent of parents or guardians, being of the age of twenty-one; but by the Dutch law he could not marry without such consent till thirty. Now, I do not mean to say that Huber (*De Confl. Leg.* l. 1, t. 3, s. 12) is correct in laying down as universally true 'that *personales qualitates, alicui in certo loco jure impressas, ubique circumferri et personam* [255] *comitari*;' that being of age in his own country, a man is of age in every other country, be their law of majority what it may; yet it is not to be laid out of the case that the Dutch law would impose, in this respect, a very unfavourable disability upon the British subject." Whether Huber's doctrine is correct has been a subject of much discussion by jurists. But supposing there to be a personal disability, it is submitted that the husband has no right to avail himself of a temporary disqualification to invalidate in this country, in which he was under no such disqualification, a marriage with a person under no disability, either by the law of her own country or of his.

This marriage, however, does not rest entirely upon the civil contract before the French authorities, for the parties were re-married according to the rites of the Church of England, in the chapel of the British Embassy. If the *lex loci contractus* is to govern this point, the question is, What is that law? It must be the general marriage law of England before the Marriage Act (26 Geo. 2, c. 33), which extends to England only. The parties are married at the British Ambassador's house, which, it is submitted, is for this purpose, by law, part of the British dominions. Lord Stowell, in *Ruding v. Smith* (2 Hagg. Con. 385), says that, in the English factories abroad, marriages are regulated by the law of the original country to which they are still considered to belong. There is no case precisely like the present. In *Pertreix v. Tondeur* (1 Hagg. Con. 136), in 1790, Lord Stowell says, "Taking the privilege to [256] exist in ambassadors' chapels (which perhaps has not been formally decided), I may still deem it a fit subject of consideration whether such a privilege can protect a marriage where neither party is of the country of the ambassador." He doubted, therefore, whether, even in such a case, the marriage was not good. In *Rex v. Brampton* (10 East, 282) Lord Ellenborough said, "that marriages in ambassadors' chapels, if made by the allowance of the foreign State, would be good marriages in those countries; but that, if not a good marriage in the place where it was celebrated, it would not be a good marriage any where." Mr. Jacob (*b*) observes upon this dictum, "However the Lord Chancellor is reported to have given his opinion in the House of Lords, (*c*) that there was no doubt about the validity of such marriages." Supposing, however, such doubt to have existed, it has been completely removed by the statute passed in 1823 (4 Geo. 4, c. 91). The object of that statute was, as is stated in the preamble, "to relieve the minds of all His Majesty's subjects from any doubt concern-

(*b*) Addenda to Roper's Law of Husband and Wife, vol. 2, 497.

(*c*) Hansard's Parl. Deb., vol. 9, N. S., col. 1319, in the debate on the stat. 4 Geo. 4, c. 67; with regard to marriages at St. Petersburg, Lord Eldon said, "That during the fifty years he had been in the profession he never heard of any doubts, till the late bills were brought in, whether marriages performed in the chapels of our ambassadors were valid. There was no doubt that they were good marriages, and he was persuaded that no contrary opinion would ever be sanctioned by judicial authority."

ing the validity of marriages solemnized by a minister of the Church of England, in the chapel or house of any British Ambassador or minister residing within [257] the country to the Court of which he is accredited; and it enacts, "That all such marriages shall be deemed and held to be as valid in law as if the same had been solemnized within His Majesty's dominions." If the ambassador's house be, for this purpose, part of the British dominions, it can make no difference whether both or one only of the parties have a British domicile. The act of Parliament was passed for the purpose of relieving the doubts of all Her Majesty's subjects, which it would not do if it do not apply to marriages between British subjects and foreigners.

The Queen's advocate and Addams in support of the libel. The validity of the first marriage must depend upon the law of France, the law of England adopting the *lex loci contractus*, with certain exceptions, as where there is an essential difference of religion, or where the law of the country cannot be resorted to, as mentioned by Lord Stowell in *Ruding v. Smith*. We have pleaded that this marriage is invalid by the law of France, which makes no distinction between natural and legitimate children; we have sufficiently pleaded the law, which will be proved in the usual manner. It is said that the minority of Mr. Lloyd under the French law cannot apply in this case, as the foreign law did not apply in *Ruding v. Smith*; but the circumstances of that case were not like the present; here the question is as to the validity of a marriage in the civil form, between a British subject and a French subject in the territory of France. The civil contract must be according to the general law of the land, which [258] is applicable to all contracts, whether the parties be subjects of that kingdom or foreigners. This doctrine has been lately acted upon by Lord C. J. Tindal (*Trimbey v. Vignier*, 1 Bing. N. C. 151), who held that the holder of a bill of exchange drawn in France, and indorsed there in blank, cannot recover against the acceptor in the Courts of this country, as, by the law of France, an indorsement in blank does not transfer any property in a bill of exchange. The *lex loci contractus* must govern as to all civil contracts.

With respect to the marriage in the British Ambassador's chapel, it is said that such marriage is valid under the stat. 4 Geo. 4, c. 91. There has been no decision as to the construction of that act. Before the passing of that act it was necessary that both parties should be of the country of the ambassador; such was the result of the case of *Pertreis v. Tomdear*; and it never could have been the intention of the legislature to legalize the marriages of any persons whatever, if celebrated in the ambassador's chapel, contrary to the law of the country where they took place. The act uses the term "subjects" throughout, and it must have been intended to apply only to cases where both parties were of the ambassador's country; had the legislature intended differently the statute would have been differently worded; for in an act passed in the same session (4 Geo. 4, c. 67) with regard to marriages at St. Petersburg, the words used are, that such marriages shall be good "whether both or one of the parties be British subjects."

[259] *Judgment*—*Dr. Lushington*. In considering the admissibility of this libel, I think it most convenient to direct my attention, in the first instance, to the second marriage, pleaded to have taken place in the house of the British Ambassador at Paris.

The validity of this marriage must be supported, either by the law as it existed previous to the act of 1823, or by the law as affected by that statute. With respect to this act, I am not aware that it has received, after discussion and deliberation, any judicial construction. I have taken some pains to ascertain whether, in any Court, this question has been judicially determined, namely, whether a marriage in the house of a British Ambassador, one of the parties so married only being a British subject, is or is not excluded from the operation of the act? All I can find is, that a case (that of *O'Connor v. Ommaney*), occurred in the Court of Chancery in 1837, in which the payment of a sum of money depended upon the validity of a marriage between a British subject and a native of Switzerland, solemnized in the house of the British Ambassador at Naples, and the Master reported that a valid marriage had taken place; which report was not objected to, and being confirmed by the Court, a decree passed accordingly. But I do not find that the point of law underwent any discussion or consideration, and I cannot, therefore, regard this case as a ruling decision.

I begin by considering the words of the statute itself, without reference to any

other in *pari materia*, and I may first observe that it is a remedial [260] statute, intended for the redress of what, in the judgment of the legislature, was a grievance and hardship, and, according to all rules of legal construction, it is to receive such an interpretation as will meet the evil intended to be remedied; such a statute must have an extended, not a restricted, construction. It is to relieve the minds of all Her Majesty's subjects from any doubt concerning the validity of these marriages; words which must be construed in an ample, not a confined, sense. The statute certainly is not expressed in very satisfactory terms, because not a word is said as to whether it applies to marriages between British subjects alone or in which one party only is British, or whether it comprehends all marriages solemnized in a British Ambassador's chapel. On the other hand, there are no words of exclusion shewing it was the intention of the legislature to confine the act exclusively to British subjects; it declares that all marriages shall be valid, without exception, and I cannot see on what principle I can put a construction upon the act which should exclude a marriage where one of the parties is a British subject and the other a foreigner. If I were to do so, I should not carry the act into full effect, for I should not relieve the minds of all Her Majesty's subjects from doubt. I am, therefore, clearly of opinion that, provided one of the parties be a British subject, a marriage under the circumstances of the present case is valid under the act.

This is the conclusion I have formed from the statute itself; but another statute had been passed in *pari materia* that very year (4 Geo. 4, c. 67) to render valid marriages had at St. Petersburg, in the chapel of the Russia Company, and in private houses, in which it is expressly enacted that such marriages shall be good whether both or one of the parties be British subjects; and it has been strongly and fairly contended that if the legislature had intended the same thing in the subsequent act, in *pari materia*, it would have used the same terms. But although it be undoubtedly a principle of law that, in the construction of an Act of Parliament, you are to look at other statutes in *pari materia*, yet it is a dangerous doctrine to push too far, especially on the subject of marriage. I find, for instance, in a statute passed in the late reign (3 & 4 Wm. 4, c. 45), "to declare valid, marriages solemnized at Hamburgh, since the abolition of the British factory there;" the same purpose is intended as in the St. Petersburg Act, but the wording is not the same.

I am not unaware of the very great danger that may arise from legalising in England marriages had in foreign countries; that the consequences may be these—you may have the status of the parties different in different countries; you may have the issue of a marriage legitimate in one country and illegitimate in another, and cohabitation prohibited in one country, and in another allowed. But these are considerations which fall within the province of the legislature which has thought fit to pass this act, and it is my duty only to administer the law.

I am of opinion that the validity of this marriage cannot be impeached, and, consequently, that the libel must be rejected. It is unnecessary that I should enter into a consideration of the law of [262] France, as pleaded, with reference to the first marriage, being of opinion that the second marriage is legal by virtue of the statute.

LLOYD *against* LLOYD. Consistory Court of London, Michaelmas term, December 14th, 1839.—Communications from a party in a suit to his solicitor with reference to the suit are privileged communications.

A suit was afterwards instituted by the husband for a divorce, by reason of the wife's adultery, and in Michaelmas Term a sentence of separation was pronounced. In the course of the argument an objection was taken to an interrogatory addressed to Mr. Lloyd's solicitor (with the view of eliciting evidence of the husband's adultery), to the following effect:—"Has the producent, since his marriage, been attentive and strictly faithful to the ministrant, as you know or believe? Will you swear that you do not believe that the producent, since his marriage, has had connexion with some woman or women other than the ministrant?" In his answer the solicitor stated that he had no means of forming a knowledge or belief on either point, except from the information of his client, in his communications with him (the witness) as his solicitor, respecting these proceedings, and such communications being privileged, he refused to give any other answer to the question.

On behalf of the wife, it was contended by Robertson that the privilege set up

extended only to a professional adviser in the case, and that no other professional advisers were recognized in these Courts [263] than proctors and counsel. *Wilson v. Rastall* (4 Durn. & E. 753), *Cuts v. Pickering* (1 Vent. 197), *Vaillant v. Dodemead* (2 Atk. 524), *Mynn v. Robinson* (2 Hagg. Ecc. 195), *Evans v. Knight* (3 Phill. 423). The Court was of opinion that such a limitation of the privilege would go too far, excluding common law counsel (who are sometimes consulted in proceedings in these Courts), and even the clerks of the proctor and the persons employed by him abroad; that the solicitor was not an "agent," in the sense used by Lord Hardwicke in *Vaillant v. Dodemead*; that he stood in the condition of a confidential adviser with reference to the suit, and that, therefore, the communication was privileged, and he was not compelled to divulge it.

WEGUELIN against WEGUELIN. Consistory Court of London, Easter Term, May 30th, 1839.—Evidence given by a witness examined *de bene esse*, by reason of ill health, is not admissible, if the witness be at the hearing of the cause capable of being re-examined.

This was a cause of divorce for adultery, brought by the husband against the wife. A witness who was alleged to be in immediate danger of death had been allowed by the Court (on April 20th) to be examined *de bene esse* before the admission of the libel. When the cause came on for hearing this day the witness so examined was still alive, although said to be in extremis.

The Court would not allow the evidence to be received, without an affidavit as to the witness's incapacity to be re-examined, stating that the very [264] meaning of the phrase *de bene esse* implied that it was conditional, and that the witness must be re-examined, if capable.

On the 8th of June, an affidavit having been produced, stating that the witness was so ill that she could not undergo an examination without danger, the Court admitted the evidence, and pronounced for the divorce.

SMITH AND WILLIS against DIXON. Consistory Court of London, Trinity Term, July 5th, 1839.—In a suit for subtraction of a church-rate of ninepence in the pound. An allegation pleading that the churchwardens having produced an estimate and required a rate of sixpence in the pound, which would have been sufficient to meet all necessary demands, and that the rate of ninepence in the pound, which without any estimate was moved as an amendment, and carried, and was excessive, admitted as being *primâ facie* an answer to such suit.—An article in an allegation pleading omissions of a small amount in a church-rate rejected.—An allegation in a suit for subtraction of church-rate having been admitted, pleading that the rate in question of ninepence in the pound was excessive; an allegation in reply, stating that upon a sixpenny rate being proposed by the churchwardens for absolute necessities, an increased rate of ninepence in the pound was moved and carried for the purpose of repairing the church bells, upon a calculation made at the time, admitted as a sufficient explanation of such increased rate.—Held that a church-rate made upon the same assessment as the poor-rate is a valid assessment.

This was a cause of subtraction of church-rate, brought by Smith and Willis, the churchwardens of Stebbing, in Essex, against Joseph Dixon, a parishioner and inhabitant.

A libel in the usual form had been admitted without opposition. An allegation on the part of Dixon, in answer to the libel, now stood for admission, pleading:

First. That the rate or assessment, pleaded and referred to in the first, second and third articles of the libel given in and admitted in this cause, &c., was not duly made and assessed according to law. That the said rate was not, as untruly alleged and pleaded, made for and towards the repairs of the church of the parish of Stebbing, in the county of Essex, and for such other purposes as a church-rate was or is by law applicable, for the party proponent doth allege and propound that on the churchwardens, parishioners and inhabitants meeting [265] together in vestry, on the 7th day of February, 1839, for the purpose of making "a rate for the repair of the church of the said parish of Stebbing," an estimate was by the said churchwardens produced and read to the parishioners and inhabitants assembled; that such estimate, which

included certain charges for the salaries of the parish clerk and beadle, and for expenses in respect of the church clock, amounted to the sum of ninety-six pounds and no more, &c.

Second. That in pursuance of the said estimate, and in order to obtain sufficient funds for the liquidation thereof, the said Willis proposed that a rate of sixpence in the pound be made, that such proposition was duly seconded, &c. ; whereupon Dixon, one of the parties in this cause, moved as an amendment “that the consideration of the question be deferred until that day twelvemonth,” which was seconded by Wm. Davey, an inhabitant of the said parish ; whereupon Wm. Stock, a parishioner, moved, as a further amendment, that a rate of ninepence in the pound be made, which having been seconded by Robert Monk, a parishioner, the said original proposition, and the said Joseph Dixon’s amendment were, upon a shew of hands, respectively negatived, and the amendment of the said Wm. Stock carried ; whereupon the said Joseph Dixon demanded a poll, which was taken, and upon the close thereof the amendment of the said Wm. Stock was carried, &c.

Third. That a rate of sixpence in the pound, as proposed by the said church-wardens, will produce the sum of one hundred pounds and upwards ; and that the said amendment, proposing a rate of nine-[266]-pence in the pound, was made without any fresh statement or estimate, and that such augmented rate was and is excessive and illegal, &c.

Fourth.(a)¹ *That the said rate or assessment of nine-pence in the pound is not a fair and equal assessment upon all occupiers of lands, tenements, or premises in the said parish, in respect of the lands, tenements, or premises so occupied or held, used or enjoyed by the several rate-payers then in the parish ; for the party proponent doth allege and propound that three several messuages and gardens annexed thereto in the said parish are not assessed in the said rate, but the same, and the names of the occupiers thereof, are altogether omitted therein, and that such several messuages and gardens respectively are assessed to the poor rate of the said parish.*

That the said rate or assessment is made without a specification of the different tenements, lands and premises in respect of which the occupiers thereof are liable to such rate or assessment, and that *(the rateable value in respect of a church-rate for the said parish is in some instances more and in others less than the proper rateable value—these words were struck out, agreeably to the directions of the Court, and the following were inserted :)* in consequence of such omission or want of specification, the several rate-payers of the said parish are not informed for or in respect of what property they are severally rated at or assessed.

The fifth, in supply of proof, referred to the original rate, and also annexed two exhibits, C [267] and D, and pleaded C to contain the names of the persons and value of the properties held by them in the said parish, and wholly omitted in the said church-rate ; and D to be a true copy of several parts of such rate in which the inequalities of assessment appear as pleaded in the fourth article. These exhibits were as follows : (a)²

(C) Names of Occupiers and Descriptions of Property held by them and omitted in Church-Rate Book for Church-Rate of 7th Feb. 1839, at Stebbing, in Essex.

Occupier.	Description of Property.	Value per Annum.
		£ s. d.
Chopping, Sam., Senr. {	Cottage and Gardens at Bran	3 0 0
	End	
Chopping, John . {	Cottage and Garden in Mill	2 12 0
	Lane	
Nicholls, Zachariah . {	Cottage and Garden in Brain-	5 4 0
	tree Road	

(a)¹ Those words of this article which are in italics were rejected by the Court.
(a)² The exhibits C and D were struck out of the allegation as reformed.

(D) Names of Occupiers and Descriptions of Property held by them and unequally assessed.

Occupier.	Assessment.	Amount of Rate.
	£ s. d.	£ s. d.
Chopping, Samuel . . .	73 15 0	2 15 3 $\frac{3}{4}$
Dixon, Joseph . . .	152 15 0	5 14 2 $\frac{1}{4}$
Erith, William . . .	123 0 0	4 12 3
Crow, James . . .	4 15 0	0 3 6 $\frac{3}{4}$

Addams opposed the allegation. He contended that in order to invalidate a church-rate, it is not sufficient to shew that it exceeds the estimate of the churchwardens; and with regard to the omissions that they were of trifling amount, and would not affect the validity of the rate.

[268] Haggard in support of the allegation.

Judgment—Dr. Lushington. The foundation of the legality of a church-rate is, that the money is necessary for sustaining the fabric of the church, for repairs, and for such expenses as are indispensable to the decent and proper performance of divine worship; and, *primâ facie*, the churchwardens should, in the first instance, produce an estimate of the sum required for these purposes, as they are not to advance the money themselves. I do not mean to lay it down that if churchwardens, under peculiar circumstances, propose a rate which is utterly inadequate, the parish is bound by their estimate; but I merely say that, *primâ facie*, they ought, in the first instance, to state the amount required. I am confirmed in this opinion by a case in the Court of Queen's Bench, where that Court, being called upon to compel the making of a church-rate, held it to be a sufficient return to the mandamus that the churchwardens had refused to produce an estimate (10 Ad. & Ell. 730).

The churchwardens then having produced an estimate, which I consider to have been a correct proceeding, I must presume that they included in the estimate (as it was their duty to do) all the legal demands that would be made upon them, and that there were no other expenses likely to be incurred, for which a rate would be required. Looking to the circumstances stated in the plea, I must believe, till the contrary be shewn, that a rate of sixpence in the pound would have been sufficient for [269] the expenses included in the estimate, and that a rate of ninepence is excessive; and a rate, which is palpably and clearly excessive, is illegal, and cannot be enforced by this Court. The legality of a church-rate depending upon its necessity, for the purposes I have mentioned, if the Court should sanction a rate made, to an indefinite extent, without regard to the estimate produced, it would be accessory to an abuse which formerly crept into parishes, when church-rates were made for covering expenses totally and entirely irrelevant to the proper subjects of church-rate. I consider the objection to the rate, on this ground, admissible.

With respect to the other objection, I think it is an unfortunate circumstance that, in the present state of the law, the Court is under the necessity of either quashing a church-rate, or of supporting it altogether. I should be exceedingly unwilling to quash a rate on the ground of an omission so small as this. Upon the present occasion it is not necessary to consider whether the rate would be vitiated by the omission of the names of persons on account of their poverty; in strictness, the proper course is to assess all, and afterwards to excuse such as are too poor to pay. If indeed there was a considerable omission, which was intentional, I should be bound to quash the rate; but it has never been decided that, where, under peculiar circumstances, which may justify it, there has been an omission to rate for very minute sums, such rate is illegal. The article relating to the omission of these persons I shall, therefore, direct to be struck out.

With regard to the other ground of irregularity, it is not pleaded in a satisfactory form; it is stated [270] that some occupiers are rated at more, and others at less, than their proper rateable value, without specifying who is rated beyond, and who below, the proper value. If certain persons are rated below the proper value of the property they occupy, it is an admissible averment; but it must be distinctly stated who are

the individuals so under-rated. If, however, the rate is, in other respects, right and proper, it is not a slight disparity between two persons' assessments that would induce me to overturn the rate; but if it be clearly a partial assessment, exposing one set of persons to a burthen beyond what they ought to bear in respect to their property, I shall be compelled, in justice, to quash the rate.

August 7th.—The admission of an allegation, on the part of the churchwardens, responsive to the preceding allegation, came on for debate this day. It pleaded, with reference to the increase made in the rate beyond the estimate, that no church-rate had been made in the parish for several years; that the churchwardens, fearful of exciting the parish, had omitted a sum required for the repair of the church bells (two of which were cracked and useless), and that the produce of a rate of three-pence in the pound had been calculated in the vestry to be the sum requisite for such repair, and that the parish had been assessed for church-rate on the poor-rate assessment.

Haggard in opposition to the allegation.

Addams in support of it, was stopped by the Court.

[271] *Judgment*—*Dr. Lushington*. According to what is pleaded in this allegation, I am clearly of opinion that it is admissible. It states, in answer to the defendant's allegation, that, for several years, whenever a rate has been proposed, it has been rejected, and that, on that account, and to prevent any excitement in the parish, the churchwardens confined their estimate to the amount indispensably requisite to defray the unavoidable expenses, and that this was the reason why, in their estimate, they did not include the repair of the bells. In the defendant's allegation no reason is stated which in any degree accounted for the augmentation of the rate. It is said that there was no estimate of the expense of repairing the bells; but if the rate shall turn out no more than is sufficient, the want of an estimate is not a fatal objection.

As to the repair of bells, it is competent to the vestry, or a majority of the vestry, to vote a rate for that purpose. I apprehend that the churchwardens alone can apply a rate only to expenses which are necessary for sustaining the structure of the church, and for the decent performance of divine service therein; but the majority of the vestry may, if they think fit, authorise a rate for this purpose, and this is a power they have, in this instance, purported to exercise.

The allegation then pleads, with reference to that part of the adverse allegation which states that parties are unequally assessed, and that there is a want of specification of the property, for which [272] parties are rated to the church-rate, that the church-rate is made on the same assessment as the poor-rate, and that the poor-rate books are open to the inspection of the parishioners: so that any person who considers himself to be unequally assessed may ascertain the fact by inspecting the poor-rate books. As an answer, in fact, there can be no doubt that what is here pleaded is an answer; for if any parishioner has an opportunity of referring to the poor-rate books, it cannot be said that he has no means of ascertaining whether he is rightly assessed or not. But a question of law arises whether or not a church-rate made on an assessment for a poor-rate is valid in point of form; whether an assessment must be drawn out for that specific purpose. I have no authority for that proposition. Undoubtedly, where the assessment for a church-rate differs from that for the poor-rate, or where the parties have no opportunity of ascertaining that it is a just and equal rate, that mode would be objectionable; but here these objections do not apply. With one exception, namely, that of tithes, which are assessable to the poor- and not to a church-rate, the assessments are the same for both poor-rate and church-rate; and being so, does the law require the parish to be put to the expense of having the whole rewritten? I know of no authority in law for this proposition, and I see none in common sense. All that is required is, that every parishioner should have an opportunity of seeing whether the rate be equal or not, and if he has that opportunity, by inspecting the poor-rate books, my opinion is that the law is satisfied.

[273] I am of opinion that this allegation contains an answer to the allegation on the other side, and I, therefore, admit it.

No further proceedings were had in this case, the defendant consenting to pay the rate and costs.

PECHELL v. JENKINSON. Prerogative Court, Trinity Term, July 15th, 1839.—An unattested codicil without date, the deceased dying in Jan. 1839, pronounced for, the case being bare of facts, and there being nothing to shew that the codicil

was signed after the 1st of Jan. 1838, when the stat. 1 Vict. c. 26 came into operation.

[Commented on, *In the Goods of Streaker*, 1859, 4 Sw. & Tr. 194. Applied, *In the Goods of Tweedale*, 1874, L. R. 3 P. & D. 206.]

This was a question as to the validity of a codicil, without date, to a will dated the 5th of June, 1830, the testatrix dying on the 20th of January, 1839; whether or not the codicil was to be considered with reference to the provisions of the stat. 1 Vict. c. 26.

The circumstances are fully stated in the judgment of the Court.

The Queen's advocate and Phillimore in support of the codicil.

Haggard and Harding contra.

Judgment—*Sir Herbert Jenner*. This is a question as to the validity of a codicil to the will of Mrs. Sarah Pechell, of Berkhamstead, who died in January, in the present year, [274] leaving a will and eleven codicils, including that propounded.

The will bears date 28th June, 1830; it gives the residue of her personal estate and the produce of her real estate to her three sons, Samuel G. Pechell, Augustus Pechell, and the Rev. H. R. Pechell, and appoints them executors.

The codicil in question is without date and unattested; it is in the deceased's own handwriting, and is written on the third side of the sheet which contains the will. It is in these words:

"In order to prevent any doubts that might arise as to the true intent and meaning of the residuary clause in my will, I declare it to be, and I give and dispose of all monies, stock, and securities for monies, and all property and effects whatsoever possessed by me, or to which I am entitled, and also all monies, stocks, and securities whereof I am entitled to dispose in virtue of any power or discretion under the will of my late dear husband, or any codicil thereto; or under the will of my son, Paul William, and which are not respectively otherwise by me specifically disposed of, to and for the benefit of my three sons in such manner as in the said residuary clause is mentioned.

"SARAH PECHELL."

This codicil is opposed by Mrs. Jenkinson, wife of the Bishop of St. Davids, one of the daughters of the deceased, asserting herself to be interested in certain estate and effects over which the deceased had a power of disposal, and that such interest is prejudiced by the said codicil. It has been propounded in an allegation given on behalf of the [275] executors to which the answers of Mrs. Jenkinson have been taken, and the case now comes before the Court to be heard on those answers only, no witnesses having been examined. The capacity and handwriting of the testatrix have been admitted, and the question is simply, whether the codicil comes under the operation of the statute 1 Vict. c. 26, or not? It being contended for the executors on the one hand that the presumption is in favour of the codicil being written before the 1st of January, 1838, when that act came into operation, and that it lies on the other side to shew that it was written after that time; while for Mrs. Jenkinson it is contended that the burthen of proof lies on the executors, who ought to prove the codicil to have been written before the act came into operation. Looking to the will and codicil, and the admissions of the party as to capacity and handwriting, I cannot doubt the intention of the testatrix that the paper should operate as a codicil. The Court, being satisfied of this intention, cannot enter into the consideration urged on behalf of Mrs. Jenkinson, whether the deceased fully knew and understood its legal construction or operation. The only question for the Court to determine is whether the paper is entitled to probate as part of the will. Of the several codicils before the Court, three appear to have been executed and attested in the presence of two witnesses, and these three appear to have been codicils to a former will; the latest date appearing on the face of any of the papers is 1837, which appears together with the deceased's signature in the margin of the codicils No. 4 and No. 10, opposite to certain cancellations.

[276] Under the old law it is admitted the codicil would be good. What then is the legal presumption in this case, throwing out of consideration the allegation and answers, for the answers give no material assistance? The real question is, does the late act of parliament affect the case or not? The will is dated in June, 1830; doubts were entertained when the act first came to be considered whether alterations made after the 1st of January, 1838, in a will bearing date prior to 1838, were not, under the 34th section, exempted from the operation of the act; but the Court was of

opinion, after discussion of the point, and seeing what anomalies must arise out of such a construction, that such could not have been the intention of the legislature, and that the object of the 34th section was to protect wills made between the 3rd of July, 1837, the time of passing the act, and the 1st of January, 1838, when it came into operation. Is the Court to hold that, because a paper is without date, it was written after the 1st of January, 1838, and consequently, being unattested, is to fall under the new law? Is not the Court rather to be astute in finding means to carry into effect the intentions of a testator?

I am of opinion that where a case is bare of circumstances like the present, and the deceased was as likely to do what she has done before as after the 1st of January, 1838, the presumption should rather be that it was done before that time. There is nothing here to lead to a contrary conclusion; every person is presumed to know the law, and where a codicil is written without date, but signed by the deceased, the Court would, in the absence of [277] circumstances tending to a contrary conclusion, be bound to presume that it had been executed according to the law as it stood at the time it was written. Its being written on part of the same paper with the will is a strong presumption in its favour. I agree, too, in the observation of counsel that the admission in the answers of the codicil having been transcribed from a draft affords a presumption that the draft was prepared by a professional man, and that it was given to and transcribed by the deceased before the passing of the act, because, if given after the act was passed, the deceased would have been instructed that it was necessary to execute it, and that she would have executed it in the presence of two witnesses.

In this case, I am of opinion that the codicil is entitled to probate.

VIESCA (BY HIS ATTORNEY) v. D'ARAMBURU. Prerogative Court, Michaelmas Term, 2nd Session, Nov. 16th, 1839.—The deceased, a Spaniard, died domiciled in Spain, leaving 10,000l. in this country: pending a suit in the Court at Cadiz as to the validity of one of two wills of the deceased, a judicial administrator was appointed, with a power to pay to the heirs of the sister of the deceased a moiety of his property, to which they would be entitled in any event. The Court, carrying out the decree of the Court at Cadiz, granted administration to the attorney of the judicial administrator limited to receiving the 10,000l. in this country.

[Referred to, *In the Goods of Earl*, 1867, L. R. 1 P. & D. 452.]

On petition.

The deceased, Don Domingo de Aramburu, a Spaniard, died at Cadiz, 3rd September, 1835, leaving considerable property in the hands of his bankers at Paris, and 10,000l. in England in the custody of Mr. Campbell, a merchant in London. On the 13th October, 1835, Don Angel D'Aram-[278]-buru, the son of the deceased's brother, set up or propounded in the Civil Court of First Instance at Cadiz a will of the deceased, dated 29th December, 1814, in opposition to another will dated 12th June, 1829, propounded by Donna Rafaela de Aramburu, the deceased's sister. By the will of 1814 the brother and sister of the deceased were made residuary legatees of nearly the whole property, and in the event of one dying in the lifetime of the testator, the child or children of the deceased legatee were substituted. By the will of 1829 the property was left to the sister only (the brother being dead), and in the event of her death, to her child or children. She survived the testator. Pending the suit at Cadiz, on the 8th February, 1838, Don José de la Viesca was appointed judicial administrator, or administrator pendente lite, with authority to collect the funds, but without power to dispose of any part of them. On the 12th April, 1838, the sister died, and the children took up the suit which was still pending. Under the circumstances of the case, by virtue of the law of Spain, the Court of Cadiz made this provisional order—that, as the heirs of the sister were entitled to a moiety of the property, after deducting a legacy (left in both wills) of two thousand dollars, at all events, the estate should be divided into moieties, whereof one should be paid over absolutely to the heirs of the sister, and the other should remain in deposit till the termination of the suit, the judicial administrator, Don José de la Viesca, being re-appointed (on the 16th October, 1838), with extended powers, to carry the order into effect; letters exhortatory being directed to France and England, by the Court [279] of Cadiz, for the purpose of enabling Don José de la Viesca to receive the funds in those countries. From this order Don Angel D'Aramburu, the other party,

appealed to a Court of Review, which affirmed the order and condemned the appellant in the costs, and he thereupon appointed Don José de la Viesca his agent in England, to subduct the caveat which had been entered against the grant of administration here. Don José de la Viesca substituted Sir John Lubbock as his agent for this purpose, and to take the grant of administration decreed by the Court at Cadiz. In opposition to this it was set up that the appointment of Don José de la Viesca, as the agent of Don Angel de Aramburu, to withdraw the caveat, was compulsory, that it was done by the Court at Cadiz, and that administration ought not to issue.

Addams in support of the application. The Court has no jurisdiction, except over the sum of money in the hands of Mr. Campbell, with reference to which it will defer to the foreign law; and the foreign Court having decided that Don José de la Viesca is entitled to the administration, this Court will grant letters of administration of this property to Sir John Lubbock, his attorney, limited as prayed.

Haggard in opposition to the grant. It is said this question depends altogether upon foreign law, and that where there is a sentence of a foreign Court of competent jurisdiction, it is binding upon this Court. But the order of the Court of Cadiz is interlocutory only; it is a direction pending the [280] proceedings, and is not to have the force and effect of a regular definitive sentence. When the Courts of Spain have decided between the will of 1814 and that of 1829, I admit that such judgment will be binding upon this Court; but where there are matters still pending between the two parties, and the case is not *res adjudicata*, it is not the practice of this Court to grant such an administration without any necessity being stated for it.

Judgment—Sir Herbert Jenner. The administration which has been granted by the Court in Spain, with the consent of Don Angel D'Aramburu (except that he desired another sort of security), appears to be highly convenient and for the benefit of all parties. The main question, as to which of the two wills is valid, is still pending in the foreign Court; but the Court of Cadiz, confirmed by the superior Court, on appeal, was of opinion that it will be for the benefit of the party who shall be eventually entitled to the property that it should be secured in the hands of the judicial administrator. I do not know that this order is absolutely binding upon this Court; but if it be discretionary, the Court would be inclined to follow the decision of the tribunal to which all the parties are subject, and which ought to have that which is incidental to the cause, namely, the care and security of the property. The Court has no hesitation in decreeing administration to Don José de la Viesca (represented by his attorney), the judicial administrator appointed by the Court of Spain, subject to the limitations contained in the petition.

[281] LOCKWOOD *against* LOCKWOOD. Consistory Court of London, Michaelmas Term, 2nd Session, Nov. 19th, 1839.—Divorce by reason of cruelty pronounced for, the proof held to be sufficient, although as to several of the articles in the libel there was a failure of proof.—The children of the parties being competent witnesses, the Court cannot prevent their production.

This was a suit for divorce, by reason of cruelty, brought by Lady Julia Lockwood against Robert Manners Lockwood, Esq., her husband. The parties were married, in 1821, at Rome, and cohabited, principally abroad, till October, 1834, when they finally separated. The charges of cruelty were detailed in various articles of the libel, the substance of which is stated in the judgment.

On the first session of Michaelmas Term, 1838, an objection was raised on the part of the husband to the examination of two of the children, a daughter and son, issue of the marriage, as witnesses for the wife, to prove an act of cruelty towards the wife, and the beating of one of the children in her presence. The objection was supported on these grounds: the tender age of the children at the date of the transaction (the eldest having been only ten years old); that the occurrence was alleged to have happened four or five years back; that the children were in the custody and under the tuition of their mother, and that the Court had a discretion to forbid their examination. On the other hand, it was contended that the children were competent witnesses, and that, if the party desired their evidence, the Court had no discretion, and must allow them to be examined.

[282] Dr. Lushington. The Court has no discretion to prevent the examination of competent witnesses, and it is not contended that children are not legal and competent witnesses for or against father or mother. If the wife calls for their evidence

they must be examined, though, at the same time, it is a measure which, if possible, ought to be avoided.

The main cause was argued in Trinity Term, 1839.

The Queen's advocate and Haggard for the wife.

Phillimore and Addams for the husband, contended that the facts proved in evidence, which fell short of the plea, did not amount to legal *sævitia*.

Judgment—*Dr. Lushington*. I esteemed it due to the importance of this case, and necessary also, from the nature of the suit and the kind of evidence with which it was instructed, carefully to deliberate upon the whole papers, before I finally made up my mind. I conceived that it was not a proper case to be disposed of on first impressions, however strong: the whole evidence requires strict examination.

The suit is brought by Lady Julia Lockwood for a separation by reason of Mr. Lockwood's alleged cruelty. As to what does or does not constitute cruelty, the decisions of my predecessors in this Court and the Court of Arches leave no room for further discussion; the only question which can [283] arise is whether the facts established in any new case come within the limits already prescribed by precedent. It is quite needless to refer, in detail, to authorities so well known and acknowledged; all that is necessary to state may be said in a very few words: "There must be either actual violence committed, attended with danger to life, limb, or health; or there must be a reasonable apprehension of such violence." This I apprehend to be the substance of the doctrine laid down in *Evans v. Evans* (1 Hagg. Con. 35), cited in the argument in this case, and in other subsequent cases. In applying this doctrine, difficulties of two kinds may arise: first, whether the charges preferred amount *per se* to legal cruelty; no such difficulty attends this case, for that some of the articles in the libel detail charges of legal cruelty is beyond all doubt. The more usual difficulty, and that which attends this case, is whether the charges be substantiated by adequate evidence, and that, of necessity, entails the duty of considering, not merely what has been sworn, but how far that evidence is to be credited, and in what respects it is contradicted.

I now proceed to consider the articles of the libel, and the proof in support of them.

With regard to the third article, charging Mr. Lockwood with misconduct to procure Lady Julia's money, there is no proof.

The fourth article charges Mr. Lockwood with cruelty in 1827. In September in that year it is alleged that Lady Julia, being in Paris, was in a very debilitated state of health in consequence of a [284] miscarriage, and that it was deemed necessary that she should occupy a bed separate from her husband; that, at such time, he forced himself into her bed and struck her. The two witnesses examined on this article are Sir R. Chermiside and Jane Susan Pethoud; but their evidence so entirely fails to substantiate the charge that I may at once dismiss this part of the case from further consideration.

The fifth article charges that during the residence of the parties in the Champs Elysées, which, commencing in 1827, lasted (I conceive) for four years, in June, 1829, Lady Julia was taken ill, and a miscarriage approaching, Mr. Lockwood compelled her to leave her bed, and go into another room, whereby her life was endangered. Now this article is wholly without proof as to any part of it which can affect Mr. Lockwood.

The sixth article relates to occurrences in 1831, whilst the parties were resident in the Hotel de Castries. It charges general ill-treatment, and Lady Julia's declarations and complaints to her maid. It is admitted that this article is without proof.

The seventh article also relates to transactions said to have occurred at the Hotel de Castries. It pleads that Mr. Lock and his family also resided there, and that he used to allow Lady Julia and her children to occupy his rooms during the day time. It pleads that one day Lady Julia being about to dine with Mr. Lock, Mr. Lockwood seized her roughly by the arm, and swore she should not sit down; that she was in a very weak state of health; that Mr. and Mrs. Lock interfered for her protection, and that that night he kicked her out of bed.

[285] The first witness examined on this article is Mr. Lock. His examination took place in 1838, seven years after the fact is said to have occurred, and at the time of his examination he was seventy years of age. It is not rationally to be expected that, under these circumstances, he should be able to depose with very minute accuracy. Both the description of the facts to which he was examined and the

interval of time between their occurrence and his examination, and his age, render precision very improbable. He appears to be a witness deserving of credit, from his situation in life, and, so far as appears from his evidence, deposing with a desire to speak the truth and no more. The substance of Mr. Lock's evidence is, that Mr. Lockwood was in a very violent passion—"almost blind with rage" are his words; he does not depose to the use of force or any threat of force. On the fourth interrogatory Mr. Lock expresses his belief, but it is his belief only, that Mr. Lockwood was prepared to have dragged her out of the room if she had not clung to the witness; and he adds that after dinner he "thought the matter forgotten."

The next witness is Mrs. Lock. Now her statement varies in many particulars from her husband's. She states that Lady Julia first came into her apartment, much alarmed lest Mr. Lockwood should follow her; that she went through and concealed herself in another room; that she (Mrs. Lock) locked the door, and refused to let Mr. Lockwood in, at first, upon his arrival; at last she did; that he shewed very great violence, and broke open two of her doors. This went on till towards dinner, when Lady Julia came in and begged protection of [286] Mr. and Mrs. Lock; that Mr. Lockwood, in a violent passion, seized her arm, saying, "You come up stairs with me!" That Mr. Lock interfered, but Mr. Lockwood's rage was such that he attempted to drag her to the door, and with oaths declared she should not sit down to dinner with them; that the fury of Mr. Lockwood was such, and the terror of Lady Julia so great, that she became apprehensive of serious consequences if she were left alone with him.

The only other witness examined on this article is the witness Pethoud; but I doubt if her testimony can be brought to apply to it. It is true that on this occasion Mr. Lock does not speak to so many circumstances, nor so strongly, as Mrs. Lock, but I think this is explained in some degree by my previous observations. Mrs. Lock is much the younger person (she was only fifty-seven at the time of her examination), and it is not necessary that Mr. Lock should have been present at the whole of the transaction.

The result, then, in my judgment, is, that the testimony of these two witnesses is deserving of credit, and that they do prove gross misconduct and violent and unjustifiable usage on that occasion, and especially considering the state of health of Lady Julia and her sufferings from the *tic douloureux*, there cannot be a doubt in my mind that a repetition or continuance of that treatment might very seriously affect the health of a lady already the victim of so painful a disorder.

It was urged in argument that the Court did not know the origin of the quarrel. This is true; but I have not, therefore, any legal right to assume [287] gross provocation, nor could I easily imagine any which would justify such conduct.

I must consider, therefore, this article to some extent proved; but how far it will avail to call on the Court to decree a separation must be for further consideration, and depend upon all the facts taken together. It must not be forgotten that after dinner Mr. Lock says he thought the matter was forgotten, and that the parties continued to cohabit as before is an admitted and indisputable fact.

There is no charge preferred against Mr. Lockwood of any thing which occurred from this time till the autumn of the year 1832. The eighth article relates to the transactions at Lady Aldborough's in George Street, Hanover Square; and it will be necessary to examine both the charge and the evidence on both sides with great care.

The article pleads, first, harshness of behaviour, and that, on one evening, Mr. Lockwood desired Lady Julia to go to bed (and that this was about half past nine appears from the evidence in the cause); and on her declining to do so, saying that Lady Aldborough had company that evening, he swore she should, and with great violence dragged her by the arm and hair out of the room and up to her bed-room; that Lady Julia's maid, being alarmed, contrived to get him out of the room, and to lock the door; that Lady Julia went into Lady Aldborough's bed-room; that Mr. Lockwood forcibly entered therein, and with great violence pulled her out; that Mr. Gore was present when Lady Julia was pulled out of the drawing-room; that he expressed a strong opinion upon the subject, and that Mr. Lockwood apologised. Now, no [288] doubt can be entertained, and it was admitted in the argument, that the facts here pleaded, if sufficiently proved by the evidence in the cause, would amount to an act of cruelty, within the strictest definition of law that can be applied to it.

In the responsive allegation this charge is met by a general denial in the seventh article, and by a more specific denial in the eighth, which admits a dispute between the parties, and that Mr. Lockwood took Lady Julia up stairs to her own room and afterwards removed her from Lady Aldborough's room to her own; but it ascribes the origin of this dispute to a conversation between Lady Julia and Mr. Gore, said to be very offensive; it denies all pulling by the hair, and all violence, and it denies, positively, all apology to Mr. Gore.

Now one of the most important witnesses brought forward in support of this charge is Mr. Gore, and one of the first considerations to which I must direct my attention is the degree of credit which ought to be given to his evidence. He is the nephew of Lady Julia by the half-blood, and Mr. Lockwood alleges that there was an unrestricted familiarity of intercourse between them, which he deemed improper; and to substantiate this averment, certain letters from Mr. Gore, addressed to Lady Julia, are annexed, and Mr. Lockwood pleads finding Mr. Gore in Lady Julia's bed-room, she being in bed, and that he strongly censured her thereupon. Now I think no reasonable doubt can be entertained of Mr. Gore being a biassed witness, I may say doubly biassed, from his relationship to and close connexion with Lady Julia, and from his violent dislike to Mr. Lockwood, manifested by the letters [289] and in the evidence: he is a near relation and a strong partizan. Now how should I deal with such a witness? I apprehend the course I should follow has been repeatedly pointed out by a very high authority on former occasions, where such questions have arisen in these Courts. I well recollect that in the Prerogative Court, in the case of *Constable and Bailey v. Tuffnell* (4 Hagg. Ecc. 465, 507), a strong objection was made to a witness on this ground, and I recollect the opinion expressed by Sir John Nicholl to this effect: that, in matters of opinion, such a witness was to be distrusted; in matters of fact, to be credited: the degree of credit of course being governed by circumstances, namely, the probability of the transaction, and whether the evidence was contradicted or not, and especially the tone in which the evidence was given.

To come then to Mr. Gore's evidence, passing over his description of Mr. Lockwood's general conduct. He deposes in substance to this effect, that without any apparent cause (for he distinctly denies any offensive conversation taking place between him and Lady Julia) Mr. Lockwood insisted on his wife's going to bed, and that too with oaths; that he seized her by the hair and the arms, and carried her out of the room; that he told him his conduct was cowardly and ungentleman-like; that he afterwards repeated similar expressions, and that Mr. Lockwood burst into tears and desired him to say nothing about it, though he did not directly apologise. On the third interrogatory he negatives the previous provocation alleged in [290] the responsive allegation, and confirms his former evidence, stating that he was the only person present. Now it is abundantly clear that, unless this evidence be untrue, it cannot be called a high colouring of facts, or misapprehension or misrepresentation; it must be more; it must be a wilful deviation from the truth.

I now then proceed to inquire whether this evidence is corroborated by any other testimony in the cause.

Jane Pethoud is the principal witness, whose testimony, from her long connexion with Lady Julia, and other circumstances, must also be narrowly watched. On the eighth article she says she saw Lady Julia with her hair undone and about her shoulders, crying dreadfully, and Mr. Lockwood pushing her behind up stairs; she also mentions Mr. Gore being there at this time, and afterwards details some facts as to Lady Julia locking herself in, and so forth, but no act which could come within the description of legal cruelty. I think it clear that the evidence of Jane Pethoud applies to the same transaction to which Mr. Gore speaks.

There is a third witness, Thomas Pickles, and though there are some discrepancies in minor points (such as to Mr. Gore's dining there, and as to Lady Aldborough's being present), yet, looking at the lapse of time and the concurrence in more important particulars, I do not doubt that he is speaking to one and the same transaction: indeed, to take it otherwise would rather strengthen the case against Mr. Lockwood. He speaks of frequent contentions; of Mr. Lockwood expressing himself in harsh terms, and, as to this occasion, he says he [291] saw Mr. Lockwood dragging Lady Julia from the drawing-room up stairs! "He had hold of her by the arm, or rather by the shoulder; he was using violence rather than otherwise; her hair was all down; she was crying violently; Mr. Lockwood said, 'Damn you, I will make you!'"

Now, it was observed in the argument that Lady Aldborough has not been examined. I see no reason to consider this as an objection applying in any degree to Lady Julia. It was competent to Mr. Lockwood to have examined her just as it was competent to Lady Julia to have examined her, if she thought fit; but there is nothing in the case to shew that it was peculiarly incumbent on Lady Julia to do so. Lady Aldborough was not in any degree more a witness of Lady Julia than she was of Mr. Lockwood. Mr. Lockwood has counterpleaded the article, and it is impossible for the objection to be urged with any fairness, if he had an opportunity of examining Lady Aldborough, and if he declines to do so, that he should turn round to Lady Julia and say, "You ought to have examined this witness," whom it was equally in the power of Mr. Lockwood as of Lady Julia to examine.

Looking then at the evidence of these three witnesses, I am of opinion that the accounts of the transaction given both by Pethoud and Pickles very strongly corroborate the testimony of Mr. Gore, and I am necessarily led to the conclusion that there was personal violence, attended with great passion, and, as I consider, outrageous expressions, for such expressions are spoken to both by Mr. Gore and by Pickles; the expression particularly spoken to by the latter is, "Damn you, I will make you!" and Mr. Gore states that oaths were used by Mr. Lockwood on that occasion. Now, I am of opinion that such conduct does bring Mr. Lockwood within the reach of the authority of this Court, and that such acts as these are a violation of the law, as laid down and acted upon in these tribunals.

I observe here that Mr. Lockwood's ill-usage on this occasion does not lead to an immediate total separation; the parties continued to cohabit together (so I must conclude, for it is not pleaded to the contrary) for some time, and I must take all the subsequent circumstances into consideration before I can determine what sentence to pronounce. Although, however, there was not an entire breaking-off of all matrimonial cohabitation, it appears that there had been some arrangement for separate beds, prior to the return of the parties to Paris, in the end of 1833 or beginning of 1834; in the early part of that year they went to reside in the Rue Matignon.

The ninth article pleads that whilst Lady Julia was in her bed-room one evening, Mr. Lockwood entered and seized her by and twisted her arms in a cruel manner; that she rang the bell for assistance, and when the maid came, complained of ill-treatment, and for some time could not sit down with comfort; and that her health was injured in consequence of this ill-treatment.

Now, the witness Pethoud is examined to establish the facts charged in this article. If she is to be credited, it is in substance proved; not, indeed, the actual infliction of the violence in the [293] presence of the witness, but the conclusion of the affray, and the consequences thereof; she finds Mr. Lockwood letting go Lady Julia's arms; she sees the marks there and on her side, where Lady Julia told her Mr. Lockwood had kicked her. She complained (as the witness says) for some days, and suffered great pain.

This is entirely a question of credit, for no one can say that the facts, if proved, do not establish cruelty. This witness may, as I have already observed, be in no small degree prepossessed in favour of a mistress she had so long lived with. But I cannot, on the consideration of her evidence, say that it is given in a discreditable form; in many instances she has fallen short of the plea, and I can discern no indicia of deliberate falsehood and premeditated perjury. The proof as to prior transactions renders this occurrence more probable.

But if any doubt could reasonably remain on the mind of the Court as to whether this article be proved or not, I conceive that doubt must be dispelled by the evidence of Dr. Sichel. Though he cannot remember whether he at the time saw the marks of violence on Lady Julia's person, yet he attended her when suffering, and manifestly from the effects of this ill-treatment. As it does not distinctly appear how long after the injury Lady Julia complained to him of the misconduct of her husband, it possibly may be doubtful whether such complaint is direct evidence of the ill-usage. It is a rule and principle of this Court that where a complaint is made by a wife of injury from a husband recenti facto, it is always received as ad-[294]-missible evidence in these Courts, and for the best of all possible reasons; because, from the nature of these transactions between man and wife, unless such evidence were received, it would be only necessary for the husband to inflict ill-usage when they were alone, and the wife would be excluded from all possibility of redress. She complains to her maid

recenti facto: but it does not distinctly appear that the declarations to Dr. Sichel were made instanter, at the earliest opportunity; and, therefore, these declarations may not be direct evidence of the ill-usage. But such declarations are evidence to confirm the statement and credit of Pethoud. Pethoud states that Lady Julia made the complaint to her recenti facto, and the fact that Lady Julia made, though not at the same time, a complaint to Dr. Sichel, confirms her veracity. I have no doubt of this: it is no direct proof of the fact, but it corroborates the evidence and credit of Pethoud, if her credit is sought to be impeached.

Looking then at all the circumstances, I conceive I am bound to hold this charge proved; and, looking also at Lady Julia's state of health and suffering, I think it is both morally and legally an act of cruelty. Suggestions have been made in argument to account for this ill-usage, suggestions to falsify the evidence; but they are purely suggestions, unsupported, as I think, by any evidence in the cause.

The tenth article is the charge which Miss Lockwood alone is produced to substantiate. I do not deem it necessary to examine this evidence with any minuteness. I think, in my view of this [295] cause, I may without injustice to either party pass it over, giving to Mr. Lockwood the full advantage of considering it not sufficiently proved.

The eleventh article of the libel need also detain me but a very short time. There is no evidence given in support of it which can possibly affect Mr. Lockwood in this suit.

The twelfth article refers to a period when the parties occupied a house at Versailles, about the end of September, 1834. It pleads that Mr. Lockwood put himself in a violent passion with his wife, and ran at her with a stick, saying he would "cram it down her throat," that she then jumped out of a window into the garden; that her servant, coming to her for assistance, found her in a very agitated state; that this was followed up by an immediate communication to Mr. Fitzjames.

The witnesses produced to prove the averments in this article are the servant Pethoud and Mr. Fitzjames. Neither of these witnesses saw the principal part of the transaction, though Pethoud saw the conclusion. Lady Julia's declaration to Pethoud is evidence, it may be questionable if the communication to Mr. Fitzjames is so. On the whole, I do not feel myself justified in laying any great stress on this article.

The thirteenth article details the circumstances of Lady Julia resolving to quit her husband, taking refuge in the bed-room of Lady Anne Maria Dawson, then on a visit at the house, and pleads that Mr. Lockwood swore he would go into the room and bring his wife back "by the scuff of the neck;" that he was prevented from doing so by the interference of Mr. Fitzjames.

[296] Before proceeding further with the remainder of this article, it may be expedient to see whether this part be proved. It may not be an unimportant consideration, for it is not distinctly pleaded that this was the termination of all matrimonial cohabitation. Lady Anne Maria Dawson states the fact of Lady Julia coming into her room in a state of great agitation, saying that Mr. Lockwood had ordered her to go back with him to Paris in the course of half an hour, that she might as well cut her throat as do so. Lady Anne Maria Dawson then accompanies Lady Julia to St. Germain's, to her brother's, Colonel Dawson Damer. The evidence, as I have stated it, does not prove any misconduct of Mr. Lockwood in the presence of the witness; it only shews the strong impression made on her mind by the statement and appearance of Lady Julia. Mr. Fitzjames was present at the earlier part of the transaction, and he deposes to Mr. Lockwood's threatening to pull his wife out "by the scuff of her neck," and to his own interference for her protection. He further describes Mr. Lockwood's agitation on finding that Lady Julia had actually quitted his roof and taken shelter under another; to his admission that he had been very much to blame; to his declaring "that he had been a brute to her," and his willingness, if she would return, to engage not to subject her to any personal molestation.

Now, looking at all that had preceded this occurrence, to the acts of violence into which Mr. Lockwood had suffered himself to be betrayed on former occasions, the state of suffering health in which Lady Julia was, the language used in this [297] instance, I think Lady Julia had reason to be alarmed for her personal safety, and that, for the sake of her health and security, she was justified in quitting her husband's house. I cannot think that Mr. Fitzjames's evidence is at all shaken; it is confirmed in some

degree by letters, and by the whole *res gestæ*. It is said that he is a near relative of Lady Julia, and by a suit for a separation he may ultimately succeed to certain property. But it appears to me that there is no valid objection against his testimony, which, as I think, is corroborated by Mr. Lockwood himself, in what I am now about to advert to.

By a document in Mr. Lockwood's own handwriting (the exhibit A) Mr. Lockwood consents, on Lady Julia's demand, to a species of separation; to an arrangement with respect to herself and children, to his own exclusion from his own house. I do not go the length of saying that this document admits ill-usage on his part; but I must say it is most consistent with, and corroborative of, the statement of Mr. Fitzjames, for he would not have signed such a paper as this, consenting to his own exclusion, unless he had thought some blame at least was attributable to himself.

To follow up this history: for some short time Lady Julia resided under the roof of Mr. Fitzjames, at Versailles, and then, in consequence of an arrangement, she returned to Paris, and Mr. Lockwood being excluded, occupied the house in the Rue Matignon. It is shortly after this that Lady Julia presents a petition to the French Court. The contents of this petition are in no way evidence against Mr. Lockwood, and I only refer to the fact [298] as a part of the history, drawing from it no inference unfavourable to Mr. Lockwood.

The seventeenth article states a transaction of the year 1835, when Mr. Lockwood came into his wife's presence, and some violence of behaviour towards the maid; but it is only of importance as shewing generally an excitable temper, and that he deemed himself not bound, at least altogether, by the terms of the agreement.

But I have hitherto confined my observations to the charges preferred by Lady Julia, and the evidence relating thereto; but before I consider the last circumstance pleaded in this libel, namely, the occurrences at Tunbridge Wells, I must advert to Mr. Lockwood's plea and evidence. It will not occupy any considerable space of time, for the evidence is very short.

The allegation may be divided into three parts. The first is defensive against the charges preferred, and not a single witness is examined in support of any one of the averments. The second part is accusatory of Lady Julia, and many documents are appended to prove the averments, but no witness is examined, save as respects her conduct towards the children. The third part relates to the negotiations and references for a separation.

Perhaps it will be better to consider the last head first. It appears from the evidence of Mr. Vernon Lockwood (though he is only able to depose on the subject in general terms) that after he had in vain attempted an arrangement, some agreement was come to between the parties for a separation on certain pecuniary terms. This agreement is proved by Mr. Baker. But as related to the edu-[299]-cation of her son, Lady Julia declared she could not comply with the terms. In the year 1837 a reference was made to the Earls of Aberdeen and Wicklow, Colonel Stopford, and Mr. Vernon Lockwood. Their object was to promote a reconciliation. No. 2 contains the propositions agreed to by the referees. They recommended a reconciliation, but until that be accomplished they advise the separation to continue on the terms, pecuniary and otherwise, contained in that document. With regard to this award, if it is proper to be so called, Lord Aberdeen speaks in nearly the same terms as Mr. Lockwood, save that he says the proposal was not to be considered binding unless both parties were willing to accept them.

Now, what view can I take of this transaction which can possibly affect my judgment on the case? What does it prove? As to the conduct of either party personally towards each other, it does not in the remotest degree prove anything. All that possibly can be extracted from it adverse to Lady Julia is that she refused to consent to a separation on pecuniary terms which were reasonable, or were deemed so by her own friends; that having the larger share of the joint property she is too anxious unreasonably to retain it. But assuming all this, it cannot affect my judgment on the points which I have to decide; even if I were convinced that one of the chief objects of the suit, on the part of Lady Julia, was to retain her own fortune, it can affect a legal judgment, as to the cruelty, very remotely, if at all.

I am now come to consider the misconduct imputed by Mr. Lockwood to Lady Julia. No abso-[300]-lute criminality is ascribed to her; indeed, the prayer that the Court will order her to return home to cohabit with Mr. Lockwood is the strongest

disclaimer of any such charge of criminality. But she is accused of flirting, and "of levity of manner and of impropriety of conduct towards gentlemen." This levity of manner and impropriety of conduct towards gentlemen is stated to have been the cause of angry discussion between the parties, and, amongst other things, to have led to Mr. Lockwood's prohibiting her from dining with Mr. Lock. But in what way is this charge substantiated? A great part of it was in its nature capable of proof; her levity of manners, her impropriety of conduct, must have been visible; the friends and acquaintance of the family might have proved its existence; there must have been some disputes which shewed that quarrels had arisen, which could only have originated from such a source. But there is not a single witness produced to substantiate the charge—not one. Am I to take the letters as a proof? A proof of what? Of levity of manners and impropriety of conduct towards gentlemen? What is the meaning of the plea? The plea must mean, and can only mean, acts done towards and in the presence of gentlemen; that must be the meaning of the terms, that this lady's conduct was not such as it should have been in the company of gentlemen. Of such an averment the letters are no evidence whatever.

But I shall not shrink from expressing my opinion of these letters. If such a correspondence was secret and clandestine; if accidentally discovered during cohabitation, I think it would have afforded [301] the husband some just ground of offence. Not that these letters denote in any degree a departure from purity of conduct on the part of Lady Julia, but because it is, in my judgment, not altogether consistent with the strict prudence which husbands have a right to require, and most do require, from their wives; because, however innocent in its origin, such intimacy leads to danger. It is said this correspondence was clandestine; was it so in the proper sense of the term? I can find no evidence of this. But assuming it was so, it might possibly cast some blame on Lady Julia, but as it was unknown to her husband, it cannot in any degree extenuate his violence; for if it was not discovered till her visit to Tunbridge Wells in 1838 it could have had no operation on his preceding conduct. I cannot conclude this branch of the case without observing that though no witnesses have been produced to substantiate the charge of levity of manner and impropriety of conduct towards gentlemen, yet that interrogatories to that purport have been addressed to several of the witnesses, all of whom have negatived the accusation in the most decided terms.

The last remaining circumstance which requires notice is the proceeding of Mr. Lockwood forcibly to enter and take possession of the house Lady Julia was residing in at Tunbridge Wells, after a separation de facto of above three years. I think this proceeding wholly unjustifiable; I know of no right which, under the circumstances, a husband possesses to take the law into his own hands, to supersede the established tribunals, and to attempt to do [302] himself what he thinks justice by force of arms. If such measures are permitted, suits for the restitution of conjugal rights may at once be abolished, and the ipse dixit of the husband substituted for the decree of a court of justice, the husband being his own judge and executing his own sentence. One of the most certain consequences of such proceedings might be a breach of the peace.

Reviewing, then, the whole history detailed in the proceedings, and endeavouring well to weigh and give its due force to all the evidence, I am of opinion that the seventh, eighth, ninth, and thirteen articles are proved; that the prayer of Mr. Lockwood that I should order Lady Julia to return to cohabitation with him must be rejected, and a decree pronounced in her favour. I think personal ill-usage has been proved; that, considering Lady Julia's state of health and acute suffering, at least occasionally, the effect of such ill-usage might be expected, and reasonably expected, seriously to endanger her health, already impaired by disease; that, such ill-usage being repeated more than once, it is my duty to give her the protection of the law, and release her from all chance of further ill-treatment. I avail myself gladly of the opportunity of declaring my opinion that this is not an aggravated case of constant, and deliberate, and brutal ill-usage; but it has unfortunately happened, probably from that irritability of temper described by his brother, Mr. Vernon Lockwood, in his evidence, that Mr. Lockwood has occasionally lost the command over himself, and, when under the sway of passion, has been led to the commission [303] of acts which render further cohabitation unsafe, and entitle Lady Julia to the protecting interposition of this Court. I, therefore, pronounce in favour of Lady Julia's prayer.

COOPER *against* WICKHAM. Arches Court, Michaelmas Term, 2nd Session, Nov. 12th, 1839.—At a vestry meeting called, by notice signed by the churchwardens for the purpose of making a church-rate for the repair of the church, a resolution was moved and seconded, “That this vestry, considering church-rates at all times bad in principle, and particularly unjust in practice, and quite uncalled for at the present time, resolved to adjourn all further consideration of the subject for which it has been called, till this day twelvemonths,” which resolution was carried. Held that one of the churchwardens, in having voted in favour of the resolution and against the rate proposed (of two-pence in the pound), was not guilty of any ecclesiastical offence, it not being averred that, in consequence of the refusal of the rate, the church was still out of repair.

This was an appeal from the Consistorial Court of Wells, in a cause of the office of Judge promoted by the Rev. W. P. T. Wickham, clerk, the rector of the parish of Shepton Mallett, in the county of Somerset, against Job Cooper, one of the churchwardens of the said parish.

The citation called upon Cooper to appear and answer to certain articles, &c. touching and concerning his soul’s health, and the lawful correction and reformation of his manners and excesses, touching and concerning his office of churchwarden, and more especially for having, at a vestry meeting duly holden on the 31st of January, 1839, in the said parish, for the purpose of making a church-rate, in pursuance of a notice published according to law, voted in favour of a resolution then and there moved and seconded, such resolution being in the words following, to wit:—“That this vestry, considering church-rates at all times bad in prin-[304]-ciple, and particularly unjust in practice, and quite uncalled for at the present time, resolved to adjourn all further consideration of the subject for which it has been called till this day twelvemonth;” and also for having, at the said meeting, voted against a church-rate then and there duly moved and seconded; and, further, to do and receive as unto law and justice shall appertain under pain of the law and contempt thereof, &c. &c.

An appearance being given and articles prayed, they were given in.

The articles were as follow:—

(The heading of the articles followed the citation.)

First. We article and object to you, the said Job Cooper, that, previous to and in the month of January last past, the roof of the nave of the parish church of Shepton Mallett, in the county of Somerset and diocese of Bath and Wells, was in so dilapidated a state that the rain came through the same into the body of the said church, to the serious detriment and injury of the fabric, and also of a valuable organ in the said church, and to the great inconvenience of the officiating minister in the said parish church, who, on one occasion, on account of the rain so coming therein, was prevented from reading prayers in the reading-desk, and of the congregation of the parishioners and others from time to time assembled in the said parish church, and this, &c. &c.

Second. Also, &c. that, in consequence of the premises mentioned in the next preceding article, a vestry meeting, agreeably to a notice in writing signed in duplicate by Charles Wainwright and by you, the said Job Cooper, then and now the church-[305]-wardens of and for the said parish of Shepton Mallett, was duly holden on the 31st of January last past, in the vestry-room of the said parish church, for the purpose of making a church-rate towards effecting the repairs of the said church, and for expenses necessary for the due administration of divine service, and incident to the office of churchwarden; that the said meeting having adjourned to the school-room, belonging to the national school, in the said parish, certain estimates were laid before the said meeting, by the said Charles Wainwright, whereupon a resolution was then and there moved and seconded respectively by two dissenting ministers in the words or to the effect following, to wit:—“That this vestry considering church-rates at all times bad in principle and particularly unjust in practice, and quite uncalled for at the present time, resolved to adjourn all further consideration of the subject for which it has been called till this day twelvemonths;” that, notwithstanding the premises, you, the said Job Cooper, then and there, in violation of the laws, statutes, canons, and constitutions ecclesiastical of this realm, and of your duty and obligations as churchwarden, and what is fitting and right to be observed in respect thereof, and to the evil example of others, voted in favour of the aforesaid resolution, and then and

there also voted against a church-rate of two-pence in the pound, then and there duly moved and seconded (as an amendment to such resolution respectively, by the said Charles Wainwright and by Alfred Gale, a parishioner and inhabitant of said parish. And this, &c. &c.

Third. The third in supply of proof pleaded a [306] duplicate of the notice for the vestry meeting, signed by Mr. Cooper, also a copy of the estimates.

Fourth. That at the close of the poll for and in respect of the said resolution and amendment, a scrutiny took place, when you acted as a scrutineer on behalf of the said resolution, and that the said resolution was carried by a majority of thirty-seven, the numbers being in favour of the said resolution, and against the rate 235 and 198 in favour of the amendment and for the rate; that the said resolution, amendment, and result of the poll were correctly entered in the vestry-book of the said parish, and that the said book will be produced at the examination of the witnesses and at the hearing of this cause, if required. And this, &c. &c.

Fifth. Also, &c. that at and during the premises you were and still are an inhabitant and one of the churchwardens of the parish of Shepton Mallett aforesaid, and therefore, and by your appearance to the citation in this cause, you were and are subject to the jurisdiction of this Court, and that by reason of the said premises you have incurred ecclesiastical censures, and that you have not undergone any punishment for the same. And this, &c. &c.

Sixth and seventh. Usual articles.

The articles were admitted in the Court below, which constituted the grievance of which the party proceeded against complained.

Addams and Curteis for the appellant. The party proceeded against has been guilty of no ecclesiastical offence; he did not vote for the resolution, or against church-rates generally, but against this particular rate, which a churchwarden may [307] legally do, if he think the rate excessive or unnecessary. The appellant must be dismissed with his full costs.

Haggard and Jenner for the respondent. It is expressly pleaded that the appellant voted for the resolution, and this was contrary to his duty; for a churchwarden is bound to keep the church in repair, whereas, although he brought forward an estimate of the cost of necessary repairs for the church, he voted against a rate; for the adjournment for twelve months was held equivalent to a refusal in *The Leicester case* (8 Adol. & Ell. 889).

Nov. 20th, 3rd Session.—*Judgment*—*Sir Herbert Jenner*. The present is a proceeding somewhat novel in its circumstances. The principles are sufficiently familiar to us, and perhaps will be for some time to come; for questions of church-rate, and of refusals of church-rate, have lately become pretty frequent.

The appellant in this case, when cited to appear before the Court of Wells, did appear absolutely, and prayed articles, which were accordingly brought in and admitted by the chancellor of the diocese of Bath and Wells; from the admission of the articles an appeal was brought to this Court, and the question to be decided by it is whether the chancellor of Bath and Wells acted rightly or otherwise in admitting these articles.

Now, upon reading the citation in the cause, it [308] did appear to me that there was something novel in the citation itself, for it called upon the churchwarden to answer to certain articles, &c. "touching and concerning his office of churchwarden," and undoubtedly as churchwarden he was amenable to the jurisdiction, "and more especially for having, at a vestry meeting duly holden, for the purpose of making a church-rate, voted in favour of a resolution then and there moved and seconded, such resolution being in the words following, to wit:—"That this vestry, considering church-rates at all times bad in principle and particularly unjust in practice, and quite uncalled for at the present time, resolved to adjourn all further consideration of the subject for which it has been called till this day twelvemonths:" and also for having, at the said meeting, voted against a church-rate "then and there duly moved and seconded." I confess, when I read this citation, it did appear extraordinary that the party should be called upon to answer for having voted for these resolutions without stating the consequences which followed therefrom; without stating the necessity of the rate: that the repairs of the church have been neglected by its refusal, or even whether the resolution was carried or not. If this had been an original proceeding before me, if I had been asked to allow my office to be promoted against the churchwarden here,

for an ecclesiastical offence, I should have hesitated a long time before I granted the application on a statement so loose and indefinite. I am yet to learn that a churchwarden may not vote for such a resolution or against a rate, unless that vote produces consequences which it is his duty to prevent, namely, [309] that the church became dilapidated for want of the repairs for which the rate was proposed and refused. I do not know that it is any breach of ecclesiastical discipline, as far as the churchwarden is concerned, to vote for the resolution as it stands, though it may be an indecent, improper, and obnoxious one; I do not know that it is an ecclesiastical offence, for which the party is amenable to the Ecclesiastical Court, to vote for such a resolution, if it be not followed by the consequence of the church being left in a state of dilapidation. I do not see that any ecclesiastical offence is charged in the citation; it is a mere abstract proposition, that the party voted for a certain resolution and against a church-rate, without stating the consequences of the vote. If such a citation issued I should have thought that the most ready way to meet it was, not to abstain from appearance, but to appear under protest, denying that any ecclesiastical offence had been committed; and if there had been an appearance under protest, and it had been overruled in the Court below, and an appeal had been prosecuted to this Court, I should have had no hesitation in reversing the decree, for it is impossible, on the face of the citation, to say that it alleges an ecclesiastical offence for which it is competent to the Court to inflict ecclesiastical censure, and to follow it up with condemnation in costs. However, it appears that the party in the Court below, acting under the advice of those whom he consulted, gave an absolute appearance to the citation and prayed articles. The citation is dated 1st April, 1839; the party is cited to appear on the 16th of April, and he does not appear till the [310] 30th (which I apprehend was the next Court-day but one after the return), and he prays articles. The articles themselves, so far as I collect, were not brought in till the 18th June, the offence (if any) having been committed on the 31st January; the citation being dated two months after the offence, and the appearance being given for the party on the 30th April, the articles are not brought in till the 18th June. I must say that there has been great delay in the proceedings; and considering that five or six months elapsed after the offence (if any) was committed, before the articles were brought in, it is possible that circumstances may have occurred in the intermediate time to shew that the consequences which might have followed from the refusal of the rate had not ensued.

Now what happens when the articles are brought in? The citation merely sets forth the fact that the churchwarden voted for the resolution and against the rate, the offence being two-fold. The heading of the articles is in the same form as the citation—so far the rules of the Court have been complied with. The first article merely pleads that in January last the roof of the nave of the church was out of repair, and there it ends; but I do not find that the church still remains out of repair as it was in January, 1839. However, the article, standing alone, is a proper article to be pleaded, and is not inconsistent with the citation, though it stops short, and does not state that the church is still in need of repair.

Now the church being in this want of repair, it was necessary to consider what was required to be done to it, and, accordingly, it is next pleaded [311] that a vestry was called by the churchwardens (the party proceeded against being one), and was duly held on the 31st January, for the purpose of making a rate for the repairs of the church and other purposes (a very proper proceeding by the churchwardens, and so far Mr. Cooper acted in pursuance of his duty), and an estimate was laid before the vestry by the other churchwarden, when a resolution for adjourning the consideration of the subject for a twelvemonth was moved and seconded by two dissenting ministers; and undoubtedly I have no hesitation in saying that this resolution is equivalent to a denial of the rate, and if any consequences had followed—that is, if the repairs of the church could not be performed—I should have held that the persons who voted for it, and particularly this churchwarden, would have been amenable to the Ecclesiastical Court for neglect of their duty. But the article goes on to plead that the party cited “in violation of the laws, statutes, canons, and constitutions ecclesiastical of this realm, and of his duty and obligations as churchwarden,” and so forth, voted in favour of the resolution and against a church-rate of two-pence in the pound. Here the article stops, and the case remains as in the first article.

The fourth article pleads that at the close of the poll a scrutiny took place, the party cited acting as scrutineer on behalf of the resolution which was carried, and the

rate negated. But the question still remains, Is any ecclesiastical offence charged against the churchwarden? Is the refusal of the rate itself, at the vestry called for the purpose of making a rate, an ecclesiastical offence? for I take [312] both the facts together—the resolution to adjourn the matter for twelvemonths, and the refusal of the rate—as one and the same thing; although some offensive words are introduced as to the character of church-rates, it is one and the same offence; it is a refusal of the rate, not only of two-pence in the pound, but of any rate whatever: Is that an ecclesiastical offence in a churchwarden calling a vestry to make a rate? No case has been cited of a proceeding in these Courts under similar circumstances, where a churchwarden was cited for having voted against a rate and in favour of a resolution against church-rates altogether. I can well understand that if the consequence of the resolution being carried, and of the rate being refused, had been that the church became dilapidated, a churchwarden so proceeding would be amenable to the Ecclesiastical Court for such misconduct, and punishable by ecclesiastical censure and costs. But here the Court is in the dark. It is merely stated that in January last the church was in a state of dilapidation; it is not stated that it remained so at the time the citation was served; on the contrary, it is perfectly consistent with the articles that the church had been put into decent repair, and the necessary articles and elements had been provided for divine service. In a criminal proceeding the Court is not to conjecture or presume any thing; and, if it could, I am not able to presume that the repairs have not been done, or that the different articles necessary for divine service have not been provided; I am left quite in the dark. I agree that it is the duty of the churchwardens not only to apply the funds (if there [313] are any in their hands) to the repairs of the church, and to the providing of articles necessary for the decent performance of divine service, but that, if they have not funds, they are bound to take every step they legally can to procure funds; and, in order to exonerate themselves from the charge of neglect of duty, they are bound to shew that no fault is imputable to them, and that if they had no funds they have taken all legal steps to procure funds; but I must be informed what was the consequence of their not doing so. It has been said that, *prima facie*, there is an admission on the part of Mr. Cooper that funds were wanting. But this is not so; it was proper that the necessity of the repairs should be considered, and that the estimate of the expense should be discussed. The estimate might be considered too much, and the vestry might think a smaller amount sufficient for the purpose. I cannot conceive that the Court is at liberty to go beyond the citation and articles, and I consider it a question of considerable doubt whether the articles are in sufficient conformity with the citation, for the citation simply states that he voted for a certain resolution and against the rate; and I will not say that a churchwarden may not do so without being liable to ecclesiastical censure (however proper it may be that he should remain neutral on such occasions), or that it would not be an assumption of power in the Court to censure a churchwarden for voting in favour of a resolution that “church-rates are at all times bad in principle and particularly unjust in practice,” though he is bound to put the church in proper repair; for he is not punishable for expressing such a conscientious opinion, unless the consequence followed that the church fell into a state of dilapidation; I do not think this Court could proceed to punish a churchwarden merely for a vote embodying a proposition which he believes to be true. The question here is whether the church is out of repair in consequence of the resolution, and of the rate being refused. In all cases of criminal proceedings the charge should be fully stated in the citation, that, by the refusal of the rate and through the neglect or misconduct of the churchwardens, the church is not in a sufficient state of repair. I am the more inclined to hold this doctrine, because in a late case—that of *Miller and Simes v. Palmer* (vol. 1, p. 540)—all the circumstances were set forth, and it was specifically pleaded that the church still remained in consequence in a state of dilapidation.

Under these circumstances I am not prepared to say that there is such an ecclesiastical offence charged in the citation or in the articles as an Ecclesiastical Court can visit with ecclesiastical censure and costs; I am of opinion that the articles ought not to have been admitted in the Court below, and I pronounce for the appeal and reject the articles.

It has been argued that the respondent is bound to pay the costs in both Courts. I am not of that opinion; I think the party lost his way in not appearing under protest, and if he chose to give an absolute appearance and to pray articles, I think the

expense of the articles should fall upon him. [315] But I think he is entitled to his costs in this Court, where he was under the necessity of appearing and where he has had the sentence reversed. I am of opinion that the articles must be rejected, and that the party promoting the office of the Judge must be condemned in the costs of the appeal.

WARNER against GATER. Arches Court, Michaelmas Term, 3rd Session, Nov. 20th, 1839.—A church-rate for defraying the expense of the consecration of a church, rebuilt under the stat. 59 Geo. 3, c. 134, s. 40, valid, although no faculty had been granted.

This was a question as to the admission of the libel with additional articles, in a cause of subtraction of church-rate, by the churchwarden of Botley, in Hampshire, against a parishioner. The suit was brought by letters of request from the chancellor of the diocese of Winchester. The rate was made for defraying the expense of consecrating a new parish church, the old edifice having been pulled down in order that it might be rebuilt on a more convenient site. The libel had come on for admission in Trinity Term (29th of June), when the case was directed to stand over for the production of the sentence of consecration, and in order to ascertain whether it was done under the authority and within the provisions of the Church Building Acts; the additional articles now pleaded that the resolution for pulling down the old church and building a new one had passed unanimously; that half the additional accommodation in the new church had been set apart for free and open sittings, and that the consent of the rector, [316] ordinary and patron had been obtained, as required by the act.

Phillimore and Addams against the rate. The question is whether this rate can be sustained. It is admitted that no faculty had been granted for pulling down the old church; the statute of the 59 Geo. 3, c. 134, s. 40, under which it is now said the church was rebuilt, does not dispense with a faculty, supposing the Court to be satisfied that the church was rebuilt under the Church Building Acts, the object of which was the building of "additional churches." It is submitted further, that the notice given of the vestry meeting was not sufficient, the notice being "for making of a church-rate and other purposes."

The Queen's advocate and Nicholl in support of the rate.

Nov. 30th, 3rd Session.—*Judgment*—*Sir Herbert Jenner.* I think it now perfectly clear that the proper consents were obtained within the 40th section of the Act, and that the libel and the additional articles are proper to be admitted.

The libel pleads that on the 26th March, 1835, a vestry meeting was held pursuant to notice, when it was resolved to take down the old church and rebuild a larger church nearer to the body of the village, and that in pursuance of this resolution a new church, affording better accommodation to the parishioners, was built on a more suitable site, the expense being borne by a subscription, aided by [317] the Church Building Society; that on the 22nd August, 1836, the new church was consecrated, and was resorted to by the parishioners as the parish church; that on the 18th August (prior to the consecration) a vestry meeting was called by regular notice, to make a rate for general church purposes; that a rate of one shilling in the pound, to meet the expenses of opening the new church, was agreed to; that the greater part of the inhabitants had paid the rate, and that Mr. Gater had been duly assessed in 10l. 9s. 5½d., and had refused to pay the same.

When the libel was before the Court on the former occasion some important questions arose as to the authority of the parish to pull down and rebuild the church; whether or no a faculty was requisite; and these questions were a good deal discussed; and the Court, considering that difficulties might arise, and that it might be exceedingly inconvenient if it held the opinion that in this case a faculty was necessary for the transfer of the parish church to a different site, suggested whether it might not turn out that it was done under one of the Church Building Acts, which might take it out of the usual course of the general law. Accordingly, inquiry has been made, and this turns out to be the fact, and additional articles have been brought in, pleading that the consents of the necessary parties had been obtained, letters from the bishop of the diocese (the ordinary), and from the patron of the living being annexed, and the incumbent having been himself the chairman at the vestry, and the other conditions of the 40th section of the 59 Geo. 3, c. 134, having been complied

[318] with. What does the act provide? That the churchwardens, with the sanction of the vestry and the consent of the ordinary, the incumbent, and the patron (there being no lay impropriator here), may pull down and rebuild the church on the same or another site. They got the consent of the vestry by the vote; the consent of the ordinary and of the patron are also obtained, and the incumbent was chairman of the meeting; and it also appears, from the additional articles, that half of the additional accommodation has been set apart as open sittings, so that it seems to me that all the provisions of the act of Parliament have been complied with, and that this church has become the parish church of Botley.

Then the question is whether the rate was properly made or not. The first objection is that there was not sufficient notice of the purpose for which the vestry was assembled; it was "for making of a church-rate and other purposes." Certainly there is no specification of the exact object or purposes to which the rate was to be applied; but there is a notice that the meeting was to be for the making of a church-rate, and it is hypercritical to say that every particular circumstance and object is to be stated in the notice. Mr. Gater was present at the meeting, and he proposed a rate of a fourth part of what was proposed by the churchwarden; but a shilling rate was carried by a large majority of the vestry, for the purpose of making provision for the consecration of the church. I am of opinion, therefore, that the notice was sufficient, and that no one could have been taken by surprise.

[319] Now, the rate was for the consecration of the parish church, and it could not be a parish church till it was consecrated, and I should be glad to have it pointed out to me by whom the expense of consecration was to be defrayed. There is nothing in the resolution of the vestry that it should be defrayed by voluntary subscription. If the church had been rebuilt on the same site, still it would not have been a parish church till it was consecrated, and the parish must have been charged with the expense of consecration of such a church. I am of opinion that a rate for consecration of the church is one which it was incumbent on the parishioners to make, and, being carried by a large majority of the vestry (all but two), I think it is a legal and valid rate, and that every parishioner is bound to contribute to it; and being of opinion that it is a good and valid rate, legally and validly made, I shall hold, if the facts stated in the libel are proved, that Mr. Gater is liable to the rate. I, therefore, admit the libel and additional articles.

[320] NEWTON AND THOMAS *against* CLARKE. Prerogative Court, Michaelmas Term, 4th Session, Dec. 4th, 1839.—A testator intending to execute a codicil, signed the same while lying in bed, there being present in the room the two witnesses who attested the codicil; the curtains at the foot of the bed being drawn at the time, one of the witnesses could not actually see the testator sign his name, nor could the testator see that witness subscribe the codicil as attesting it: Held that the testator and the witness signed their names in the presence of each other, as required by the stat. 1 Vict. c. 26, s. 9.

[Distinguished, *Hudson v. Parker*, 1844, 1 Rob. 34; *Norton v. Bazett*, 1856, 1 Deane, 264. Approved, *Tribe v. Tribe*, 1849, 1 Rob. 782.]

This was a question as to the admission of an allegation, propounding a paper as a codicil to the will of Mr. Patrick Persse, who died in June, 1839. The question was whether the codicil was duly executed under the statute 1 Vict. c. 26. It was alleged that on the 8th of April, 1839, the deceased, being then confined to his bed, directed his nephew, who was the residuary legatee in the will, to prepare a codicil, increasing the legacy of a servant from 60l. to 100l., which he prepared accordingly, and brought to the deceased in his bed-room, which was small, the bed standing with the foot towards the fire-place. During the execution of the codicil by the deceased the curtains of the bed were drawn open on both sides, but closed at the foot of the bed. Two small tables were in the room, one at the foot and the other at the side of the bed. When the nephew returned with the codicil (which he had prepared in another room) into the deceased's bed chamber he read the same over, in the presence of White, the deceased's footman, Clarke, the servant whose legacy was increased by the codicil, and the nurse to the deceased, who, in their presence and hearing, expressed his approbation thereof; the deceased then signed the co-[321]-dicil, in the presence of the same persons, except that one of them (White the footman) did not actually see him sign the paper, as he was standing by the fire, where the curtains of the bed

were closed. The nephew then subscribed his name, as attesting the execution, and proposed that White should do the same; previous to which, he again read the paper to White, in the presence and hearing of the testator. White then attested the codicil, signing it upon the small table placed between the foot of the bed and the fire, where the curtains were still closed, so that the testator might not have seen him sign.

The Queen's advocate and Haggard opposed the allegation. The question is whether this is a good execution under the 9th section of the Act, which requires that the signature of the testator shall be made or acknowledged in the presence of the witnesses, who shall subscribe the will in the presence of the testator, the intention of the statute being that the testator and the witnesses should see each other sign their names. Under the Statute of Frauds a constructive presence was allowed, but in the cases determined under that Act it was held that the testator should be in such a situation that he might see the witnesses. In the present case the witness was not within the reach of the organs of sight of the testator. *Shires v. Glascock* (2 Salk. 688), *Casson v. Dade* (1 Bro. Ch. Cas. 98), *Doe dem. Wright v. Manifold* (1 Maule & Selw. 294), *Winchilsea v. Wauchope* (3 Russ. 441) (*The Duke of Roxburgh's* [322] *Will*, where the Master of the Rolls said, "The duke might have seen what the witnesses were doing." Here the witness and the testator could not see each other.

Addams and Robertson in support of the allegation. The whole question turns upon the word "presence." The statute does not require that the testator should actually see the witnesses sign; the cases referred to turned upon the question of constructive presence; here the persons were in the actual presence of each other; if they are in the same room, that will satisfy the Act. In *Tod v. Winchilsea* (2 Car. & P. 491) Lord Tenterden held that it was not absolutely necessary that the testator should see the witnesses, since he might be blind.

Judgment—*Sir Herbert Jenner*. The word "present" occurs in the Statute of Frauds, and the meaning of that word has been a subject of discussion in the cases referred to. In the present case the first consideration is under what circumstances the execution took place. It took place in the chamber where the deceased lay, which was small (not a large one, where he could not see what was going on), and the probability is that all that was going on was heard by the deceased, the bed curtains being open on both sides, and only closed at the foot, to screen him from the fire. All the other requisites of the Act were complied with, but it is said White could not see the testator [323] sign his name, nor the testator see him attest his signature. To be sure it appears somewhat strange to say that what was done by a person in the same room, and in the hearing of another person, was not done in his presence. As far as the words of the Act go, I should be of opinion, without reference to the cases, that the witness being in the same room was present. The object of the Act is to prevent the substitution of another paper, and that no fraud should be practised on the deceased. I should, therefore, hold that this is a sufficient attestation in the presence of the testator, and a sufficient compliance with the Act of Parliament. The several cases referred to were questions under the Statute of Frauds, where wills were attested in a different room from that where the testator was. In one of those cases (that of *Casson v. Dade*) the doctrine of constructive presence was carried to a great length, for the testatrix executed the will in her carriage, standing at the office of her solicitor, the witnesses retiring into the office to attest it, and it being proved that the carriage was accidentally put back, so that she was in such a situation that she might see the witnesses sign the will through the window of the office; and this was held to be tantamount to being present: she had not ordered her carriage to be put back, and yet it was held that the attestation was constructively in her presence. In this case no suspicion of fraud can be suggested; the party employed the residuary legatee to prepare the codicil, and he will be a sufferer to the extent of the legacy.

I am of opinion that under the Act, where a paper is executed by the deceased in the same [324] room where the witnesses are, and who attest the paper in that room, it is an attestation in the presence of the testator, although they could not actually see him sign, nor the testator actually see the witnesses sign; and if the facts pleaded in this allegation are proved to the satisfaction of the Court, I must pronounce for the validity of the codicil.

Allegation admitted.

The executors afterwards took probate of the codicil.

IN THE GOODS OF CATHERINE ELIZABETH THICKNESSE WOODINGTON, Widow, Deceased. Prerogative Court, Hilary Term, Jan. 16th, 1839.—Probate allowed of a will concluding “signed and sealed as and for the will of me, C. E. T. Woodington, in the presence of us, Thomas Hughes, Ellen Hughes,” as being signed at the foot or end thereof.

[Followed, *In the Goods of Gunning*, 1846, 1 Roberts. 460. Discussed, *Smee v. Bryer*, 1848, 1 Roberts. 616.]

On motion.

The testatrix died in November, 1838, having on the 28th of May preceding made her will, which concluded in the following manner:—

“Signed and sealed as and for the will of me, Catherine Elizabeth Thicknesse Woodington, in the presence of us, Thomas Hughes, Ellen Hughes.”

Pratt moved for probate of the will, as having been duly executed under the 9th section of the stat. 1 Vict. c. 26, upon the affidavit of Thomas [325] Hughes, one of the attesting witnesses, who deposed that the deceased wrote her name in the manner as it appeared on the instrument in his presence only, but afterwards on the same day, the date of the will, in his presence and in that of the other subscribed witness, acknowledged the will to be her will, and to have been written by her; and that he believed that the names of the deceased as there so written were intended by her as and for her signature to the will, and that he and Ellen Hughes, on the same day attested and subscribed the will, in the presence of the deceased and of each other.

Sir Herbert Jenner. The deceased, by placing her name where it stands, seems to have intended that it should answer the purpose of a description as well as of a signature, and such signature being at the foot or end of the will, and the will being written by the deceased, and acknowledged by her to be her will in the presence of the two subscribing witnesses, I think this is a sufficient acknowledgment of the signature to the will to satisfy the provisions of the statute.

IN THE GOODS OF ELEANOR BRYCE, Spinster, Deceased. Prerogative Court, Hilary Term, Jan. 16th, 1839.—A testatrix signed her will with a mark, her name not appearing. Held to be a sufficient signing under the stat. 1 Vict. c. 26, s. 9.

The deceased died on the 23rd of October, 1838; she left a will executed shortly before her death, which was signed by a mark without the name of [326] the deceased; the signature was attested by two witnesses, Dr. Thomas Elliotson and the nurse, who attended the testatrix.

Gostling prayed probate.

Sir Herbert Jenner. Although the name of the testatrix does not appear upon the face of the instrument, the affidavit sufficiently accounts for the manner in which the will was signed; the statute does not say that the name of the testator shall appear at the foot of the will; the paper is identified as being the will of the deceased, and being signed in the presence of the witnesses present at the same time, who attested its execution, I am of opinion that the statute is sufficiently complied with.

IN THE GOODS OF ANN RAWLINS, Widow, Deceased. Prerogative Court, Hilary Term, Feb. 2nd, 1839.—The deceased signed her will, not in the presence of witnesses, and subsequently produced her will before two witnesses, and said to them “Sign your names to this paper.” Held not to be an acknowledgment of her signature under the 9th section of stat. 1 Vict. c. 26.

The deceased died on the 22nd October, 1838, leaving a will, signed by her at the end, and with the following attestation:—

“Signed and sealed in the presence of, this 24th day of September, 1839, Charlotte Browning, Thomas Brown.”

Upon an affidavit of Charlotte Browning to the following effect:—“That on the 24th of September [327] the deceased came into the room wherein the deponent and her fellow witness to the said will (Thomas Brown) then were, and produced and shewed to them the said last will and testament (which, about half an hour preceding, this deponent, on going into the deceased’s parlour, had observed her writing), and the said deceased then said to this deponent and the said Thomas Brown, ‘Sign your names to this paper,’ meaning the said will; that this deponent and the said Thomas Brown then, at the same time, and in the presence of the said deceased and of each other, signed their names accordingly to the said will; and the said deceased, immedi-

ately they had so signed it, took it up and left the room therewith, and this deponent on the following day saw the same on the dressing table in the said deceased's bed-room."

Haggard prayed probate.

Sir Herbert Jenner. Can the signature to this will be said to have been "made or acknowledged by the testatrix in the presence of the witnesses," as required by the ninth section of the statute? From the affidavit it appears that all that the deceased did was to request the witnesses to sign their names to the paper, without saying that it was a will, or that the signature was hers; I cannot hold this to be a sufficient compliance with the statute, and I must reject the motion.

[328] IN THE GOODS OF WILLIAM HENRY FOY, Deceased. Prerogative Court, Hilary Term, Feb. 12th, 1839.—Probate having been granted at the Cape of Good Hope of a will and an unattested codicil thereto, made there in March, 1838, by an officer in the East India Company's service; probate of both papers also allowed to pass here.

William Henry Foy, a major in the East India Company's Bombay Artillery, died at the Cape of Good Hope on the 30th of March, 1838. He quitted this country early in life, and in 1827, while on furlough in England, he married, and in 1829 returned to India, where he remained until January, 1838, when he proceeded on leave to the Cape of Good Hope for the benefit of his health. Shortly before his death he made a will, which was duly attested, and he afterwards made a codicil, which he signed, but which was not attested by witnesses. Probate of both papers was granted at the Cape of Good Hope.

Curteis moved the Court to grant probate of both papers following the grant at the Cape.

Sir Herbert Jenner. Was the deceased domiciled there?

Curteis. No; he was at the Cape only for temporary purposes. He intended to return to India, where, I submit, he was legally domiciled.

Sir Herbert Jenner. Does a person by going to India in the East India Company's service change his domicile?

Curteis. I submit that he does; it was so held [329] in *Bruce v. Bruce*.(a) But if not, here is the decree of a competent Court where the deceased died, and the statute 1 Viet. c. 26 does not extend to the colonies. Mr. Justice Blackstone (vol. 1, Introduction, § 4) says that the colonies are not bound by an act of Parliament unless particularly named; and that such was the opinion of the authorities in India is shewn by their having (with certain exceptions) re-enacted the statute as to wills, but such Act was not come into operation until the 1st of February, 1839.

The Court directed the case to stand over, and on a subsequent day allowed probate of both papers to pass, but gave no opinion as to the domicile.

IN THE GOODS OF JAMES CLARK, Deceased. Prerogative Court, Feb. 20th, 1839.

—Testator being too ill to sign his will, requested the drawer thereof to sign it for him, which he did in his own name, not in that of the testator: Held sufficient.

[Explained, *In the Goods of Marshall*, 1866, 13 L. T. (N. S.) 643.]

James Clark, late of Warfield, in the county of Berks, died on the 4th of June, 1838. Shortly before his death, and upon the day on which he died, being very ill, he requested the Rev. Mr. Furlong, the vicar of the parish, who was attending him at the time, to make his will. Mr. Furlong accordingly drew up a will, and the deceased took a pen in his hand for the purpose of signing his name to the will, but from bodily weakness was unable to do so; he then requested Mr. Furlong to sign the will for him; Mr. Furlong upon this, with the statute 1 Viet. c. 26 before him, and in-[330]tending to follow its provisions, signed the will in his own name thus:

"Signed on behalf of the testator, in his presence, and by his direction, by me,
"C. F. FURLONG,

"Vicar of Warfield, Berks."

The above signature was made for and acknowledged by the testator, in the presence of us, whose names are hereto subscribed—"Mary Butler ✕ her mark, Ann Clark."

(a) 8 Bro. P. C. 566; 2 Bos. & P. 299, note; and Lord Eldon's observations in *Marsh v. Hutchinson*, 2 B. & P. 231.

The witness, Ann Clark, was the wife of the deceased, and had a legacy under the will, and was appointed the executrix according to the tenor thereof.

Jenner prayed probate to the executrix.

The Act has been complied with, and the executrix is a good witness, although she will lose her legacy under the 15th section of the Act.

Sir Herbert Jenner. The statute allows a will to be signed for the testator by another person, and it does not say that the signature must be in the testator's name; here, this gentleman, at the testator's request, signed the will for him, not in the testator's name, but using his own name. I incline to think that this is a sufficient compliance with the Act; the executrix is a good witness, but will lose her legacy.

Probate to pass.

[331] IN THE GOODS OF ANN ALLEN, Widow, Deceased. Prerogative Court, March 19th, 1839.—The deceased signed her will, by a mark, in the presence of one witness who subscribed the will as attesting it, and on a subsequent day she acknowledged her signature in the presence of that witness and of another who also subscribed the will, but the former witness did not again subscribe the will; probate refused.

[Followed, *In the Goods of Simmons*, 1842, 3 Curt. 79.]

Ann Allen, the deceased, died on the 29th of January, 1839. On the 29th of December preceding she executed her will by making her mark thereto in the presence of William Tuck, who then, in her presence, subscribed his name as a witness. On the 7th of January, Amy Lake Overton having arrived at the deceased's house from Bristol, the deceased, in her presence, and in that of William Tuck, both of whom were present at the same time, acknowledged her said will and her aforesaid mark, and Amy Lake Overton then signed her name as a witness thereto in the presence of the deceased and of William Tuck, who did not again attest the will.

Haggard prayed probate.

Sir Herbert Jenner. The Act requires that the signature "shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and that such witnesses shall attest and shall subscribe the will in the presence of the testator." Here, the deceased made her mark in the presence of one witness only, who attested it, and afterwards, on a subsequent day, acknowledged her signature in the presence of the same witness, who did not then subscribe it, and of another who did. The natural construction of the words of the act, which are in the future tense, seems to be that when the [332] signature is made or acknowledged, the witnesses shall then attest it, not one at one time and one at another.

Haggard. The act does not expressly require that.

Sir Herbert Jenner. No, not expressly; but are the words, shall attest, equivalent to shall have attested? Suppose both the witnesses had subscribed the will singly at different times, and the deceased had afterwards acknowledged her signature, would that have been sufficient?

I doubt whether this is a sufficient compliance with the Act, and I must reject the motion. Had not the property been so small (under 100l.) I should have directed the paper to be repounded.

IN THE GOODS OF CHARLES NICHOLAS RIPPIN, ESQ. Prerogative Court, March 19th, 1839.—Testator duly executed his will with a legacy therein of fifty pounds to S. S.; subsequently to the execution the testator erased the word fifty and substituted the word thirty; this alteration being unattested, probate of the will passed in blank, the word fifty having been entirely erased.

[See further, 3 Curt. 121.]

The deceased died on the 9th of January, 1839, having made his last will and testament, bearing date the 19th of November, 1838, and thereof appointed James Dolman, Henry John Turner, and George Kirby, executors, and which was duly attested. In the early part of the month of December, 1838, the deceased gave his will to James Dolman, who was then upon a visit to the deceased, and requested him to peruse it, and give his opinion [333] as to the contents thereof. James Dolman took the will away with him, and on the next day carefully perused the same, and particularly noticed that the deceased had therein left a legacy of fifty pounds to his servant Sarah Soar, and had only given a legacy of twenty-five pounds to each of his two sisters. Shortly afterwards, upon returning the will to the deceased, he asked

Mr. Dolman whether it would do, who pointed out the legacy of fifty pounds to the servant, and said he considered it too much, with reference to the legacies of twenty-five pounds to his sisters; upon which the deceased asked him if he could not make a codicil, to which he replied in the affirmative. The testator shortly before his death delivered his said will to Mr. Dolman, folded up in an envelope, and it remained in his possession in the same state until after the deceased's death, upon which event he again opened and read the same, and then noticed that the word "fifty" in the legacy to the said Sarah Soar was erased, and the word "thirty" in the testator's handwriting substituted.

Pratt prayed probate of the will as it originally stood.

Sir Herbert Jenner. The will is duly executed, but there appears in it a legacy of thirty pounds written on an erasure, and there is no signature of the testator or subscription of the witnesses, made in the manner required by the 21st section of the Act; the alteration, therefore, can have no effect, except so far as the effect of the will, as it originally stood, shall not be apparent. It is not apparent what the word was [334] over which "thirty" is written; it cannot be made out. The legacy then of thirty pounds being an alteration, and not attested in the manner required by the statute, cannot stand; and the only question is, whether the legacy of "fifty" pounds, which is not apparent upon the face of the will, but which is deposed to by a party who saw it in the will before the alteration, can be pronounced for? I am of opinion that the Court is not at liberty to supply by parol testimony what is not apparent upon the face of the will itself, and the 21st section of the Act, declaring that "no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent," &c. I am of opinion that, according to the construction which I must put upon these words, the legacy is lost altogether.

Probate to pass with the legacy in blank.

IN THE GOODS OF MARY WARDEN, Spinster, Deceased. Prerogative Court, March 19th, 1839.—Testatrix signed her will, and on a subsequent day sent for two witnesses to attest the same; upon their arrival they said that they were come for the purpose of signing their names as witnesses to her will, which was then produced, upon which the testatrix said, "I am glad of it, thank God!" and they subscribed the will as witnesses. Held to be an acknowledgment of her signature by the deceased under 1 Vict. c. 26, s. 9.

Mary Warden, of Great Ilford, in Essex, died on the 28th of December last. On the 10th of that month the deceased, being in a declining state of health, requested D. P. Gladwin to make her will, which he did, and after he had read the same over to the deceased, she signed it in the presence of Gladwin, Elizabeth Tuck, and Elizabeth Martin, but Elizabeth Tuck alone subscribed her name as a witness. A day or two afterwards, Gladwin and [335] Tuck being with the deceased, Gladwin suggested to her that he thought there should be two witnesses to her will, upon which the deceased immediately sent for William Habgood and James Carter (neighbours), for the purpose of their witnessing her said will. When Habgood and Carter came they went up into the deceased's bed-room, when Gladwin produced the will, and told the deceased that they had come as she requested for the purpose of signing their names as witnesses thereto, to which the deceased replied, "I am very glad of it, thank God!" whereupon Habgood and Carter signed their names to the will in the presence of the deceased, both being present at the same time. Gladwin then sealed up the will in an envelope, and left it with the deceased.

Below the signature of the testatrix these words were added, "I appoint D. P. Gladwin to execute this my will."

Addams submitted that this was a virtual acknowledgment of her signature by the deceased. The act does not expressly require a direct acknowledgment: suppose a person wrote his will on a sheet of paper and signed it, and sent for two witnesses, and said, there is my will, attest it, would not that be sufficient? Is not the present case in effect the same? He cited Bythewood's Conveyancing, by Jarman, vol. 1, p. 75; and the Court being of opinion that, under the circumstances, the signature was sufficiently acknowledged by the testatrix, under the ninth section of the statute 1 Vict. c. 26, allowed administration with the will annexed to pass to the residuary legatee, the appointment of the executor not being part of the will.

[336] IN THE GOODS OF SARAH BIGGAR (Wife of Charles Biggar), Deceased. Prerogative Court, April 18th, 1839.—A married woman having under her marriage settlement a power to dispose of property “by will to be published by her in the presence of and to be attested by two credible witnesses,” published her will in the presence of two witnesses, who attested the same, one of those witnesses being the wife of the executor, who was also a legatee under the will and had not renounced or released his legacy. Probate granted, leaving the question as to the due execution of the power open.

The deceased, under her marriage settlement, had a power to dispose of certain property “by her last will and testament, in writing, to be published and declared in the presence of and to be attested by two or more credible witnesses.” She made her will in due form, and it was attested by two witnesses, one of whom was the wife of J. E. Sanders, the executor, and a legatee of 10l. under the will, who had not renounced nor released his legacy. The parties, whose interests were affected, consented to the probate.

Addams prayed probate.

Sir Herbert Jenner. The will is required to be executed in the presence of two credible (that is, competent) witnesses. One of the witnesses is the wife of the executor, who has not renounced, and who is, besides, a legatee. The consent of the parties will not render the witness competent. Formerly, in such cases, this Court left it to a Court of Equity to say whether the power was duly executed or not; but it has been held lately that this Court is bound to give its opinion, in the first instance, as to the validity of the execution. It is really a question for a Court of Equity. The safest way will be to allow probate to pass, leaving the question as to the execution of the power open; it is clear that a Court of Equity cannot act unless the Court of Probate allows probate of the paper to pass.

[337] IN THE GOODS OF SIR CHARLES IBBETSON, Deceased. Prerogative Court. June 25th, 1839.—Testator, after the execution of his will, obliterated and erased certain parts thereof. Probate granted of the will, with those parts in blank, the original words not being discernible on the face of the paper.

[Discussed, *Ffinch v. Combe*, [1894] P. 199.]

Sir Charles Ibbetson, late of Denton Park, in the county of York, Bart., died on the 9th of April, 1839, having executed his will, with a codicil thereto, on the 14th of November, 1838, and thereof appointed his sister-in-law, Dame Alicia Mary Ibbetson, widow, and John Thomas Selwyn, Esq., executors. The personal property of the deceased amounted in value to about 25,000l. When the will was prepared, blanks were left by the solicitor who prepared the same, for all the amounts of the legacies, and for the names of several of the legatees in the sixth sheet of the will; these blanks were afterwards filled up by the deceased previously to the execution of the will. After the death of the testator, upon opening the will, which was found with the codicil folded and sealed up together in an envelope, in a press or bureau in the deceased's sitting room, there was an obliteration of the name of a legatee, and the amount of the legacy, and an erasure of the amount of a legacy to his farming servants.

Addams moved for probate of the will as it then stood; that is, with the interlineations remaining, and with the parts removed in blank.

Sir Herbert Jenner. The obliterations and erasures should be carefully examined by persons accustomed to inspect writings in order to ascertain how the will originally stood; [338] possibly with the use of glasses that may be discovered; but I am quite unable to make it out. The interlineations are all deposed to in the affidavit of the solicitor as having been there before the execution; probate may, therefore, pass with the interlineations as stated in the affidavit; probate should also pass with the obliterated and erased passages restored, if they can be made out, otherwise probate must pass with those parts in blank.

Probate eventually passed with the interlineations, but with the parts destroyed in blank, as it could not be discovered what those parts originally were.

IN THE GOODS OF RICHARD HAYES, Deceased. Prerogative Court, July 4th, 1839.—Probate allowed of an unattested codicil made at sea by a purser of a man-of-war, as that of a seaman, under the exception contained in the 11th section of the stat. 1 Vict. c. 26.

Richard Hayes, purser of H.M.S. "Thunderer," died on the 27th of August, 1838. He left a will duly executed on the 26th of April, 1833. On the 18th of January, 1838, he wrote a codicil to his will and signed it; this codicil was not attested.

On the 28th of May Curteis prayed probate of both papers, submitting that the codicil was valid, under the exception contained in the 11th section of the stat. 1 Vict. c. 26, as the will of a seaman at sea, that section enacting "that any soldier, being in actual military service, or any mariner or seaman, being at sea, may dispose of his personal estate, as he might have done before the making of this act." But the Court, having some doubt whether a purser was included in the term seaman, directed the case [339] to stand over, in order to ascertain whether any construction had been put upon the word "seaman" with regard to nuncupative wills excepted under the Statute of Frauds.

On the 4th of July the motion was renewed, the case of *The Earl of Euston v. Lord Henry Seymour*, by his *Guardian*, before Sir William Wynne (21st July, 1802), having been found, in which an allegation, propounding a nuncupative codicil made by Lord Hugh Seymour, the admiral of the station of Jamaica, was rejected, on the ground of its having been made at the admiral's house on shore, and, therefore, not "at sea," as required by the statute; Sir William Wynne, however, intimating his opinion that the admiral would be included in the words "mariner or seaman," in the 23rd section of the statute of frauds, 29 Ch. 2, c. 3.

Sir Herbert Jenner. Under the old law it is quite clear that this codicil would be entitled to probate, as no formality was required for the disposal of personal estate. By the 11th section of the recent statute the wills of soldiers in actual military service, and of mariners or seamen at sea, are excepted from the operation of the act, and supposing the deceased, in this case, to have been a "mariner or seaman" within the terms of the act, the codicil is entitled to probate; the question then is whether the purser of a man-of-war comes within the terms "mariner or seaman." The only case in which a similar question has been raised, that the Court is aware of, is that which has been cited, of *The Earl of Euston v. Lord Henry Seymour*; the question in that case [340] was as to the validity of a nuncupative codicil of Lord Hugh Seymour, under the 23rd section of the Statute of Frauds. Lord Hugh Seymour had made a codicil by nuncupation, while at the house appropriated to the admiral of the station at Jamaica. Sir William Wynne was of opinion that the allegation propounding the codicil was inadmissible, as it could not be said that the admiral was at sea at the time of nuncupation; but on reference to the notes of Sir Christopher Robinson and Dr. Arnold I find that Sir William Wynne said that if it had been *res integra*, and he had been compelled to determine the question, it was "the inclination of his mind" to hold that the term "mariner or seaman" included the whole profession, "because he did not know where to stop." Some of the reasons assigned for the exception (which was not merely to protect illiterate persons), it was said, applied just as well to the commander-in-chief as to a common seaman; the same sudden emergency might arise to render it necessary for the individual to dispose of his property by word of mouth, in the one case as in the other; and whilst at sea one might be *inops consilii* as well as the other. It is difficult to say where the line of exclusion is to be drawn. Under these circumstances, this being the only case which the Court has to guide it, in the construction of the act, and thinking that the reasons for the exemption apply equally to a commander-in-chief as to a common seaman, I incline to hold that the codicil in question falls within the exception contained in the 11th section of the act, as being that of a "seaman at sea." I am of opinion, according to the construction of the [341] term given by Sir William Wynne, and according to the reason of the thing, that the term "mariner or seaman" does not exclude any person in her Majesty's Navy, though superior officers of the ship, being "at sea," from the exception contained in the act.

Probate to pass of the will and codicil.

IN THE GOODS OF JOHN JOHNSON, Deceased. Prerogative Court, July 4th, 1839.—Probate allowed of a will executed in India, and attested by two witnesses, but without a full attestation clause; the Court presuming that the statute had been complied with.

John Johnson, a major in her Majesty's 13th Regiment of Foot, embarked from India for England on the 18th of March last, and died on the voyage on the 19th of

April. On the 20th of August, 1838, while in India, he executed a will, which was attested by two witnesses, but it did not appear from the attestation clause that the witnesses were present at the same time, and there was no affidavit to that effect. While on board ship he executed a codicil, which was duly attested, in which reference was made to his will.

Addams moved for probate of the will and codicil.

Sir Herbert Jenner. The will is dated the 20th of August, 1838; there are two witnesses to that will, but it does not appear upon the face of the paper that the requisites of the act have been complied with, and there is no affidavit to that effect; but where, as in this case, [342] the witnesses are in India, the Court will assume that the will has been duly executed. Here there is reference made to the will in the codicil which was duly executed, which might be a republication of the will. Again, might not this gentleman be considered a "soldier in actual military service" under the 11th section of the act?

Addams. I should submit that he might.

Sir Herbert Jenner. In this case I shall assume that the act has been complied with.

IN THE GOODS OF THOMAS HOWELL, Deceased. Prerogative Court, July 15th, 1839.

—The appointment of the executors in a will being made in a clause after the signature of the testator, administration, with the will annexed, granted to the residuary legatee, the clause appointing the executors not being part of the will.

Thomas Howell died on the 7th of April, 1839, leaving a will dated the 27th of March preceding, signed by him, and attested by three witnesses. The will concludes thus: "Declaring this to be my last will and testament, on the day and year first before written.

"Signed, sealed, and declared by me, the testator,

"THOMAS HOWELL,

The Seal.

"In the presence of us, at his request, and in the presence of each other as witnesses—Christopher Brown, Jonas Hunt, Jasper Taylor.

"And I hereby appoint Messrs. Bradford and Burt of Swinden, and Jonas Hunt, executors."

[343] The whole of the will, including the appointment of the executors, was written before the deceased signed it; it was all read to him, and he afterwards signed it, and it was attested by the witnesses.

Phillimore prayed probate to the executors.

Sir Herbert Jenner. The appointment of the executors is after the name of the testator. If that is part of the will, the signature is not at the foot or end of the will, as required by the statute; the Court has no discretion, but must deal with this addition in the same manner as if it had been a bequest of the residue or of real estate.

Motion rejected.

The Court subsequently allowed administration, with the will annexed, to pass to the residuary legatee, without the clause appointing the executors; upon their consent.

IN THE GOODS OF WILLIAM BROOKE, Deceased. Prerogative Court, Dec. 4th, 1839.

—Testator, after the 1st January, 1838, erased certain words in a will executed in July, 1837, and wrote a memorandum, stating what the words erased originally were, but such memorandum was unattested. Motion for probate of the will as it originally stood rejected.

[Reversed nomine *Brooke v. Kent*, 1840, 3 Moore, P. C. 334; 13 E. R. 136 (with note).]

The deceased left a will, dated the 15th of July, 1837. After the statute 1 Vict. c. 26 came into operation the testator made certain alterations in his will, by erasing some words and inserting others, and at the end of the will he wrote this memorandum: "The erasure in the twenty-third line of the sixth sheet, the word 'two' taken out, [344] and the word 'one' put in its place; and in the first line of the seventh sheet, the word 'four' taken out, and the word 'two' put in its place; and in the fifth line of the seventh sheet, the word 'four' taken out, and the word 'two' put in its place: By me,

"WM. BROOKE, June 26th, 1838."

These were the alterations in question, and they were not attested as required by sect. 21 of the stat. 1 Vict. c. 26.

The Queen's advocate prayed probate of the will as it originally stood, submitting that the Court might do so, as it appeared from this memorandum upon the will itself what the original words were.

Sir Herbert Jenner. If the construction which the Court has put upon the 21st section of the act be correct (*a*)¹ this motion must be rejected. My opinion is that the memorandum, being unattested, forms no part of the will of the deceased, and that it cannot be looked at to shew what the words were which have been erased. If any doubt exists as to propriety of the construction which the Court has put upon this clause of the Act the will should be propounded, (*b*) in order that the opinion of the Superior Court may be taken upon the point.

Motion rejected.

[345] *ROOKES against ROOKES*. Arches Court, Hilary Term, Jan. 11th, 1840.—A party who appealed *apud acta*, being assigned to prove his libel of appeal in the Court above, referred for proof to the process, in which were the following minutes of the Court below :—1. "With due deference, &c., Gidley (A.) appealed, and is assigned to certify of the prosecution of his appeal by, &c." 2. "Gidley is assigned to certify prosecution of appeal." "Appeal deserted." Held, that the appeal was sufficiently proved, and that the second minute (under the circumstances) was of no effect. *Semble*, that where a party has duly appealed, the judge of the Court below cannot limit the time for the prosecution of the appeal.

On petition.

This was an appeal from the sentence of the Judge of the Consistorial Court at Exeter, in a cause of divorce, by reason of cruelty, brought by the wife against her husband. On the 12th of July, 1839, the Judge pronounced that Mrs. Rookes had failed in proof of her libel, and dismissed Mr. Rookes; from that sentence an appeal was alleged *instanter*, and a minute of Court was entered to the following effect :—"On which day the Judge, &c. did pronounce, decree, and declare that the said Mary Rookes is not entitled to the sentence for which she prays in this suit." "Saving the Judge's reverence, &c. Gidley (*a*)² appealed, and is assigned to certify of the prosecution of his appeal by this day month, if a Court day, otherwise on the next Court day following."

The next Court day was on the 13th of September, when the appeal not having been prosecuted, and [346] no reason assigned for its non-prosecution, the following minute was entered :—

"To certify prosecution of appeal, Gidley is assigned. Appeal deserted."

On the 23rd of October the proctor for Mrs. Rookes extracted in this Court an inhibition and citation, which being served and returned, an appearance was given for the respondent, and a libel of appeal was prayed and brought in; this libel was admitted on the 12th of November, and the respondent gave a negative issue thereto; the appellant was assigned to prove; a monition for the process issued, the process was brought in and the proctor for the appellant alleged that the appeal was contained in the process. The proctor for the respondent now prayed that his party might be dismissed, on the ground that the appellant had not proved his appeal.

Addams for the respondent. The question is simply whether the libel of appeal in this Court is proved; that is a question of fact, and the only proof offered is the process of the Court below; all that is contained in the process with reference to the appeal is in the minutes of the Court at Exeter, of the 12th of July and 13th of September, whence it appears that there was an appeal, but it also appears that such appeal was deserted. It is said that on the 13th of September the case was not called; but in the affidavit of the registrar it is sworn that the proctor was in Court, and that the entry was made agreeably to the usual practice of the Court.

(*a*)¹ *Rippin, Deceased*, ante, 332, and *Sir C. Ibbetson, Deceased*, 337.

(*b*) This was afterwards done, and the allegation propounding the will as it originally stood was rejected, and from the decree of the Court rejecting the allegation an appeal was prosecuted to the Privy Council, where the point has been argued, but as yet no decision has been given.

(*a*)² The proctor of Mrs. Rookes.

[347] Sir Herbert Jenner. Is it not a wrong practice to dismiss an appeal without calling the cause? If so, ought it not to be corrected?

Addams. This Court cannot try the practice of the Court of Exeter in this question—whether the appeal was deserted or not is a question of law; the question here is a point of fact, whether the appeal is in the process. I submit that it is not; it only appears that there was an appeal, and that it was dismissed.

Haggard *contrà*. There is no question that an appeal was duly entered; can, then, a registrar, by the mere stroke of his pen, deprive a party of a sacred right, of that which Lord Holt terms a “badge of freedom?” Can he oust the jurisdiction of this Court?

A year and a day are allowed a party, who has entered an appeal, to prosecute it.

Sir Herbert Jenner. Do you contend that in all cases that time is allowed? that the Court has no power to compel the prosecution of an appeal?

Haggard. I cannot find any case in which a party’s appeal has been put an end to within that time.

Sir Herbert Jenner. What do the books of practice say as to the right of the Judge a quo to abridge the time?

[348] Harding (on the same side). Oughton says (in tit. 320) that the Judge a quo may abridge the time; but here the cause was never called, the minute, therefore, is a mere nullity.

Sir Herbert Jenner. This is an appeal from the Consistorial Court at Exeter, and in that Court it was a cause of separation from bed, board, and mutual cohabitation, by reason of cruelty, brought by Mrs. Rookes against her husband, and (looking at the process) it appears that on the 12th of July, 1839, that Court pronounced that Mrs. Rookes was not entitled to the remedy she prayed, and dismissed the party cited. From this sentence, which was a definitive sentence, it is admitted that there was an appeal *apud acta*—that is, immediately upon the sentence being pronounced. The minute of the Court entered on that day is to this effect: “Gidley appealed, and is assigned to certify of the prosecution of his appeal by this day month, if a Court day, otherwise on the next Court day following.” So that there was an appeal immediately asserted *apud acta*. But on the 13th of September (I presume the next Court day) the following minute was made:—

“Gidley is assigned to prosecute his appeal. Appeal deserted.”

The proctor for Mrs. Rookes proceeded in the usual way to bring the case to a hearing before this Court: he extracted an inhibition and citation, which being served and returned into Court, the usual steps were taken by the party cited to appear before this Court: a libel was prayed and was [349] brought in, alleging the proceedings that had taken place in the Court below, and the sentence of the Judge, and the appeal asserted from that sentence; and that libel was admitted in the Michaelmas Term of that year. On the libel being admitted the party was assigned to prove; there was a monition for process, the process was brought in, and the proctor for the party appellant alleged that the appeal was contained in the process, and I find that it is contained in the process, for it is an appeal from the definitive sentence of the 12th of July, that was asserted by the proctor; and the question is whether the minute of the 13th of September is to deprive the party of the appeal asserted *apud acta*.

Let us see what is alleged to support the petition in this case, in which the party complains that there is no appeal whatever, and the Court is asked to pronounce against the pretended appeal—that is, that the party has failed to prove her libel of appeal. It is alleged on behalf of the appellant that the minute of the 13th of September is a mere nullity; that the case on that day was not called in Court; that the entry was made entirely without the knowledge of the appellant’s proctor in the Court, who was not authorized by her to desert the appeal, and it is contended that she is entitled to a year and a day to prosecute her appeal. On the other side it is denied that the minute was made without the knowledge of the proctor, who was present in Court, and knew that the entry would be made. But there is the affidavit of the proctor, that Mrs. Rookes did not know it; that the case was not called, and he denies that, according to the practice of the Court, the course taken was a proper one. There is an [350] affidavit of Mr. Turner, the registrar of the Court, and he states that he believes the minute of the Court of the 13th of September was not made without the knowledge of the proctor of Mrs. Rookes, “for that he was present

in Court," that may be, but if the case was not called on, he had no notice; "and well knew that, agreeable to the ordinary practice of the said Court, such entry would be made, unless he the said John Gidley was prepared on that day to certify the prosecution of his appeal."

If such be the practice of the Court, it is high time it should be amended. It is not because a practice of that kind has prevailed, that an assignation so made behind the back of the party (for if the case was not called there was no notice to the proctor) should have effect. "Appeal deserted" was not pronounced by the Court; if the case was not called, there was no opportunity afforded to the other party of alleging anything to the Court.

I am clearly of opinion that there has been no desertion of the appeal. It is true that the Court below is not prohibited from proceeding to enforce its decree until served with an inhibition; but that cannot in any way affect the Court of Appeal. For the Court below to say I will limit the time within which a party shall prosecute an appeal is not within the power of that Court: the desertion of an appeal must be declared by the Court of Appeal. I must overrule this petition, and with costs.(a)

[351] *WHITCOMB against WHITCOMB.* Consistory Court of London, Hilary Term, Jan. 28th, 1840.—A citation at the suit of the husband living in the diocese of London, taken out in that diocese, being served by letters of request on the wife, in the diocese of Hereford where she was resident. The Court pronounced the wife in contempt, for the purpose of carrying on the proceedings.—The husband's domicile is *prima facie* that of the wife.

This was a suit for restitution of conjugal rights, by the husband against his wife; the husband's residence was within the diocese of London; and the wife, who was living in the diocese of Hereford, had been cited by letters of request; she had not appeared to that citation, and the proctor for the husband now prayed the Court to pronounce the wife in contempt, for the purpose of carrying on the proceedings against her, in *poenam contumaciæ*; the circumstances are stated in the judgment of the Court.

Phillimore in support of the motion. The question is whether a wife has any other domicile than that of her husband. In *Chichester v. Donegal* (1 Add. 19) Sir John Nicholl said, "*Prima facie*, at least, the husband's actual and the wife's legal domicile are one, wheresoever the wife may be personally resident." The judgment of Sir J. Nicholl in that case (though not precisely in point) was confirmed by Sir John Leach (6 Madd. 375).

Judgment—Dr. Lushington. This is a very important question, and it is de-[352]-sirable that I should briefly state the facts upon which my judgment must be founded.

The facts of the case (for I am bound to take the affidavits as true) are these: There has been a legal marriage between the parties, and whilst they were resident at Presteign, in the diocese of Hereford, the wife withdrew from her husband without just and legal cause; and, subsequently to that period, the husband quitted his residence at Presteign and became permanently resident within the jurisdiction of the Consistorial Court of London. Then he instituted a suit for restitution of conjugal rights, and a citation by letters of request was taken out and duly served, but there was no appearance in obedience to the citation, and I am now prayed to pronounce the wife in contempt, for the purpose of proceeding in the cause. It has been truly said that there is no direct authority upon this point; but that it has been held that the residence of the husband is the residence of the wife. I have looked at the case of *Donegal v. Donegal*, which I consider to be an authority in favour of the position. But there is another case, bearing more immediately upon the point, *Shackell v. Shackell*, in the Arches Court, in which the husband, who resided at Egham, cited the wife, who resided at Paris, and of course the jurisdiction of the Court could only be founded on the husband's being resident within the jurisdiction of the Arches Court at the time. But I think there is a case still more to the purpose, that of *Sir George and Lady Warrender* (9 Bligh, 89), in the House of Lords; for though the report of the case [353] refers solely to the Scotch law, yet the House of Lords laid it down in the strongest terms that the wife, though not actually domiciled in Scotland, had her

(a) In this case no further proceedings were taken.

legal domicile there, to all intents and purposes, as it was the domicile of her husband ; that, therefore, the Scotch law governed the case and they pronounced for a separation. Suppose a husband residing in England, and the wife, for the sake of their children, residing abroad, unless this Court could initiate proceedings for the purpose of his obtaining justice, the husband must resort to the foreign country, which might afford a different remedy from that which is obtained in this Court. I am disposed to grant the motion as prayed, and if the case comes to a final hearing, and the opinion of the Court shall be in favour of the husband, and there shall appear no cause for the separation, I shall have to determine whether or not I am to pronounce the wife in contempt for disobedience to the orders of the Court.

SPRY *against* FLOOD. Consistory Court of London, Hilary Term, Feb. 18th, 1840.—

A possessory title to a pew is sufficient against a mere intruder. The Court will decide upon the admissibility of a plea, according only to the facts stated therein.—The rector is entitled to the chief seat in the chancel, unless it be prescribed for by another.—Held, that sect. 51 of the local statute, 51 G. 3, c. 151, which enacts, “That the said vestrymen (of St. Marylebone) shall set out and appropriate . . . such a number of seats for the gratuitous accommodation of the poor of the said parish for the time being, and also such of other pews or seats for the use of the parishioners of the said parish as the said vestrymen shall think necessary, proper, and convenient,” is imperative upon the vestrymen, and empowers them to set out and appropriate the pews (other than those for the poor) without restriction, and not subject to the superintendence of the Ordinary.—Held, that by the 52d section, which enacts, “That it shall and may be lawful to and for the said vestrymen, if they shall think proper . . . to let the pews, &c. or any of them (save and except the pews or seats to be appropriated for the gratuitous accommodation of the poor of the said parish for the time being as aforesaid), to such persons only who shall be inhabitant householders within the said parish,” the vestrymen were empowered to let all the pews save those for the poor, and consequently to remove the rector from one of two pews of which he had been in possession from the time of his induction, and to let it to another inhabitant householder.

[Referred to, *Stileman-Gibbard v. Wilkinson*, [1897] 1 Q. B. 749.]

This was a suit for perturbation of church-seat, by Dr. John Hume Spry, rector of Marylebone, against Mr. Christopher Flood, the vestry-clerk of the parish. On the first session of Michaelmas Term, 8th November, 1839, the libel stood for admission ; it pleaded in substance,

First. That the minister incumbent of every parish is entitled to convenient sittings in his [354] parish church, for the use of his family, of common right ; that such right is originally inherent in the minister incumbent of every parish, and that unless specially divested thereof, he ought to be protected in the enjoyment of the same, &c.(a)

Second. That the parish church of St. Marylebone was built and consecrated in February, 1817, by virtue of the stat. 51 Geo. 3, c. 151 ; that previous to the vestrymen proceeding (as, if they thought fit, they were authorized and empowered to do so by the said act) to let the pews in the said church to the inhabitant householders of the parish, and prior to the consecration of the church two pews were (so far as they had authority to do so), by the said vestrymen, set apart or appropriated to the use of the minister of the parish and his family. That Dr. Heslop, the then perpetual curate, but afterwards rector, the said parish being made a rectory in virtue of the stat. 1 & 2 Geo. 4, c. 21, on the consecration of the said church, took possession of the said two pews, and occupied the same by himself and family during the remainder of his incumbency, &c.

Third. The third pleaded the induction of Dr. Spry as rector, and his occupation of the pews so appropriated.

Fourth. That on the 15th of June last Mr. Flood, the vestry-clerk, accompanied by a carpenter, though protested against by Dr. Spry, took forcible possession of the said two pews by placing a padlock upon the door, and excluded Dr. Spry and his family therefrom, &c.

(a) This article was rejected by the Court.

The fifth, sixth, and seventh were the usual concluding articles.

[355] The Queen's advocate and Phillimore. The libel begins, in the first article, by pleading the right of the minister and incumbent at common law: "That the minister incumbent of every parish is entitled to convenient sittings in his parish church, for the use of his family, of common right; that such right is originally inherent in the minister incumbent of every parish, and that, unless specially divested thereof, he ought to be protected in the enjoyment of the same." We admit the general law, that, of common right, rectors are entitled to the principal pew in the chancel, and that, if there is no chancel, the rector is of common right entitled to sufficient and reasonable accommodation for himself and his family. But the present case is taken out of the common law right, as is pleaded in the second article; and the 51 Geo. 3, c. 151, gives to the vestrymen express authority to let all the pews in the church with the exception of those for the poor.

Suppose all that is pleaded in the third and fourth articles to be true, if the vestrymen did set apart the two pews, could they bind their successors? Could not a subsequent vestry vary the arrangement, re-let the pews and make a different distribution of them for the relief of the church-rate, to which the rents of the pews are applied? Dr. Spry has not alleged that he has not sufficient accommodation for himself and family. The libel must be rejected altogether.

Addams and Curteis in support of the libel. It is sufficient to aver that Dr. Spry has a possessory right to the pew, in order to put a disturber on his [356] defence, and it is not necessary to plead an indefeasible right; and undisturbed possession for eleven years is amply sufficient to confer a possessory right. The law is not disputed that the incumbent of a parish is entitled of common right to convenient sittings for himself and family; but it is said that this common right is taken away by the local act which authorizes the vestrymen to let the pews. But although there is not in terms an exception in favour of the minister, such a reservation must be understood; the common right of rector, vicar, or perpetual curate, who are all equally entitled to convenient sittings, cannot be ousted but by express enactment. Can it be maintained that the legislature intended to authorize the vestrymen to charge the incumbent of the parish for sittings for his family? The vestry acted originally as if they believed there had been a reservation, and the then incumbent took possession of the pews, not as if conceded by the vestrymen, but as of common right.

Judgment—Dr. Lushington. The sole question to be decided is whether the libel (taking the facts stated therein to be true) is or is not an admissible plea? There is nothing said as to whether the disturbance complained of was done by order of the vestry or not, and I do not mean to travel out of the libel, or to import any facts into the case beyond what are apparent on the face of the plea.

Before I speak more particularly of the contents of the first article of the libel I will state my [357] notions of the rights of a rector or vicar in an ancient parish church. I apprehend that the rector would be entitled, according to the common law of the land, to the chief seat in the chancel, whether he be endowed rector, or spiritual rector only, unless some other person were in a condition to prescribe for it for himself from time immemorial; and that the Ecclesiastical Court, in the exercise of its ordinary authority, would allot to him the possession of such sitting and protect him against the disturbance of such right. It is a question whether, under any circumstances, the rector or any one else can properly be displaced from a pew, except by the churchwardens, and how far churchwardens could interfere of their own authority, with a possessory right, is a point upon which I do not mean to enter. It was the opinion of Lord Stowell that they could not do so without reference to the ordinary. Perhaps later cases may have extended their power, and the necessity of the times may have allowed a different practice to grow up, and it may be competent to them to act without any authority of the ordinary previously conferred.

Now, it is contended, on behalf of Dr. Spry, upon the facts stated in the libel, that he has a possessory title, and I certainly am of that opinion; but his right is pleaded in an inconvenient manner. I am not prepared (though it may not be necessary to dispose of that question) to assent to the statement of the law as it is laid down in the first article, and the Court should not admit this as an averment of law that can be substantiated. The term "minister incumbent" may be of a doubtful interpretation; if it be intended to include therein perpetual curates, [358] I should have great difficulty in assenting to the proposition that the family of a perpetual curate have a

common law right to sittings in the church. A perpetual curate, as in the case of *The Duke of Portland v. Bingham* (1 Hagg. Con. 157), may be a mere stipendiary curate, the impropriation being in utroque jure, for the monasteries had cure of souls, and performed the duties of the church by stipendiary curates, and since the suppression of the monasteries the impropriator might have the complete incumbency. It was not till 1756 that Lord Hardwicke interfered to protect the rights of the curates; but these were not common law rights; so that if it be meant that a curate is to be protected in his title to sittings for his family by common law right, as existed from the time of Richard 1st, I confess I should have great difficulty in assenting to such a doctrine. [Addams. The common law of the Church, not from time immemorial: it cannot be so, as the right to pews did not commence till the Reformation.] If it be the common law of the Church, I have another view of the question. Supposing he had such a right, how could it be enforced? By the medium of the ordinary, who would allot a sitting. I will suppose a case of the alteration of a church, where the pew of the rector is taken down; he would appeal to the ordinary, who would allot a pew; but I cannot say he has a common law right to any pew at all. I think, therefore, that the first article had better be omitted, and it cannot be of much importance to the solution of the question.

Looking to the facts in the libel, I have no doubt whatever that, if this was a case of possession in an [359] ancient parish church, Dr. Spry would have such a possessory right as it would not be competent to a vestry clerk, or any individual, to molest or disturb. The question, therefore, is this: Whether, from the peculiar circumstances of the parish, according to the statement made (so far as the Court can, on the face of the statement, form any opinion that will guide it), the ancient law is altered, and the vestry clerk is invested with competent authority so to interfere with the possessory right? Now, that a vestry clerk alone should have such authority would be an extraordinary anomaly. But it is not contended that the vestry clerk has any such right; I am told that he acted under the orders of the vestry; but that does not appear, and I am unwilling to say whether the vestry have such power or not: it will be time to give my opinion upon that point when I am called upon to decide it. But it is evident to me, and must be to any one, that hereafter I shall have to determine very different questions, and I apprehend it may be expedient that I should state my view of what these questions are.

First, to what extent the ordinary jurisdiction of this Court is ousted by private acts of parliament?

Secondly, whether the vestry have a right to let all the pews, except such sittings as are to be appropriated to the poor?

Thirdly, if they have such right, whether they can displace, with or without a cause, and whether I have or have not authority, as the act stands, to judge of their conduct and determination?

Lastly, as Dr. Addams has argued that Dr. Heslop [360] was in possession of the pews, by what he denominates the common or ordinary right, Whether, in point of fact, such a right exists or not?

As the case stands, I have no doubt that the libel is admissible, and I admit it (except the first article), with a slight alteration in the fourth article.

I wish it to be distinctly understood that in the observations I have made as to the rights of perpetual curates I have made them only *ex majori cautela*. I do not mean to give any opinion as to what those rights are.

To this libel Mr. Flood's answers were given, in which he admitted that he took possession of the pew, and dispossessed Dr. Spry; "but he said he so took possession of the said pew, for and on behalf of the vestrymen for the time being of the said parish, in his capacity of vestry clerk, by the order and directions, and under the authority of the said vestrymen; and that the said pew hath been since appropriated, and let by the said vestrymen to an inhabitant householder, &c."

An allegation was subsequently brought in on behalf of Mr. Flood, which stood for admission on the first session of Hilary Term, 1840; this allegation was opposed. The contents of the allegation are sufficiently referred to in the judgment of the Court.

Addams and Curteis for Dr. Spry. The answers of Mr. Flood to the libel admit the whole case, [361] namely, that, previous to the consecration of the church, pews were set apart for Dr. Heslop, and which he occupied during his life; that Dr. Spry

is rector of the parish, and was in possession of those pews quasi proprio jure, and occupied them till he was disturbed by Mr. Flood, who contends that he was justified by the order of the vestry. The allegation sets up no legal justification of the disturbance. The right of Dr. Spry is admitted to be not only a possessory right, but an absolute right. The Act of Parliament gives the vestrymen no right of re-entry into a pew once let, except in certain specified cases. The object of the whole proceeding was to degrade and insult the clergy of the parish, and in particular to annoy Dr. Spry.

The Queen's advocate and Phillimore in support of the allegation. Under the 51st & 52nd sections of the Act, 51 Geo. 3, c. 151, the vestrymen have the power to do what they may think "necessary, proper, and convenient" with any pews in the church, save in excepted cases. This parish is not under the general law, but under its own peculiar law. Dr. Spry has not ventured to say that the sittings he has left are not sufficient for himself and his family. The vestrymen had, under the act, a power to remove Dr. Spry from the pew, and let it to other persons, and even if, in doing so, there has been an absence of discretion (which is not the case), it is not in the power of the Court to control them. We contend that the jurisdiction of this Court is ousted by the act.

[362] *Judgment*—*Dr. Lushington*. This allegation purports to be an answer to the libel, which I was bound to consider an admissible libel. The opposition to its admission was analogous to a demurrer at common law: it was not disputed that I had some jurisdiction, and had power to interfere with a totally unauthorized disturber, and on the face of the libel nothing more appeared. This allegation sets up a different state of facts, and alleges that the law, as applicable to this state of facts, requires me to pronounce that the disturbance is justified, and that the dispossession was lawful. It does not question the jurisdiction of the Court, but contends that, in the exercise of that jurisdiction, I am not to proceed as in a case where the ordinary ecclesiastical law would govern, but must follow the directions of a particular statute.

The question of jurisdiction, I apprehend, stands thus: this church is made a parish church, and is locally situated within the diocese. If no more had been said, the jurisdiction of this Court and the ordinary ecclesiastical law would attach, and no saving of jurisdiction would have been necessary. But confessedly more has been done by the statute, and contrary to the common law, for the pews, under certain circumstances, are to be let by the vestry: unless sanctioned by Act of Parliament, letting of pews in a parish church is illegal. The result, then, is that I retain the jurisdiction, but must administer the law as modified by the statute.

In considering the true construction of the statute, let us see what is the old general law on the subject of church seats. Dr. Spry, it is admitted, [363] had a possessory right to this pew. The vestry, as a vestry, could not have interfered, and their clerk would have been a disturber if he had attempted to do so under the old law. Again, in a new church, where there can be no prescriptive title, the Court would allot to the rector a proper pew for himself and his family, and sittings for his servants. Then the question is, has this law been altered, and in what respects? In endeavouring to find the true exposition of the statute it is vain to resort to authorities as to the mode of construction; many are to be found in the books, but, unless they are carefully discriminated, they would be more likely to lead into error than conduct to a safe conclusion.

The first consideration is, What is the meaning of the words in their plain and popular sense? The 51st section is in these words: "That the said vestrymen shall set out and appropriate, in the said new church or chapels to be erected, &c., such a number of seats for the gratuitous accommodation of the poor of the said parish, for the time being, and also such a number of other pews or seats for the use of the parishioners of the said parish as the said vestrymen shall think necessary, proper and convenient." Now this is a complete alteration of the common and ordinary ecclesiastical law; it dispossesses the churchwardens, by necessary implication, of all the authority they would otherwise possess, since, according to the old law, this power was left, in the first instance, to the discretion of the churchwardens, and subject to the superintendence of this Court: that discretionary power is here taken away from them, and conferred upon the vestry.

The next question is, Does the statute deprive [364] the Court of its superintending authority, or does this Court possess the same power over the vestrymen, as it would

have had over the churchwardens if no such statute had passed? Now, there is nothing of reservation or exception in the clause; the jurisdiction remains, it is true, but there is a wide distinction between the jurisdiction itself and the law by which it is to be governed. How could I hold in this case that I retain the ancient power of superintending the discretion exercised in the allotment of pews? According to the ancient law, this Court possesses such superintendence over churchwardens, but it has never superintended the discretion of vestrymen, because they have never had such power. How could I hold that the power which the common law gives me over churchwardens is given me by the statute, directly or indirectly, over vestrymen? It appears to me that I have no alternative, under this clause, but to say that this Court is deprived of the power which it exercises over churchwardens, and that, in their setting out of seats, there is no restriction imposed upon the vestrymen; it is to be done as they "shall think necessary, proper and convenient." And this clause is imperative; the vestrymen are bound to set out seats for the gratuitous accommodation of the poor, and to appropriate other pews or seats; and if they neglect they would be liable to indictment for violation of an Act of Parliament.

The next section enacts, "That it shall and may be lawful, to and for the said vestrymen, if they shall think proper, or any person appointed by them, to let the pews or seats to be erected, or placed within the said intended new church and [365] chapels, or any of them (save and except the pews or seats to be appropriated for the gratuitous accommodation of the poor of the said parish for the time being as aforesaid), to such persons only who shall be inhabitant householders within the said parish." This is not an imperative clause; it gives the vestry a discretionary power to let the pews—what pews? "The pews or seats to be erected or placed within the intended new church, or any of them." If the statute had stopped here, I should have inclined to the opinion that it would have given the vestrymen the power to let the whole of the pews. But then comes an exception: "Save and except the pews or seats to be appropriated for the gratuitous accommodation of the poor." Where there are general words first, and an express exception afterwards, the ordinary principle of the law applies, "*expressio unius, exclusio alterius*." How am I to engraft another exception on the words? And can I say that the power conferred upon the vestry is not a continuing power? That the vestry having once appropriated, cannot afterwards let? Upon what ground could I say that, although the vestry have this power, in the instance of the rector, they are restrained from the use of it? In some cases it has been said that you should so construe statutes, if possible, as not to affect common law rights; but this Act directly overturns all the common law upon the subject, for it at once subverts the authority of the churchwardens, the ancient officers of the church, and confers it upon the vestrymen, who by the old law had no authority at all.

Again, I cannot satisfy my mind that the rector [366] has at common law a right to any particular pew in a new church; though unquestionably the ordinary, if not restrained by statute, would give him proper sittings for himself and his servants.

The statute law of the land is binding upon every Court, and I think there is no worse justice administered than, even in the case of an admitted and, perhaps, unforeseen evil, to depart from the plain and simple words of a statute. I think all authority, as well as common sense, leads to the same principle of construction which is so well expressed by one of the greatest writers (Wolff) upon political law, and which is as perfectly applicable to the construction of Acts of Parliament as to the interpretation of treaties: "*Verbis plenè expressis omnino standum est, nisi a rebus humanis omnem certitudinem removere volumus*." Constrained, therefore, by the statute, I am under the necessity of admitting so much of the allegation as pleads that the vestry had the power of letting the pews not appropriated to the poor, and that, in pursuance of that power, they took possession of the pew in question, and let it; which disposes, so far as my judgment goes, of the main question in the case.

But various circumstances are pleaded to shew that the vestry have exercised a sound discretion in the course they have adopted; unless, however, I have power to decide what is a just and proper discretion, what can it avail to plead these circumstances? I have stated my reasons for thinking I have no such power; that the vestry are the sole judges, totally uncontrollable by any ecclesiastical authority. On that ground alone, therefore, I ought not to [367] admit that which I believe to be wholly superfluous. But I think I am bound, where a statement of facts has been

pleaded, in order to call upon the Court to pronounce an opinion as to the discretion exercised by the vestry, to say that, assuming all the facts to be true, they do not satisfy my mind that a just and proper discretion has been exercised. Had the case hinged upon this point I should have had no hesitation in saying that all the circumstances together would not convince me that, for the sake of a paltry saving of a few pounds, it was wise, just, expedient, or proper to deprive the rector of his pew, or to exact a rent for it. I should not have volunteered this opinion if the allegation had been confined to the law of the case.

The result then is that I shall admit the allegation when reformed, allowing the party to plead the law, and that Dr. Spry was dispossessed by order of the vestry ; and I reject the remainder of the allegation.

April 25th.—In Easter Term, the proctor for Dr. Spry declaring he proceeded no further, the proctor for Mr. Flood prayed that he might be dismissed with his costs.

The Court was of opinion that it ought not to condemn Dr. Spry in the costs : first, because it was a matter which affected not only himself but his successors ; secondly, because the question involved points of law of some difficulty ; it was not, therefore, a case for costs.

[368] IN THE GOODS OF CONSTANTINE EDWARD PHIPPS. Prerogative Court, Hilary Term, March 17th, 1840.—An unattested will, made by an officer on service at Berbice, allowed to pass as that of a "soldier in actual military service," under 1 Vict. c. 26, s. 11, at the prayer of the party whose interest was prejudiced by such will.

Motion.

The deceased was a lieutenant in the 76th Regiment of Foot, stationed at Demerara, where he died, 26th June, 1839, a bachelor, leaving a father. After his death a testamentary writing, in the form of a letter to his solicitor, written by the deceased while on military service at Berbice, was found amongst his papers, dated January 28th, 1839, but unattested.

Haggard prayed probate of this paper, under the 11th section of the 1 Vict. c. 26, which exempts the wills of soldiers "in actual military service" from the operation of the act. The motion stood over for some time for inquiry as to what precise meaning was attached by the government authorities to the phrase "actual military service."

It being stated at the War Office that the deceased would be there considered in actual military service, the motion was renewed.

Sir Herbert Jenner. I understand there have been two cases (*a*) in which probate has passed in common form, upon [369] affidavit that the deceased was a soldier in actual military service. I am not prepared to say that our regiments in the colonies, or in garrison at home, are in actual military service. I cannot think that it was the intention of the legislature to except every officer, under such circumstances, from the operation of the act. Under the peculiar circumstances of this case, considering that the party deceased was with his regiment, and in the opinion of the War Office in actual military service at the time, I shall allow probate of this letter to pass. It is under the peculiar circumstances of this case that I do so, nor should I do it but that the father, who prays probate, is the person who would be entitled to the whole property if his son is dead intestate, and there is no person against whom the paper could be propounded.

IN THE GOODS OF JAMES BEAVAN, Deceased. Prerogative Court, Hilary Term, March 17th, 1840.—A testator after the execution of his will, having partly erased the word four, and substituted the word five, the alteration not being attested, as required by the stat. 1 Vict. c. 26, probate of the will passed as it originally stood, the word four being sufficiently apparent upon the paper.

[Discussed, *Finch v. Combe*, [1894] P. 199.]

Motion.

James Beavan, the younger, of the parish of Llanvihangel Crucorney, in Monmouth-

(*a*) Probate in the two cases referred to passed upon an affidavit from a clerk in the War Office that the parties deceased were, at the time their wills were made, in actual military service.

shire, died on the 16th of October, 1839. He made and duly executed his will on the 5th of that month, and appointed his brother, the Rev. Thomas Beavan, sole executor.

The will was prepared by Mr. Philip Price, of Abergavenny, solicitor, who was also one of the attesting witnesses. In the will a legacy of four [370] hundred pounds was bequeathed to Anne Althea Beavan, the wife of the testator. This legacy of four hundred pounds, since the execution of the will, was increased to five hundred pounds, by partly erasing from the word four the letters *our*, and inserting in their place the letters *ive*, thereby converting the word four into five. This alteration was made within ten days after the execution of the will by the Rev. Thomas Beavan, in the presence and at the request of the deceased.

Upon the face of the will it appeared that the letter *f* had not been altered, and other parts of the word four were also discernible.

Upon an affidavit from Mr. Price, the drawer of the will, as to the state of the will when executed, and from Mr. Beavan as to the alteration being made subsequently to the execution of the will,

The Queen's advocate moved the Court to allow probate of the will to pass as it originally stood.

Sir Herbert Jenner. There can be no doubt that the word five has been substituted for four, for it could have been no other word. That being so, and the letter *f* remaining unaltered, and part of the other letters of the word four also apparent upon the face of the instrument, are not "the words or effect of the will before the alteration" sufficiently apparent? The Court cannot pronounce for the word five as altered, as it has not been attested in the manner required by the 21st section of the act; but as it cannot be said that "the words or effect of the will before the alteration are not apparent," the [371] Court, I think, is justified in allowing probate to pass with the word four, as the will originally stood. This case is distinguished in this respect from those in which the probate has gone in blank, where it could not be made out what the original word or figure was. I think such a case can hardly occur again.

YOUNG AND SMITH *against* RICHARDS. Prerogative Court, Hilary Term, March 17th, 1839.—Of the two attesting witnesses to a will, one having deposed that the will was attested in the presence of the testatrix, and the other that it was not so attested. The Court refused to rescind the conclusion of the cause for the purpose of re-examining the attesting witnesses.—One of the attesting witnesses to a will having deposed that the will was attested in the presence of the testatrix, and the other that it was not, the Court rescinded the conclusion of the cause, for the purpose of examining other witnesses who were present at the time.—The wife of an executor who was a party in the cause is not a competent witness to support the will.

This was a business of proving in solemn form the will of Jane Richards, spinster, who died in 1839, by James Young and William Smith, the executors named in a will of the deceased, dated 16th November, 1839, propounded by them against James Richards, her brother and only next of kin.

One of the two attesting witnesses to the will, in his deposition, had stated that after the testatrix had signed the will, it was taken down stairs, and that the attesting witnesses signed their names thereto in a parlour, and not in the presence of the testatrix. Since he had deposed to this effect he had recollected that he was in error, and that the attesting witnesses signed their names in the testatrix's presence, as the other witness had deposed. An application was now made to the Court to rescind the conclusion of the cause, for the purpose of re-examining the attesting witnesses.

The Queen's advocate in support of the application; Phillimore *contra*, was stopped by the Court.

[372] Sir Herbert Jenner. The question is whether this is an error or an invention. Suppose the witness had stated that the deceased was not of capacity, and afterwards recollected that she was of capacity? It would be dangerous to allow the re-examination. I cannot, under all the circumstances, allow the conclusion of the cause to be rescinded, for the purpose of re-examining the attesting witnesses. I do not see how I could permit it after publication of the evidence, shewing a defect of proof to satisfy the Act of Parliament. The affidavit I cannot believe. The effect of the deposition is to be considered when the case comes on for hearing. It may be a

question whether hereafter the Court may not rescind the conclusion of the cause to admit the evidence of persons not yet examined. At present I reject the motion.

April 23rd.—On the first session of Easter Term, the Queen's advocate applied for leave to examine further witnesses who were present at the transaction, on their affidavits corroborating the statement of the attesting witness, who deposed to the attestation taking place in the presence of the testatrix.

Phillimore *contra*. This is a novel application without sufficient ground, and it would form a dangerous precedent. Nothing can be more clear and precise than the statement of the witness, "When this was done, Mr. Arthurton and I accompanied Mr. Young down stairs to the parlour, leaving the deceased in bed, and we there, in the parlour, in the presence of each other, and not in [373] the presence of the deceased, signed our names at foot of the said paper as witnesses."

Sir Herbert Jenner. The question is not as to the deceased's capacity at the time of execution, nor is it pleaded that any imposition was practised towards her; both the attesting witnesses agree that she signed the will in their presence, but one says that they attested it in her presence, and the other that it was attested in another room. In such a case, what is the Court to do where the two attesting witnesses depose contrary to each other? There is no reason to suppose that each did not depose according to his and her belief at the time, and how is the Court to determine which it should credit? If there had been any plea by which the validity of the will or the capacity of the deceased had been impeached, or any fraud had been suggested, the Court would have had greater difficulty in complying with this application; but would it not be too much for the Court to say, "I reject all supplementary evidence of persons who were present, because it is possible such persons may be prepared to support the case by perjury?" I do not think that the Court should place itself in such a situation. It is a different thing to re-examine an attesting witness after the depositions have been seen; but the witnesses now to be examined are as able to speak to the transaction as the attesting witnesses themselves. What is the Court to do where witnesses differ? In another case, now before the Court, (a) a similar thing occurred; one witness swears the testator signed the will in the presence of [374] the attesting witnesses, two others swear he did not. Is the Court to shut out all proof that will shew which is right? It is quite clear that the intention of the testatrix will be defeated unless the Court can determine, by other evidence, whether one witness is entitled to greater credit than the other. The Court will look with the greatest caution to evidence taken after publication, but if I were to reject this evidence I should be certain of defeating the ends of justice. The Court will, therefore, rescind the conclusion of the cause to allow further witnesses to be examined who were present at the execution. I should have been disinclined to take this step but for the reasons I have assigned.

Application granted, reserving all other questions.

July 17th.—On a subsequent day an objection was taken to the competency of a witness named Smith, on the ground that she was the wife of one of the executors, who was a party in the cause; and the Court held that, notwithstanding the 17th section of the Act, an executor, who was a party in the cause, and consequently liable to costs, could not be examined as a witness in that cause, and, therefore, rejected the evidence of the wife.

The cause afterwards came on for hearing, and the Court pronounced for the will.

[375] IN THE GOODS OF E. J. LAY, Deceased. Prerogative Court, Hilary Term, April 23rd, 1840.—The will of a seaman, who went on shore, and there died by an accident, allowed to pass as that of a seaman "at sea," under the stat. 1 Vict. c. 26, s. 11.

[Referred to, *In the Goods of M'Murdo*, 1868, L. R. 1 P. & D. 542; *In the Estate of Anderson*, [1916] P. 52.]

Motion.

The deceased in this case was mate of Her Majesty's ship "Calliope," and whilst the vessel was in the harbour of Buenos Ayres, on the 4th November, 1839, obtained leave to go on shore, where he met with a severe fall, and was thereby so severely injured that he died on shore on the 9th. Immediately after the accident he wrote

(a) *Chambers and Yatman v. The King's Proctor*, see p. 415.

on a watch-bill, in pencil, his will, which was cut out and certified by the officers on board the ship on the 5th; but it was unattested. The paper had been rejected by the receiver of seamen's wills, in regard to prize-money.

Addams moved for probate of the paper, under the 11th section of the act, excepting the wills of mariners "being at sea."

The Court, distinguishing this case from that of *Lord Hugh Seymour*,^(a) who was living on shore at Jamaica, only occasionally going on board his ship, held that this case came within the exception of the act; that it was the will of a seaman at sea, although the deceased, having had leave to go on shore, was not actually on board ship at the time the will was made.

[376] *ELDRED against ELDRED*. Court of Peculiars, Easter Term, Second Session, April 28th, 1840.—In a suit for divorce by reason of the wife's adultery, an allegation on her behalf, pleading cruelty by the husband, coupled with a charge of adultery, as a foundation for a prayer of separation against the husband, admitted.

This was a suit by Thomas Eldred, against Elizabeth, his wife, of the parish of Seven Oaks, Kent, for a separation, by reason of adultery. The libel pleaded the marriage of the parties in 1827; the birth of a child; and acts of adultery committed by the wife, in 1838, with a person in the service of Mr. Eldred, and in 1839 with two other persons. A responsive allegation on the part of the wife, denying the alleged adultery, and charging her husband with cruelty from the year 1831, and with adultery in 1834 and 1836, and concluding with a prayer for separation on both grounds, was now offered to the Court; this allegation was opposed.

Addams for the husband. The objection to this allegation is, that it sets up the cruelty of the husband as a bar; whereas it is an acknowledged principle of these Courts that cruelty cannot be pleaded in bar to a suit for adultery. This was attempted once a short time ago, in *Scriviner v. Scriviner*, in the Consistory Court of London, where the libel, charging the wife with adultery, was met by an allegation containing a charge of cruelty against the husband, which was objected to, and [377] the judge of that Court directed the whole of that part of the allegation to be expunged.

Jenner for the wife. The cruelty is not pleaded in bar to the suit for adultery; the wife not only pleads cruelty, but adultery; and it has been held that an act of cruelty will revive a charge of adultery that has been condoned. Here an act of adultery had been condoned, and the husband subsequently treated his wife with cruelty, which revived the adultery. *Durant v. Durant* (1 Hagg. Ecc. 733). In this allegation the cruelty is pleaded as a revivor of the adultery.

Addams. If this subterfuge avails, it may be adopted in every case, with a ruinous expense to the husband.

The Court desired the cases of *Chambers v. Chambers* (1 Hagg. Con. 439), *Chettle v. Chettle* (3 Phill. 507), and *Arkley v. Arkley* (3 Phill. 500) to be looked into; the whole question in the meantime standing over.

April 15th.—On the first session of Easter Term the case came on again for argument, when

Phillimore for the husband, contended that the averment of adultery had been introduced merely as a peg upon which to hang a charge of cruelty, which was intended really as a bar to the husband's suit. The charges of adultery in the libel are confined to the years 1838 and 1839. The allegation—[378] deduces the cruelty from 1831; in November, 1833, a separation took place; so here terminates the first period of the cruelty, as the wife returned to cohabitation in February, 1834. Then is pleaded a charge of adulterous intercourse on the part of the husband with strange women, whereby he became infected with the venereal disease, with which she is alleged to have been also infected. But she is charged with forming low connexions. There is no case in which a wife, in her defence against a charge of adultery, has been allowed to introduce specifically a charge of cruelty as a bar. All the cases are different. *Worsley v. Worsley* (1 Hagg. Ecc. 734), *Chambers v. Chambers* (1 Hagg. Con. 439), *Arkley v. Arkley* (3 Phill. 500), *Chettle v. Chettle* (3 Phill. 507), *Durant v. Durant* (1 Hagg. Ecc. 733), *Popkin v. Popkin* (1 Hagg. Ecc. 765, n.).

(a) Vide *In the Goods of Richard Hayes, Deceased*, ante, p. 338.

The Court. The plea is that the wife had been treated with cruelty for a long series of years, and driven from the house; that the husband then committed adultery with strange women. I want to know whether, in such a case, cruelty, coupled with adultery, would not be admissible?

Phillimore. I think not.

Addams on the same side. This is an attempt to do, by a side-wind, what could not be done directly, namely, to set up cruelty as a bar to a suit for adultery, in the hope that, if the proof of the husband's adultery fails, the Court would accede to the wife's prayer for divorce, on the ground of cruelty. At all events, it is an attempt to harass the husband with expense, in the hope of deterring him from proceeding. It is the admitted doctrine of this Court that cruelty is not pleadable in bar to a suit for adultery substantially; if adultery be pleaded by the wife, and the husband sets up a condonation, the wife may plead cruelty to revive the adultery.

The Queen's advocate for the wife. The question is not whether the charge of cruelty would operate as a bar to the husband's suit; but whether it is not pleadable, coupled with the adultery, not as a bar, but, if the wife establishes her innocence, as a ground for her prayer for a divorce. The wife's means of defence should not be marred: she avers her entire innocence, and the cruelty and adultery of her husband. It appears, from the original papers in *Arkley v. Arkley* and *Chettle v. Chettle*, that acts of cruelty were allowed to be pleaded, and in the latter case there was no averment of the wife's innocence.

Jenner on the same side. There has been a long chain of cases, from *Worsley v. Worsley* (1 Hagg. Ecc. 734), in 1730, in which cruelty has been allowed to be pleaded in defence, though not in bar.

Judgment—*Sir Herbert Jenner*. There can be no doubt that cruelty is not pleadable as a bar to adultery; but it is not clear that cruelty, coupled with other circumstances, may not [380] be pleaded as a foundation for a sentence of separation. The charges contained in this allegation may be considered as made for a double purpose; as a bar in the event of the wife's guilt being established, and as a ground for separation if it should appear that she is innocent.

In *Moorsom v. Moorsom* (3 Hagg. Ecc. 87, 92) Lord Stowell says, "Indifference, ill-behaviour, or cruelty is not pleadable in a suit for adultery. It will not justify her criminal misconduct." But he does not say that it is not pleadable for other purposes. In *Forster v. Forster* (1 Hagg. Con. 144, 146) the same learned judge says, "A third plea of defence offered, but with less effect, is that his treatment of his wife was, as it really appears to have been, marked with unkindness and disaffection. I say with less effect, because if the course of unkindness was such as the law would notice, the remedy is not that to which she has unhappily resorted, but an application to this Court for the protection of a separation by reason of cruelty: and if the ill treatment is not of that gross kind against which the law would relieve in this form, still she is not to find her remedy in the contamination of her own mind and person, but in the purity of her own conduct, and in a dignified submission to an undeserved affliction. At the same time, though such a plea has no absolute effect, it has a very proper relative effect, where infidelity on the part of the husband is likewise charged; because it adds greatly to the probability that such a charge is well founded, if it appears that his affections were visibly estranged from his [381] wife, and, therefore, more likely to be diverted to other less worthy objects;" in this case, then, unkindness and disaffection towards the wife were pleaded by her as well as connivance; for these observations were made at the final hearing of the cause. In *Chambers v. Chambers* (1 Hagg. Con. 439, 451), which was a suit against the wife for adultery, the wife gave in a long allegation, recriminating, asserting her own innocence, and pleading cruelty, incidentally, against her husband. Her plea did not conclude with any prayer; but at the hearing a prayer was made on her part for separation, on the ground, it must be presumed, that her innocence and her husband's guilt were established. But although this charge was incidentally made, it formed part of the argument; for Lord Stowell, after having declared his opinion that Mr. Chambers had proved his case, and that Mrs. Chambers had failed in proving hers—that is, as to the charge of adultery against her husband—proceeds, "A remaining charge is that of cruelty, which is introduced rather incidentally, and was argued only on the supposition of the proofs of her innocence; but the Court holds her not innocent. On this plea the question might arise whether a party would be entitled to bar her husband from his remedy

of divorce for adultery, proved against her by the plea of cruelty. I am inclined to think that she would not. It is certain that the wife has a right to say, 'You shall not have a sentence against me for adultery if you are guilty of the same offence yourself.' The received doctrine of compensation [382] would have that effect, because both parties are in eodem delicto; but this is not so in reerimination of cruelty: the delictum is not of the same kind. If the wife was the prior petens in a suit of cruelty I do not know that she would be barred by a reerimination of that species; for the consideration would be very different: the Court might not oblige her to cohabitation, which would be dangerous. Here the husband is the prior petens in a suit of adultery, and I take the general doctrine to be, 'that a wife cannot plead cruelty as a bar to divorce for her violation of the marriage bed.' That is no doubt the general rule, and founded upon reason and justice. The concluding passage is important as to the effect of the evidence in the cause. But the plea was not dismissed at once, as altogether irrelevant and unworthy of consideration, although it could have no effect as a bar to adultery which was fully proved. No one can hesitate to concur in the opinion thus expressed by Lord Stowell upon the proofs in that case; but this decision could not apply, supposing the husband had not succeeded in establishing his wife's guilt, and the wife had been equally unsuccessful in her charge against her husband. In such a case, what would have been the sentence of the Court as to the remaining charge of cruelty? Would the Court in such a case have dismissed the parties, and have left the wife to have instituted another suit on the same facts? Surely that would have been a most extraordinary way of proceeding, and extremely hard upon the husband in point of additional expense; or, suppose another case, namely, that both parties had established their case against [383] the other, must the wife have been left to sue for restitution of conjugal rights when a return to cohabitation would be dangerous? Or must she be left without any provision or maintenance, the husband being equally guilty with herself? It is true that the husband may be put to great expense which may turn out to be unnecessary. The case may be altogether without foundation, may be fabricated merely for the purpose of harassing the husband and deterring him from further prosecuting his suit on account of the expense, which, as in this suit, he may be ill able to bear. Such a course would be deserving of the highest reprobation and censure; but can the Court, on that possibility, debar the wife from pursuing her legal remedy? Would not this Court run the risk of defeating the ends of justice if it were to shut out the wife's proof. These observations apply to cases generally of this description; in the present case there are circumstances which, perhaps, entitle it to a more favourable consideration. The parties married in 1827; they lived together without any imputation on the wife's purity until 1838, when it should seem that she all at once plunged into the most profligate and barefaced adultery with a menial servant, scarcely taking the least precaution to conceal her guilt. This, which has been truly described in argument as a low and degrading connexion, was followed by scarcely less open adultery with two other persons in 1839. In August, 1839, the wife left her husband's house, voluntarily as he pleads, but, as the wife alleges, in consequence of gross cruelty inflicted upon her by her husband. The husband was at this time [384] ignorant of any misconduct on her part; for he expressly pleads that he was only informed of it in September, when he lost no time in bringing this suit. Nothing is suggested in the libel of unhappiness or disagreements; it might be supposed that the parties lived together in a state of harmony and affection until the unfortunate introduction of the groom into the service of Mr. Eldred.

But what is the fact, if the wife's statement be true? That the husband, from the year 1831, had treated his wife in the most cruel and brutal manner; that his treatment of her was such that she was obliged to quit him in the latter end of 1833, and that she only returned to cohabitation on promises of amendment on his part; but that his cruelty was again renewed, and continued up to the time of the final separation. There is the additional circumstance also pleaded, that in 1834 and 1836 he had contracted the venereal disease which, in the former of those years, he communicated to his wife, and that in August, 1839, when his wife left him, the mother accused him of the fact, which he did not deny; so that he might not unreasonably expect that his wife might bring a suit against him. This rests at present merely in allegation; but supposing the facts pleaded by the wife to be true, surely the case assumes a very different complexion from that which it originally bore, and it can hardly be said that

the cruelty here pleaded is merely a plea in bar. The facts and circumstances seem to be intimately connected with each other, and the history of the married life of these parties may throw some light upon the charges and the evidence by which they are to [385] be supported. In *Arkley v. Arkley* (3 Phill. 500) the cruelty was pleaded only as introductory of the charges of adultery. In *Chettle v. Chettle* (3 Phill. 507) a general charge of cruelty was pleaded, but the particular facts were struck out; on what grounds I have not been able to ascertain; but in that case there was no prayer for separation, but merely for dismissal; so that it should seem to have been pleaded as a bar to the sentence; in the present case the cruelty and adultery are made the grounds for a prayer of separation on the part of the wife, which could only be obtained on the supposition of her innocence.

It may be argued hereafter that the husband's adultery has been condoned on the wife's own shewing; but it was held in *Durant v. Durant* (1 Hagg. Ecc. 733) that subsequent cruelty would revive condoned adultery; as it had been laid down in the earlier case of *Worsley v. Worsley* (1 Hagg. Ecc. 734).

It was formerly doubted whether it was not necessary to take out a cross citation; but in *Best v. Best* (1 Add. 411) it was decided that such a proceeding was not necessary, as both parties were before the Court, and the marriage was the foundation for either suit; and in *Barrett v. Barrett* (1 Hagg. Ecc. 22) newly discovered adultery was allowed to be pleaded in a suit for cruelty without a fresh citation being taken out.

I am then of opinion that this allegation is admissible.

Nov. 18th.—In Michaelmas Term the cause came on for [386] hearing, when the wife abandoned her defence, and offered no opposition to the sentence of separation.

Phillimore for the husband, prayed the Court to condemn the wife, under the circumstances, in costs.

The Court, however, pronounced for the separation by reason of the wife's adultery, but made no order as to costs.

The cause had come on for hearing, the wife's costs and alimony having been first paid.

IN THE GOODS OF HUGH DONALDSON DONALDSON, M.D. Prerogative Court, Easter Term, May 1st, 1840.—The term "soldier" in sect. 11 of 1 Vict. c. 26, held to extend to persons in the military service of the East India Company.

Motion.

The deceased, a surgeon in the East India Company's service, died at Calcutta in April, 1839, a bachelor, without a father, leaving his mother and brothers and sisters. In July, 1838, he embarked from England (where he had been on leave since 1834) to join his regiment in India, and was placed in medical charge of recruits for Queen's regiments in that country, though he had no commission in [387] Her Majesty's service. Whilst on board ship, at Portsmouth, he wrote the paper in question, which he forwarded to his mother by post, and it remained in her custody till she heard of her son's death, which took place soon after he joined his regiment. The paper, which named no executor or residuary legatee, was not attested.

Haggard moved for administration, with the paper annexed, to the mother, on the ground that the deceased was a "soldier in actual military service," which brought him within the exception of the 11th section of the stat. 1 Vict. c. 26.

Sir Herbert Jenner. The deceased must be considered to have been a surgeon in the East India Company's service; his being in charge of recruits for royal regiments, which was no part of his regimental duty, would not constitute him a Queen's officer. But with respect to mariners, the exemption is extended to merchant seamen, and by parity of reasoning, persons in the military service of the East India Company would seem to be included in the term "soldiers;" there is nothing in the section of the Act which restricts the exemption to the Queen's service. I am of opinion that a soldier in the East India Company's service comes within the exception; and I am inclined to hold that, under the circumstances, the deceased in this case was in actual military service at the time the will was written.

[388] THE OFFICE OF THE JUDGE PROMOTED BY HODGSON *against* DILLON. Consistory Court of London, Easter Term, May 4th, 1840.—A license granted by the bishop to a clergyman to officiate in a proprietary chapel is revocable at the will of the bishop.

[Referred to, *Sedgwick v. Bishop of Manchester*, 1869, 38 L. J. Ecc. 32. Followed, *Richards v. Fincher*, 1874, L. R. 4 Adm. & Ecc. 263. Referred to, *Combe v. Edwards*, 1878, 3 P. D. 137; *Martin v. Mackonochie*, 1879, 4 Q. B. D. 769.]

This was a cause promoted by the secretary of the Lord Bishop of London, against the Reverend Robert Crawford Dillon, D.D., a clergyman of the Church of England, for publicly reading prayers, preaching, administering the Holy Sacrament of the Lord's Supper, and performing ecclesiastical duties and divine offices, according to the rites and ceremonies of the United Church of England and Ireland, in an unconsecrated chapel, called Charlotte Street Chapel, Pimlico, without any license or lawful authority for so doing, and contrary to, and in defiance of, the injunctions of the Bishop of London to the contrary.

The articles, which now stood for admission, alleged that on the 29th February, 1840, the bishop, under his hand and episcopal seal, duly revoked a license granted by him to the defendant on the 24th July, 1829, to perform the office of minister of the chapel aforesaid, and strictly enjoined him thenceforth to abstain from further performing the office; that, notwithstanding, Dr. Dillon continued to officiate after the instrument of revocation had been served upon him, and since being served with the citation in this cause, with-[389]-out license or lawful authority, and contrary to the bishop's injunctions.

The license, addressed to the Reverend Robert Crawford Dillon, M.A., authorized him to perform the office of minister of Charlotte Street Chapel, Pimlico (the consent of the rector having been obtained), "in preaching the word of God, and in reading the common prayers, and performing all other ecclesiastical duties belonging to the said office, according to the form prescribed in the Book of Common Prayer," he having first "subscribed the articles and taken the oath, and made and subscribed the declaration, which in this case are required by law to be taken, made and subscribed."

Addams for Dr. Dillon, opposed the admission of the articles. Dr. Dillon, who is the proprietor of the chapel, became the purchaser, under the belief that, having obtained the consent of the incumbent of the parish, he could have a license, authorising him to officiate as minister. Such license he obtained in 1829 from the present Bishop of London, and he had officiated ever since. The license did not run in the usual form to curates, *durante bene placito*; it granted an absolute right of officiating without reservation. Is such a license, so granted to the minister of such a chapel, he being the proprietor, revocable at the bishop's mere pleasure, without due process of law? I submit that it is not without such cause shewn as could deprive a rector, vicar, or perpetual curate. Stipendiary curates, whose license is revocable at pleasure, have an appeal under the statute. A person who has purchased a proprietary chapel, and has been [390] licensed to officiate there, ought in fairness and equity to have some reason assigned, whereas nothing more is said than "We now revoke and declare void, &c." The bishop may have, or think he has, cause for the revocation, but none is set forth in the articles. If there be any offence imputed to Dr. Dillon, the offence should be charged. By revoking the license without cause shewn the bishop not only issues a sentence of deprivation at his own discretion, but of degradation, for no incumbent in this or any other diocese would allow him to officiate.

Nicholl in support of the articles. There is a distinction between the present case and the case of a rector, vicar, or perpetual curate; in the latter the bishop must admit, unless he can shew cause; whereas, in such a case as this, he may refuse a license altogether; and, if granted, he may revoke it at pleasure. I am not aware of any case or authority where it is doubted that the bishop has the power to revoke such a license as this.

Judgment—Dr. Lushington. It does not appear from the articles that the bishop had any particular reason for revoking the license in this case; they are silent as to the motives which induced the bishop to adopt this measure; all that is presented to the Court is an act done by him purporting to revoke the license he had granted. The question, therefore, is whether the bishop has an absolute right, at his own exclusive discretion, to revoke such a license. Under such circumstances [391] I am not to impute to Dr. Dillon the having given good cause for the act, nor to the bishop the having acted without any reason.

On looking at the terms of the license I cannot but regret that licenses of this description should be issued with so little care and caution; not that the mode in

which the license is worded can affect the law of the case ; but on account of the doubts that may be raised, and of their leading people into mistakes. The license is granted to Dr. Dillon, as the minister of a proprietary chapel, and it authorizes him to perform all the "ecclesiastical duties belonging to that office." I know not what functions, according to the law of the Church of England, appertain to the minister of an unconsecrated chapel ; I know of no ecclesiastical duties belonging to that office. "You having first before us subscribed the articles and taken the oath, and made and subscribed the declaration, which in this case are required by law to be taken, made and subscribed." I am not aware what that oath and that declaration are which are said to be required by law. The observation is perfectly true that this is an absolute license ; there is no reservation that it should be only *durante bene placito*, or during good behaviour ; but it is simply a grant of a license ; and the question I have to determine is whether the bishop has a right of summary revocation.

Neither of the counsel has referred to any legal authorities, and I do not think it requisite to support the judgment I am about to give by a reference to authorities on the subject. I think that the principle on which the law of the Church [392] of England stands in this matter is this : no clergyman whatever of the Church of England has any right to officiate in any diocese in any way whatever, as a clergyman of the Church of England, unless he has a lawful authority so to do, and he can only have that authority when he receives it at the hands of the bishop, which may be conferred in various ways ; as by institution (in the case of a benefice), by license, where the party is a perpetual curate ; and by license, when the clergyman officiates as stipendiary curate.

I do not think it requisite to consider what is done in the case of rectors, vicars, and perpetual curates, because these persons are now all regulated by the law of the land. The point I have to consider is this : What is the nature of a proprietary chapel, unconsecrated, and what is the nature of a license granted by the bishop to the minister of such a chapel ; by what power and authority he grants such license, and whether, on the ground of having granted such license, he is stopped from remedying himself, except in the mode required by law ?

I need not state that the ancient canon law of this country knew nothing of proprietary chapels or unconsecrated chapels at all. The necessity of the times, the increase of population, and want of accommodation in the churches and chapels in the metropolis and other large towns, gave rise to the creation of chapels of this kind, and to the licensing of ministers of the Church of England to perform duty therein. The license granted by the bishop on such occasions emanates from his episcopal authority. He could not, however, grant such a [393] license without the consent of rector or vicar of the parish, for the cure of souls belongs exclusively to the rector or vicar. Here is the consent of the rector obtained not to an ordinary license to a stipendiary curate, but to confer a nondescript title, that of minister of an unconsecrated chapel.

The bishop, therefore, confers this license by virtue of his episcopal authority. What is to prevent his revocation of it at any time he may think fit ? Is this a license which will not only be good against him, but is it to prevail against any successor who may come after him ? It is a license granted only from the exigency of the moment, and for no other reason whatever. Supposing, by new powers being given under the Church Building Acts, other churches and chapels were to be consecrated according to the law of the Church of England throughout the land ; would not the necessity for these unconsecrated chapels cease ? And, under such circumstances, could the grantee of such a license continue to officiate, in direct opposition to the bishop ?

It is not necessary to examine the expediency of vesting such a power in the bishop ; the question is, What is the law ? I think it is incumbent upon those who assert the affirmative—that is, who assert that it is in the power of the bishop to confer a permanent right, as against himself—to shew that such a power has been conferred by the ecclesiastical law. I am of opinion that no such power has been granted ; that it is not even in the power of the bishop himself to estop himself ; but that he is bound, according to the exigency of the case, to [394] revoke such a license if he thinks the good of the Church requires it.

I have heard no authorities cited on one side or the other which require the examination of the Court to ascertain their applicability ; and, on general principles,

I am of opinion that the bishop has authority to revoke such a license as this according to his own discretion; he has exercised that discretion in this case—a discretion not examinable by me; and I have no alternative but to admit the articles.

May 7th.—The defendant, at first, gave a negative issue to the articles, but on the next Court day retracted his negative issue, and gave an affirmative issue.

The Court thereupon pronounced in the terms of the promoter's prayer, namely, "That the defendant be monished to refrain from publicly reading prayers, preaching, administering the Holy Sacrament of the Lord's Supper, and performing any other ecclesiastical duties, and divine offices in the said chapel, without lawful authority, and that he be condemned in the costs."

[395] IN THE GOODS OF ALEXANDER ELLIS, ESQ. Prerogative Court, May 9th, 1840.—Motion for probate, of a will signed by the deceased in the presence of two witnesses present at the same time, who went into an adjoining room and signed their names, rejected.

[Referred to, *Carter v. Seaton*, 1901, 85 L. T. 76.]

Motion.

The deceased, a barrister at law, who died on the 21st of April, 1840, a bachelor, possessed of personal property to the amount of 18,000l., shortly before his death gave instructions for a will, which were taken down in writing from his dictation, by his uncle, whereby he bequeathed a legacy of 1000l. to each of his three sisters, and the residue to his brother. The deceased having remarked that there must be two attesting witnesses to the will, his uncle waited till the physician came, when the deceased signed the paper in the presence of the witnesses, who, unfortunately, previous to affixing their names to it, took the paper into another room, separated from the deceased's bed-room, by a passage, both doors being open, so that the witnesses could hear the deceased breathe, but could not see him, nor be seen by him.

The Court said that it was a very hard case, but the Court had no discretion under the Act, which is imperative, and no consents would do. If the execution is not attested in the deceased's presence, actual or constructive, the Court must refuse probate. In this case the witnesses admit that they attested the paper in a room where they could not have been seen by the deceased, and could not see him.

Motion rejected.

[396] THE OFFICE OF THE JUDGE PROMOTED BY CORY AND OTHERS *v.* BYRON. Arches Court, May 13th, 1840.—Articles against a churchwarden for "quarrelling, chiding, and brawling by words," and for "smiting" pronounced not to be proved; but no order made as to costs.—The office of the judge ought not to be promoted by more than one person, except in the case of churchwardens.

[Referred to, *Fell v. Law*, 1848, 1 Roberts. 739.]

This was a cause of office, brought by letters of request from the commissary of the Bishop of Winchester for the parts of Surrey, promoted by William Cory, John Charles Stahlshmidt, and Frederick Thomas West, inhabitants of the district of St. John the Evangelist, Waterloo Road, Lambeth, against John Ballard Byron, one of the churchwardens, for the offence of quarrelling, chiding, and brawling by words; and for smiting or laying violent hands upon John Larkin Hopkins, in the aforesaid district church, on Sunday, the 7th of July, 1839.

The articles, after pleading the law, objected to the defendant that, on the morning of the day before mentioned, whilst the congregation were assembling for divine service, he entered the organ-loft, and addressing John Larkin Hopkins, who was therein, asked him, in an angry and imperious manner, who he was, and that Hopkins having replied that he attended to officiate for Mr. Brownsmith, the organist, he (the defendant), in an austere, quarrelsome, and chiding manner, replied that "he knew nothing of him, or of any deputy of Mr. Brownsmith;" that the organ having been unlocked, Hopkins proceeded to seat himself in front of it, to commence the usual morning service, [397] whereupon the defendant, without any observation or previous notice whatever, struck Hopkins, and shouldered him from the seat with so much violence that William Perkins, who was present, and against whom Hopkins was thrown, was thereby impelled with considerable force against one of the doors of the organ, causing considerable noise; that some person present having uttered the word "assault," the defendant, in an angry, brawling, chiding, and quarrelsome tone of

voice and manner, exclaimed, "Yes, I have committed an assault, and you are witnesses (or a witness) of it, and you may bring an action if you like as soon as you please;" and that during the transaction he conducted himself in other respects in a violent, quarrelsome, chiding, and brawling manner towards Hopkins, to the great offence of the persons there assembled, in violation of the statute, &c.

The responsive allegation pleaded that in April, 1839, John Lemam Brownsmith was elected organist of the district church, he, at the time of his election, holding an appointment in the choir of Westminster Abbey, which prevented him from officiating at the organ on half the Sundays in the year, during at least the greater part of the morning service; that the defendant, as one of the churchwardens, had been specially enjoined by the Rev. Robert Irvine, the minister, not to permit any chance assistant, whom Brownsmith might depute, to play the organ, when he did not attend, but to procure on such occasions a sufficient organist; whereupon he (the defendant) did procure the attendance of Joseph Calkin, a former organist of the church, and who had become familiar with the notes and [398] compass of the organ, and used to the style of singing in which the charity children had been taught, and who had officiated in the absence of Brownsmith, from the time of his election, till the 7th of July; that, on that day, about twenty minutes before the commencement of morning service, the defendant seeing some one go into the organ-loft, followed him there, and when Hopkins announced himself as Brownsmith's deputy, he (the defendant) civilly told him that he could neither recognize him in that capacity, nor permit him to act; upon which Hopkins, without demur, quietly left the organ-loft and quitted the church; that about ten minutes before the service commenced, he (the defendant), upon re-entering the organ-loft (which he had left) to unlock the organ-doors with Calkin, found Hopkins again there, and upon his again announcing himself as Brownsmith's deputy, repeated what he had before said, and proceeded to unlock the organ, requesting Calkin to take the organ for the day; that, having unlocked the organ, his right arm, extended for the purpose of pushing the right-hand folding-door back against the organ, came in contact with Hopkins, but without any considerable force, or violence, save as resulted from the push made by Hopkins for the seat in front of the organ; that no sooner had the defendant's arm come in contact with Hopkins, than one of the persons who had entered the loft with him exclaimed, "an assault! you see an assault!" in answer whereunto the defendant merely said, in a mild tone of voice, without any excitement, "Then, sir, if you think fit, bring your action for it; I have my witnesses;" and it denied that the defendant [399] conducted himself towards Hopkins in a violent, quarrelsome, chiding, and brawling manner.

Phillimore and Curteis for the promoters. It is proved that Hopkins was pushed with violence; and words of brawling are proved. The churchwarden had no right, as churchwarden, to interfere with the organist's choice of a deputy. He took the key of the organ, which he had no right to do. The organist has the controul of the organ, and has a right to appoint a deputy. It is proved that Byron shouldered Hopkins off the stool with violence, and when told that he had committed an assault, said, in an angry tone, "Bring your action." The interrogatory to Hopkins, "Who are you?" uttered in an angry and dictatorial manner, and the words "I don't know any one as Mr. Brownsmith's deputy," in a church, amount to brawling, which no provocation can justify. *Huet v. Dash* (2 Sir George Lee's Rep. 511), *Dave v. Williams* (2 Add. 130), *North v. Dixon* (1 Hagg. Ecc. 730), *Jarman v. Bagster* (3 Hagg. Ecc. 356, 360).

Addams and Robinson for the defendant. There is no proof of the articles, even on the evidence of Perkins, Cooke, and Hopkins. The institution of the suit is an abuse of the process of the Court, and if the articles had been submitted to the Judge, and he had been told the real story, he would not have permitted his office to be promoted. It is the duty of the Court to set its face against such suits if they [400] are instituted, not for legitimate purposes, but for the gratification of private malice, or for any cause but the only justifiable one, namely, the vindication of public decency and propriety.

Judgment—*Sir Herbert Jenner*. The offence imputed to the defendant is of a very grave and serious nature, not only quarrelling, chiding, and brawling by words, but smiting, or laying violent hands upon, a person in this district church, on a Sunday, immediately before the commencement of divine service, when the congregation were assembling for the performance of public worship. The jurisdiction exercised by

these Courts, in cases of this kind, is a very wholesome jurisdiction, to prevent any unseemly quarrels in churches, especially during divine service; to preserve order and decorum in places set apart for the worship of God, and to protect congregations assembled for divine worship from having their minds disturbed by quarrels and brawls, and especially by the laying of violent hands upon any one in the church. The jurisdiction is not only a very wholesome one, but it is of ancient standing, for it was the law long before the 5 & 6 Edw. 6 (under which this proceeding is instituted, as well as under the ancient law), which was passed for the purpose of aiding, not creating, the jurisdiction of the Ecclesiastical Court. These offences were held to be of a very serious character as well before as after the passing of that statute, and whatever opinion some persons at the present day may entertain as to a part of the punishment inflicted for such offences, namely, the [401] prohibition to enter the church for a certain period, at that time it was considered a very serious punishment, and the penalty of excommunication ipso facto is incurred by a person who should smite, strike, or lay violent hands upon another, in the church or church-yard. It is true, at this time, the penalties attached to excommunication are not so serious as at the period when the Act of King Edward passed; for, by the 53 Geo. 3, c. 127, the sentence of excommunication is followed up by imprisonment for a term not exceeding six months. The offence imputed to Mr. Byron is the more serious, considering that he was one of the churchwardens of the parish, whose especial duty it was to preserve order in the church, and if the Court should be of opinion that he is guilty of the offence charged against him, he is doubly reprehensible, as he will not only have committed an ecclesiastical offence himself, but have violated his duty as an officer of the church, who is bound to keep due order and decorum in the church itself. Now, if the proof is made out, and the facts are established as charged in the articles, there can be no doubt that this was an unprovoked assault as can well be imagined, and the Court would have no hesitation in holding that Mr. Byron has incurred the penalty of the law. But the more serious the offence, the more important is it to consider whether the evidence be sufficient to establish it, and Mr. Byron, being one of the churchwardens, would be, as I said, doubly reprehensible, if guilty of the offence; yet, having, as churchwarden, duties to perform, the Court would protect Mr. Byron, if, in conformity with his duty, he did no more than [402] was necessary to secure the due performance of divine worship, and to prevent any inconvenience arising to the minister, or the congregation assembled to hear divine service in the church.

Without at present entering into the defence set up by Mr. Byron, let us see what is the evidence in support of the articles. The transaction appears to have arisen out of a dispute respecting the election of an organist for the parish. A Mr. Brownsmith had been elected, and had officiated as organist for seven years, down to Easter, 1838. In the latter part of 1837, or the beginning of 1838, he was appointed vicar choral in Westminster Abbey, and he was thereby prevented from attending at the early part of the service of the church of St. John's, Waterloo Road, every alternate Sunday, in every alternate month. It seems that, in Easter, 1838, a gentleman named Calkin, was elected organist in the parish, and he performed the duty in the years 1838-1839. He seems to have discharged the duty (according to this evidence) with great efficiency, attending much to the singing of the charity children and becoming well acquainted with the tones of the organ. But in Easter, 1839, Mr. Brownsmith was again elected organist, on which occasion a considerable degree of feeling appears to have been excited. Some members of the select vestry (who have the management of the affairs of the parish) objected to the appointment, because Mr. Brownsmith could not perform the duty personally, and it appears from the evidence of the Rev. Mr. Irvine, the minister, who has been examined on behalf of Mr. Byron, that there was an order of the vestry that the duty of organist should be performed per-[403]sonally, and not by deputy, and it does not appear from any part of the evidence that this order of the vestry was ever rescinded: therefore the order was still in existence. But this is a point of no great importance in the case. Mr. Calkin appears to have performed the duty of organist, in the absence of Mr. Brownsmith, for one or two Sundays preceding the 7th of July, 1839, and on that day he was called upon by Mr. Byron to officiate, as Mr. Brownsmith was not present. This is the historical part of the case, as leading to the transaction on which the present proceeding is founded.

The promoters of the suit are three gentlemen, named Cory, Stahlschmidt, and

West, and the first circumstance which struck the Court, when Mr. Byron's allegation was brought in, was that three gentlemen should have thought it necessary to take upon themselves the office of promoter, and the Court observed at the time that it was very unusual, and might possibly lead to the institution of suits without sufficient ground, since, if the promoters failed in substantiating their case, the costs would fall lighter upon two or three than upon one; and I am confirmed in my impression that this unusual mode of proceeding ought not to be encouraged, for I find from the evidence of the promoters themselves that a subscription was entered into, not indeed for the promotion of this suit, but for the institution of proceedings, somewhere against Mr. Byron for the assault upon Mr. Hopkins, in order that the expense might not fall upon one individual, but be shared by a great number. I am of opinion that this is not a proper practice, and I am not disposed to encourage the promotion of the office of [404] the judge by more than one individual, except in the case of churchwardens.

Now, it seems that two of the witnesses examined in the cause are members of the select vestry, and supporters of Mr. Brownsmith, for whom they voted in 1839; and it appears that the three promoters themselves are members of the select vestry, and also supporters of Mr. Brownsmith, having voted for him. These are circumstances which should lead the Court to look a little minutely into the evidence in support of the articles. Here are three witnesses to prove the charge, two of whom are members of the select vestry, and supporters of Mr. Brownsmith, and who attended (as they state) at the church that day to support Mr. Hopkins' right to officiate, and these are the only persons (except Mr. Hopkins) who were called to support the charge against Mr. Byron.

The first witness is Mr. Perkins. He states that he is an inhabitant of the district, and one of the select vestry; that on the 7th of July, 1839, about ten minutes before eleven o'clock, he was in the organ-loft, with Mr. Cooke, his fellow witness, and found Hopkins there, waiting to play the organ, as he had done many times before; that, just upon the stroke of eleven (when the service commenced), Byron, who had possession of the key of the organ, came into the gallery, accompanied by Calkin and Calkin's brother. I may here observe that the Court is not sitting here to inquire whether Mr. Byron did right in refusing to deliver up the key of the organ, or in engaging a person to play the organ in the absence of Mr. Brownsmith; that is no part of the duty of the Court; the simple sub-[405]-ject for my inquiry is whether in the performance of what he considered to be his duty he exceeded the bounds of decorum which he ought to observe, and particularly whether he was guilty of quarrelling, chiding, and brawling, and laying violent hands upon any person.

The witness then states that Hopkins was at this time seated on the stool in front of the organ, prepared to begin the service; that Mr. Byron and his two friends came in, quite in a hurry, and, without any one of them saying one word, Calkin went close to the stool on which Hopkins was seated, "and," he says, "as well as I could see, who was on the opposite side, Mr. Byron, with his shoulder, either shoved Hopkins himself, or shoved Calkin so that he shoved Hopkins with such violence, as to throw him off the stool, and knock him against me, and he fell against me with such force that I was myself thrown aside, and struck myself against the organ-door on that side, and banged the organ-door back. A very great noise was occasioned. Mr. Byron was in a great passion. Mr. Cooke said to him, 'Mr. Byron, this is very unhandsome conduct;' I don't recollect his using the word 'assault;' but Mr. Byron made answer, in a sharp and angry manner, 'If I've committed an assault, you've got your witnesses, and you may bring your action as soon as you please.' Mr. Calkin had by this time got on the seat, and begun playing the organ, for Mr. Byron had unlocked it at the moment he shoved Mr. Hopkins." On the interrogatories, something of a different account is given. The witness says that he went to the organ-loft on the occasion, of his own accord, to protect Mr. Hopkins, "expecting Mr. Byron [406] would use some violence to Mr. Hopkins, knowing him to be a petulant person, who does not care what he does." He says, "I called on Mr. Cooke on my way, or met him in the road. I have no doubt that Mr. Hopkins went there to assert his right to officiate at the organ, as Mr. Brownsmith's deputy, and if any one opposed him, to dispute the possession of the organ-loft for the day. I did go to protect him from violence, and so far to aid and abet him in his proposed assertion of his right; but there was nothing in the nature of a previous arrangement." He says that the case

is not truly described in the responsive allegation; that Hopkins was seated on the stool in front of the organ before they came in, or got on it just as they came in; Mr. Cooke told him to seat himself there, and he did so, and he adds, "I cannot say that I saw the defendant strike or smite Hopkins; I was on the opposite side of Hopkins to Byron, who might have struck him without my seeing it;" and he denies that the shove was occasioned by the motion of Byron's arm in opening the organ-door, "because that door was pushed back before the shove was given."

The second witness is Mr. Cooke, a surgeon, also one of the select vestry, and he is the father-in-law of Mr. Brownsmith, the organist, therefore his evidence must be taken with some degree of allowance on that account. He says that, as one of the select vestry, he was there to see the duty of organist performed; but I do not know that this is the particular duty of the select vestry; that duty is done by the church-wardens; and it appears by the evidence of the Rev. Mr. Irvine that Mr. Byron [407] had been directed by him to do so. I do not say that Mr. Irvine had a right to give him this direction; I say nothing of the rights of any one; but Mr. Byron acted by the direction of Mr. Irvine, though that would not be sufficient to justify him if he has been guilty of the offence imputed to him.

Mr. Cooke states that, on Mr. Perkins and himself arriving in the organ gallery, they found Hopkins seated on the organist's stool; that when Mr. Byron came, he was somewhat excited; his manner was hurried, and, seeing Hopkins on the stool, he asked, in an angry and dictatorial manner, "Who are you, sir?" Hopkins replying that he was Brownsmith's deputy, Byron answered, in his former angry manner, "I know nothing of any deputy of Mr. Brownsmith," and proceeded to unlock the organ. Now, this is a totally different account from that given by Perkins, who says that Byron, on his coming into the organ-loft, "without saying one word," shouldered Hopkins off the stool. It is extraordinary that these two gentlemen should give such a different account of the transaction, and still more extraordinary when we read the account given by Hopkins himself. Mr. Cooke proceeds to depose that Hopkins just vacated the seat to allow of the doors of the organ (which are of considerable size) being opened, when Calkin got upon the stool, and so did Hopkins, at the suggestion of the witness, who said, "You had better take your seat and begin the service." Byron then interposed, and, "placing his hand or arm between the two, he, with his shoulder, gave Hopkins a shove, and knocked or pushed him off the stool," which caused him to fall against Perkins, [408] knocking him against the door of the organ, which flew back with a great jar and noise, which must have been heard. Some observation was then made by some one, he quite forgets by whom, in the way of remonstrance at Byron's conduct, but quite calm. He believes the word "assault" was used, and, in reply, Byron said either "I admit I have committed an assault" or "If I have committed an assault you can bring your action as soon as you like." This he said in a very angry tone: he was greatly heated then. He says, "I did not see any smiting, and I do not know that I should be justified in using the strong terms articulate to describe Mr. Byron's conduct, viz., 'a quarrelsome, violent, chiding, and brawling manner.' He was excited, certainly; much excited, and got warmer as he went on, and spoke both to Mr. Hopkins and ourselves in a very rude and imperious manner, and quite unbecoming the sacredness of the place and occasion; and it so disturbed my mind, and that of Mr. Perkins, and Mr. Hopkins also, that we could not attend divine service, but left the church altogether, and went all of us to my house." In answer to the interrogatories this witness admits that in fact he was the person who used the word "assault" on the occasion, the words being, he believes, "What you have done amounts to an assault upon the young man," though he says he is not clear about the words. But he swears positively that Byron said in return, "Bring your action if you think fit; I have also my witnesses, sir." The words used by Byron were in answer to a remark coming from Cooke, and as they are in themselves equivocal, it [409] depends upon the manner in which they were uttered whether or not they amount to brawling; they may be offensive and insulting, or they may be mild, and a mere answer to the observation. I cannot say, from the evidence of these two gentlemen, and considering the interest in which they came forward, and the fact disclosed that both of them were subscribers in the first instance to a list of members of the select vestry, for the purpose of bearing the expense of an action against Mr. Byron of some kind or other, not in this Court, though they afterwards withdrew their names; I say, looking at the evidence of these two gentlemen, I am

not prepared to say that it makes out the offence even of chiding, brawling, and quarrelling, considering that Mr. Byron was acting under the direction of the minister, to see that there was a proper substitute for the organist. To some extent their evidence negatives the plea; and though I agree with the counsel for the promoters, that it is not necessary that the witnesses should swear that the party was actually guilty of chiding, brawling, and quarrelling, there must be sufficient evidence from which the Court can collect that such was his conduct. I should, therefore, be of opinion, as far as their evidence goes, that the offence of chiding and brawling is not made out; and the more so since, notwithstanding that the congregation were assembled in the church, immediately previous to the commencement of divine service, not a single individual has been called who heard the altercation in the organ-loft; no witness but Mr. Hopkins and these two persons who support his pretensions.

[410] But let us look at the evidence of Mr. Hopkins. He states that he was, at the date of the occurrence, an inhabitant of the district; that he was engaged by Mr. Brownsmith to assist him at the organ as his deputy in March and subsequently, when he performed the duty without interruption; that on the 7th July, at a quarter before eleven, he went into the organ-loft by himself, and in about three minutes after Mr. Byron came into the gallery alone, looked at him, and asked him his name, "quite in a mild tone of voice," to which the witness replied merely, "Hopkins," whereupon Mr. Byron made no remark, but merely bowed slightly and politely and went away; that in about two minutes after Mr. Cooke and Mr. Perkins entered, to whom he mentioned what had occurred, and that Mr. Byron had not unlocked the organ; that about three minutes before eleven Byron again entered the organ-loft, at the opposite door to which he had entered before, accompanied by Mr. Calkin and his brother, and without saying a word to the witness, Cooke or Perkins, all of whom were standing carelessly together, began unlocking the organ door; that while doing so he said, "Mr. Brownsmith is not here to do his duty; Mr. Calkin, take the organ;" that he (the witness) then said he attended as Mr. Brownsmith's deputy, on which Byron answered in a peremptory tone, "I don't know you, sir; Mr. Brownsmith should be here himself, sir;" that Mr. Cooke then said to Byron, "You know very well that Mr. Brownsmith cannot be here," and then Mr. Cooke and Mr. Perkins desired the witness to get upon the stool; that he hesitated at first, through fear, there appearing by [411] this time to be a good deal of excitement on both sides, though no more angry words had passed, but there was confusion, and he was afraid that if he got on the stool he should be knocked off. So that, by Mr. Hopkins's account (and nothing can be more candid) he was not on the stool at this time. The witness proceeds: "Mr. Perkins then said, 'Never mind him,' meaning Mr. Byron, 'get upon the stool.'" This is very different from the representation of Mr. Perkins or of Mr. Cooke; the brawling here, if there was any brawling, was by Mr. Perkins himself. I think there is a great deal of confusion in the evidence, and that one occasion must have been confounded with another. "Mr. Byron said, 'If he attempts to do so, I'll order the beadle to turn him out,' and he added to Mr. Perkins and Mr. Cooke, 'and you too: how dare you to interfere with my duty! The organ is my property, and nobody shall touch it but whom I think proper.'" It is most extraordinary that these circumstances should have taken place, without being noticed by the other witnesses; I think Mr. Hopkins must have confounded this with some other occasion. "Mr. Cooke and Mr. Perkins, however, encouraged me to the attempt, by saying, 'Get upon the stool, get upon the stool; don't mind him!'" This is the evidence of a witness on behalf of the promoters. "I did attempt to do so, and at the same moment Mr. Calkin was getting on the stool on the opposite side. In attempting to get upon the stool I received a push on my left shoulder, but whether it was from Mr. Byron or Mr. Calkin I could not see, though from the respective positions in which we were I should [412] say it came from Mr. Byron. On receiving this push, which must have been a smart one, as it so excited me that I nearly lost my senses, receiving such treatment in such a place, I stumbled off the stool, and fell against something on my right side, which I supposed was the organ, as I heard a great slam of the organ-door, and but for my coming in contact with this I must have fallen on the ground. Mr. Cooke exclaimed, 'An assault!' I only heard these words, but he repeated them a second time, and stepped forward to make the exclamation, and Mr. Byron in a sharp tone replied, 'Very well, bring your action if you like,'" Here, then, it is Mr. Cooke who uses the word "assault;" and he and Mr. Perkins are

the persons to urge Hopkins to get upon the stool, and not to mind Mr. Byron. This is a different representation from the accounts given by Mr. Perkins and Mr. Cooke; I do not mean to say that these gentlemen have deposed with an intention to make an improper representation; but that they have taken up a wrong impression of the facts to which they were called to depose. But it is impossible upon this evidence to hold that this gentleman has been guilty either of the offence of chiding, brawling, and quarrelling, or that of laying violent hands upon Mr. Hopkins; indeed, it is hardly contended that there is sufficient proof of smiting.

On interrogatory, Mr. Hopkins states some circumstances which shew that his fellow witnesses have taken an active part, not perhaps in the present proceedings, but in some proceedings against Mr. Byron, for his conduct on this occasion. He states that he attended at Doctors' Commons in [413] company with Mr. Cooke, and at his request; that he was interrogated by him on the subject at the proctor's office, and in reply to the question whether Mr. Byron had assaulted him the witness stated that "he could not say that he had done so." He says that he was requested to take some legal proceedings against Mr. Bryon, but he declined so to do, as he did not wish to mix himself up any further in the matter; and he states that "he has heard and believes that some subscription was entered into in the vestry towards the promoter's costs, and that the names of Mr. Cooke and Mr. Perkins were first down." Both these gentlemen admit that they did sign their names to a promise to contribute to the expense of some proceeding, but not this suit, though they withdrew them a day or two afterwards. But, although they are competent witnesses, they are members of the select vestry, who are supporters of Mr. Brownsmith, as well as the promoters, and it shews that this matter has not been taken up in the spirit in which cases of this description ought to be by persons who are the voluntary promoters of the office of the Judge.

This then is the evidence produced in support of their case by the promoters themselves; only three persons present in the organ-loft, not a single individual who was in the church, to shew that there was anything like confusion or disturbance produced in the minds of the congregation. I am of opinion that, on their own shewing, the promoters have not established their case as to the charge of chiding, brawling, and quarrelling; neither of the witnesses will swear that the words [414] were uttered in a quarrelling, brawling, and chiding manner; and there is nothing in the words themselves, independently of the demeanor and conduct of the party, that should lead the Court to the conclusion that the party was guilty of the offence; and there is no smiting or laying violent hands upon any one established even by their own evidence. I am of opinion, therefore, that they have failed in establishing their case against Mr. Byron altogether. But when I look to the evidence on the other side I find a different representation of facts and of the conduct of Mr. Byron, and there is no more reason why these witnesses should give that conduct too light a colour than that the others should make it too dark; one class of witnesses may desire to support the rights of Mr. Brownsmith, and the other to assert the innocence of Mr. Byron of the charges alleged against him; and one class is as credible as the other. It is not for the Court to inquire into the motives of parties in proceedings of this kind, which are instituted ad publicam vindictam; but when the Court sees what has taken place in the parish, and the proceedings of certain persons in the select vestry, which have come out in evidence in this case, I do not think the transaction calls for the interference of the Court, to the extent of prohibiting Mr. Byron from entering the church, still less of condemning him to excommunication and imprisonment. I am, therefore, of opinion that the promoters have failed in the proof of their articles, and that Mr. Byron is entitled to be dismissed from the suit. The only question is as to the costs; and, [415] taking into consideration all the circumstances, I think I shall meet the justice of the case by leaving the parties to pay their own costs. I dismiss the party, and make no order as to costs.

CHAMBERS AND YATMAN *against* THE QUEEN'S PROCTOR. Prerogative Court, May 1st, 1840.—The will, dated and executed on the 15th November, 1839, of a testator who was labouring under certain delusions on the three previous days to its execution, and who destroyed himself on the day following (the 16th) while under temporary insanity, pronounced for, and the costs of the Queen's proctor, who opposed the will on behalf of the Crown, refused.—Of the three attesting
E. & A. III.—15*

witnesses to a will, two deposed that the testator did not sign the will in their presence, the other that he did. The Court, believing upon the evidence that the testator did sign the will in the presence of the witnesses, pronounced it to have been duly executed under the stat. 1 Vict. c. 26.

This was a cause of proving in solemn form of law the will of Thomas Thompson, Esq., deceased, promoted by Robert Joseph Chambers and William Yatman, Esqrs., the executors, against the Queen's proctor, the deceased having left no known relations.

The will bore date and was executed on the 15th of November, 1839; and early on the morning of the 16th the deceased destroyed himself, and was found, under a coroner's inquest, to have been in a state of insanity.

The will was in the handwriting of the deceased, and was as follows:—

"I, Thomas Thompson, of the Inner Temple, being in sound health, but considering the uncertainty of human life, make this, my last will and testament.

"I appoint my friend, Robert Joseph Chambers, [416] of the Middle Temple, Esq., and my friend William Yatman, of Great Russell Street, Bloomsbury, Esq., to be the executors of this my will.

"I bequeath my landed property, freehold and copyhold, according to the tenure thereof, absolutely and for ever to Robert Joseph Chambers aforesaid.

"I bequeath two thousand pounds sterling to William Yatman aforesaid.

"I bequeath nine thousand five hundred pounds stock, standing in my name in the 3 per cents. reduced, to my friend William Murray, of the Middle Temple, Esq.

"I bequeath one thousand pounds sterling to the Rev. Mr. Rowlatt, Reader at the Temple Church.

"I bequeath five hundred pounds sterling to Mrs. Jane Lucas, widow of the late Mr. Daniel Lucas, nephew of the late Robert Martin, of Homerton, Holloway, Esq.

T. T. forty

"I bequeath ~~twenty~~ pounds sterling to each of my servants, M. Pugh and E. Dawkin, now living with me.

"The rest of my personal property, after paying my funeral expenses and all my just debts, and also what I may bequeath by codicil hereafter, I bequeath to Robert Joseph Chambers aforesaid, and leave and appoint him my residuary legatee.

"It is my wish that my body be buried in the Temple church-yard; but I leave to my friend Robert Joseph Chambers the care of keeping in repair the tomb in Hackney church-yard, in which the mortal remains of Mrs. Martin and my mother were deposited.

[417] "I hereby revoke all former wills, and declare this only to be my last will and testament; in witness whereof I set my hand and seal, this 15th day of November, 1839.

Seal.

"THOMAS THOMPSON.

"Signed, sealed, declared and delivered by the said testator, Thomas Thompson, as his last will and testament, in the presence of us—Louisa Lucas, John Woolfitt, Charles Ellis."

A caveat having been entered by the Queen's proctor, the executors propounded the will, and examined the three attesting witnesses.(a)

(a) The evidence of the attesting witnesses was to the following effect:—

Charles Ellis. I was acquainted with the late Thomas Thompson from the month of February, 1832, to his death. I am, and have been for several years, in the employ of Mr. Woolfitt, of Fleet Street, upholsterer, who was employed by the deceased to furnish his chambers in Harcourt Buildings, and on other business. I must on an average have seen and conversed with him two or three times a week for the last three or four years. On the 15th November last I, in the morning, received a note from the deceased, begging me to call on him; I did not go to him immediately, in consequence of which he wrote a second note to Mr. Woolfitt, desiring my attendance. I went to the deceased between twelve and one o'clock; the deceased at first asked me the amount of his account due to Mr. Woolfitt. I told him it had not been made out; the deceased then said that he wished to give a cheque for it,

An allegation was afterwards admitted on behalf of the Crown, pleading,

1st. That the deceased died by his own hands on the morning of Saturday, the 16th of November, 1839; that he was of the age of sixty years or thereabouts, and died a bachelor without any known relations, and without having made any will valid in law, leaving personal estate of the value of about 25,000l.

2nd. That the said deceased was, for some years before and down to his death, a person of strange and eccentric habits, very irritable and hasty in his temper, violent in his language, and jealous and [422] sensitive of what he considered personal slights on the part of his friends and others, that he was dull and morose in his temper,

and begged that his account might be made out by the time he should call on Mr. Woolfitt, and he appointed three o'clock on the same afternoon [418] for his so doing; he also said that he should at the same time bring with him his will, to be witnessed by Louisa Lucas (who was a young woman employed in Mr. Woolfitt's shop), Mr. John Woolfitt and myself, he so named us, and I recollect his saying, "You have done the same thing before for me." At three o'clock the deceased came to Mr. Woolfitt's; that is to say, I having been out, on returning there at three o'clock, found the deceased already in the shop, sitting at a table, and with him Mr. John Woolfitt and Louisa Lucas; the deceased, addressing me, said, "Mr. Ellis, to business, refer to my account." I told him what was the probable amount, the account not having been exactly made out, upon which the deceased wrote a cheque on his bankers, Messrs. Hoares, for such amount, which he paid to Mr. Woolfitt on account. The deceased then from his pocket-book produced a paper, which I found was his will, and he then in my presence, and in the presence of Mr. John Woolfitt and of Louisa Lucas, pointed out an erasure in the said paper, namely, the alteration of the sum of "twenty" to "forty," calling my attention to it, and at the suggestion of Mr. Woolfitt the deceased set his initials against such alteration; I believe that the words used by the deceased to us, the witnesses, were, "I wish you to witness my will," or to that effect; he said very few words; I did not see the deceased sign the said will, but there was a signature and a seal affixed to it. At the time of his asking us to witness his will the deceased pointed to or touched the seal, the signature being then already written. We, that is, Mr. Woolfitt, Louisa Lucas, and I, then, in the presence of the deceased, and in the presence of each other, being all present at the same time, subscribed our names as witnesses to the said will, the order of our signing I do not remember. When the will had been so witnessed the deceased folded it up and put it into his pocket, and almost immediately went away. Very little else passed beyond his taking leave in an ordinary manner. I suppose that between half an hour or perhaps three-quarters of an hour passed before the deceased left the shop on that occasion. I have no recollection of any particular conversation, besides what I have related, which took place between the deceased and either of us, the witnesses, none other having been present on the [419] occasion before mentioned. The deceased was, during the whole of the time that I was so present with him, and time of his producing his will and our witnessing the same, calm and collected, and, as I believe, of sound, perfect, and disposing mind, memory, and understanding; there was not an action or a word done or spoken by the deceased which could have led any one to believe the contrary. The witness then identified the will.

To the 6th interrogatory the witness answered: "The deceased himself produced the said will on such occasion. The only part of the said will which was written after the same was produced by the deceased was the addition of the deceased's initials, 'T. T.,' between the fourth and fifth lines of the second side thereof, which initials, I believe, were added and written by the deceased after we, the attesting witnesses, had subscribed our names. The said will had been signed and dated (as now appears therein) before it was produced to me."

Louisa Lucas gave a similar account of the deceased's coming to Mr. Woolfitt's, and giving him a cheque, and proceeded, "The time when my attention was first called to the paper which I on that occasion witnessed was when Mr. Woolfitt, after he had given the receipt, called me, saying, 'Now, Louisa.' I was then in the counting-house in the shop and quite near where Mr. Thompson was sitting, but until I then came to the table I had not noticed the said paper. I recollect that, after I so came forward, I saw Mr. Thompson with his own hand make an alteration in it; I recollect Mr. Thompson saying these words, 'I have altered it from twenty to forty.' Mr. Woolfitt,

and had long before his death lived a retired and secluded life; that during the last two or three years he became subject to delusions or fancies of the mind, but more particularly so during the last twelve months of his life; that the deceased formerly occupied chambers in Paper Buildings in the Temple; that on the 6th of March, 1838, the same were consumed by fire; that on that occasion the deceased was in danger of losing his life, and from that period became more excited and irritable than before; that he frequently declared to his intimate friends or acquaintance that he had become an object of scorn and contempt, not only to them but to the whole world,

I also remember, said to him, 'You had better put your name against it,' and I saw Mr. Thompson write his name, or the initials of his name, I forget which, to the alteration which he had so made. Mr. Thompson then, in the presence of Mr. Woolfitt and of Mr. Ellis and of myself, pointing to the said paper, and to a seal on it, said to me, 'Miss Lucas, this is my will and this is my seal.' I cannot say that I saw Mr. Thompson sign the said will, except the alteration which he signed in the margin. I do not recollect that Mr. Thompson said anything about his signature to the said paper. I can-[420]-not take upon myself to swear, from my present recollection, that I did notice whether at such time the said will had or had not been signed opposite to the seal or at the end thereof. . . . From all that I saw of Mr. Thompson on that occasion, and heard him say and converse about, I believe him to have been at such time of sound mind, memory, and understanding; he was very calm and collected on that occasion, and I believe him to have well known what he then said and did, and what was said or done in his presence; his manner and conversation were those of a person perfectly rational and sensible; I saw nothing to the contrary."

To the 6th interrogatory she answered: "I did not see the said will actually produced; it was on the table at which Mr. Thompson was then sitting when I first saw it; I do not believe that any part of the same was written after I so first saw it, except the alteration made by an obliteration in the fifth line of the second side or page thereof, and interlineation over the same of the word 'forty' with the initials 'T. T.' I did not see the signature 'Thomas Thompson,' or the date 15th, written therein by the deceased; I believe that the same were so written previous to my seeing the said will."

Mr. Woolfitt's account of the execution was as follows:—"It was after Mr. Ellis came in, and in his presence, as well as in the presence of Louisa Lucas and of myself, that the deceased produced his will—out of which pocket, or in what manner precisely he produced it, I did not sufficiently notice, so as to recollect, but he laid it on the table before him, and having done so, he said to me (as I stood over him), and pointing to an alteration (then already made in the said will), 'I have made an alteration of twenty to forty, what had I better do?' I replied, 'Why, sir, you had better do as solicitors say, set your initials against it;' the deceased seemed pleased at what I said, and with a pen wrote his initials against or over such alteration; when he had so done he, the deceased, then in my presence, Mr. Ellis and Louisa Lucas being also present, signed his name 'Thomas Thompson' at the end of the said will, opposite the seal thereon, and upon which he placed his finger, and he [421] also wrote the date on the will, how much of it I do not remember. When he placed his finger on the seal he said, 'This is my act and deed;' the deceased, after so doing, turned the will round to Louisa Lucas, who signed her name, and I next signed mine, and lastly Mr. Ellis signed his name. We, the witnesses, were all present at the same time with Mr. Thompson, as well when he signed his name to the will as when we respectively subscribed our names thereto. From all that I saw of the deceased on the said occasion I have no reason to believe that he was other than a man of sound, perfect, and disposing mind, memory, and understanding; in his manner and conversation on such occasions he was quite rational and sensible, and, therefore, I believe that he was then capable of making and executing his will, and of doing any serious or rational act of that or the like nature, requiring thought, judgment and reflection."

To the 6th interrogatory: "It was the deceased who produced the said will, the figures '15,' and the names 'Thomas Thompson' therein were written after the said will was produced. I am positive that the names 'Thomas Thompson' and the said date, '15,' were written by the deceased in my presence on the said occasion, and that the same were not written previous to the production of the said will to me on such occasion."

from not having resented some insult which he supposed himself to have received in the street from a person he never knew. That his friends endeavoured by every means to dispel such delusion, and to assure the deceased that they had the same opinion of him as ever; that such idea or delusion was so strongly impressed upon the mind of the deceased that he declared it would be necessary for him to leave the country and hide himself in some foreign land. That the intimate friends of the deceased, having altogether failed in removing such delusion, communicated with and represented to the medical attendant of the deceased their opinion that he was of unsound mind.

3rd. That at the latter end of 1838, or beginning of 1839, the deceased, whilst labouring under delusion of mind, called upon William Yatman, party in this cause, and told him that he was in a worse [423] dilemma than ever, and that the benchers of the Inner Temple were going to take measures to disbar him, in consequence of a fraud which he (the deceased) had perpetrated upon them, in having represented himself upon his admission as a member of the said Inn as of the degree of an esquire, his father being only a chemist; that the deceased then declared that he was a lost man, and that Mr. Yatman must get him out of the country. That no measures to disbar the deceased were ever taken or contemplated by or on the part of the Society of the Inner Temple. That Mr. Yatman, well knowing that it was entirely the effect of delusion which had been for some time before, and was then, operating upon the mind of the deceased, reasoned with, and did all in his power to dispel such delusion.

4th. That the delusion above pleaded still continuing to operate upon the mind of the deceased, he, on Tuesday, the 12th of November, 1839, called unexpectedly upon Mr. Yatman, and, in great distress of mind, addressing him, said (amongst other incoherent things), "You must get me out of the Temple directly; every eye is upon me in the Temple; will you advise me where I can go? I must go to Calais this night," or to that effect. That Mr. Yatman endeavoured, by reasoning with the deceased, to calm his mind and to dispel the delusion under which he so strongly laboured, but without effect.

5th. That on the next following morning (the 13th of November) a further interview took place between the deceased and Mr. Yatman; that the deceased then appeared to be, and was, much more disturbed in his mind than he ever before appeared to [424] have been; that the deceased, then addressing Mr. Yatman, said that he was the victim of a most foul conspiracy; that he had seen it in a book in a circulating library, and it had been practised on him in a drawing room, and that the conspiracy would drive him to self-destruction, or in words to that effect.

6th. That on the next following day (the 14th of November) Mr. Yatman and the deceased again met, when the deceased asked Mr. Yatman if he had thought of anything for his relief; that Mr. Yatman replied that he had, and promised to see him again on the Sunday following; that the deceased then said, "Pray do all you can for me, or it will have a fatal termination," or to that or the like effect.

7th. That Mr. Yatman, being satisfied of the insanity of the deceased, consulted the immediate personal friends of the deceased as to the necessity of some steps being taken for the protection of the deceased, so as to prevent any fatal consequences from his then insane state of mind, when it was agreed between Mr. Yatman and the several persons with whom he so consulted that as they were neither related to nor connected with the deceased, and did not know or believe that he had any relation living, nothing more could be done than to watch the deceased.

8th. That the deceased was not, on the 15th of November, being the date of the will, of sound mind, &c.

9th. That about 10 o'clock on the next following morning (Saturday, the 16th of November, 1839), one of the servants of the deceased having knocked at his master's bed-room door, and receiving no answer, entered the room, and then found the de-[425]-ceased dead; that on the same day an inquisition was held before the coroner and a jury then assembled in his chambers; that the jurors upon their oaths found, as the fact was, that the said Thomas Thompson, not being of sound mind, memory, and understanding, but lunatic and distracted, and in a state of insanity, did kill himself; and such verdict was accordingly returned.

10th. The tenth pleaded a copy of the inquisition.

To this allegation the answers of the executors were given, and

1st. They admitted the first article to be true, except that they denied that the deceased died without a valid will.

2nd. They denied that the deceased was a person of strange and eccentric habits, very irritable and hasty, or dull and morose in his temper, and violent in his language.

They admitted that he was jealous or sensitive in respect of what he might consider personal slights on the part of his friends or others, and that he had for some time before his death led a somewhat retired and secluded life.

They admitted that at times during about the last year of his life the deceased was subject to certain mental fancies or delusions on one or two particular subjects; that he formerly occupied chambers in Paper Buildings, in the Temple, and that when they were burnt (6th March, 1838) the deceased might be in some danger of his life, and that the temporary effect thereof (to which extent only they admit the fact to have been) was to render the deceased somewhat irritable and excited. [426] They disbelieved and denied that the deceased frequently declared to his friends or acquaintance that he had become an object of scorn and contempt, not only to them but to the whole world, from not having resented some insult which he supposed himself to have received in the street from some person unknown to him. They believed, however, that he did sometimes (not frequently) express himself to some such effect to some one or two of his intimate friends; and Mr. Yatman admitted that he so expressed himself to him on a single occasion, in November, 1838, and Mr. Chambers admitted that he so expressed himself to him on one or two occasions at or about the same period when he (Chambers), believing the deceased's fancies to be consequent upon a disturbed imagination, arising from a disordered state of the stomach, so represented to the deceased, who admitted it might be so, and promised to physic and diet himself accordingly, and which having done as he afterwards assured respondent (Chambers), he felt, as he also assured respondent, the beneficial effect thereof in the thorough removal of such fancies or impressions from his mind.

They admitted that such idea or delusion might at times, but at times only, be so strongly impressed on the mind of the deceased as to induce him to declare that it would be necessary for him to leave the country and hide himself in some foreign land, or to that effect.

They denied that the intimate friends of the deceased either failed in removing such delusion, or represented to the deceased's medical attendant their opinion that he was of unsound mind. They [427] admitted that one of such friends (Dr. Shepherd) did throw out an expression to that effect in casual conversation with his friend or acquaintance, Mr. Copeland, being the surgeon then in attendance on the deceased for a painful disease, viz., a disease in the rectum, which often compelled the deceased to resort to surgical aid for relief.

3rd. Mr. Yatman admitted that on the 12th November, 1839, the deceased called on him and told him that he was in a worse dilemma than ever, and that the benchers of the Inner Temple were going to take measures to disbar him in consequence of a fraud which he (the deceased) had practised upon them as pleaded, and declared that he was a lost man, and that respondent (Yatman) must get him out of the country. That believing what the deceased said to be the effect of delusion, then operating on his mind, he did all in his power to dispel such delusion.

They admitted that no measures to disbar the deceased had ever been taken or contemplated by the Society of the Inner Temple.

4th. Mr. Yatman admitted the same to be true, save that he denied that his efforts by reasoning with the deceased, to calm his mind and dispel the delusion, were without effect, for he said the same had the effect of calming the deceased's mind, and dispelling his delusion, at least for a time.

5th. Admitted to be true.

6th. Admitted to be true.

7th. To the seventh Mr. Yatman answered that, believing the deceased to be in a very disturbed and excited state of mind, he did at the time articulate speak to two personal friends of the deceased, whom [428] he sought out for the purpose, as to whether some step had not best be taken for the deceased's protection, and lest some fatal consequence should ensue from his then mental condition, when he admitted that it was mutually agreed between such two friends and him (Yatman) that nothing could be done beyond watching the deceased; he denied that such conclusion was come to for the reason stated (neither of them being related, &c. to the deceased), but because they considered there was nothing in his then state of mind which would authorize any attempt to put a restraint upon the deceased.

8th. They denied that the deceased was on the 15th of November of unsound mind, &c.; they admitted, however, that he might be on that day, and had been for some time before, and might be on the day after, at times (but at times only) under fancies or delusions, the offspring of a disturbed imagination; and that he did on the day articulate commit suicide, being at such time in a state of temporary mental derangement, in part owing, as they conceived, to the bodily anguish which he suffered at times from his aforesaid disease, in part to mental disquietude, arising from the terror and alarm with which he contemplated a surgical operation that he was about to undergo for its cure, and which Mr. Copeland was to have performed upon him in the course of a few days. They disbelieved, and therefore denied, that the transient impressions (notions, fancies, delusions, or what else) under which they admitted the deceased at times to have laboured ever constituted insanity in the proper sense of that term; but if they did, still they, the respondents, disbelieved [429] and denied that such insanity was in any sort or degree in operation at, or during any part of, the time in which the deceased was employed in the making and execution of his last will and testament; on the contrary, they verily believed that such the deceased's last will and testament (being, they submitted, a rational act, in all respects rationally done by the deceased) was in no sort or degree the offspring of, or proceeding from, or connected with, any insanity under which the said deceased may have laboured at any time, even admitting (which, however, they denied) that he was ever, properly speaking, insane.

9th and 10th admitted to be true.

One witness only was examined in support of the allegation opposing the will, namely, the Rev. Dr. Shepherd, who deposed to the following effect:—

1st and 2nd. To the first and second articles—"I first became acquainted with the late Thomas Thompson, Esq., about forty years ago, at which time I was a fellow, and he was an undergraduate, of University College, Oxford, and I thenceforward continued to be acquainted with him, rather intimately than otherwise, during the remainder of his life." "The last time of my seeing and having personal communication with the deceased was about ten days previous to his death. I can hardly term the deceased to have been an eccentric character; he, as many persons are who have lived and are in the habit of living much alone, had his peculiarities; he was very irritable, but from my own personal knowledge I cannot depose to his use of violent language." "Knowing his temper, I was careful to avoid subjects or occasions of dispute with him; he was of a temperament strongly inclined to pride, he was suspicious, and extremely sensitive of anything which could be construed into a neglect or an affront. It was not until the latter end of 1838, or beginning of 1839, that I became aware that a delusion had taken possession of and fixed itself in the deceased's mind. I then [430] found that under such a delusion, and, as I believe, without any foundation, the deceased imagined that he was slighted and shunned by all the world (that is, by all his friends and acquaintances), on account, as he imagined, of his not having resented some supposed insult. Several years previous to the year 1838 I called on the deceased at his request, when he asked me whether I had heard anything to his discredit, to which I replied in the negative, but no explanation was entered into. I recollect that he occupied chambers in Paper Buildings, in the Temple, which chambers were consumed by the fire which happened there in March, 1838; the deceased, as I have reason to believe, was thrown into a state of great alarm by such the destruction of the chambers which at the time he was occupying. That event I consider was not without its effect on the mind of the deceased. I do consider that he was in all probability after that time more irritable and excitable than before, although I am not able to call to mind any particular circumstance to illustrate such my opinion. I have, subsequent to the period before mentioned, namely, since the commencement of the year 1839, as one of the deceased's friends, endeavoured to dispel the delusion which had possessed him as before mentioned—for instance, when he talked of all the world slighting him; I asked him to point out any individual who had so treated him; he did name an individual who had so done; I called on that individual, and finding that there existed no ground for the deceased's notion, I communicated it to him, and he became satisfied that his suspicion, as regarded the individual in question, was groundless. At my suggestion on a subsequent occasion another friend of the deceased interfered to undeceive him in respect of his notion that another individual had slighted or insulted him; the result of such interference I am not of my own knowledge able to depose, but I have reason to believe that it was successful. After

the time of my having, as before mentioned, succeeded in convincing the deceased (as I believe I did) that the individual named had not slighted or insulted him, it did appear to me that the impression on the deceased's mind, that he was an object of universal scorn, by degrees became weakened, and, as it seemed to me, was effaced. At about the time of my interfering to undeceive the deceased in [431] respect of the delusion before mentioned, the deceased was, as I knew, under the care of Mr. Copeland, for the treatment of a surgical complaint, and I called on Mr. Copeland, and requested him to direct his attention as well to the mind as to the body of his patient. I did not on that or any other occasion represent to Mr. Copeland, or any other medical adviser of the deceased, that it was my opinion that the deceased was of unsound mind, nor did I intend to convey the idea that such was my opinion; but I did state that Mr. Thompson was under a mental delusion on one point which I explained, being the delusion to which I have already referred. I do recollect that at the period of the deceased being under the delusion as aforesaid he certainly did declare that it would be necessary for him to leave the country and hide himself in some foreign land, or he expressed himself to that effect."

8th. "I did not see the deceased on the 15th of November, 1839; I do not believe that I had seen him within the last ten days of his life; the last occasion of my seeing him was when about that time he called on me at my residence in Russell Square; it was a friendly call, he on the behalf of a friend making of me an inquiry about a school, on which subject I gave him a reference to one better able than myself to give him the information he required on that occasion; there was not in the deceased's manner or mode of conversation anything remarkable one way or the other; he was quite rational and sensible in his conversation, and from what then occurred I am not able to depose otherwise than that it appeared to me, and it is my present opinion, that the deceased was at that time of sound, perfect, and disposing mind, memory, and understanding, well knowing and understanding what he then said and did, and what was said and done in his presence, and was, as I believe, capable of giving instructions for or of making or executing a will, or of doing any other act of business which required the exercise of thought, judgment, and reflection; I have no reason to believe the contrary."

On the interrogatories.

2nd. "The testator was at all times of gentlemanly manners, courteous in his conduct and demeanour, and generally esteemed by his friends and associates; he was undoubtedly, [432] at all times (as I believe), the master of his own person and property, and I firmly believe that he did up to the day of his death do and perform all acts ordinarily done and performed by persons in the full possession of their faculties, with order, method, and regularity; his general conduct or conversation did not at any time season of frenzy or distraction."

3rd. "I did at one period consider (and I saw him repeatedly during that period) that the mind of the testator was disordered on one point, namely, that of his fancying himself without cause the object of scorn to his friends and others; it was in the latter end of 1838, or beginning of 1839, that the delusion on the deceased's mind appeared to be strongest; even at that time I did not distrust the deceased's general capacity for transacting his own business and managing his own affairs. It did not occur to me that such delusion was the effect of disordered health; it may have been so, but it is a question which I am not competent to answer. I think that the said delusion did gradually become weaker and weaker, and did disappear altogether by the spring of the year 1839; I did see the deceased occasionally (but not very often) in the course of the spring and summer of the year 1839, and then considered that the delusion before mentioned had passed away. The deceased did dine with me in May, 1839. I do not recollect that he did so after that time; I did not, at or after that time, notice anything whatever in the conduct or conversation of the deceased indicating mental derangement; I did see the deceased about ten days next before his death; I did not then observe in him any signs or symptoms of mental delusion."

4th. "Notwithstanding the existence of the delusion on the deceased's mind before mentioned, I never did consider the deceased to be a madman or bereft of his senses, nor as an irresponsible person, nor as a person incapable of doing any legal act or incapacitated from making a legal will."

10th. "There is nothing on the face of the will to shew that it is other than a perfectly rational act. . . . I should not have hesitated to become an attesting

witness to a will executed by the deceased in my presence, had I been requested on the last occasion of my seeing him."

[433] The Queen's advocate and Jenner for the Crown, before entering upon the question of the sanity or insanity of the deceased, contended that the will was not duly executed under the statute 1 Vict. c. 26, s. 9, which declares that no will shall be valid unless the "signature" thereto "be made or acknowledged by the testator in the presence of two or more witnesses present at the same time," as two of the three attesting witnesses deposed that the will was not signed in their presence, and as there was no direct acknowledgment of the signature, *quâ* signature, which is the word used by the act.

Addams and Pratt contra. On the evidence of the witnesses the signature must have been made, or at least acknowledged, in their presence, and either is sufficient. The statute does not require that the witnesses should see the testator sign; and an acknowledgment need not be in so many words "This is my signature:" a virtual acknowledgment is sufficient.

If the case rested upon the evidence of Ellis and Lucas it would be doubtful, at the utmost, whether the signature was made in their presence or not; but Woolfitt's evidence puts it beyond a doubt.

Sir Herbert Jenner. I am clearly of opinion from the result of the evidence that there is sufficient proof that the paper was signed in the presence of the witnesses. The attestation clause is to the effect that it was "signed, sealed, declared, and delivered" in the presence of the subscribed witnesses. These witnesses, however, [434] differ very materially in their account of the execution of the paper, as to whether the deceased's signature was made in their presence. The Court believes that all these witnesses have deposed according to the best of their recollection and belief of the circumstances. I give no greater credit to the evidence of Mr. Woolfitt than to that of his co-witnesses, because the latter were in his employment; but there is one circumstance in favour of his testimony, namely, that a person deposing affirmatively is in general to be believed to a certain degree, in preference to those who depose negatively. The evidence of Ellis and Lucas not only exhibit discrepancies, but the testimony of each is not consistent with itself, and although the discrepancies are not important, they shew that the Court cannot rely upon the accuracy of their recollection; indeed, Lucas seems to be aware that her recollection is imperfect. The other witness, Woolfitt, differs materially from his co-witnesses; and the question is, to which, upon legal principles, the Court should give the greater degree of credit.

Upon general principles, affirmative is better than negative evidence. A person deposing to a fact which he states he saw must either speak truly, or must have invented the story, or it must be sheer delusion. Not so with respect to negative evidence; a fact may have taken place in the very sight of a person who may not have observed it, and if he did observe it, may have forgotten it; now Mr. Woolfitt speaks distinctly and positively to the fact that the deceased signed the will in the presence of all the witnesses, and declared it [435] to be his act and deed. It is impossible to suppose that he can have invented this statement, and, looking to his habits of business, connected very much with the Inns of Court, I cannot think that he is a very likely person to have been deceived as to such a fact. I see no discrepancies in Mr. Woolfitt's evidence, and when I find a witness so deposing, I am bound to place greater reliance upon his affirmative evidence, as to a fact respecting which he could hardly be mistaken, than upon the negative testimony of the two other witnesses who have shewn a want of perfect recollection.

There is another circumstance which affords a great probability that the paper was executed in conformity with the statute, namely, that the deceased was a barrister, and therefore, it is to be presumed (supposing him to have been of sound mind), knew the proper form of execution, which is shewn by the attestation clause; this is something to confirm the testimony of Mr. Woolfitt, and all the *res gestæ* satisfy the Court that Ellis and Lucas must have forgotten that the deceased did affix his signature to the will in their presence.

Being of this opinion, it is unnecessary to consider the second ground, namely, the acknowledgment of the signature, upon which point I give no decision.

So far as the statute is concerned, I am of opinion that the will is proved to have been duly executed.

The argument then proceeded upon the other point, namely, the sanity or insanity of the deceased.

[436] Addams and Pratt for the executors. What does the evidence to support insanity amount to? Nothing more than that, towards the latter part of the testator's life, at the end of 1838, and in 1839, he laboured under what Dr. Shepherd calls in one part of his evidence a delusion, in another part an impression, that he had been slighted, or not treated with sufficient respect, and which might savour, to some extent, of insane delusion. But Dr. Shepherd, who had been intimate with him for forty years, says that he can hardly term him an eccentric character; that, like many others who lived much alone, he had his peculiarities, and was very hasty and irritable; that it was not till the end of 1838 or beginning of 1839 that he became aware of any delusion being "fixed in his mind" (though it was not fixed, since it gave way to reason), when he imagined he was spurned or slighted by the world, on account of his not having resented a supposed insult. This impression, however, gave way to argument and reason; he says it seemed to him by degrees to weaken, and became effaced in the spring of 1839, when he believed him fully capable of making a will. "I should not have hesitated," he says, "to have become an attesting witness to his will on the last occasion I saw him." From the answers of Mr. Chambers it appears that shortly before the will something of that impression did appear, whether from a derangement of health or any other cause; but this is not to render the testator insane. The observations of Lord Eldon in the case of *Macadam v. Walker* (1 Dow, 148-177) are peculiarly applicable to the present case. The true [437] question is not whether he had ever been insane before, or from what cause? but whether he was of sufficient sound mind at the time? Suppose the Court was obliged to hold that the testator was not altogether a person of sound mind on a particular point, so slight a delusion cannot affect the validity of such a will as this. If the will had been in the slightest degree connected with delusion or insanity, then, however slight it might be, it would invalidate the will; but supposing the will to be a perfectly rational act in itself, and rationally done according to the doctrine of this Court, laid down by a high authority (*Cartwright v. Cartwright*, 1 Phill. 90), which has prevailed from 1793 to the present time, it is valid. Is this an act rational in itself and rationally done? No act can be more rational. As to the form of the paper, nothing can be more correct and regular; every thing shews that it was well considered. On the face of the will there is nothing to denote that the testator was meditating suicide; on the contrary, he speaks of "what I may bequeath by codicil hereafter," shewing that self-destruction was not in his mind at this time. It is not an inofficious will; the testator being without relations, who would be more likely to have his property than Mr. Chambers, who had been at Oxford with him, and had been called to the bar with him, and Mr. Yatman, an old schoolfellow at Westminster?

The Queen's advocate and Jenner for the Crown. What is the law applicable to such a case? It is true every person must be presumed sane till the contrary be proved, and the burthen of proof is on [438] the party impeaching the will. But when it is established that the party deceased was insane at any time, the onus shifts, and there must be proof that the act was done at a time when he was sane, or had a lucid interval. What is insanity? Where there is an insane delusion; where a person believes what does not exist. *Dew v. Clark*.(a) It is said that, unless partial insanity connects itself with the act in question, it cannot be affected. But this point is considered in *Dew v. Clark*. The distinction in other Courts, as well as this, is that in civil cases, if there be partial insanity, and no lucid interval proved, the act is invalidated, though the insanity be not directly connected with the act; but in criminal cases, the party is not exempted from responsibility unless the act be directly connected with insanity. The amount of proof of a lucid interval differs with the cause of insanity, being less in cases of fever or drinking. The case of *Cartwright v. Cartwright* is a strong case, but it does not go to this extent, that in all cases a rational act rationally done should have validity. Dr. Shepherd's evidence alone would not establish insanity; but, taken in conjunction with the answers of the executors, the result is that the testator was labouring under an insane delusion at the time he made the will. He had told Mr. Yatman that the benchers of the Temple were about to disbar him, on account of a fraud he had practised on his admission, in describing

(a) Report of the judgment by Dr. Haggard, 1826.

himself as the son of a gentleman, whereas, in fact, he was the son of a chemist. This was a delusion. On the 13th November he told Mr. Yatman that there was a [439] conspiracy against him, which would drive him to self-destruction. On the 14th, Mr. Yatman and the deceased again met, when the latter asked if he had thought of any thing for his relief, saying, "Pray do something, or it will have a fatal termination!" On the 15th the will was made, and his death took place on the 16th, when he is found by the coroner's inquest to have been in a state of insanity.

May 9th.—*Judgment*—*Sir Herbert Jenner*. The question in this case is with respect to a paper propounded as the will of Mr. Thomas Thompson, who died 16th November, 1839. The paper is all in the handwriting of the deceased, and purports to have been signed by him in the presence of witnesses, and the names of three witnesses are subscribed to it, as attesting its execution in their presence; therefore, *prima facie*, the paper is entitled to the probate of the Court. But this paper in the form of a will is opposed on behalf of the Crown, Mr. Thompson having died without any known relations; if he has not left a will valid in law, the Crown will be entitled to the possession of his property. The grounds of opposition are two: first, that the paper was not duly executed in the presence of witnesses, as required by the act; secondly, that the deceased was not of capacity at the time of execution. I will dispose of the first ground briefly, it having been argued as a separate and distinct question in the first instance, when the Court was of opinion, and expressed that opinion the last Court day (and I see no reason to depart from that opinion), that the evidence of Mr. Woolfitt, who deposes that the will was exe-[440]-cuted in the presence of himself and the other attesting witnesses, and that it was attested by them in the presence of the deceased, is entitled to a greater degree of credit than that of the other two witnesses, who might have forgotten the fact at the time they gave their evidence. The great and important question remains behind, namely, the capacity of the deceased.

Before entering upon this question it may be necessary to advert a little to the circumstances of this gentleman's history.

It appears that he was brought up at Westminster, where he became acquainted with Mr. John Yatman, a schoolfellow, and their friendship continued during the remainder of the deceased's life. It appears that Mr. Yatman was afterwards employed by the deceased as his solicitor. From Westminster it should seem that he went to University College, Oxford, and there he formed an acquaintance with Mr. Robert Joseph Chambers, with whom he contracted a great intimacy and friendship, which lasted during his life. Both were called to the bar nearly at the same time, though Mr. Thompson does not appear to have practised at the bar, having a very comfortable provision, his personal property amounting to 25,000*l.*, besides freehold and copyhold estates, the value of which is not stated. The deceased lived a very retired life; he was unmarried, and had no known relations. On his death, therefore, the Queen's proctor, under the circumstances, interfered on behalf of the Crown, not simply for the benefit of the Crown, but to preserve the rights of persons who might be entitled to the property of the deceased, if he be dead intestate; so that it was a very proper interference on the part of the Crown.

[441] Now, this gentleman living, as I said, a very retired life, as far as the Court has any information before it, the only person who could give any account of his real state and condition is the single witness produced, the Rev. Dr. Shepherd, the deceased's college tutor, who appears to have kept up an intimacy and friendship with the deceased from that time till very shortly before his death.

The case set up on the part of the Crown is one of habitual insanity, and it is the first case within the recollection of the Court in which habitual insanity has been attempted to be proved by the testimony of a single witness. It is admitted that, in this case as in others, the presumption of law is in favour of sanity, particularly where the will is in the handwriting of the deceased, and executed in the presence of witnesses; and that it is incumbent on the party alleging the insanity to establish that state of mind; what then is pleaded in this case? (The Court here stated the contents of the allegation given in against the will, and continued.) This is the whole case set up by the Crown, and upon the evidence of one witness examined in support of this allegation, and the answers of the other parties to it, the Court is called upon to pronounce the will invalid, as made and executed at a time when the deceased was labouring under insanity.

The first point to be considered is this : Is habitual insanity proved ? Because it is admitted that, where habitual insanity does not exist, the proof of actual insanity at the time must come from those who impeach the act. The Court, therefore, must look for proof of habitual insanity [442] or insane delusion from those who oppose this will ; but I cannot find in any part of the evidence any instance of insanity till the latter end of 1838 or the beginning of 1839 ; I cannot find that Dr. Shepherd states anything of the nature of delusion, as far as his judgment goes, in the conduct of the deceased till that time, or till the spring of 1839. Dr. Shepherd saw him for the last time ten days before his death. The character he gives of the deceased is this (the Court here read the evidence of Dr. Shepherd). Now, it is admitted that, as far as this evidence of Dr. Shepherd goes, it is not sufficient to shew habitual insanity ; it carries it back no further than March, 1838, and it must depend upon other evidence to carry the insanity beyond that date. And I must say that, when I see that Mr. Copeland attended the deceased on the 21st October, 1839, it seems very extraordinary that Mr. Copeland should not have been produced as a witness in the cause, to say, after the statement made by Dr. Shepherd, what his opinion was of the state of the deceased when he saw him. Mr. Copeland could have been able to give the Court more exact and accurate information as to the state of the deceased than Dr. Shepherd.

Dr. Shepherd, then the only witness who is called to prove habitual insanity on the part of the deceased, states that, although he did, at a particular period, entertain an opinion or impression that the deceased was labouring under a delusion, he considered that, in the spring of 1839, it had entirely disappeared, and altogether passed away. The deceased dined with Dr. Shepherd in May, 1839 and conducted himself in a perfectly [443] rational manner ; and after the spring of 1839 he is not able to speak to anything of the nature of groundless delusion in the mind of the deceased. I cannot say that the evidence of a person so competent to form an opinion as Dr. Shepherd, and who had such opportunities, is not satisfactory to my mind ; that up to that time at least the deceased was a person of sound mind, memory, and understanding, except at the particular time when those notions were dwelling in his mind ; I cannot see in the evidence of Dr. Shepherd anything of habitual insanity on the part of the deceased ; though at times, owing to the particular state of his bodily health, certain delusions might have been impressed upon his mind, and if he had made the will when under the influence of one of these delusions, the Court might have had a good deal of difficulty in saying that the deceased was of perfectly sound mind, memory, and understanding.

It being admitted that the evidence of Dr. Shepherd is not sufficient to establish insanity, what other evidence is there ? Mr. Chambers and Mr. Yatman are the executors named in the will. Mr. Chambers is residuary legatee and devisee of the real property ; Mr. Yatman has a legacy of 2000*l*. The answers of these gentlemen have been called for to the allegation, and it is said that they carry the case something further than Dr. Shepherd has done, and that they prove that the deceased did labour under morbid impressions and delusions at the time the will was made and executed. Now, these gentlemen have stated in the most candid manner everything within their knowledge, and as fully and fairly as they could, against [444] their own interest. They are, therefore, entitled to have their evidence taken altogether, and not in parts only ; where it is against their own interest they are bound by their admission, but where explanations are offered, the Court will not refuse to hear them, considering the candid manner in which they have met the case. (See the answers, which the Court read.)

Then on the three days, the 12th, 13th, and 14th November, the deceased, it is admitted, was labouring under delusions ; the Court has this fact on the admission of the parties, Messrs. Chambers and Yatman ; but, according to Mr. Yatman, he succeeded in dispelling those delusions from his mind. But between the 12th November and the spring of 1839, as far as the Court has any information, this gentleman had no such delusions in his mind. All that the answers admit is that on the 12th November, and two following days, he was labouring under delusions. But there is nothing to lead the Court to presume that they existed on the 9th, 10th, and 11th November. In the absence of evidence, what is to authorize the Court in coming to the conclusion that the deceased was labouring under an insane impression on the 15th November, when the will was executed ? There is no reason to suppose that the state

of his mind was different on the 15th November from what it was on the 11th. The Court cannot act upon conjecture of what the stages of his delusion might be. What is the Court to do, in order to see whether the act of the deceased is a valid act? It must look to the manner in which the act was done, to satisfy itself whether a lucid interval is established. It cannot [445] be contended that the delusion was fixed and of long duration; and if done during a lucid interval, the act will be valid, notwithstanding previous and subsequent insanity. I think it right to notice that on the 14th November, according to the admission of Mr. Yatman, the deceased intimated that, unless some measure were taken against the supposed intention of the benchers of the Temple to disbar him, which was a delusion, it might have a fatal termination; and, perhaps, he might at that time have contemplated an act of self-destruction. But it is also probable that the deceased, knowing he was subject to this delusion, might, as an act of precaution, have meant to dispose of his property by will; it is quite consistent with probability that it was a measure of precaution, and not in contemplation of an act of self-destruction.

It has been contended in this case that whatever might have been the state of the deceased's mind, the act itself being a rational act rationally done, is sufficient proof of a lucid interval; and the case of *Cartwright v. Cartwright*, before Sir William Wynne, has been cited in support of this position. It has been contended, on the other hand, on the authority of Sir John Nicholl, in the case of *Dew v. Clark*, that where an insane delusion exists, there is unsoundness of mind; and it has been said that *Cartwright v. Cartwright* is always a favourite case, and is paraded when it is contended that a rational act rationally done is entitled to be considered valid. On the other side, it has been observed that *Dew v. Clark* is another favourite case, and is paraded in its turn, when the object is [446] to shew that where there is delusion in the mind of an individual there is insanity. Now I cannot but think that these two cases have, to a certain extent, been pressed beyond what they will bear, and I think it not irrelevant to make a few observations upon those cases, before I consider how far their principle applies to the present.

The case of *Cartwright v. Cartwright* was the case of a lady who had been for some time suffering under raving madness, who was in confinement, and whilst there made a will, which was pronounced for. But I cannot consider that this case establishes the point that any rational act, done in what appears to be a rational manner, will be considered sufficient to establish a lucid interval. I think the position laid down by the learned judge was with reference to the particular act done in that case, which was one of a very extraordinary nature. It was the case of a lady, possessed of considerable property, who had for different periods of time been afflicted with insanity, accompanied by symptoms of the worst character, and at, and for some time preceding, the period when the will was made was in such a state of mind that her hands were confined; she was tied down and not suffered to have a candle. Being importunate for pen, ink, and paper, which had been withheld from her by direction of the physician, to pacify her they were by his permission given to her, and her hands being untied, she sat down and wrote the will, which turned out to be the result of her own sole will and pleasure, not being dictated or suggested by any person. The learned judge said: "I think the strongest and best proof that can [447] arise, as to a lucid interval, is that which arises from the act itself; that I look upon as the thing to be first examined, and if it can be proved and established that it is a rational act rationally done, the whole case is proved." But Sir William Wynne did not content himself with considering merely whether the act was a rational act; he looked into all the grounds and circumstances to see how far the act was the result of the deceased's own will and intention, with regard to the claims of her family: to see what was the state of her mind and behaviour at the time (for she had been in a state of actual raving), which was calm and collected, having all her senses about her; and he came to the conclusion that the act, being so rational in itself and so rationally performed, was sufficient to establish a rational intention and soundness of mind in the party. That Sir William Wynne did not consider every rational act rationally done as sufficient to prove a lucid interval we may collect from what is stated in a subsequent part of his judgment, in which he refers to cases where testamentary acts of a rational character were set aside. So that it is not every rational act rationally done which, under all circumstances, is sufficient to constitute a lucid interval: it was the particular manner in which the act was done in that case which led Sir William Wynne to the conclu-

sion that there was a lucid interval, whatever might have been the state of the deceased before ; and it is to prevent that case from being pressed beyond what it deserves that the Court, agreeing with all that fell from the learned judge, has thought it necessary to make these observations.

[448] The case of *Dew v. Clark* has been cited to shew that, wherever delusion exists in the mind of a person, his mind is insane ; and that case, I must say, in my opinion, is not always cited fairly ; that is, it is cited in detached passages, to shew that where delusion is, insanity exists, in all cases and under all circumstances. But the learned judge has not laid it down that every false imagination which may exist in the mind is an insane delusion, that is a notion which no sane person would believe, and which can be dispelled by no argument or demonstration ; though he did say that where there was a delusion, which was an insane delusion, if it continued and became habitual, existing at all times and without intermission, it would be exceedingly difficult to sustain an act done under such circumstances. But this position was laid down as applicable to the particular chain of circumstances in that case, and in his elaborate judgment there is a minute survey of every circumstance in the business and mode of life of the deceased, from the day of his marriage, and the birth of his child, to the conclusion of his life, shewing the delusion that existed in his mind, that it was an insane delusion, and that the will was written under the influence of that delusion, with regard to his daughter, appearing immediately on her birth, existing in every stage of his life, and pertinaciously adhered to in spite of all remonstrances. Therefore I do not consider that the case of *Dew v. Clark* goes to the full extent, that a will, under whatever circumstances, must necessarily be invalid, because the deceased might entertain notions which might have no foundation ; but the [449] Court must look to see whether the delusion be an insane delusion, and continued to be an insane delusion, and was so indelibly fixed in the mind of the deceased that no reasoning, no demonstration, no remonstrance of friends could convince him that it was devoid of foundation.

In the case before the Court Dr. Shepherd states that the error the deceased took up was entirely effaced from his mind, though he subsequently, according to Mr. Yatman, adopted another, that the benchers of the Temple were proceeding to disbar him. But supposing this was an insane delusion, how long did it last ? For three days the impression remained on his mind, but there is no evidence that it lasted longer, unless the act of self-destruction reflects back on the 15th November ; that occurred, I think, in the case of *Macadam v. Walker*. Suppose the deceased laboured under an insane delusion on the 12th, 13th, and 14th November, is the Court to assume the continuance of the disease on the 15th ? It is somewhat extraordinary that the case of *Cartwright v. Cartwright*, which is appended as a note to the report of a case which occurred in 1809—*White v. Driver* (1 Phill. 84)—has been so much relied on, while that case has not been referred to ; I cannot, however, but think that the latter case is important. That was the case of a person who had been at times subject to insanity for several years preceding her death, and until four days before the execution of the will which was propounded and which was pronounced for by the Court.

[450] Sir John Nicholl, in the course of his judgment, stated that “the deceased had been subject, not only to eccentricities, but to delusion and derangement at different periods for several years, but it was not continuous ; she was not under confinement ; she managed her own affairs ; she came out of the workhouse on the 21st of January ; she acted immediately, and continued to act from that moment till her death, as a sane and rational person. There is no indication of any fraud or circumvention in procuring this will, or even in suggesting it to her ; a desire to make a will is not with her an insane topic. The deceased herself declares and directs the disposition of her property ; the disposition itself is neither insane nor unnatural.” And speaking of the execution of the will in that case, the learned judge says, “The Court has the concurrent opinion of these several persons”—that is, the witnesses to the execution—“that the deceased was perfectly sane and rational throughout the whole period of the transaction.” This is not an unimportant observation with reference to the present case. The circumstances attending the execution of the will in this case are these : The will is in the handwriting of the deceased ; it is signed by him, and attested by three witnesses ; it is very fairly written, without a mistake from the beginning to the end, and with but one alteration, and that is with respect to the

amount of a bequest to a servant, and to that the deceased has affixed his initials, and the signature is made with great care and regularity. On the face of the will itself there is nothing to shew delusion or eccentricity, and I am of opinion that [451] the disposition is a natural one under the circumstances.

The next thing to be considered, as I am of opinion that it is a rational act, is, Was it rationally done? The deceased was a barrister, and, therefore, there was no necessity for him to resort to a professional person to draw up a will for him, and accordingly he prepares it himself and takes it to the persons who were to witness it. The witnesses to the will are John Woolfitt, Louisa Lucas, and Charles Ellis. Mr. Woolfitt is an upholsterer, well known in business, and the deceased had employed him to furnish his chambers; and it is proved by Mr. Woolfitt, and by the other persons, that the deceased was in the habit of going to Mr. Woolfitt's shop, though he had more communication with Ellis, the shopman, than with Mr. Woolfitt himself; so that these were persons to whom the deceased would very naturally apply to attest the execution of his will. These three persons have been examined, and the first intimation they had of an intention on the part of the deceased to execute his will was by a letter which Ellis says he received from him on the morning of the 15th. It appears from the evidence of Ellis that he was in the habit of seeing the deceased two or three times a week for some months; Ellis, therefore, is a person likely to know whether, at the time when the will was executed, there were any symptoms about the deceased indicating that he was labouring under any delusion; but he does not give any evidence to that effect. According to his statement nothing can be more rational than the conduct of the deceased. Having made an ap-[452]pointment to call at the shop, he produced a check from his pocket-book for 140l., which he gave to Mr. Woolfitt on account of his debt, and then he proceeded to the execution of the will, pointing out the alteration he had made, and when the execution was attested he folded the will up, put it in his pocket-book, and went away. This witness says he was, during the whole time, "cool and collected;" and, although he does depose an interrogatory that the deceased was hasty, and expected a great deal of deference, and was of an irritable temper, and occasionally used violent language, he says he was not, at all events when at Mr. Woolfitt's shop, otherwise than of sound mind, memory, and understanding. According to the other witnesses, Lucas and Woolfitt, nothing could be more cool, collected and rational than the conduct of the deceased on that occasion, there being no appearance of delusion in his mind at that time. If, therefore, between the 12th and the 14th of November he laboured under an insane delusion, I am satisfied that he was at the time of the executing this will of sound mind, memory, and understanding, enjoying a lucid interval, if it be proper to call it a lucid interval, where habitual insanity has not been proved.

Upon the whole of the case I am perfectly satisfied in my own mind that this paper emanated from the deceased, he being at the time of sound mind, memory, and understanding, and free from delusion; his whole conduct in the making and executing of the will proves that he was not at the time labouring under any delusion of mind. If there had been a delusion previously existing, there was a lucid interval, and I have no hesitation in [453] pronouncing for the validity of the paper, and decreeing probate.

The Queen's advocate asked for the Crown's costs; but the Court refused them.

GODRICH v. JONES. Prerogative Court, May 30th, 1840.—The Court will not grant an administration pendente lite unless a necessity be shewn for the grant.—Query, whether the Court will grant such an administration, limited to the purpose of investigating the title to property assigned in the lifetime of the deceased.

[See further, pp. 630, 671, post.]

Petition.

This was a cause of proving in solemn form the will, with two codicils, of Harriet Lloyd, spinster, promoted by Francis Godrich, as sole executor of the will in question, against Pryce Jones, an executor named in a prior will. The will had been pronounced in a conditit; a defensive allegation on behalf of Mr. Jones had been admitted, and a responsive allegation by Mr. Godrich, and witnesses had been examined on all the pleas, though publication had not passed. Mr. Jones now applied for a grant of administration pendente lite to the person who had been appointed by the Court of Chancery receiver of the rents and profits of the deceased's estate,

limited for the purpose of appearing as personal representative of the deceased, and of substantiating proceedings in Chancery in respect to property alleged to have been improperly obtained by Godrich from the deceased, the Court of Chancery not having jurisdiction to clothe a receiver with the power of suing and of protecting the estate against persons who claimed it adversely to the estate of the testatrix.

[454] The Queen's advocate and Haggard in support of the petition. This application has been made at the suggestion of the Lord Chancellor, the power of a receiver under an order of that Court not being equal to those of an administrator, and this Court grants administration pendente lite for the protection of the property. Jones swears that Godrich fraudulently possessed himself of certain property of the deceased shortly before her death, by an agreement which it is proper should be investigated in another Court, and he swears he believes Godrich, if called upon to refund the property so obtained, would prove to be insolvent or in very embarrassed circumstances.

Addams against the petition. There is no precedent for such a grant without sufficient proof that the property is in jeopardy. But here there is nothing to shew that the property belongs to the estate of the testatrix.

Judgment—Sir Herbert Jenner. Although this Court, generally speaking, has the power to grant administration pendente lite, it has always required that a necessity for such grant should be shewn by proof that the property is in jeopardy. It is stated in *Northey v. Cook* (1 Add. 326) to be the established rule of the Court not to grant administration pendente lite for the purpose of taking property out of the hands of a litigant party, unless [455] it be shewn that it is in jeopardy; and that the party in possession of it is incapable of furnishing adequate security; and there are two cases in Sir George Lee's Reports, *Sutton v. Smith* (1 Lee, 207), and *Maskeline and Brohier v. Harrison* (2 Lee, 258), which bear out the position. The questions, therefore, are, first, whether the circumstances of the case, as stated in the affidavits, shew that the property is at this time in jeopardy, and could be secured by the grant between this time and the hearing of the cause; and, secondly, if the circumstances of the case are such as to render it desirable that there should be such a grant of administration, whether this Court has exercised the power of granting administrations with the limitations set forth in the Act on petition. This Court would not take upon itself to decree an administration of this kind, unless there was an absolute, or at least a very pressing, necessity for it; and it lies on the party applying to shew that there exists such a necessity.

The allegation in opposition to the will pleads that property of the deceased was obtained improperly from her, and the affidavits in support of this application by Mr. Jones and Mr. Van Sandau, his solicitor, state that, if Mr. Godrich were called upon to pay the stock and other property belonging to the deceased, of which he hath unduly possessed himself, he would have great difficulty in doing so, which might happen, I apprehend, to many parties if they were called upon to refund all the property in litigation at a moment. Mr. Jones, after de-[456]-tailing the manner in which the property is alleged to have been obtained from the deceased, states "that he verily believes that the property, or the greater part, hath been unduly obtained from the deceased, and that it is desirable that the same should be forthwith investigated; and that there is great apprehension for the safety thereof, and that if the said Francis Godrich was required to pay the said stock and other property belonging to the deceased, and of which he hath unduly possessed himself, he is, and would prove to be, insolvent, or in very embarrassed circumstances." Now, it appears to me that this is as loose a statement as can be made as to the danger in which this property is supposed to be placed. Neither Mr. Jones nor Mr. Van Sandau deposes to a belief that Mr. Godrich is in embarrassed circumstances; it is merely Mr. Jones's apprehension, upon what ground does not appear. I never recollect so loose a statement, on which the Court has been called upon to act; nothing as to the party's belief, only his apprehension; he believes that there is a great apprehension, without any ground being stated.

In answer to this statement, what does Mr. Godrich say? For the Court must look, not at the mode in which the property was obtained from the deceased, but at the means which Mr. Godrich has of paying over any property of the deceased in his possession to the persons to whom she may have disposed of it by her will. He states that "he is absolutely possessed in his own right of considerable freehold and

leasehold property, in various counties, sufficient to maintain him independently of his profession, and that his profession has for [457] many years realized to him an income of about 1500*l.* per annum." Now really this is a complete answer to what is suggested on the other side as to an "apprehension" that he might prove in embarrassed circumstances. I do not, therefore, think that the property is in such jeopardy as to call upon the Court to take what is admitted to be a novel step, of granting administration pendente lite, for the purpose of investigating these claims, and of ascertaining whether or not this is to be considered as the property of the deceased.

But suppose the property were in jeopardy, and the circumstances were such as to call upon the Court to grant administration pendente lite, has it ever exercised the power of granting such administration for the purposes sought for here? The limitations for investigating Mr. Godrich's title to the property he claims, as given by the deceased, and to other property obtained by assignment, or by drafts filled up by him, are pretty sweeping limitations. I cannot find any case in which the Court has made, or has been called upon to make, such a grant, where no reasonable ground is assigned to shew that the property is in jeopardy, and I must be cautious in making a precedent for such a grant for such a purpose. It was long doubted whether an administrator pendente lite had authority to bring an action of ejectment, or any other action. That point has been determined by the Court of Chancery, and it is now considered that an administrator has such power; but I never heard that an administrator pendente lite had the power of commencing actions against persons in possession of property claimed under a will in litigation, and [458] I am not inclined to make a precedent, and still less in a case where the parties are in a condition to pray publication of the evidence, and the case may be heard before the Court breaks up for the long vacation. I am not prepared to say that the Court has the power to grant such an administration; though I will not say it has not the power under peculiar circumstances; but I do not think that, in the present case, the Court is called upon to exercise it. Under these circumstances I am of opinion that I must reject the petition, and leave the party to bring the cause to a hearing as speedily as circumstances will admit. I cannot see that the actions could be tried till the whole question as to whose property it is had been disposed of by this Court.

STEPHENS v. TAPRELL. Prerogative Court, June 6th, 1840.—Cancellation of a will is not a revocation thereof, under the words "otherwise destroying" the same in the stat. 1 Vict. c. 26, s. 20.

Allegation.

This was an allegation propounding by direction of the Court (*a*) a paper as the will of Mr. Edward Stephens, a solicitor at Bristol, who died 15th of March, 1840, leaving a son and daughter, and personal property to the amount of about 25,000*l.* The paper in question, which was in the deceased's handwriting, signed by him, and attested by two witnesses, when found a few days after his death, locked up in his office, was in a cancelled state: [459] the body of the will was struck through with a pen, the name of the testator was crossed out, the attestation clause, and the names of the witnesses were likewise run through with a pen, and what had been intended for a codicil, but which was not legally executed, was also cancelled with a pen.

May 16th.—Nicholl opposed the admission of the allegation. There can be no doubt that this was the act of the deceased himself, with the intention to revoke the disposition; and the cancellation is total and entire. In the present Will Act it was not the intention of the Legislature to impose new and vexatious restrictions upon testamentary acts, but to assimilate the law respecting wills of personal property to that which regulated the devise of real estates, relaxing the law where it was too stringent. In all cases the law is anxious to carry out the intentions of the deceased.

The 20th section of the present act provides that the whole will may be revoked by burning, tearing, or otherwise destroying the paper. The next section applies to a partial revocation, contemplating the will as a subsisting disposition. Then the cancellation of an entire will can only be provided for by the 20th section. The 22nd

(a) On motion, April 23rd.

section relates to the revival of a will ; so that the Legislature contemplated a manner of revocation in which the paper would exist in specie ; in the case of burning or tearing the paper might still exist, and therefore the word "destroying" was not used in the sense of an annihilation of the material.

These clauses were framed upon recommendations contained in the report of the commissioners on real [460] property, who proposed that there should be only four modes in which any will can be revoked : " 1st, by another inconsistent will or writing, executed in the same manner as the original will ; 2nd, by cancellation or any act of the same nature ; 3rd, by the disposition of the property by the testator in his lifetime ; and 4th, in the case of a woman by marriage. By the first and third of these modes the will may be revoked either entirely or in part ; by the second and last the revocation will be complete."

In the bill, as originally introduced, the words were, "by burning, cancelling, or tearing," and it might have struck a member of the committee that, by retaining the word "cancelling," and omitting "obliterating" (both words being included in the Statute of Frauds), without inserting any general term, doubt and uncertainty would be created, and it might be that the word "cancelling" was likewise omitted, and a word added, intended to be of the most general import, denoting the revocation of the entirety of the disposition, and the destruction of the vitality of the will, though not the material upon which it was written. If it was intended to defeat fraud, burning, tearing, or any other act of destruction, not in the presence of witnesses, is not less within the compass of fraud than cancellation ; on the contrary, they are less formal and less satisfactory acts of revocation than the cancellation of an instrument still preserved in the safely locked repositories of the deceased. If burning, tearing, and cancelling had been the only modes of revocation without witnesses, then if a will had been daubed over, or liquid had been thrown upon it, or various [461] other acts had been done to it, the revocation would have been insufficient ; therefore a general term was employed.

In common parlance, the word "cancelling" is equivalent to "destroying," and this is even supported by learned writers. In *Moore v. De la Torre* (1 Phill. 375) the destruction of the instrument itself is distinguished from a destruction of its effect ; and the word "cancellation" was understood as equivalent to "revocation," or "destruction." If this was so under the old law, it must be so now ; for if cancelling was understood by a Court of law as a mode of destroying a will, the legislature must be considered to have adopted that construction, and to have intended "cancelling," as one of the acts included in the words "otherwise destroying." Swinburne (on Wills, part vii. s. 16) interprets "cancelling" to mean, "taking away the force and virtue of a will." Rumpere testamentum was the metaphorical language of the Roman law (Cic. De Or. 1, 57). Tacitus (Hist. i. c. 6) and Quintilian (De Inst. Or. 11, c. 1) use the verb *destruo* in the sense of destroying the effect of a thing. The Court has held (*Hobbs v. Knight*, vol. i. p. 768) that if a party cut out his name with a pair of scissors it is a destruction within the meaning of the Act : it would have been treated as a mode of cancellation under the old law. Suppose a deceased erased his name with a pen-knife, or washed it out by a chemical preparation ; or suppose the will had been written and attested in pencil, and he had rubbed it out with Indian rubber ; would neither act as a revocation ? Are all other [462] modes of revocation under the old law recognized by the new, except cancellation ? What is self-destruction in the ordinary sense of the expression ? It is not necessary to destroy any part of the body in order to terminate life, and where you destroy the essence, the vitality, the soul of a will, the will itself is destroyed.

Addams in support of the allegation. The question is entirely governed by the statute, and the Court is not to adopt a metaphorical interpretation of the words "otherwise destroying," and indulge in speculations as to what would or would not destroy the effect of a will. The intentions of testators are defeated under this Act every day. Suppose a testator, having made a will, at a subsequent period writes under it, "I hereby revoke and annul this will," and signs this in the presence of a witness who attests it, or in the presence of two witnesses not present at the same time ; the effect of the will would be destroyed, but, it is no revocation under the statute. When, after mentioning certain specific modes of destruction, the legislature adds, "or otherwise destroying," it could only mean other modes of destruction *ejusdem generis*, and it must be presumed that cancelling was intentionally left out. There

may be good reasons why drawing a line over a paper should not be considered an act of destruction.

With regard to the 21st section, suppose a testator bequeaths fifty legacies in his will, and obliterates forty-nine, adding in the margin his reasons, affixing his name in the presence of one witness, or of two witnesses not present at the same [463] time; notwithstanding all these pains taken to obliterate those parts of his will, if apparent, they must be pronounced for. Where a will is once regularly executed, it can be revoked only in the modes provided in the Act; and there must be a real burning, or real tearing, or a real destruction; the legislature never could have meant a destruction of the effect of the will.

June 6th.—*Judgment*—*Sir Herbert Jenner*. As this case is to govern other cases, and has been solemnly argued, I have taken time to consider the point, although I did not feel much doubt.

The first question is, By whose act was the paper, which is a regularly executed will, and would have been entitled to probate in common form, placed in its present condition? And there can be no doubt, it having been found locked up in the deceased's repositories, that the reasonable presumption and the legal presumption is, that it was done by himself. The next question is, What, under the present law, is the effect of the act? It is admitted that, prior to the first of January, 1838, this would have been a good revocation, for under the old law cancellation, *animo revocandi*, was a mode of revoking a will. The Act 1 Vict. c. 26, however, has made a very considerable alteration in the testamentary law; by this statute a distinction existing under the former law is removed; wills both of personalty and of land are required to be executed and revoked in the same manner; the Court has, therefore, no discretion, but must govern itself by [464] what it considers to be the true meaning and construction of the act.

In order to arrive at the construction which ought to be put upon the Act, it may be necessary to inquire what the Act has done. In the first place, it has abolished all implied revocations: no alteration of circumstances (with one exception), with respect to the condition of a testator or of a legatee, will amount to an implied revocation. The only alteration of circumstances which is to amount to a revocation of a will duly executed is that of marriage. This alteration of the testamentary law was founded on the fourth report of the commissioners appointed to examine the state of the law with respect to real property, who suggested a great number of improvements of that law, and in their fifth proposition: "With respect to implied revocations they propose that a will be revoked by burning, cancelling, tearing, or obliterating it, with the intention of revoking it, by the testator, or in his presence, and by his direction: " these being the modes prescribed in the Statute of Frauds. The legislature, however, in acting upon this report, did not adopt all its suggestions; for, in the first place, the enactment with respect to the revocation of a will by marriage is not founded on the report; and the suggestion "that no will should be expressly revoked, otherwise than by another inconsistent will or codicil, or some other writing executed and attested in the same manner as shall be required for the validity of a will," they did not adopt wholly; but the 20th section stands thus: "That no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid"—that is, by [465] marriage—"or by another will or codicil, executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed;" so far departing from the suggestion of the commissioners, and from the law as it stood before the statute, as regards "any other inconsistent will;" and the section goes on: "or by the burning, tearing," two of the modes prescribed in the Statute of Frauds, and suggested in the report, omitting the words "cancelling," and "obliterating," and inserting, "or otherwise destroying the same, by the testator, or by some person in his presence, and by his direction, with the intention of revoking the same."

Then the question comes to this: Is a will destroyed, within the meaning of the 20th section, by being struck through with a pen, the name of the testator being crossed out, and the names of the attesting witnesses being struck through? It appears to me quite impossible to put such a construction upon the Act as to say that cancelling a will, by striking it through with a pen, is a destruction of the will. When the legislature, after mentioning "burning" a will, and "tearing" a will, speak of "otherwise destroying" a will, they must be understood as intending some mode

of destruction ejusdem generis, not an act which is not a destroying in the primary meaning of the word, though it may have the sense metaphorically, as being a destruction of the contents of the will; it never could have been their intention that the cancelling of a will should be a mode of destroying it. And the Court is justified in this conclusion, [466] by seeing that cancelling was advisedly omitted, the commissioners having recommended that "cancelling" and "obliterating," as modes of revocation, should stand. The legislature, however, with this recommendation of the commissioners before them, omit "cancelling" and "obliterating," and insert "otherwise destroying."

It has been suggested by a learned counsel, who was present when the bill was in Committee in the House of Commons, that the word "cancelling," was advisedly omitted, because the words "otherwise destroying" would include every mode of destruction. But this substitution appears extraordinary, for nothing could have been easier, if it was intended to adopt the recommendation of the commissioners in respect to cancellation, than to have framed the clause thus: "or by burning, cancelling, tearing, or otherwise destroying," which would have left no doubt; whereas, by leaving out the word, they would throw great doubt on the construction of the clause. If it was the intention of the legislature to have adopted the suggestion of the commissioners, it is extraordinary that they should have left out the very word "cancelling" and substituted other words at least as ambiguous: indeed, to my mind, the term "cancelling" is not by any means so equivocal to denote a mode of revoking a will as the words "otherwise destroying." Cancellation may be an equivocal act, but the word itself is not equivocal, and cancellation was a mode of revocation under the old law.

The learned counsel has satisfied me that the 20th section applies to a total, and not to a partial, revocation. But the Court is fortified in its view [467] of this question by the 21st section, which is founded upon a part of the fifth proposition of the commissioners, who recommend "that where a will is found with unattested obliterations, it should be considered to be wholly unaltered, except that if any words cannot be read or made out in evidence, in consequence of the obliteration, the will shall take effect as if such words did not form part of it." Here, again, the Legislature have not adopted the whole of the recommendation; the terms they have used are, "except so far as the words or effect of the will before such alteration shall not be apparent," not adopting the suggestion that the words might be "made out in evidence," and the Court is obliged to reject extrinsic evidence, however strong it may be, as to the contents of the will before the attestation, and to look only to the will itself, and, when it finds a word to be utterly illegible, to omit that word as well as the word substituted. Whether the commissioners would have recommended that partial alterations should have this effect, if they had known that the Legislature would have rejected the other part of their recommendation, it is difficult to say; as it stands, there seems some inconsistency. If an alteration be made in a single legacy, by striking it through with a pen, it is of no effect, unless it be attested by witnesses, or, unless the original word be rendered utterly illegible. If the construction contended for be correct, then the Legislature would have said that the whole will might be revoked by a mode more simple than is required for a small part, that where all the legacies were struck out but one, the whole must have effect; whereas, if [468] that one be also struck out, then the whole will is revoked. This never could have been intended; it could not have been the intention of the Legislature that the striking the will through with a pen should be a mode of revocation. "Cancellation" and "revocation" are different terms, though sometimes confounded, cancellation being an equivocal act. It appears to me that the Legislature, having advisedly omitted cancelling amongst the modes of revocation, and substituted words of more equivocal meaning, cannot have intended that striking through with a pen should have been a mode of revocation; and that, if they did consider cancellation to be a mode of revocation, they would have taken care to render their mentioning clear.

Being, therefore, of opinion that, if the facts pleaded in the allegation are proved, the will is entitled to probate, I admit the allegation to proof.

HENFREY against HENFREY. Prerogative Court, June 6th, 1840.—The testator having left two substantive wills, the latter disposing of the whole of his property, although not expressly revoking the former will, nor the appointment of executors therein, held to have revoked the former, and to be alone the will of the testator.

[Affirmed, 1842, 4 Moore, P. C. 29; 13 E. R. 211 (with note).]

On petition.

Henry Henfrey, formerly of Foundling Terrace, Gray's Inn Road, died at Havre de Grace on the 27th of February, 1839. He left the two following testamentary papers, the one dated the 14th of July, 1838, the other the 26th of February, 1839:—

[469] 1st. "This is the last will and testament of me, Henry Henfrey, of No. 1, Foundling Terrace, Gray's Inn Road, Middlesex; First: I direct that all my just debts and funeral and testamentary expenses shall be paid and satisfied. And whereas, I am entitled under the settlement made on my marriage with my present wife, Marian, otherwise Mary Ann Henfrey, and in the events therein mentioned, to the reversion of the sum of two thousand pounds, to be paid and invested under the trusts of the said settlement. Now I give and bequeath unto my said wife, Marian, otherwise Mary Ann Henfrey, her executors and administrators, one moiety of the said sum of two thousand pounds so settled and to be paid and invested as aforesaid; and I give and bequeath to my said wife all my plate, linen, china, and household effects, and subject to the payment of all my just debts and funeral and testamentary expenses; I give and bequeath all the rest and residue of the estate and effects to which I am or at any time may be entitled, or which I have or may have power to dispose of by this my will, including all my contingent interest under my late father's will, unto my brother Charles Henfrey, his executors, administrators and assigns. And I appoint my said brother, Charles Henfrey, and my brother-in-law, Charles Marston Stretton, executors of this my will. And I hereby declare my mind and will to be that the said Charles Henfrey, and Charles Marston Stretton, shall not be answerable or accountable for any more monies than they shall actually receive under this my will, nor for any involuntary loss whatsoever. And, lastly, I hereby [470] revoke and make void all my other wills: in witness whereof, I have, to this my last will and testament, contained in one sheet of paper, set my hand and seal, this fourteenth day of July, one thousand eight hundred and thirty-eight.

"HENRY HENFREY.

L. S.

"Signed, sealed, published and declared by the above-named testator, as and for his last will and, testament in the presence of us who, at his request, in his presence, and in the presence of each other, have subscribed our names as witnesses thereto—Jos^h. Elmer, W^m. E. Quinton, of No. 19, Southampton Buildings, Chancery Lane, Middlesex."

2nd. "I here by Leave all I possess in this world to my wife, Mary Ann Henfrey, Containing Household Furniture, Books, &c. I likewise wish to be paid to Miss Diana Maddox, the sum of five pounds, which money was borrowed for my use, this 26 day of February, 1839.

"HENRY HENFREY.

"Witness, Thomas Mitchell; witness, Elizabeth Latham."

On the 8th of November, 1839, letters of admi-[471]-nistration with the latter paper annexed, were granted by this Court to the widow, who was now cited "to bring into and leave in the registry, the letters of administration so granted, and shew cause why they should not be revoked and declared null and void, &c., and why probate of the two papers as together containing the last will and testament of the deceased should not be granted to the executors therein named."

A proctor having appeared for the widow, and declared that he opposed the first paper, the proctor for Mr. Charles Henfrey (the party proceeding) was assigned to declare whether he would propound the same; he then brought in an act on petition, in which he alleged the due execution of both papers by the deceased, and "referring to the last will and testament of the said testator, as contained in the two testamentary papers aforesaid," prayed the administration heretofore granted to be declared null and void, and that probate of the two papers might be granted to the executors.

Addams in support of that prayer, contended that the deceased, when he executed

the last paper, did not intend to revoke the former, which was a formally executed instrument, referring to the settlement made on the testator's marriage, appointing executors, and disposing of all the property; that the latter paper was intended as codicillary; that supposing the gift in that instrument to the widow conveyed the whole of the property, which was doubtful, and ought to be left to a Court of Construction, still that the appointment of executors in [472] the will was not revoked; and he cited *Beard v. Beard* (3 Atk. 71).

Haggard and Curteis contra.

Sir Herbert Jenner. This case comes before the Court on petition, in which very little more is stated than appears upon the face of the papers themselves, namely, that the deceased made a will on the 14th of July, 1838, and afterwards made a will disposing of all his property; now the latter paper, on the face of it, would seem to revoke the former will. I have always understood that the appointment of executors was considered a gift to them of all the testator's property; here, by the latter paper, all is given to the widow; there was, therefore, no necessity to appoint executors. There is no case in which it has been held that where there are two wills it is absolutely necessary that there should be a clause expressly revoking the appointment of executors, or that two substantive wills should be admitted to probate.

The latter paper, in my view of it, was executed as a will and not as a codicil, and being so executed, and a perfect instrument disposing of all the property, although there is no express revocation of the former will or of the appointment of executors, it is, ex necessitate, a revocation of the former will.

At present I overrule the petition and confirm [473] the administration already granted, and direct it to be delivered out. If the party wishes the question to be brought before the Court in a more formal shape I shall be glad to hear it.

HAWES AND VICAT *against* PELLATT. Arches Court, June 29th, Nov. 12th, 1839; June 15th, 1840.—Causes of church-rate may be removed by letters of request from the commissary of the bishop to the Court of Arches.—In the libel for subtraction of church-rate, the defendant being wrongly assessed for a small portion of the rate as landlord (erroneously under a local statute), the Court allowed the libel to be reformed, holding that the rate was not bad in toto.—In a suit for subtraction of church-rate, the churchwardens having in the first instance proceeded erroneously, the defendant, who eventually consented to pay the rate, was not condemned in the whole costs, but in 5l. nomine expensarum.

[Observed upon, *Asterley v. Adams*, 1871, L. R. 3 Adm. & Ecc. 368.]

This was a suit for subtraction of church-rate, brought by virtue of letters of request from the commissary of the Bishop of Winchester for the parts of Surrey within that diocese, by the churchwardens of the parish of Christ Church, Surrey, against Mr. Pellatt, a parishioner. The defendant appeared to the citation under protest, and contended that he had been wrongfully cited; that it was contrary to the statute 23 Hen. 8, c. 9, that he should be called upon to appear in this Court by letters of request, and that the reason stated for granting the letters of request, namely, that he might have the benefit of employing advocates and proctors, did not apply to him, as he, being a dissenter, did not intend to employ advocates or proctors, who, being members of the Established Church, would, he conceived, necessarily have a bias against him, and for whose assistance, although unsuccessful, he would have to pay.

[474] Addams contra, submitted that there could be no doubt that the letters of request were lawfully issued, and he cited *Ex parte Williams* (4 Barn. & C. 313).

Sir Herbert Jenner. The question is whether a suit for subtraction of church-rate, which is undoubtedly of ecclesiastical cognizance, may be brought here by letters of request. It is almost of daily occurrence that questions of ecclesiastical cognizance are so brought, and the practice has been recognized by Courts of Common Law, and I know of no principle of law which distinguishes cases of church-rate from others.

With regard to the reason set forth for issuing the letters of request, it is usual to state that the parties would have the benefit of the assistance of advocates and proctors, which they could not have in the Court below. It may be inconvenient to the defendant to be cited out of his diocese or peculiar jurisdiction, and, if unsuccessful, to pay the costs of the party taking out the letters of request; but it is the plaintiff who is under the necessity of resorting to legal advice and assistance, since every act

he does must be in accordance with the rules of the Court; if he commit an error in drawing up the citation or libel he may at once fail in his suit; whereas the party cited has less need of assistance, and may conduct his own defence if he chooses to do so, without professional advice.

I am clearly of opinion that the right of the [475] party to proceed in this Court is well founded; this has been decided in the case cited by Dr. Addams, in which Lord Chief Justice Abbott said, "Taking this offence to have been created by the 5th and 6th of Edward 6th, c. 4, I should think that the authority thereby given to the ordinary is to be exercised in the same manner as any other authority given to that officer. Now one mode of exercising his authority is by letters of request to the archbishop or his substitutes. But in *Wenmouth v. Collins*, Lord Holt appears to have been of opinion that the offence of brawling was not created by the statute which has been referred to, and I think that his opinion was correct. If that be so all difficulty is removed, and there can be no doubt that the Court of Arches may derive jurisdiction from letters of request." It appears that in that case another objection had been taken, namely, that the letters of request ought to have been addressed to the bishop of the diocese and not to the Court of Arches; that the appeal should have been from the commissary, first to the bishop, and then to the Court of Arches; but it was held that an appeal from the commissary to the bishop, whose judge he was, would be an appeal *ab eodem ad eundem*, and that the appeal was direct to the Court of Arches. This is a parallel case, and there can be no doubt of the jurisdiction of the Court. I, therefore, overrule the protest, and with costs.

The libel was afterwards brought in; it was in the usual form, except that it alleged that Mr. Pellatt was assessed in the sum of 1l. 19s. 2d. as [476] a rate upon 235l., the rental by composition of the premises partly occupied by himself, and the remainder let to third parties; that he had compounded for these premises under the authority of the local act, 51 Geo. 3, c. 32, s. 59, &c.

Mr. Pellatt opposed the admission of the libel; he contended that he had been unduly assessed; that the statute with reference to which the assessment had been made did not apply to church-rates; and he denied that he had compounded for this rate, although he had formerly entered into a composition; and he prayed the libel to be rejected.

Addams for the churchwardens, admitted that the statute did not in terms apply to church-rates, but stated that it had been usual in the parish to include church-rates, and that it was for the benefit of landlords to do so; that as the defendant himself had heretofore compounded, he ought not to be at liberty now to resist the rate; he submitted that it was not necessary to have a fresh agreement for each rate.

Nov. 12th.—Sir Herbert Jenner. In this case the Court deferred giving its opinion until it had had an opportunity of looking into the act of Parliament referred to in the libel, that act being a local act, and not printed with the statutes at large, the Court had no opportunity of seeing.

The first article of the libel is proper to be admitted.

The second pleads that Mr. Pellatt was, at the time of making the rate, and before, the landlord [477] of certain houses, and it referred to the Act of Parliament, 51 Geo. 3, c. 32, entitled, "An Act for better assessing and collecting the poor and other rates in the parish of Christchurch, in the county of Surrey, &c.," in order to justify the churchwardens in having assessed him, and not the occupier of certain premises included in the rate; and the question is whether Mr. Pellatt is liable to be rated as landlord, or whether the occupiers ought to have been rated. I have looked very attentively at the Act of Parliament, and I do not find that it applies in any way to church-rates, and if church-rates were included in the act, this Court would have no jurisdiction, as a remedy is given by the Act by distress, and there is no reservation of the jurisdiction of this Court. I am of opinion that the second article is such as not to render Mr. Pellatt liable to pay the sum assessed. It is said that he had up to this time agreed to pay according to the present rate, but I am of opinion that the statute does not in any way bind Mr. Pellatt to be rated in this manner. In the heading of the rate it appears that, except for a small portion of this rate, Mr. Pellatt is liable to be rated for premises in his actual occupation. The Court is not prepared to say that because an error has been made to a small amount in the sum assessed, therefore the rate upon the face of this libel is bad in toto. I shall, therefore, refer the libel back for reformation, with respect to the second article.

The libel was then reformed, (a)¹ and 1l. 9s. 4d. [478] only claimed as a rate on a rental of 176l. 6s. 8d. on the premises in the actual occupation of Mr. Pellatt. Various proceedings were afterwards had; Mr. Pellatt gave in his answers, which were objected to as insufficient, and further answers were directed to be brought in. He afterwards gave in an allegation, setting forth various grounds of opposition to the rate, namely, that it was not legally and duly made; that it was excessive; that it was retrospective; that some of the purposes for which it was intended were illegal; that in several instances the owners instead of the occupiers were assessed; that it was unequal; that no demand had been made of him for 1l. 9s. 4d., the sum now claimed, but that the demand was for the larger sum.

Mr. Pellatt afterwards declared he no longer opposed the rate, and prayed to be dismissed.

Addams on behalf of the churchwardens, prayed that Pellatt might be condemned in the costs.

[479] June 15th, 1840.—Sir Herbert Jenner. The only question now before the Court is whether Mr. Pellatt is to be condemned in the costs occasioned to the parties proceeding against him, he having admitted the amount now demanded of him? The general rule and principle in such cases is that where churchwardens are successful, they are entitled to have their costs; but it is contended that this case is an exception to that rule.

There is no ground for holding that Mr. Pellatt was not justified in opposing the demand originally made of him, although the difference in amount now demanded was trivial, there being a great principle involved in the question; and had Mr. Pellatt offered no further opposition when the libel was admitted as reformed, the Court would not have condemned him in costs, as in *The Streatham case*, (a)² and probably they would not have been pressed by the churchwardens. But Mr. Pellatt was not so satisfied, and in his answers went into a great deal of extraneous matter, which the Court was of opinion he ought not to introduce, and the answers were directed to be amended; he afterwards brought in an allegation, setting up various grounds of opposition to the rate, which allegation was opposed, and directed by the Court to be reformed. Mr. Pellatt, however, now withdraws that allegation, and consents to pay the rate now sued for. There are some circumstances which should induce the Court not to condemn the party in the whole of the costs, for the churchwardens, [480] at the commencement of the suit, were clearly in error in applying to church-rates the Act of Parliament regulating the poor and other rates in the parish. I think nothing can be imputed to Mr. Pellatt in opposing the rate until the libel was reformed, although his resistance afterwards was not justifiable; under all the circumstances, then, I am of opinion that I shall best consult the justice of the case by condemning Mr. Pellatt in the sum of five pounds, nomine expensarum.

(a)¹ The assessment charged in the libel originally was for
 three houses in tenements, two glass houses, and two houses
 and tenements at 200l. £1 13 4
 Also, six houses in tenements 0 5 10

£1 19 2

When reformed, so much of the former assessment of which
 Mr. Pellatt was not the occupier was deducted from the
 assessment of

£200 0 0
 viz. 23 13 4

Leaving £176 6 8

Being, at 2d. in the pound, £1 9 4

(a)² *Blunt and Fuller against Harwood*, 1 Curt. 648.

WHITE AND JACKSON *against* BEARD. Consistory Court of London, July 27th, Nov. 8th, 1839; June 12th, 24th, 1840.—The parishioners in vestry assembled having passed a resolution that a rate should be made, the fact of the rate itself not being then made, but drawn up subsequently by the churchwardens alone will not vitiate the rate.—A church-rate being passed by a resolution of the vestry, it is no objection to such rate that the heading was subsequently inserted.—Query, whether Morant's History of Essex is admissible evidence to prove that Great and Little Coggeshall are one parish.—If a church-rate under 10l. be disputed in the Ecclesiastical Court, it is not necessary to plead that the party had been summoned before the magistrates.—A church-rate is not invalid by reason of omissions of an inconsiderable amount, it is a question of degree, and in the present case, where the rateable property was 8622l., and property was omitted amounting to 200l., the Court pronounced for the rate, but without costs.

[Held not applicable, *Asterley v. Adams*, 1871, L. R. 3 Adm. & Ecc. 369.]

This was a suit for subtraction of church-rate by the churchwardens of Coggeshall, Essex, against William Beard, a parishioner. The libel pleaded the making of the rate (of sixpence in the pound) in vestry, on the 23rd of August, 1838, pursuant to due and legal notice; the occupation by Beard of a house and premises of the annual value of 7l. 7s. 8d., for or in respect of which he was rightly and equally assessed in the said rate at the sum of three shillings and nine-pence halfpenny; that payment had been frequently demanded, &c., and refused, and that defendant had been summoned before the magistrates, and that he denied the legality of the rate, &c.

[481] On behalf of the defendant an allegation was given in, pleading—

1st. That the churchwardens and parishioners of Coggeshall, in the county of Essex, in vestry assembled, on the 23rd of August, 1838, passed a resolution that a rate of sixpence in the pound should be made for the repairs of the church, &c., but that no rate or assessment was then or at any subsequent vestry made in pursuance thereof.(a)

2nd. That the words and figures following, to wit, "An assessment and rate thereon, &c." (the heading of the rate), appearing in the pretended rate-book, were not written in the said book or any other book until long subsequent to the passing of the said resolution, nor until in or about the month of December, 1838.(a)

3rd. That in November, 1838, Fisher Unwin, one of the parishioners of Coggeshall, in obedience to a summons served upon him, attended by his solicitor, before justices of the peace for the county of Essex, when he was required to pay the aforesaid rate, &c.; that a certain book was then produced, containing a copy of the said resolution, and the names of several of the parishioners and sums assessed against them respectively, and a confirmation thereof by the archdeacon, but the said book did not contain any of the words recited in the second article; that the said justices heard the complaint of the said churchwardens against the said Fisher Unwin for the non-payment of the said pretended rate, and also heard the objection of the solicitor on behalf of the said Fisher Unwin that no rate had in fact been made, and the said justices thereupon discharged the summons without making any order upon the said Fisher Unwin.(a)

4th. That the said pretended rate or assessment having been made by the churchwardens alone, under colour of the aforesaid resolution, but without submitting the same to the parishioners in vestry assembled, and, consequently, without opportunity afforded to the said William Beard or any other of the parishioners to object and to take the opinion of the parishioners in vestry assembled, on his or their respective assessments, or the general equality and fairness of the said pretended rate, the same is invalid in law.(a)

[482] 5th. That the pretended rate or assessment is not a rate or assessment upon all properties in the parish of Coggeshall, or rateable to the said parish of Coggeshall, or upon the inhabitants of the said parish, or rateable thereto; but, on the contrary, the same is partial and unequal, for that the occupiers of houses and lands and the rateable property in Little Coggeshall are altogether omitted in the said pretended rate; that it appears from and by the book intituled the History and Antiquities of the County of Essex, written by Philip Morant, M.A., and to which book full faith and credit are and ought to be given in Courts of law on matters of public history

(a) Rejected by the Court.

relating to the said county; that although Coggeshall is divided into two districts, Great and Little, having separate overseers of the poor, the same is a distinction of recent date, and doth not occur in the royal charters, nor in ancient deeds and records; and that Little Coggeshall may be in a different hundred, and within the peculiar jurisdiction of the dean of Bocking, at whose visitation a sidesman is annually admitted, but it now forms, and hath ever since the suppression of the Cistercian Abbey of Coggeshall, in the year 1538, formed part and parcel of the parish of Coggeshall; that in the district of Little Coggeshall there were formerly a church built by the abbot for himself and the monks, and another for the inhabitants of Little Coggeshall; but that since the aforesaid suppression of the abbey such churches have not been maintained, no churchwardens have been appointed for the district of Little Coggeshall, and the inhabitants of Little Coggeshall hold, possess, and enjoy pews and sittings in the church locally situate in the district of, and which was formerly the parish church of, Great Coggeshall alone; that they attend there for the ceremonies of baptism, marriage, and burial, and they pay small tithes and Easter offerings to the vicar, who officiates in the church situate as aforesaid in Great Coggeshall; that the rental of the messuages or tenements, lands and premises and rateable property within Little Coggeshall is of the annual value of 3000*l.* or thereabouts, and that by the omission to rate or assess the rateable property and inhabitants of Little Coggeshall, the properties and inhabitants rated and assessed in the said pretended rate are chargeable with the payment of sums of larger amount than they would be liable to pay under a rate duly made.

[483] 6th. The sixth pleaded that, irrespective of the omission of the inhabitants of Little Coggeshall, the rate was partial and unequal, divers persons being omitted to be rated in respect of their properties within Great Coggeshall, &c.

7th. The seventh annexed a list of several persons and properties omitted.

8th. That Beard was summoned to appear before W. H. Pattisson, and other her Majesty's justices of the peace for the county of Essex, on the 12th of March last, and in obedience thereto, appeared before them; that previously to such time only one demand had been made of him by the said White and Jackson for payment; that the demand was so made of him in or about October, 1838, and before the words pleaded in the second article (the heading of the rate) had been inserted in the said book, and, consequently, before the rate had been made, and that no demand having been made of the said Beard for payment of the very rate in respect of which he was so summoned as aforesaid, the proceedings before the said justices were mere nullities, and cannot found the jurisdiction of this Court to entertain the present suit for enforcing payment of a church-rate not exceeding ten pounds from the party proceeded against. (a)

This allegation was opposed.

Addams and Haggard for the churchwardens. It is not denied that a vestry was held on the 21st August, 1838, and that the vestry voted a rate; there was no necessity for a further vestry to be called to make a rate. As to the heading of the rate not being inserted till December, as it is not denied that the rate was made, and for the repair of the church, this is no objection to the rate; it does not signify if the rate was headed at one time or at another, or if there was no heading at all. The resolution of the vestry, that there shall be a [484] rate, is sufficient; the drawing it out is a matter of subsequent detail. The fifth article pleads that the rate is unequal, inasmuch as the inhabitants of Little Coggeshall are omitted, and that it appears from Morant's History of the County of Essex, "to which full faith and credit ought to be given by Courts of law," that Great and Little Coggeshall form one parish. It would, however, appear from Morant's book that they are separate parishes; but if the other party chooses to aver the contrary the plea must be altered. This species of proof is not legal evidence (Phillipps, 605-6). That part of the allegation which pleads that certain persons were omitted in the rate is the only part of it which is admissible.

The Queen's advocate and Harding in support of the allegation. One question is whether a resolution of the vestry, followed up by the churchwardens, will suffice to make a rate valid; whether the rate should not be made in vestry? According to Degge (Parsons's Counsellor, part 1, c. 12, p. 202, edition 1820) the parishioners are

(a) The Court directed the fifth article to be reformed, admitted the sixth and seventh, and rejected the eighth, see post, p. 489.

not only to resolve but to make the rate. Burn says the same thing (Ecel. Law, vol. 1, tit. "Church," p. 378, citing Gibs. 196, and 1 Bac. Abr. 373). The practice in all parishes is in conformity with the law as laid down by Degge and Burn. Then as to the heading of the rate; it was not made till December, 1838, though the meeting was in August, and then by the churchwardens alone. The summons before the magistrates was a mere nullity, for there had been no demand after the rate was made, and, therefore, this Court has [485] no jurisdiction, the amount sued for being under 10l. With respect to Morant's History, it is submitted that such works are admissible as evidence for particular purposes. Morant's book, we are informed, has been admitted at the assizes (fifteen or sixteen years ago) as evidence to prove who was liable for the repair of a bridge.

Judgment—Dr. Lushington. The allegation now given in begins by stating that, although the vestry passed a resolution that a rate should be made, none was made then, or at any subsequent vestry, in pursuance thereof. I must assume, therefore, that nothing was done by the vestry, except passing a resolution that a rate should be made, and that the rate was made at a subsequent period by the churchwardens themselves; and I am at present to consider (it being of importance to give my opinion on the questions of law) whether this objection will invalidate the rate.

That every church-rate ought, in the first instance, to be made by the whole parish, and not by the churchwardens, it would be difficult to deny. But I am not aware of any authority which says that, supposing a parish should pass a resolution to assess itself in a certain sum, a rate made afterwards by the churchwardens, in pursuance of such resolution, would be invalid, because it was not submitted to the vestry, and approved. I believe there is no authority for such a position, and I believe that the practice is to pass a resolution, and for the churchwardens to make a rate in pursuance [486] of that resolution. I cannot say that the irregularity, if it be one, is to vitiate the rate altogether; I am not prepared to go to that extent, or to say that the churchwardens, if there has been a resolution of the vestry, are precluded from collecting a just and equal rate pursuant thereto; for if they take upon themselves to collect a rate after a resolution passed by the vestry, without consulting the vestry, and it should turn out that it was not an equal rate, through the omission of persons liable to be rated, or by assessing one set of parishioners and not another, the rate would be open to any objection on the ground of inequality, and they could not recover it against any parishioner. No injustice could be done, since any parishioner, proving the fact, would be relieved from the rate. If I were to hold this to be an objection, I should invalidate a great many rates in the kingdom. I think, therefore, that the objection in the first article cannot stand.

With regard to the next objection, as to the heading of the rate, I think it of no importance in respect to the validity of the rate, as the foundation of the rate was the resolution of the vestry, and if the rate is in other respects fair and equal, it is unimportant whether the heading was inserted at the time it was confirmed or afterwards; for the heading is not of the essence of the rate; it is a mere form, so that this objection cannot avail.

With reference to the third article, the objection could not stand for another reason. It is merely to shew that the heading was not added till December, 1838, and for that purpose; if I had been of opinion that the objection in the second [487] article was available. I might have allowed so much to stand, but not the latter part, "That the justices heard the complaint of the churchwardens against F. U., for the non-payment of the pretended rate, and also heard the objection of the solicitor on behalf of F. U.; that no rate or assessment had in fact been made, and the justices thereupon discharged the summons, without making any order:" for nothing the justices may have said or done could have any effect on my mind.

The fourth article recapitulates the objections contained in the preceding articles, and I am of opinion that, if every word was true, it would not invalidate the rate.

The fifth article contains an objection of a perfectly different kind; the substance of it is, that Great and Little Coggeshall are so far united in law that the inhabitants of Little Coggeshall ought to be rated for the repairs of the church, and that they are not so rated. It is undoubtedly competent to the party to put this in plea; for if a number of persons, who ought to be rated, be omitted in the rate, the rate is unequal, and therefore invalid; so that the substance of the article is not objectionable; but there is the greatest possible objection to the manner in which it is pleaded. The

proper form is to plead that the inhabitants of Little Coggeshall have not been assessed to the rate, and to allege the reason why they ought to be rated to the parish church of Coggeshall. And with respect to the admission of Morant's History of Essex, I shall allow the party to plead whatever he thinks proper from this history; but I give no [488] opinion as to its admissibility as evidence, which can only be determined when I shall have the whole question before me, and can see what particular facts this history is intended to support. County histories may be evidence of some facts and not of others: so I reserve this question till the hearing of the cause, as it would be premature for me now to admit or refuse this evidence.

The sixth and seventh articles are, no doubt, admissible, for the objection goes directly to invalidate the rate, by alleging that it is partial and unequal, "for that divers persons, who by law ought to have been rated and assessed, in respect of their properties within Great Coggeshall, are not rated."

I do not think the objection intended to be raised in the eighth article can by possibility avail. The objection, as I understand it, is this: that the party was summoned and appeared before the magistrates in March, 1839, but that, in fact, the summons was received before the rate legally existed, and, therefore, there was no proper proceeding before the magistrates; consequently, this Court has no jurisdiction, because a summons precedent is requisite to found the jurisdiction of the Court. But this objection is not founded in law, because these Courts have original jurisdiction in matters of church-rate, of which they could have taken cognizance anterior to the 53 Geo. 3, c. 127, which limited the jurisdiction of these Courts in one respect only—that is, in cases where the amount sought to be recovered does not exceed 10l., and where the validity of the rate is not in [489] question. This very point has been decided in the case of *Ricketts v. Bodenham* (4 Ad. & Ell. 433), so that if you sue a party in the Ecclesiastical Court, and he denies the validity of the rate, the jurisdiction is founded; but if you sue for 10l., and the party admits the validity of the rate, these Courts have no jurisdiction unless the plaintiff has resorted to the summary jurisdiction of the magistrates. But here, assuming all the facts to be as they stand in the allegation, the validity of the rate is denied, and consequently the jurisdiction of the Court is founded. So that this article must be rejected.

I, therefore, reject the first four articles, direct the fifth to be reformed, admit the sixth and seventh, and reject the eighth.

Nov. 8th, 1839.—The fifth article having been reformed (being divided into two), was objected to in its reformed state. It now stood as follows:—

5th. That the pretended rate, &c., is not a rate or assessment upon all properties in the parish of Coggeshall, or rateable to the said parish of Coggeshall, or upon all the inhabitants, &c.; but, on the contrary, the same is partial and unequal, for that the occupiers of houses and land in Little Coggeshall are altogether omitted. That Little Coggeshall is appendant to the parish of Great Coggeshall, and the property within the same is subject to and ought to be rated and assessed to the church-rate. That the inhabitants of Little Coggeshall have not any church to uphold or maintain, save only the parish church situate in Great Coggeshall, to which church the inhabitants of Little Coggeshall resort for divine service; that they have, possess, and enjoy many of the principal pews and sittings in the said church, and claim and enjoy all the privileges and im-[490]munities to which the parishioners are entitled, as connected with the sacramental offices and ceremonies of the church for baptism, marriage, and burial; that there are two distinct tables of fees for the interment of the dead within the said parish, viz., one for those who are parishioners, and one for non-parishioners, and the inhabitants of Little Coggeshall at all times claim the right to the interment of their dead as parishioners, and pay only those fees to which parishioners are liable. That they also pay small tithes, or a modus in lieu thereof, and Easter offerings to the vicar officiating in the church of Great Coggeshall. That by such omission to rate or assess the rateable property and inhabitants of Little Coggeshall, the proprietors and inhabitants rated and assessed in the said pretended rate are chargeable with the payment of sums of much larger amount than they would be liable to pay under a rate duly made, for that the rental of the messuages or tenements, land and premises and rateable property within Little Coggeshall is of the annual value of 2042l. or thereabouts, and the rental of the messuages, &c. in Great Coggeshall is of the annual value of 8622l. or thereabouts.

5th a. In part supply of proof of the premises in the preceding article mentioned,

the party proponent craves leave to refer to Morant's History of Essex, to be produced at the hearing of this cause; and the party proponent doth allege and propound the same to be a true and authentic history to which good faith and credit have been given in courts of law, &c.

Addams and Haggard objected that the article in its present state did not aver that Great and Little Coggeshall are one parish.

The Queen's advocate and Nicholl contra. We aver that Little Coggeshall is appendant to Great Coggeshall, which means, that it is "part and parcel" of it; that there is no church to maintain but that of Great Coggeshall; that the parishioners of Little Coggeshall resort thereto for all the ser-[491]-vices and sacraments of the church; that there are two tables of fees in the parish, one for parishioners and one for non-parishioners, and the inhabitants of Little Coggeshall claim to pay the lowest rate, and it appears that they contribute to the payment of the clergyman in tithes (or a modus) and Easter offerings.

Judgment—Dr. Lushington. Many facts are pleaded in these articles which, if true, would go a considerable way towards shewing that Great and Little Coggeshall are one parish; it is not merely averred that the inhabitants of the latter occupy pews and sittings in the church, but that they pay small tithes (or a modus) to the vicar, and Easter offerings. The objection I entertained to the article before was, that I thought Morant's History was too much mixed up in it to enable me to see whether it was evidence or not. As the article now stands I do not think it open to objection. But there is another point, suggested by Dr. Nicholl, on which I am not in a condition to give any opinion; namely, that in ancient times, prior to Henry the Eighth, these may have been separate parishes, though afterwards united together; and a question would then arise whether, the church of Little Coggeshall having been demolished, the parishioners are to be rated to Great Coggeshall. This question was not raised in the former discussion, and it would be improper in me to give any opinion as to the effect of an ancient union of that kind. As the fifth article now stands it pleads a plain and simple fact, that [492] part of the parish is omitted in the rate which ought to be assessed, and I am bound to admit it.

With respect to article 5 *a*, pleading Morant's History of Essex, according to my apprehension I should have thought that a county history of this description is not evidence to prove any one particular fact, such as to shew that a particular parish paid such tithes, or a modus in lieu, or that a parish paid Easter offerings to the vicar; so far as regards these facts, a county history would not be admissible evidence. But in respect to a matter concerning the whole public, as, for example, at what time or place a particular battle was fought, I always thought a county history was admissible. But Dr. Nicholl has cited the authority of Mr. Baron Alderson, who admitted a county history as evidence of a particular fact, relating to the boundaries of a parish. The case occurred at Nisi Prius, and the writer of the book had no interest in extending the boundaries of the parish. The course I am disposed to take is, to let the article stand, but to reserve my opinion till the hearing of the cause, whether any part of the history can be received as to any particular fact.

The last point is as to the omissions in the rate, which are said to amount to 290*l.* per annum on a rental of 8620*l.*, and it has been said that this is so immaterial an amount that the Court would not quash the rate on that ground. I avail myself of the opportunity of stating what my opinion is with regard to this point.

I conceive that if there be omissions in a rate which seriously and materially affect the interests of the parish at large, by a part of the parishioners [493] being exempted from a rate which they were liable by law to pay, which is an injury to the rest, the Court is bound to remedy the wrong in the only way in which a remedy can be afforded, namely, if a suit is instituted, the Court will refuse to enforce the rate. But the question is one of degree.

With regard to paupers, if such be omitted, the Court will not consider that the omission invalidates the rate. But is the Court to quash a rate, or refuse to enforce a rate, because there might be omissions amounting to 5*l.*, or 6*l.*, or 7*l.* a-year? This Court never laid down such a rule, and never will. There could not be a greater absurdity, there could not be a greater injustice to the people of this country, than to quash a rate because in a rental of 8000*l.*, or 9000*l.*, or 10,000*l.* there were omissions of such trivial amount. It would be acting in defiance of the common law maxim, *De minimis non curat lex*, and it would be a doctrine which I never held, and never

shall hold till compelled by a superior Court. In this case, is 290l. per annum a considerable amount or not? I say it is; it makes a difference of one-twelfth (a)¹ to every man in the parish. I am, therefore, of opinion that it would be a material omission.

June 12th, 1840.—In Trinity Term the cause came on for hearing on the evidence of two witnesses, and the answers [494] of the churchwardens, the defendant having abandoned the fifth article as to the omission of the inhabitants of Little Coggeshall.

Addams and Haggard for the churchwardens. The objection to the rate is now confined to the alleged inequality by reason of the omission of certain persons (named in a list) in Great Coggeshall who are liable to be rated. The annual amount of rateable property in the parish is 8622l., and the amount of the property omitted, as appears from the answers of the churchwardens, is 65l. 11s. 6d., belonging to fifty or sixty persons, which will not make one halfpenny difference to Mr. Beard. It has been stated by Sir John Nicholl, (a)² with reference to church-rates, that a person intending to object to the assessment ought to attend in the vestry and state his objections in the first instance. Mr. Beard is a vestryman, and the rate was avowedly made on the assessment for the poor. No objection was alleged against the rate, but an adjournment for six months was moved, but negatived, and a rate was carried. Assuming the poor rate as the ground of valuation has been sanctioned by the Ecclesiastical Court. [Dr. Lushington. I do not say that it may not be convenient to do so; but I am not aware that any judge of this Court has said so, except myself. I am of opinion that if the poor rate contain all the property rateable to the church-rate, there is no reason why it should not be used.] Amongst the items said to be rateable are the [495] poor-house, which is used for the meeting of the guardians, 40l. rent being paid for the use of it, and the parochial school.

The Queen's advocate and Nicholl for the defendant. The real question is, whether there be sufficient ommissa to invalidate the rate. Of the three kinds one is property omitted without any reason at all; the second, property for which the landlords have been rated instead of the occupiers; the third class consists of omissions of persons deemed paupers. The amount of the first kind of ommissa they make 66l.; we make it 152l.; they estimate the value of the property much too low. The property rated to the landlords amounts to 133l. The omissions in the third class amount only to 16l. The total sum is, therefore, 301l.

June 24th.—*Judgment*—*Dr. Lushington*. I have taken time for the consideration of this case, from an anxiety to support the judgment I am about to pronounce, as far as possible by reference to past authorities. I confess, however, that the delay arose rather from this anxiety than from any great expectation that by such examination as I could make any important light would be thrown on the subject. It is a great misfortune, with reference to these questions of church-rate—church-rate depending on immemorial usage, and not being governed by act of Parliament—that the law is not laid down either by elementary writers or by the decisions of Courts, with such precision as to afford any definite principles to guide my de-[496]-termination in this case. Church-rate not being so important in point of amount as poor-rate, it has neither attracted the same attention, nor received the same consideration as its sister branch of taxation. One consequence of this is that this Court has no power whatever to amend a church-rate; and it is placed in this situation, that where a suit is brought against an individual who resists the payment of church-rate, it must either pronounce the rate altogether null and void, and relieve him from the payment of the rate altogether, or it must, on the other hand, pronounce for the validity of the rate.

Now, looking at the authorities on this question, it appears, in a previous case, to have been determined that the Ecclesiastical Court has not jurisdiction in any original proceeding by a rate-payer to set aside a rate on the ground of inequality in the assessment; for the remedy of the party unequally assessed is to enter a caveat against the confirmation, or to refuse payment of the rate. This is the doctrine laid down in the case of *Watney v. Lambert and Simpson* (4 Hagg. Ecc. 84) by Sir John Nicholl, and the necessary inference from this doctrine is that it is out of the power

(a)¹ I.e., a rate of $5\frac{1}{2}$ d. upon 8910l. ($8620 + 290 = 8910$) would produce nearly as much as a rate of 6d. upon 8620l.; difference $\frac{1}{2}$ d. = one-twelfth of the rate. But the proportion of 290 to the whole rental is only about one-thirtieth.

(a)² *Lee and Parker v. Chalcraft*, 3 Phill. 647.

of any parishioner to bring a rate under the consideration of this Court, on the ground of erroneous confirmation, and, consequently, the party has no remedy except by resistance to the rate; because in an objection to the confirmation of a rate I cannot administer any remedy, since it has been decided by the same authority that a rate may be sued for and [497] enforced notwithstanding no confirmation has taken place (*Knight and Littlejohns v. Gloyne*, 3 Add. 53).

The present rate in point of amount is most trifling; the whole sum sued for in the libel is 3s. 9½d. It is quite clear that, so far as regards the pecuniary interests at stake, it never could be worth the while of any individual to resist the present rate; since, if he succeeded, and received the costs decreed by the Court, the trouble and expense must be infinitely greater than any compensation of this kind which could be awarded by the Court.

Regretting as I do that so long a litigation should have taken place on account of a sum so very small in amount, I cannot consider myself entitled in justice to say that, however small the amount of the rate may be, a party has not a right, if he considers that he has a legal ground of objection, to bring forward a legal defence in this Court, and there may be reasons for resisting the payment of the rate, however small the amount; because it may be that, by acquiescing in the payment of a small rate, made upon an erroneous principle, a rate of greater amount might be imposed on the parish, and the individual so acquiescing might be prejudiced thereby; because it has been stated by Sir John Nicholl that the acquiescence of a parishioner in any particular mode of rating is to be taken as a *prima facie* proof of the equality and justness, and fairness of the rate (*Lambert and Simpson v. Weall*, 4 Hagg. Ecc. 103).

I have stated the difficulty which judges experience in these questions, from the absence of any [498] distinct authorities with regard to church-rates, and I must say that the examination of all that has taken place heretofore only augments my difficulty: because if I am to look to any, I must look to all. From Archdeacon Prideaux I find that the ancient custom of rating was totally different from that of the present day, for the ancient custom was to assess the landlords of estates for their land or stock in the parish, one or the other, but not the whole; but the present and the proper mode is to assess every parishioner, according to the value of the lands and tenements which he occupies in the parish, without other distinction.

When I look to the provisions of the statute—the only statute which in the slightest degree applies to church-rate, is the 53 Geo. 3, c. 127—that statute applies merely to the collection of the rate, and has no reference either to the mode in which it should be made, or to any of the principles which should govern any difficulties in the case. I consider that that statute affords me no assistance whatsoever; because the object of the 7th clause is simply to give a more easy mode of collecting a church-rate, where the validity of the rate is not disputed, and it is somewhat singular, looking at that statute, which is entitled “An Act for the better regulation of Ecclesiastical Courts in England, and for the more easy recovery of church-rates and tithes,” that the seventh section, after enacting that “if any one duly rated to a church-rate or chapel-rate, the validity whereof has not been questioned in any Ecclesiastical Court, shall refuse or neglect to pay the same sum at which he is rated,” the justices may direct the payment, if under 10l., [499] contains this proviso: “That nothing herein contained shall extend to alter or interfere with the jurisdiction of the Ecclesiastical Courts, to hear and determine causes touching the validity of any church-rate or chapel-rate, or from proceeding to enforce the payment of such rate, if the same shall exceed the sum of 10l., from the party proceeded against.” If the validity of the rate be questioned under this proviso, these Courts are entitled to entertain jurisdiction to determine the validity of the rate; but it gives the party a right of appeal from the justices to the Quarter Session; but I confess, when I look at the clause altogether, I have great difficulty to understand on what ground there could be an appeal at all.

I mention these circumstances to shew how entirely these questions have been left by the Legislature to be decided by the Court, without any assistance to guide its determination.

What are the principles upon which church-rates must necessarily stand? The first and leading principle I apprehend to be this: that the rate shall be just and equal. This was stated by Sir William Wynne in the case of *Thompson and Sandford*

v. *Cooper* (3 Phill. 640, n.), as “a truism ;” he uses this expression : “The first article pleads, generally, that the rate is unequally made ; this is a truism ; it must be equally made—no law is required—reason shews that it must be so.” The learned judge then goes on to deal with the objections to the rate, on questions of fact, on the ground that if found to be unequal, the rate itself cannot be [500] supported. And I observe also that in the judgment of Sir John Nicholl, in the case of *Lambert and Simpson v. Weall* (4 Hagg. Ecc. 91-100), is this expression : “The sole object here is to obtain payment of a church-rate ; that is opposed on the ground of inequality, and the defendant has selected two persons, who are under-rated as compared with his assessment : two instances for this purpose are as good as two hundred, and the real gist of the case depends on the true valuation of those three houses, and that must be proved by the valuation of competent persons.” Now, undoubtedly, the expression used by Sir John Nicholl is a very strong expression. The principle, therefore, being clear, the question I am to look at is this : Whether the facts and circumstances of the case altogether do make this an unequal rate ? The meaning of “unequal rate” is this : that some party or other has a right to complain that, under the rate, the payment of which is demanded of him, he is made to pay more than he ought to pay under a just assessment. And an assessment may be unequal in divers ways ; where a party who ought to be rated is omitted, of necessity it is an unequal rate ; and where a party is rated at less than a fair valuation, compared with other parties, it is abundantly clear that every other rate-payer is called upon to pay more than his just quota. The principle is clear, but the carrying it into practice is abundantly difficult ; because I apprehend that there is scarcely a parish in the United Kingdom in which it would not be perfectly easy to overturn any church-rate if the Court were to [501] decide against the validity of a rate in consequence of the omission of some one or two or three names.

Again, no church-rate could stand a scrutiny on the ground of inequality, if the value of each of the premises assessed were to be examined with a nice and careful scrutiny ; there would be always a difference of opinion, as in the case I cited, as to the particular value of each tenement, and as to whether one property or another was taken at too high or too low a calculation. It would be absurd to say that the doctrine, though true in itself, should be pushed to such an extremity : no rate in the country could stand at all. I apprehend there must be some bound and limit, and the only limit which can possibly be prescribed is the exercise of a just and fair discretion on the part of the Court to relieve persons from the pressure of actual injustice ; I am well aware it may be said that there cannot be a more dangerous principle than that of leaving to the Court so large a latitude of judgment ; that it might tend to throw the matter into a state of doubt and uncertainty ; that one judge might be of opinion that certain omissions or errors would not overturn a rate, whilst another might consider the quantum of error sufficient for that purpose. But all such objections are vain ; for on many questions, which are not provided for, it is agreeably to the law of the land that every judge should be allowed to exercise his judgment, and according to the best of his skill and ability administer justice with discretion.

In cases of this nature it has always been a rule for the Court to see that no large sum be included [502] in the rate which shall not be necessary for the legal expenses of the churchwardens, or for the decent performance of divine service. See what would be the consequence if the Court had no jurisdiction in such a case as this. The consequence of having the hands of the Court estopped by a rule of this kind, that a rate having been made by a majority of the vestry, whatever its amount, it was unquestionable, would be, that the majority of a vestry would have the power to tax the parish without any possible restriction or limitation, and the money so raised might be applied to illegal purposes, without, as the law stands, any remedy at all ; and it is laid down by those whose duty it is to decide these questions that it is the bounden duty of this Court to exercise its jurisdiction upon the principles I have stated, applied to the facts of each case ; for so the law must be administered until it be changed.

Now I collect from past authorities that the principle which has governed these Courts, when objections have been made to the validity of church-rates, is the following—I use the words of Sir John Nicholl (*Lambert and Simpson v. Weall*, 4 Hagg. Ecc. 103) : “In suits where the rate is objected to on the ground of inequality, the burthen

of proof lies upon the rate-payer who resists; he must prove, and satisfactorily prove, the inequality; if the matter be left doubtful, he fails in his defence."

Having stated, as clearly as I could, the principle which must govern my judgment, it is now my duty to advert to the facts of the case, and to consider what ought to be, on a fair examination of those facts, the judgment I should pronounce.

[503] The objections to the rate are threefold, as I understand; in the first place, it is objected, that certain property has been wholly omitted; in the second place, it is objected that landlords have been rated instead of tenants; thirdly, that persons said to be paupers are omitted. With regard to omissions, I may observe that if property which ought to be rated be omitted, of necessity the rate becomes unequal—that conclusion necessarily follows from the premises. But it does not, therefore, follow, that because property which ought to be rated has been omitted, any very great hardship is inflicted upon any individual, because the omissions may be so trifling that it would be scarcely possible to calculate the fractional part of any coin that would represent the damage done to an individual. Again, on the other hand, there may be omissions which might not invalidate the rate, for I apprehend that the opinion of this Court, that the omission of paupers in the assessment would not necessarily invalidate a church-rate, was supported by the Judicial Committee of the Privy Council in *The Kensington case*.(a) That case, as is well known, travelled to the Court of Arches, the learned judge of which Court was of opinion that the allegation ought to have been admitted, but more particularly for the purpose of considering a totally different question—whether the rate was so far retrospective as to be null and void. But when the case came before the Judicial Committee, their Lordships were of opinion that the objection, on the ground of [504] retrospection, was fatal, though as to the omission of paupers, they concurred in the opinion of this Court, and had the rate not been illegal on the ground of retrospection, deemed the omissions not per se fatal, but matter for explanation, and if such explanation were satisfactory, the rate, so far as that objection was concerned, might have been upheld.

The next point is, the omission of occupiers—because, after all, this must come under the head of ommissa, if at all—the landlords being rated instead of their tenants; and it is undoubtedly a great error. It has been urged that the Court is bound to take the rate as made at the time, and without reference to subsequent payments. This is true in one sense of the word; a rate must be valid or invalid at the time, and a payment made afterwards cannot affect the question. It is obvious that, if the churchwardens had not adopted a proper mode of assessment, they could not, in case of resistance, enforce the rate. Every parishioner ought to be so assessed that the rate could be enforced if it were refused; and although some landlords might think it fair and equitable to pay the rate, yet others might be of a different opinion, and in case of dispute it would be impossible to enforce the rate.

The last head is that of total omissions. Now, with regard to property totally omitted, here again I am of opinion that the Court must look to the quantum, and I have no hesitation in saying that the property which has been omitted in this case is what has excited the greatest anxiety in the mind of the Court. It is stated in the answers that of [505] landlords assessed the amount is 132l.; that 66l. is the amount of persons omitted, and paupers 16l.

Now, the property I more particularly allude to is the gas works; because that property appears to have been erected (the buildings) at a considerable cost, and now it is stated that they are to be valued at a very small sum. I very greatly doubt, if the erections cost not less than 2000l., whether this property could be considered as trivial or immaterial in amount. Again, with reference to the premises occupied by the guardians of the union, it is clear that, so far as relates to the part of the house which did not belong to the parish in which the church-rate was made, there was no real pretence in law, at the time when it was made, for excluding the whole of the premises from the church-rates. These points have pressed me. I discard altogether the paupers. With regard to the general omissions, I am of opinion a grave error has been committed by the churchwardens, and now I am to see whether, under all the circumstances, the amount omitted is so great that I am bound to pronounce the rate null and void, and to dismiss the party from the suit.

(a) *Chesterton and Hutchins v. Farlar*, 1 Curt. 345, 367, 371, and 2 Moore's P. C. Cases, 330.

It appears that the value of the rateable property in the parish is 8622l. What is precisely the value of the property omitted to be rated I confess I have great difficulty in ascertaining, though it is the real gist of the case. According to the churchwardens, the property omitted, exclusive of paupers, is 50l. a-year; the property for which landlords are rated, instead of tenants, is 133l. a-year; making 183l.

[506] The Queen's advocate. According to Mr. Beard's account, the property totally omitted and the property rated to landlords amount to 285l.

The Court. Shall we take it at 200l?

The Queen's advocate. Yes.

Dr. Haggard. The difference to the defendant would be about a halfpenny.

The Court. Then the question is, whether the errors committed in this case are sufficiently great to induce the Court to pronounce against the validity of the rate. That errors have been committed with regard to this rate I have no hesitation in saying, because the whole of the property which is rateable (exclusive of paupers) has not been rated, and because, if the position laid down by Sir John Nicholl be true in point of principle (and I have no hesitation in saying that it is), if there is any property omitted to be rated, which is rateable, two instances are as good as two hundred, for the omission must produce the effect of inequality. I think, therefore, that the churchwardens have committed errors; but, at the same time, unless I can see that the errors very materially affect the interest of the rest of the parishioners, I should with the deepest reluctance find myself compelled to overturn a church-rate; because church-rates, by the law as it exists, are fully established, and I am of opinion that it would ill become any Court to invalidate a church-rate not substantially unjust [507] and unequal, by taking advantage of small and minute circumstances. Now, from a fair calculation with regard to the omissions in this rate, I do not think that the pecuniary difference is so great as to justify the Court in saying that the party has suffered any loss or damage by the omissions.

There is a case which occurred in the Court of King's Bench,^(a) in which an attempt was made to invalidate a church-rate made in part for improper purposes, and the Court of King's Bench—the objection being that the rate was in part made for the subsistence of one or two prisoners in the King's Bench and Marshalsea prisons, there being no allowance by law at the time for such prisoners—was of opinion that the amount was not sufficient to justify the Court in pronouncing the rate invalid; thereby adopting the principle that where the parishioners had not been actually aggrieved in consequence of the introduction of an improper item, under the circumstances, it was the duty of the Court to abstain from quashing the rate. Although that case, I admit, does not directly govern the present case (for I do not deceive myself by regarding it as a direct authority), the principle is, in my opinion, a just and equitable one to be adopted in this case; and considering the practice in this parish of rating according to the poor-rate assessment, a practice which, so far as regards the assessment itself, may be perfectly correct and right, because I am not aware of any distinction at present between the assessments for the poor-rate and the church-rate, except that property belonging to the church is not asses-[508]-sable to the church-rate; I say the principle I have mentioned is common and applicable to both.

Upon the whole, then, the conclusion to which I have come, though I confess not altogether without doubt, is that the errors are not sufficient in amount to induce me to pronounce the rate invalid.

But with respect to the costs, I think there is every reason why I ought not to condemn the defendant in the costs. In the first place, it is admitted that there have been irregularities in this case, which I think are of a serious description. In the second place, I am of opinion that a parishioner, so circumstanced as the defendant, if he chooses to resist the rate, is entitled to have the fullest and most complete information from the answers of the churchwardens. He ought not to be left to prove his case by witnesses; but it is their duty in their answers to set forth the whole of the facts and circumstances of the case. Where that is done, the Court may be able (except in particular cases) to pronounce its judgment without the examination of witnesses; yet these gentlemen thought proper, in their answers, to depose in general terms, instead of replying to each specific averment and allegation.

(a) *Watkins v. Seaman and Webb*, 2 Lut. 1019, 1023, and Com. Dig. tit. "Prohibition."

Looking, therefore, at all the circumstances, and to another circumstance stated by the Queen's advocate, that this gentleman may be rated for other property, and that by possibility a rate may be made as to that property of a much larger amount, which might in some degree affect his pecuniary interests, whereby the rate might incur the peril of being quashed; looking, I say, at all the facts and circumstances, I think I shall do the best justice I can in this case by pronouncing for [509] the validity of the rate, and at the same time giving no costs whatever.

As my judgment will undoubtedly (according to the present feeling of the times) become a subject of public discussion, I wish to impress upon the minds of all church-wardens the necessity, in the present state of the law, of making a church-rate with the utmost regard to accuracy, by adhering to the rule that every occupier of premises must be assessed, and that the attempt to mix up practices which obtain in poor-rate with church-rate cannot be maintained on the strict principles of law; and I hope that by attention to this in future, and by a due consideration of the difficulties with which this case has been environed, the Court will be relieved from the painful necessity of having again to adjudicate on the sum of three shillings and nine-pence halfpenny.

MACKENZIE against YEO. Prerogative Court, July 8th, 1840.—An attesting witness to a codicil, having married a legatee therein, such legatee propounding the codicil, held incompetent as a witness in support of it; and having joined his wife in the proxy in the suit the Court directed his answers to be given to an allegation on the other side, as a party in the cause.

[For further proceedings, see p. 866, post, and 3 Curt. 125.]

On petition.

This was a suit respecting a codicil to the will of Mr. George A. Barber, in which a legacy of 5000*l.* was given to Ann Melton, spinster (now Ann Mackenzie), which codicil was attested by Thomas Dyke Mackenzie, who had since married [510] the legatee. He had been examined (under protest) in support of the codicil, which (on the refusal of the executors to take probate of it) had been propounded by his wife. His answers were now called for to a responsive allegation as a party in the cause. An act on petition was given in, the object of which was to destroy his competency, on the ground of interest, as being liable to the costs of the suit; secondly, to shew that he was himself a party to the suit.

The Queen's advocate and Addams in support of the witnesses' competency. The case of *Brograve v. Winder* (2 Ves. 636), in Chancery, 1795, is directly in point; in which Lord Loughborough held that a witness not interested at the time of the execution of the will, though interested at the time of examination, was competent. Then, as to Mr. Mackenzie being a party in the cause, he is only incidentally a party; his wife is the party. On what ground is a party in the cause precluded from giving evidence in that cause? Solely on the ground of interest, not on the abstract proposition of his being a party in the suit merely; (b) and if not interested at the time of the execution of the codicil, his becoming so afterwards will not disqualify him under the authority of Lord Loughborough. He is a subscribed witness, and the evidence of a subscribed witness, whether interested or not, is never dispensed with. There is a case now proceeding (*Baker v. Archer*) where an attesting witness, who had married a legatee, has [511] been examined and cross-examined. In *Craft v. Day* (vol. 1, 846, n.) Mr. Claggett, the husband of a party cited to see proceedings—though not absolutely a party to the suit—was examined and cross-examined, and upon his evidence the codicil he subscribed was set aside.

Haggard and Nicholl contra. A paper has been propounded as a codicil, in which Mrs. Mackenzie and her husband have an interest. He, jointly with her, signs a proxy, and is a party to the suit, and in case of condemnation would be liable to the costs. In *Baker v. Archer* the legatee whom the witness married was not a party in the cause, and it remains to be seen whether his evidence is admissible. The case in Vesey is a blind case; we have no means of knowing the circumstances, and the doctrine of the Court of Chancery is, that a party shall not, by fraudulently obtaining an interest, disqualify himself. The cases are clear to shew that a witness becoming interested after attesting a deed or bond is not competent, especially where he obtains his interest

(b) Phillipps and Amos, p. 47; *Worrall v. Jones*, 7 Bing. 398.

through the very act of the party who wishes to avail himself of his evidence. As to the case of *Croft v. Day*, Mr. Dufaur asked Mr. Claggett to attest the codicil, and then wished to repudiate his evidence, which he was not permitted to do, and Mr. Claggett was examined. The case of *Buckley v. Smith* (2 Esp. 697), in 1799, is at variance with the decision of Lord Loughborough. See also *Hovill v. Stephenson* (5 Bing. 493) and *Goss v. Tracy* (1 Peere Wms. 289).

[512] *Judgment*—*Sir Herbert Jenner*. The question is whether the Court is at liberty to call for the answers of Mr. Thomas Dyke Mackenzie in a cause in which his wife is a party, setting up a codicil in which a legacy of 5000*l.* is left to her by the deceased in the cause, of which codicil the executors of the will refuse to take probate. The husband has joined in a proxy with her, and the legacy is not left to the wife's sole and separate use, and the husband will be entitled in right of his wife to the legacy if the Court shall pronounce for the codicil. The husband, therefore, has a direct interest in the cause, not only in respect to the costs, but also in the subject matter in litigation between the parties, and it is new to me that because a person at the execution of a will had not an interest, when he has voluntarily placed himself in a situation where he acquired an interest, he shall be a competent witness. If he were a necessary witness to prove the will, that would be a different state of things; but he is not so. The Act says that a will shall not be invalid on account of the incompetency of an attesting witness; but this does not make it necessary that he should be examined. I am clearly of opinion that, according to all the rules, Mr. Mackenzie is not only an interested person, but a party in the cause; and, without reference to cases decided elsewhere, in which the evidence of the witness might be absolutely necessary, as the interest came to him not by his own act but by the operation of law, there being nothing of the kind here, for the party has voluntarily placed himself in this position, and rendered himself [513] liable for costs; I am of opinion that he is in this Court an incompetent witness, and as a party in the cause is liable to be called upon for his answers. It is unnecessary to advert to the principles which would apply to the individual as a party in the cause, as a witness, or as both; it is sufficient to state that he was interested at the institution of the suit, and at the time of examination; that he has joined in the proxy, and will be liable for costs; in one respect he is disqualified as a witness, and in another he is liable to give in his answers.

ALLEN *against* M'PHERSON. Prerogative Court, July 8th, 1840.—An objection to the competency of a solicitor as a witness in support of a codicil, he having admitted that in the first instance he retained the proctor in the cause for the parties who propounded the codicil, but who did not admit that he was responsible for the costs, overruled.

This was a cause of proving the ninth and last codicil to the will of ——— Allen, deceased; the will and eight codicils were not opposed.

At the hearing of the cause,

Harding, on behalf of the party who opposed the codicil, objected to the competency of John Dingwall, as a witness in support of it, upon his answer to an interrogatory which had been addressed to him. His answer was, "I am the solicitor in this cause on behalf of the producents. I instructed Mr. Orme, their proctor, to appear in the suit. I believe the producents were unacquainted with him previous to my taking them to the office of himself and partner to prove the will and codicils of the deceased. The probate was not sent to me, nor did I pay the proctor's bill of expenses. I am a client generally in matters of business of the firm [514] of Messrs. Denne and Orme, the proctors aforesaid. I did first retain or employ them in this cause. I do not know whether I am liable to them or not for the payment of their bill of costs for conducting this cause. I really do not know what the usage in such cases is. The fact is that, knowing my clients in this matter to be responsible men, I have never thought about my liability to the proctors' costs. If, under similar circumstances, the usage is that solicitors are responsible to the proctors, I am to them." He submitted that this case was precisely the same as that of *Handley and Jones v. Edwards* (1 Curt. 722), and that under the authority of that case Mr. Dingwall was incompetent to be examined as a witness.

Addams and Nicholl *contra*. The case of *Handley and Jones against Edwards* is a single decision, and is under appeal; it is not, therefore, of binding authority as a

precedent: but this case is distinguishable from that, as there Mr. Parkes, the witness, objected to his admitted liability; here it does not appear that Mr. Dingwall is responsible for the costs, he merely admits that he retained the proctor for his clients in the first instance, and it does not appear that he is therefore liable for the costs of the suit.

Sir Herbert Jenner. Whatever doubts may be entertained of the correctness of the decision in *Handley and Jones* [515] against *Edwards*, the Court will adhere to the doctrine there laid down, unless the Court of Appeal should determine otherwise. But the question is, Are the circumstances here the same as in that case? There Mr. Parkes admitted his responsibility, but in this case the question arises whether a legal responsibility attaches to Mr. Dingwall by what he has done; he admits that he did first retain the proctors in the cause, but he says he does not know that such retainer makes him responsible, for knowing the responsibility of his clients; he never thought about his liability. The first question then is whether a solicitor, by retaining a proctor, becomes thereby legally responsible for all the costs. No case has been mentioned in which there has been such a decision; that the mere circumstance of a solicitor retaining a proctor for his party makes such solicitor responsible for the costs of the suit. Had the witness admitted his liability, as in *Handley and Jones* against *Edwards*, the Court would have held him to be incompetent, but, as the answer to the interrogatory stands, it is not established satisfactorily to my mind that Mr. Dingwall is responsible for the costs, and therefore an incompetent witness.

I shall overrule the objection and admit the evidence of the witness, subject, however, to any observations that may be made upon it.

[516] THE OFFICE OF THE JUDGE PROMOTED BY WOODS against WOODS. Consistory Court of London, July 18th, 1840.—The Court will not, in a criminal suit, direct the defendant to give security for costs.—The Court pronounced the articles in a suit for incest against a man for marrying his niece to be proved, and declared the marriage null and void, but dispensed with penance.—Oral evidence alone in this case sufficient, without proof of the entries in the marriage register.—Objections to the evidence taken in the case in part sustained.

This was a criminal proceeding instituted by James Woods against his brother, George Woods, for incest, in having intermarried with Mary Ann Spratt, the daughter of Caroline Spratt, his own sister, on the 24th March, 1839.

Addams, on the part of the promotor, moved the Court to direct the defendant to give security for costs, upon an affidavit, stating that he was selling off his effects, with the intention of withdrawing from the jurisdiction. The application was founded upon the order of the Court (13th February, 1830), "That, in all cases, the Court may, upon application made to it, direct security for costs to be given by either or all of the parties."

Haggard, on the part of the defendant, opposed the application.

The Court rejected the motion, as not within the spirit and intention of the order of Court, though within its general terms. This was the first instance of a defendant in a criminal suit being [517] required to give security for costs; and the effect of granting the application would be to compel an accused person to aid in his own prosecution, and facilitate his own punishment, which is contrary to the principles of British justice. In other Courts, a defendant sued for a penalty is not required to give security for costs. If the motion were granted and the defendant refused to comply, he must be pronounced in contempt; but no individual could be held in contempt for refusing to give security for the costs of his own prosecutor.

At the hearing of the cause—

May 4th and 12th—Haggard, for the party proceeded against, objected to the evidence which had been taken in the diocese of Norwich.

1st. That the requisition issued in the case was altogether a nullity, by reason of its being wrongly dated; that it ought to have been dated on the day on which it was decreed; but in fact it bore date subsequently, that is, when it was extracted.

2ndly. That the commission under which the evidence had been taken was granted without any legal authority, it being stated to have been granted by the official principal of the bishop, who would be the proper officer to direct such an instrument to issue, but that the requisition (under the authority of which the commission would have its validity) was directed to the bishop or his vicar general, commissary, surrogate,

or other competent judge, without naming the official principal, who is a different officer from the vicar general, although in this instance it may happen that the same person holds both offices.

[518] 3rdly. That the seven last witnesses under the commission were described as having been examined "on the aforesaid articles given by F. Clarkson," when in point of fact there were no such articles, F. Clarkson being the proctor of the defendant, and the articles being those of Rothery, the proctor of the promoter.

July 18th.—Dr. Lushington. The facts of this case are most simple, and there exists no doubt whatever as to the law; but unfortunately, through irregularity, objections have arisen, and difficulties are to be overcome, which the Court has greatly to lament.

The pedigree is pleaded as follows:—It begins with the marriage of John Woods with Lucy Ray on the 29th of May, 1788, and the marriage certificate is exhibited; whether this certificate is proved or not will appear hereafter. It is next pleaded that the parties so married had several children, and, amongst others, a daughter, Caroline, born in September, 1789, and also a son, George Woods, born in May, 1802, the party proceeded against in this cause; and there are exhibited two baptismal certificates, as certificates of the baptism of Caroline and George Woods. The articles next plead the marriage of Caroline Woods to John Spratt on the 23rd of October, 1809, at Shottisham, Norfolk, and a paper is exhibited purporting to be a certificate of their marriage. It is next pleaded that John and Caroline Spratt had issue, a daughter, Marianne, born in June, 1816, and there is a paper purporting to be a certificate of her baptism. It is next pleaded that George [519] Woods married this Marianne Spratt (who, according to the plea, was his own sister's daughter) in March, 1839, at Norwich, and there is an exhibit purporting to be their marriage certificate.

The evidence upon these articles has been taken partly in London and partly in Norfolk, and the persons examined are those most competent to give evidence as to the facts and circumstances. The witnesses are Lydia Cox, sister of Lucy Ray; William Woods, brother of John Woods, who married Lucy Ray, and who is uncle of the party proceeded against; Caroline Spratt herself, the mother of the person with whom the incestuous marriage was contracted; Caroline Alpe, the sister of Marianne Spratt; Charles Ray Woods, brother of James Woods, the prosecutor; Emma Spratt, another sister of Marianne; and William Alpe, who married Caroline, the sister of Marianne Spratt. The effect of their evidence is this: Lydia Cox deposes to the marriage of her sister, Lucy Ray, to John Woods; she states that she was living in the house, but was not present at the marriage; and it will appear that the certificate is not proved to have been collated with the register; but she proves the cohabitation of the parties as husband and wife; and as to the identity of the parties I ought to observe there is not a shadow of doubt; it would be a waste of time to go through the facts upon this point, which is not questioned. William Woods proves the marriage of his brother John to Lucy Ray by reputation and the birth of children, and amongst those children, that of his nephew George Woods, the party proceeded against, and a daughter Caroline. The next witness, Caroline [520] Spratt, speaks to George Woods being her own brother; she proves her own marriage to John Spratt, the birth of her own daughter, Marianne, in June, 1816, and that George Woods has acknowledged the connexion between them. Caroline Alpe also proves that her sister Marianne went to Norwich with George Woods to be married, and their living together in the same house at Whitechapel, so that she also proves their cohabitation. Charles Ray Woods deposes to his uncle, George Woods, having stated to him that Marianne Spratt was his own niece, so that here is a direct acknowledgment of the party proceeded against, that he was cohabiting with his own niece; and this is proved, not by Charles Ray Woods alone, but by the testimony of Emma Spratt, who states that George Woods acknowledged that the person he lived with was his own niece, and she says she was present at the marriage, and that at this time Marianne Spratt is in the family-way by George Woods, her uncle; and William Alpe also speaks to George Woods having married his own niece.

This is the whole evidence taken in London, and the result is that none of the copies of the registers are proved, for none of the witnesses prove that the exhibits are true copies of the originals; of this species of proof, therefore, there is an entire deficiency. But if oral evidence be sufficient in law, I am of opinion that there is an ample sufficiency of the very best evidence, namely, that of the nearest relations of the parties

charged with this incestuous marriage and connexion. Then, assuming the oral evidence to be sufficient to establish the facts, the first point is whether, legally [521] speaking, I am at liberty to take such proof. Whatever legal doubts may exist in this case, morally speaking, there is not a shadow of a doubt, because all the principal facts are deposed to by persons in whose knowledge they are, being the nearest connexions of the parties, and to whom there is no reason to impute a desire wilfully to mistake or disguise the facts.

To the evidence taken by requisition in Norfolk, various objections have been offered to the whole and to parts. But before I consider these objections, I apply my attention to the question whether, when the oral evidence is complete, in such a case as this it is absolutely requisite in law that the registers should be proved, or their absence accounted for.

In the first place, let us consider the nature of the case to be proved. That which is essential to the case is not the legitimacy of the parties, but their relationship by blood; it is blood which renders these marriages contrary to law, not the legality or illegality of any of the intermediate marriages. Where the legality of a marriage is in question, it has been decided that, even if the marriage be not registered at all, if the fact of marriage can be proved, the non-registration will not affect its validity; and in other Courts the fact of marriage may be proved by witnesses, and it is not necessary to produce the register. The next point is that we have the acknowledgment of George Woods himself of the existence of the relationship between the parties. This is evidence against himself, and similar evidence has been admitted in criminal cases, even where life has [522] been at stake, as where a wife has been indicted for the murder of her husband (petty treason), and there has been a difficulty in proving the marriage, her acknowledgment of the marriage has been held to be admissible as evidence against her. I observe, further, that whether there has been a marriage between the parties or not, if I am satisfied that there is a connexion by blood, even if the parties, or either of them, were illegitimate, I must come to the same conclusion and pronounce the sentence. In considering, further, whether I am entitled to dispense with the production of the register, I must look to the practice of the Court in which I am sitting, and it has been the practice to require the production of the register where it could be obtained, and I should be reluctant, unless necessity compelled me, to relax the rule. I must, however, observe that I am satisfied that a register is not to be considered the best evidence of a marriage, nor has it ever been so considered in the books and authorities on the question. The rule respecting best evidence is that you are not allowed, where there is evidence of a superior character, to give inferior evidence, unless you account for the non-production of the best evidence, the effect of which is to exclude all other evidence till the absence of the best evidence is accounted for. But I am of opinion that the register is not, in contemplation of law, the best evidence, for these reasons: first, that registration is not necessary for the marriage itself; secondly, that no error or blunder in the register could affect the validity of the marriage; and, thirdly, that registration is not like an agreement or a deed in writing, and the contents of [523] which cannot be proved by *vivâ voce* evidence, but it is a mere record afterwards of what has been done, and no doubt a very important record to those who enter into the compact; but it is a mere memorandum of the compact they enter into, not the compact itself. I am encouraged in this opinion by the course of practice in the Courts of law, which consider that, in order to establish a marriage, the evidence of any one person present at the marriage is sufficient, without calling for the register at all.

On the present occasion difficulties have arisen, not only with reference to the registers of marriages, but also with regard to baptismal certificates. But a baptismal certificate is no evidence of birth at all, but only of the acknowledgment of the parties that the child so baptised is theirs.

If this was the whole of the legal evidence in the cause, and I was driven to give an opinion upon this evidence, I should be disposed to come to the conclusion that it was sufficient, though I should not do so unless circumstances compelled me to do it.

But it is incumbent upon me to consider the objections to receiving the evidence taken in Norfolk, which go to this: that it is taken in such a shape and form that an indictment for perjury could not lie against any of the witnesses who should depose falsely and corruptly. Now, nothing in my judgment can be more dangerous to the credit of these Courts than that it should be considered that they would decide

questions affecting the rights and interests of parties upon evidence, the individuals giving which, if they depose falsely and corruptly, might not be liable to an indictment for perjury. [524] Nothing, indeed, could be more fatal to the due administration of justice than that evidence should be received under such circumstances. The effect would be, that these Courts would be attempting to administer justice in important cases, where the witnesses examined in the cause are under no apprehension that the punishment attached to the crime of perjury could be inflicted upon them, however falsely they might swear. I greatly regret that my want of experience in regard to questions of this nature makes me distrustful of my own judgment, but I must not shrink from the duty imposed upon me.

The objections to this evidence may be classed under two heads: the questions are—first, whether the oath was administered to the witnesses by a competent authority; secondly, whether the evidence has not been so taken as to prevent the possibility of punishing any of the witnesses who should have perjured themselves. The first objections go to the whole of the evidence taken at Norwich; the second to that of the last seven witnesses only.

With regard to the authority to administer the oath to the witnesses, deposing under the requisition and commission, the first objection is, that there is a discrepancy between the date of the requisition and the date of the decree. I am of opinion that this cannot affect the validity of the proceedings, though the practice is not uniform; still what was done on this occasion (the requisition bearing date the day it issued, not the day it was decreed) is not at variance with the ordinary usage of these Courts. The next objection is, that there is a variation [525] between the jurisdiction required to accept the requisition, and that accepting it at Norwich. Now, although perhaps the form of proceeding may have been in some respects singular, there does not appear to have been any essential defect; though it may be different from what might have been expected, yet I must look at the usage in the diocese of Norwich; I am not to suppose that there has been anything irregular in the present case, that is, different from what takes place in ordinary cases, and if there has not been any irregularity, it is not for this Court, addressing requisitions to country jurisdictions, to find fault with their proceedings, unless the objections affect the substantial of justice. With regard to the other objections, I hold them to relate to matters of practice only, and I do not know that all our forms should be observed in the country Courts. I am not to presume that the ordinary practice of the Court of Norwich has not been complied with; I have no right to prescribe forms of practice for that Court, and as the deviations do not affect the essential ends of justice, I presume these are the forms of proceeding in ordinary cases, and I am of opinion they are sufficient for the purpose. If there had been any proof, or any averment, that the essential ends of justice would be defeated, or that gross injustice would be done, then I should have some ground to go upon: but there is nothing of the kind; the objections urged (very properly) are of a purely technical nature. I am, therefore, of opinion that I should not be justified in scrutinizing mere matters of form, which cannot affect the purposes of justice, and it would be most dangerous, with reference to the country Courts, to convert [526] mere formalities into essentials. I fear if I were to adopt this course of proceeding towards country Courts, generally, it would be productive of the worst effects; indeed, I doubt whether any one of the country Courts would stand the test of such a scrutiny. I therefore overrule all these objections.

The effect of overruling these objections is this: it enables me to admit the evidence of the first five witnesses, who corroborate the evidence of the witnesses examined in London, and prove the exhibits of A, B, and C.

The last objection is a question apparently of mere form, but one which I have found it no small difficulty to cope with; it relates to the admission of the testimony of seven witnesses, examined in the manner I am about to state. Of these witnesses, the first, examined under the commission, is described as having been examined on the articles "brought in" by Rothery, 27th November, 1839. The second witness is stated to have been examined on articles "given in" by Rothery. The fourth witness is examined on "the said" articles. The fifth is examined on "the aforesaid" articles. All these are trifling and petty variations, till we come to the sixth witness, Lydia Green, and she is described as examined "on the aforesaid articles, brought in by Frederick Clarkson." Now, in fact, there are no articles whatever, save those brought in by Rothery; it is a mistake, and a very unfortunate mistake, by the examiner, and

the error pervades the heading of all the depositions of all the other witnesses, seven in number. Now, I have stated my opinion that if a prosecution for perjury could not be sustained against witnesses I should be [527] bound to reject their evidence: such is the established rule of other Courts, to reject all evidence where it would be impossible, through some error, that an indictment for perjury could be sustained against the parties giving it; and I think the rule is founded in justice, otherwise persons giving evidence would be liberated from a consideration of great weight—the fear of punishment for false swearing. I apprehend, so far as I can form an opinion on this point, that there could be no prosecution for perjury, with regard to these seven witnesses; for no averment could be received as to its being a mistake in the title of the depositions, and there being no articles given in by the proctor, whose name appears in the title, the prosecution would fail. I am, therefore, under the necessity of rejecting all the evidence of these seven witnesses.

Now, let us see the effect of rejecting this evidence, and of admitting the other, upon the exhibits. A is proved by one of the first five witnesses examined at Norwich, to whose evidence there is no objection, and this is the certificate of the marriage of John Woods and Lucy Ray. B, also proved, is the baptismal certificate of Caroline Woods, and C is that of George Woods. Of the exhibits unproved, D is the register of the marriage of John Spratt to Caroline Woods; E is the register of baptism of Marianne Spratt; and F is the register of the marriage solemnized between the party proceeded against and Marianne Spratt. Now, the fact of marriage between John Spratt and Caroline Woods is confirmed by Caroline Spratt herself, the party married, who also proves the birth of Marianne Spratt, her daughter, and the fact of [528] the marriage in 1839 between George Woods and Marianne Spratt is established by two witnesses present at the marriage.

Such being the state of circumstances with reference to the observations I made towards the commencement, I come to the conclusion that the evidence is perfectly sufficient to enable me to pronounce a sentence in favour of the prosecutor. With regard to the earlier facts the exhibits are proved, the identity is established; and as to the other exhibits, the facts to which they refer are proved by the oral evidence of persons whose testimony is unimpeached, and who are intimately acquainted with the facts and circumstances. I have no hesitation, therefore, in stating that, not being tied down by any technical rule requiring that the registers should, in all cases, be produced, or accounted for, I am satisfied that the evidence is sufficient. All I am anxious to say is, that I hope the judgment I pronounce will not lead to a disregard of the production of registers in future; for although the Court in this particular case has judged it expedient to dispense with the production of the registers, it would be extremely inconvenient in practice if their production were neglected.

I have one other objection to dispose of. It has been suggested that both these parties ought to have been cited, as the Court is called upon to pronounce the marriage invalid. I am not aware of any authority which requires that both parties should be cited. A question might arise hereafter whether, one of the parties not having been cited, she is bound to abide by the judgment: that is a question into [529] which I do not enter. The question I have to consider is whether it is absolutely necessary, according to the practice of the Court, in every case of an incestuous marriage, to cite both parties. In *Burgess v. Burgess* (1 Hagg. Con. 284) it was not done; it is true that in that case there was no marriage; but in *Blackmore and Thorpe v. Brider* (2 Phill. 359; S. C. 1 Hagg. Con. 393, n.) there was a marriage which was pronounced against, and only one party was cited.

I therefore pronounce this marriage null and void, and enjoin the parties to cease from continuing their incestuous connexion; and I add that this is a sentence which the Court feels bound to enforce, not only from legal considerations, but by the principles of general morality; for whatever ideas may be entertained with regard to marriages between persons within the degrees of affinity, there is no difference of opinion in respect to marriages of this kind, where the parties are connected by consanguinity, which are exceedingly revolting to the opinions and feelings of mankind, and it is inconsistent with the public welfare that such connexions should be allowed to continue. I also condemn the party proceeded against in all the costs, except those incurred by taking the evidence, which I have been compelled to reject: the other party must bear the loss occasioned by the error of the examiner selected by himself. I think it right to say that although, in some of these cases, public penance has been

directed, after considering the subject as carefully as I could, it has appeared to me advisable not to make that a part of my sentence.

[530] PANTON *against* WILLIAMS. Prerogative Court July 28th, 1840.—Papers propounded as the will and codicils of a party deceased, opposed on the ground of forgery and fraud, pronounced for by the Court, but with great doubt and difficulty, upon the testimony of two attesting witnesses to the execution.

[Reversed, 1843, 2 Notes of Cases, xxi.]

This was a suit respecting the validity of a will and two codicils of Jones Panton, of Plasgwyn, in the county of Anglesey, Esq., who died on the 26th of May, 1837, aged seventy-five, a widower, possessed of a very large property. The real estates were situated in four of the counties of North Wales—Anglesey, Denbigh, Flint, and Merioneth; and he had some houses in London, besides landed property at Ports-mouth and at Finchley. The personal property amounted to about 50,000*l*. The family estates came into his possession at the death of his eldest brother, in 1822. He left behind four children, two sons and two daughters (his family having originally consisted of four sons and three daughters), and four grandchildren, the issue of a son and a daughter deceased. Two of the sons, Mr. Jones Panton and Mr. Thomas Panton, and one daughter, Mrs. Bulkeley Williams, died in the lifetime of the testator. The surviving children were Mr. Paul Griffith Panton, Mr. William Barton Panton, Mrs. Hamilton, and Mrs. Thomas Williams. The parties in the suit were Mr. William Barton Panton, of Garreglwyd, in the county of Anglesey, Esq., the youngest son of the testator, and sole executor named in a codicil to a prior will, and Thomas Williams, of Brynbras Castle, in the county of Carnarvon, Esq., the husband of the testator's [531] youngest daughter, who propounded the papers in question as sole executor. The papers were opposed on the ground of forgery, the appearances on the face of them raising (as alleged) an inference that they had originally contained other matters, written in pencil, to which the signature of the deceased in ink had been obtained, the pencil writing being afterwards rubbed out, and a testamentary disposition (in the handwriting of Mr. Williams) substituted. The case on the other side was that the pencil marks, whence the alleged fraud was inferred, had been placed upon the papers since they had left the custody of the executor, and that the evidence in support of the charge of forgery was the result of conspiracy, perjury, and subornation of perjury.(a)

The argument occupied several days; the Queen's advocate and Phillimore for Mr. Panton, against the papers; and Addams and Haggard in support of their validity, on behalf of Mr. Williams.

Judgment—*Sir Herbert Jenner*. This is a case which came before the Court under very extraordinary circumstances. A vast number of questions have been raised in the course of the proceedings in this Court; the cause itself is one of [532] the most complicated that ever, I think, occupied the attention and consideration of the Court; the pleadings are of considerable length; a great number of witnesses were examined on these pleas, and their evidence has extended to a great bulk, upon points some of them very material and important, and others which are, perhaps, of little moment. The arguments of counsel have been extremely long and elaborate, and the Court has thought it right, in a case of this description, in which not only a considerable amount of property is involved, but the character and moral conduct of individuals—the parties in the cause, and witnesses on both—sides are also very materially concerned, to take, and it has taken, all the circumstances into its most mature and deliberate consideration, and has endeavoured, as far as it could, to deal out an equal and impartial measure of justice to the parties, as far as the evidence in the cause will enable it to do.

This is not a question which depends at all on a consideration of the capacity of

(a) Mr. Thomas Williams, the party in the cause, and Ellen Evans and Anne Williams, the two attesting witnesses to the will, were apprehended on a charge of forgery, during the progress of the proceedings in this cause, tried at the Central Criminal Court, Old Bailey, in April, 1838, on a charge of forgery and acquitted. Ellen Evans and Anne Williams recovered damages in an action at law against Mr. William Barton Panton, for a malicious prosecution; but the verdict was afterwards set aside upon a bill of exceptions in the Exchequer Chamber.

the deceased ; for it is admitted on all hands that he was a person of perfectly sound mind, memory, and understanding. The question is whether the papers now propounded before the Court are or are not the act of the testator.

The landed property of the deceased came into his possession in 1822, on the death of his eldest brother, and he also, at that time, acquired considerable personal property—I presume one-third of 50,000*l.* or 60,000*l.*, of which his brother died possessed. On the marriage of his eldest son, which took place in the year 1823, a settlement was made, [533] by which certain property was settled upon that son and his heirs, the deceased reserving his own life interest in it, and also a reversion, in the event of his eldest son dying without issue. These estates were also charged with 42,000*l.* for the benefit of the six younger children—that is, 7000*l.* for each ; and in the event of the wife of the eldest son surviving her husband, the estates were charged with a jointure of 900*l.* a-year for her. The estates, therefore, which were under settlement, were of very considerable amount. There were also unsettled estates ; what their value was does not appear, but it was not, probably, very large.

The deceased made several wills after he came to the possession of the family estates. In January, 1824, the deceased made a will (the earliest before the Court), in which, without referring to the power of disposition which he had over the settled estates, in the event of his eldest son dying without issue, he bequeathed all his unsettled estates equally between his six younger children, and appointed Mr. Paul Griffith Panton, the second son, and Mr. Hamilton, the husband of his eldest daughter, executors. By another will, in March, 1824, he exercised the power of appointment which he had over the settled estates, and in the event of his eldest son dying without issue, he appointed the settled estates, in the first instance, to Mr. Paul Griffith Panton and his issue, with remainder to Mr. Thomas Panton and his issue ; then to Mr. William Barton Panton and his issue ; afterwards to Mrs. Hamilton and her issue ; then to Mrs. Bulkeley Williams (described as Jane Elizabeth Panton), and, in the last place, to Mrs. Thomas [534] Williams, under the name of Lauretta Maria Panton ; so that all the parties were named in this will in the order not exactly of their birth, but the males before the females, and their descendants. The unsettled property and the personalty were to be divided equally between the six children, and the same executors were appointed as in the will of January, 1824, namely, Mr. Paul Griffith Panton and Mr. Hamilton.

In February, 1825, he executed a codicil, whereby he gave a small estate in the county of Denbigh to Mr. Paul Griffith Panton, and the rest of the unsettled estates to his six younger children, as tenants in common : thereby adhering to the general scheme of disposition which was made by the will of 1824, putting the six younger children nearly on an equality with each other.

So the testamentary disposition remained till November, 1828, when he made an entire new will, and by that will, in the event of his eldest son dying without issue, he devised the settled estates, first, to Mr. William Barton Panton and his issue, with power to charge them with a jointure of 500*l.* a-year to his wife ; on failure of issue, to Mrs. Hamilton and her issue ; then to Mrs. Bulkeley Williams and her issue : and then to Mrs. Lauretta Maria Williams (the wife of Mr. Williams), the party in this cause and her issue, with power to charge the estates with portions for the younger children. He then gives an estate in the county of Denbigh to Mr. William Barton Panton, his heirs and assigns ; and the remainder of his estates in England and Wales and his personal estate and effects he gives to Mr. W. B. Panton and his daughters, [535] Mrs. Hamilton and Mrs. Thomas Williams, and appoints them executors : there is, therefore, in the will of 1828, a departure from the former disposition contained in the wills to which the Court has adverted, by excluding Mr. Thomas Panton and Mr. Paul Griffith Panton.

In November, 1829, he made a codicil to that will, by which he bequeathed plate, books, and other articles, at Plasgwyn, to the possessor of that estate for the time being as heir-looms ; and other fixtures which were in that house he bequeathed to the possessor of that estate at the time of his death.

On the 21st of April, 1831, he made a further codicil to that will, whereby he revoked all the devises and bequests given by the will of 1828, and the codicil of 1829, in favour of Mrs. Hamilton and Mrs. Williams, and also revoked their appointment as executors, and gave 10*l.* to Mrs. Hamilton and 400*l.* to Mrs. Williams, and gave all his unsettled estates, and the residue of his personalty, to Mr. William Barton Panton, his heirs and assigns, and appointed him sole executor.

On the 29th of May, 1833, the deceased made a further codicil, by which he revoked the legacy of 400*l.* given to Mrs. Williams by the codicil of 1831, and, instead thereof, gave her 200*l.* for her sole and separate use, and in other respects he confirmed the will and codicils. Here, therefore, was a most complete departure not only from the scheme of the wills which he executed in the early part of the time after he came into the possession of the family estates, but also from the bequests which he had given so late as the year 1828, in favour of Mrs. Hamilton and Mrs. Williams.

[536] It is to be observed that, at the time when the codicil of 1831 was executed, Mrs. Bulkeley Williams, Mr. Jones Panton, his eldest son, and Mr. Thomas Panton were dead. Mr. Jones Panton died in 1830; Mrs. Bulkeley Williams died before that period; Mr. Thomas Panton died on his passage home from the East Indies.

The Court will presently consider the circumstances under which it is probable that this deviation from the original intention, expressed in the former wills, was made.

But these are not the last testamentary acts of the deceased. On the 6th of November, 1834, the deceased made a will—at least is alleged to have made a will, for that is the question the Court has to determine; a paper is produced, which purports to be a will of the deceased, and to have been executed by him in duplicate. By that will he devised all his estates in Anglesey, particularly the estate of Plasgwyn, which is expressly named in a codicil to that will (and which formed part of the settled estates, on the marriage of his eldest son), to Mr. Paul Griffith Panton and his heirs, who had been omitted and passed by in the will of 1828, and the codicils of 1829, 1831, and 1833; all his estates in Denbighshire and Merionethshire to Mr. William Barton Panton and his heirs; and all the estates in Flintshire to Mrs. Hamilton, Mrs. Thomas Williams, and the children of Mrs. Bulkeley Williams, as tenants in common. Then he gives all the residue of his real and personal estate to Mrs. Thomas Williams, and makes Mr. Williams, her husband, sole executor. Here is not only a complete departure from the will of 1828, and the [537] codicils to that will, but also a departure almost as great from the wills of 1824 and 1825, as in the case of Mr. W. B. Panton under the will immediately preceding this; and the effect of this will is to give, in point of fact, all the personal estate to Mr. Thomas Williams, for, although it is given to the daughter, who was married at that time to Mr. Williams, it is, in fact, left to Mr. Williams, as there is no provision that it shall be for the separate use of the wife.

In October, 1836, he made a codicil, by which he recited that it was his intention to apply to a Court of Equity to set aside the settlement which had been made on his eldest son's marriage; and declares it to be his intention that nothing contained in his will shall be deemed or construed to vary or alter in any manner whatsoever the bequest or disposal of his personal property as therein contained; and he confirms the disposition of all his leasehold estates, stock, or funded or otherwise invested property, money, household furniture, plate, linen, china, books, or library pictures, farming stock, and other personal property to Mrs. Thomas Williams, her executors and administrators, and confirms the appointment of Mr. Williams as executor: so that it does little more than confirm the disposition made by the will. In the will no reference had been made to the settlement on the marriage of the eldest son; but there was a devise of all the estates in Anglesey, particularly mentioning Plasgwyn, the house where the deceased resided, which is bequeathed to Mr. Paul Griffith Panton and his heirs; and, in fact, the devise to him, and the benefit derived by him from that devise, must [538] depend upon the revocation of that settlement, on an application to a Court of Equity, or upon the death of the child of the eldest son of Mr. Jones Panton under the age of twenty-one; for so I take the nature of the settlement, that if he left a child which did not attain the age of twenty-one then the property would revert to the testator.

There is a further codicil, which bears date in May, 1837, and that again is a mere confirmation of the will of 1834, which it expressly refers to and confirms; and it also bequeaths a legacy of 20*l.* to Jane Thomas, the deceased's upper housemaid.

Now these last three papers are those upon which the present question arises. They are propounded by Mr. Thomas Williams, the executor named in them; and are opposed by Mr. William Barton Panton, as sole executor named in the codicil of 1833; and the question is whether or not these three last-mentioned papers—the will of 1834 and the codicils of 1836 and 1837—are the valid acts of the alleged testator?

It may be proper here to observe that these three papers are all admitted to be in the handwriting of the executor, Mr. Williams, the husband of the residuary legatee, and, in point of fact, the legatee, I may almost say the universal legatee, so far as the personal property is concerned. The will purports to be attested by three persons who were in the service of Mr. Williams. Ellen Evans, lady's maid to Mrs. Williams, Ann Williams, their cook, and John Williams, who was in the service of Mr. Thomas Williams, and who is since dead. The first codicil purports to have been executed in the presence of Ellen Evans alone; the second codicil is without witness. The [539] will and the first codicil were executed in the house of Mr. Williams, at Brynbras, where the deceased is stated to have been on a visit; and the third purports to have been executed in the deceased's house, at Plasgwyn, upon Sunday, the 7th of May, upon which day it is stated Mr. Williams visited the deceased there.

Now, these circumstances are certainly such as must necessarily create a considerable degree of jealousy and caution in the mind of the Court, in examining the proofs adduced in support of these instruments. It cannot be denied that, where a will is so much to the benefit of the party by whom it is prepared, in whose house it purports to have been executed, by whose servants it purports to be attested, who were, it seems, instructed to keep the matter secret (for it is so stated by Ellen Evans and Ann Williams) at the time of execution, and where the last codicil purports to be executed, not in the presence of a witness, but, though in the house of the deceased, in the presence only of Mr. Williams, no other person being present—I say, these are all circumstances which must necessarily create a considerable degree of jealousy in the mind of the Court, and vigilance in examining the evidence adduced in support of the acts; and still more will its jealousy and vigilance be awakened when it considers that, in point of fact, Mr. Williams, a stranger in blood, is substituted in the room of Mr. W. B. Panton, if not as universal legatee, yet as residuary legatee, in a large amount of the deceased's property. On the other hand, it cannot be denied that proof may be adduced adequate to discharge the burden thus thrown on the [540] executor who propounds these papers, and it may go to account for this departure, from the intention evidenced by former testamentary acts, by a sudden change in the feelings and affections of the testator towards the different members of his family; by shewing that the deceased was of a fickle and changeable character and disposition; and that he declared his intention before the act was performed; or by a recognition of that act, and allusion to the disposition contained in it after it had been done; and there may be intrinsic evidence arising from the contents of the papers themselves, shewing that they could only have proceeded from the testator himself; or, in the absence of circumstances leading to probability or improbability, on the one side or other, they may be supported by the irresistible evidence of witnesses, of whose credit there is no impeachment whatever.

The state and condition of the deceased and his family, at the time when the execution of these instruments took place, may not be immaterial to be considered, in order to see, first, what is the probability of the disposition contained in these papers, with reference to the state of his affections.

I have already stated that, in the year 1822, the deceased (who had formerly been a stamp distributor in the county of Anglesey) succeeded to the family estates, and that upon the marriage of his eldest son he provided for him and his family by settlement of these large estates. In 1828, then, before the execution of the subsequent will, what was the state of the deceased's family? In 1828 there had been a quarrel or misunderstanding between the deceased and his son, Mr. Paul [541] Griffith Panton, and it may not therefore have been unlikely that he would pass by him, as he appears to have done in 1828, in the disposition of his property, though, on the death of his father, he would come into the possession of 7000*l.*, originally settled on him as one of the younger children; and it appears that he received from the deceased a bond for 300*l.* per annum, or some bond for securing the payment of a certain sum, if not the precise interest of 7000*l.* during his life. With respect to Mr. and Mrs. Hamilton, it should seem that she would come into the possession of 7000*l.* on the death of the testator, but that she had no bond given to her to secure the payment of any sum, she being, as it is alleged, well provided for. With respect to Mr. Thomas Panton, he does not at that time (1828) appear to have been dead, and there is no particular reason given why he should be passed over in that will. He would come into the possession of 7000*l.* on the death of his father; and he had also

300l. per annum, secured by a bond; but he is passed over altogether in the will of 1828.

At this time, then, the three persons who were to be principally benefited are Mr. William Barton Panton, Mrs. Hamilton, and Mrs. Thomas Williams; they were to divide the unsettled estates and personal property between them, and were appointed joint executors.

The Court at present must take it that this will of 1828 and the two codicils are admitted to be valid. No question is raised with respect to them in the pleadings, though it has been argued that, if the disposition contained in these papers was a [542] departure from the original intention of the former will, it is not at all improbable that the testator might again change his mind, and dispose of his property in a manner different from that in which it purports to be disposed of by the will to which I am now adverting.

In April, 1828, shortly after that will had been executed, Mrs. Thomas Williams married, and a circumstance occurred in 1829 which would go to shew that the deceased at that time was considerably annoyed, and expressed a certain degree of anger against his daughter, an action was brought against Mr. Thomas Williams, her husband, by a person named Jones, for a breach of promise of marriage by her; and it does appear, by a letter written by the deceased, that he was called upon to pay a certain sum of money on this account (the action being compromised), to prevent exposure in a Court of justice; and his letter refers to that circumstance. It also appears that, at a later period, though the precise time is not exactly stated, according to the evidence of Mr. Bettiss, the deceased told him there had been a quarrel between Mr. W. B. Panton and Mr. Thomas Williams, in the course of which a blow had passed from one to the other. Mr. Bettiss says the deceased told him, and it appears from the evidence of Jones, the housekeeper of the deceased, that there was an interval during which the visits of Mrs. Williams were broken off from Plasgwyn and, therefore, it is not impossible that this might have produced the change in the deceased's mind with respect to the benefit which he gave to Mrs. Williams, by the will of 1828, and which was [543] reduced by the codicil of April, 1831. With respect to Mrs. Bulkeley Williams, it should seem that the deceased had, after her death, brought an action against her husband for a ring which he retained in his possession, which the deceased considered belonged to him. She was dead before the time this codicil was executed; and it appears that the deceased had certainly no very great partiality for Mr. Hamilton; therefore there is no reason to suppose he would have had any great portion of the deceased's property, beyond that settled on his wife, as one of the younger children. With respect to Mrs. Hamilton, nothing appears—there is no reason, I presume, for not making her an allowance at the time of her marriage, but that she was already well provided for, which induced him to exclude her from any benefit. With respect to Mrs. Thomas Williams, I have already stated that, in 1831, her legacy was reduced to 400l.; and again, in 1833, that is further reduced to 200l. for her sole and separate use; as if the deceased had at this time not entertained that degree of regard for and confidence in Mr. Williams, which it is alleged he did entertain in November, 1834, and some time antecedent to that date.

With respect to Mr. W. B. Panton, he was the youngest of the deceased's sons; he had never left his father's house—that is, he always continued domiciled with him; he had the management of his father's property very much confided to him, and it is alleged that he was a favourite son; and there is abundant evidence to shew that the deceased and himself bore great affection towards each other; that they were mutually attached one [544] to the other; and though it has been suggested that the deceased was in fear of this son; that he was intimidated by him; that he was under the control and influence of Mr. Rumsey Williams, a solicitor, whose daughter, in 1832, Mr. W. B. Panton had married, I have looked in vain to find anything that would shew that Mr. W. B. Panton had conducted himself towards his father in any other than the most respectful and affectionate manner. Although it may be true that he partakes in some degree of the warmth of temper to which the natives of the principality are subject, and though in one or two cases he may have come into personal contact with one or other of the servants, yet there is nothing from which the Court can collect that there was any intimidation or violence on his part towards his father, or any other than the most respectful and affectionate conduct. There is no evidence whatever to shew that there was not a reality of affection between

them; and we have a witness, who is spoken of on both sides as a person worthy of credit, namely, Mr. Roberts, the medical attendant, who speaks to the attentions paid by Mr. W. B. Panton to his father, and to the return made, and which he believes to have been sincerely made, on the part of the father to the son. And the tenderness and affection of the deceased appear also to have been extended to the wife and daughter of Mr. W. B. Panton. Nothing can be more clear or explicit than the declarations of Mr. Roberts on this point. I cannot think that the Court can come to any other conclusion, even without the evidence of Henry Brereton and Grace Huxley—Brereton being the steward of the de-[545]ceased, who had been in the family many years, in the service of the brother, before the deceased came into possession of the family estates—who says they lived on the most affectionate terms together, and the deceased would scarcely do anything in the management of his property without consulting Mr. W. B. Panton; he kept hounds and horses and servants for him; he lived with him in the same house, with his wife and child, and, in short, was entirely domesticated with him. There is nothing from which the Court can collect that the deceased was not sincere in his expressions of regard and attachment to him and his wife and child; therefore it is somewhat difficult to account for his departure from the will of 1828. I think there can also be no doubt, from the evidence of Mr. Roberts, and of the servants, that during the last illness of the deceased there was the same affection and regard, the same attention paid to him by his son and the son's wife, and the same degree of attachment manifested by the deceased to his son and his wife, as is alleged in the early part of their communication with each other; and that so affectionately attached was the deceased to his son and his son's wife, that he would scarcely take any kind of medicine or food, during his sickness, from any other hands but theirs. I am, therefore, of opinion that there was no motive whatever, from any change of conduct of Mr. W. B. Panton to the deceased, or of the deceased towards him, which should have led to this alteration—to the substitution of Mr. Williams (for so it is) for his son.

Now, the deceased having died upon the 26th [546] of May, the funeral took place upon the 2nd of June; the family attended the funeral, and, amongst others, Mr. Bulkeley Williams and Mr. Paul Griffith Panton, though he had not been in his father's house for ten years preceding. There were other branches of the family present, and Mr. Thomas Williams also attended, but did not arrive at the house until the procession was quitting, and did not return to the house after the ceremony concluded, but went to his own house; it being usual in that part of the country that the will of the testator should be read after the funeral had taken place. However, it does not appear that this was done on that occasion, as Mr. Williams, a person having an interest in the deceased's property, was not in attendance. It seems that some communications passed between him and Mr. W. B. Panton not of a very friendly nature; indeed, it is quite clear that, from the time of the quarrel, there was nothing of the nature of cordiality existing between Mr. Williams and Mr. W. B. Panton, and without any communication between the parties, Mr. Williams left them after the funeral had taken place. Another day was proposed for reading the will, which was finally fixed for the 9th. Two letters were written in the intermediate time, one dated the 5th of June and another the 6th, with respect to the time at which the reading of the will was to take place; and Mr. Williams seemed to consider that his convenience had not been consulted by Mr. W. B. Panton, and states his intention of leaving the country before the 9th of June, on account of the state of health in which his wife was, who required change of air: but in [547] that letter he informs Mr. W. B. Panton, as he should not be present, that Mr. Boggie, a gentleman of the law, would attend for him. Upon the 9th of June neither his solicitor nor Mr. Williams was present; but the will is read, and it seems that Mr. Owen Gethen Williams, a brother of Mr. Thomas Williams, who resided within a short distance of the deceased's house, and who had been in communication with his brother on the subject, had been sent to Plasgwyn to say that he wished to see the will, and would either, if they would send it to his house, read it there, or come over to Plasgwyn to read it. The latter is the mode adopted, and Mr. Owen Gethen Williams, upon the same day, the 9th of June, proceeds to Plasgwyn, where he reads the will, and makes extracts from it on behalf of his brother.

Now, at that time, the preparation for the funeral of the deceased had been made, and the funeral itself had taken place, under the direction of Mr. W. B. Panton, as

executor of the deceased. On this 9th of June, and upon the funeral, there was no interruption on behalf of Mr. Thomas Williams; but it does appear that upon the 6th of June (from the letter of the 6th of June) Mr. Williams had declared that no will should be proved unless it had been seen by the family, and that he would enter a caveat against it; and upon the 9th of June, when Mr. O. G. Williams attends, and reads the will, and makes extracts from the will and the codicils, he gives no intimation whatever that his brother was in possession of a will of later date than either the will of Mr. W. B. Panton, or the codicils to that will. Not the least intimation was [548] given of the existence of such a will, by which the authority of Mr. W. B. Panton was superseded, and Mr. Williams had been substituted as an executor instead of him. At this time, it should seem, by the evidence of Mr. O. G. Williams, that he and his brother had been in communication with each other, that he had been apprised by him of the existence of this will of 1834, and of the codicil of May, 1837; for as Mr. O. G. Williams expressly states, it was under his advice that Mr. Thomas Williams, who consulted him whether it would not be proper that he should go over to Plasgwyn, to assert his rights as executor, abstained from so doing; but he came to town for the purpose of consulting and advising with a professional person in London, he at that time not being in possession of the will of November, 1834, and the codicil of 1836, though he was in possession of the codicil of 1837. The former will and codicil (that is, the will itself and the first codicil, together with certain other papers of a testamentary nature) had been deposited in the care of Messrs. Child and Company, the bankers—not of the deceased, but of Mr. Thomas Williams—and remained there deposited until the month of June after the deceased's death, when they were removed from thence, in the presence of the person who deposited them, Ellen Evans, accompanied by Mr. Boys. At this time, therefore, the whole of the family assembled at Plasgwyn were in entire ignorance of the existence of any other will of later date than Mr. W. B. Panton's, and no intimation whatever was given that there was such a will.

Now, it seems that, on behalf of Mr. W. B. Pan-[549]-ton, a letter was addressed in the usual course of business to a proctor of this Court, desiring him to send down a commission to swear Mr. W. B. Panton as executor to the will of 1828. It was stopped by a caveat having been entered on behalf of Mr. Thomas Williams; and upon that caveat being warned, it appeared it was on his behalf, as executor named in the will of 1834, and the codicils of 1836 and 1837, of which he prayed probate. This, then, was the first intimation of the existence of any will of later date given to Mr. W. B. Panton, or rather to his advisers; for, according to the evidence of Mr. Bettiss, Mr. W. B. Panton does not appear to have had an intimation of the existence of the will till the 26th of July following, though, I think, there may be some incorrectness in this, and that it must have come to the knowledge, at least, of his advisers, at an earlier period, though it is probable that the contents of the papers were not known at Anglesey or Plasgwyn till a later period.

The caveat having been warned, a proctor appears for Mr. Williams, as executor of a will and two codicils, the date of which is set forth, and of which he prays probate. These scripts were not then (as I apprehend) exhibited to the other party, or to any other persons advised with by him; but upon the 18th of July, after other proceedings had taken place in the cause, an affidavit of scripts is made, dated the 18th or 19th of July; it is brought into Court on the 22nd of July, and then it is (I apprehend) for the first time that the contents of the will and codicils were known to the adverse party, unless private communications passed between [550] them at an earlier period, of which no trace is to be found in the proceedings in this cause. Therefore, I think it not improbable that, when Mr. Bettiss states in his evidence that the first intimation which Mr. W. B. Panton had of any other will than that of which he was executor, was upon the 26th of July, at the time when the sale was advertised to take place at Plasgwyn, at which Mr. O. G. Williams declared there was a will of a later date, by which Mr. Thomas Williams was made executor, and, consequently, the authority of Mr. W. B. Panton, under which he directed the sale to take place, had been superseded, that that is what is meant to be stated.

Upon the production, therefore, of these papers it is quite clear that there must have been a very considerable degree of surprise created in the mind of Mr. W. B. Panton, of Mr. Rumsey Williams, his father-in-law, and Mr. Bettiss, who had married a sister of Mr. Rumsey Williams; in short, of all Mr. W. B. Panton's friends, who had

supposed, not only from the existence of the will and codicils, but from the conduct of the deceased, and certain circumstances to which I will presently advert, that he was the person to whom the great bulk of the testator's property would descend on his death, and which is also in conformity with declarations stated to have been made by the deceased, not only at the time of the marriage of Mr. W. B. Panton, but afterwards.

Upon this affidavit of scripts being brought in, the usual steps being taken, the will was propounded in a common condit—that is, with the exception of those articles which are usually added [551] to the common condit, where one of the subscribing witnesses to the will has died before the suit. Upon that allegation, the two surviving witnesses were examined, and the death and character of the third witness, John Williams (whose name appears subscribed to the paper), were examined to and proved. Upon this, publication being prayed, an allegation or plea was given in, stating the ground of opposition to this will; its admissibility was debated; it was directed to be reformed, and was afterwards admitted as reformed, and upon that allegation many witnesses have been examined.

The examination of these witnesses was taken under a commission at Carnarvon. In the first instance, there had been some mistake with respect to the parish in which Carnarvon was stated to have been locally situated, and another commission issued, and was opened upon the 10th or 11th of January, 1837, and the depositions under it were continued till the 17th of January, when Mr. Williams, who, being a solicitor, conducted his own cause at Carnarvon before the examiner (his proctor having left Carnarvon), protested against a further examination of witnesses, until it was ascertained whether the term probatory, which had then expired, would be extended. Application was accordingly made to the Court, and the term probatory was extended, and the examination was renewed upon the 22nd of January. Upon the commission being returned into Court, on the 2nd or 3rd of February, an allegation was asserted on behalf of Mr. Williams.

But further proceedings in this Court were interrupted by an occurrence of a most extraordinary [552] description; for it seems that, in consequence of some discoveries alleged to have been made just immediately previous to the closing of the commission, Mr. Thomas Williams and the two maid servants were apprehended on a charge of forgery, and were committed to take their trial at the Central Criminal Court, which took place in April, 1838, and terminated in their acquittal. The proceedings in this Court, under such circumstances, were almost necessarily suspended; for it was quite impossible to suppose that Mr. Williams's proctor could give in his allegation in answer to the plea on the other side, in explanation or denial of the circumstances therein stated, whilst such a charge was hanging over his head, and more particularly since the whole of Mr. Williams's papers were seized when his person was arrested, and amongst them the correspondence in reference to this case, and between him and his proctor. Therefore, the proctor very naturally declared he would waive the allegation he had asserted, and he prayed publication on the evidence which had been already given; and the prayer would have been acceded to, but that additional articles were asserted on behalf of Mr. Panton. Now, the bringing in of these additional articles was most strongly objected to on behalf of Mr. Williams, under the advice of his counsel (and very properly); but the other party pressed the bringing in of these articles, and, before the trial had been concluded, an act on petition had been entered into on the prayer of the proctor for Mr. W. B. Panton, stating the grounds on which he considered himself at liberty to bring in these additional articles. The Court [553] (after the trial was terminated), after hearing counsel on both sides, was of opinion that the proctor was entitled to bring in these additional articles: they were brought in accordingly, were debated, and ordered to be reformed; brought in as reformed, and admitted, and witnesses were examined on them. Mr. Williams also afterwards brought in an allegation in the principal cause, by way of answer to the charges against him in the former allegation on behalf of Mr. W. B. Panton and the additional articles. Other allegations were also given in, and after the examination of all the witnesses had been taken by commission, and was in the registry, the evidence was published, and the cause came on for hearing in the usual course. The Court has thought it right to state the nature and circumstances of the proceedings, because there never was a case before this Court under circumstances so extraordinary as these.

Now, the grounds upon which the opposition to this will rests must be noticed particularly. Some of them are more prominent than others; some, which were apparently important in the first instance, became of less importance in the progress of the cause; but there are some, the evidence on which required to be minutely read by the Court, more than once, after the arguments of counsel were concluded; and to some of these I must particularly advert.

A charge is made of forgery against Mr. Thomas Williams, the executor, not only as arising out of the facts stated in the additional articles, but a charge was originally made in the first allegation upon the other side. That charge has been not only denied [554] by those who have advocated the cause of Mr. Williams, but they have recriminated upon the other parties, accusing them, or at least those by whom they are advised; I do not mean any of the practitioners of this Court, but those who have had the management of the business in the country. Mr. Rumsey Williams, father-in-law of Mr. W. B. Pantón; Mr. Bettiss, who married a sister of Mr. Rumsey Williams; Mr. Spencer, Mr. William Jones, of Glanbenno, a solicitor, and others who are apparently persons of general respectable character and to be impeached only by the manner in which they have deposed and conducted themselves in the present proceedings—these gentlemen have been charged with fraud, forgery, perjury, subornation of perjury, and conspiracy, so that, upon the one side or the other, it seems agreed, a most atrocious fraud has been attempted to be practised on the deceased (supposing Mr. Williams to be the party), and on the Court, and other persons engaged in the cause, supposing the other persons to be the authors. This case, therefore, imposes upon the Court a most unpleasant duty—one which it is seldom called to perform, namely, to decide upon which of the two parties it is that the crime of forgery is to be affixed, as well as the further imputation of supporting that forgery by perjury, subornation of perjury, and conspiracy; and I must say that, in the whole course of my experience, I do not remember a case in which so much contradictory evidence has been adduced as in the present, for there is scarcely a fact throughout the whole case upon which the witnesses, on each side, are not directly at variance.

[555] A good deal has been said, in the course of the argument, upon the question as to which side the onus probandi lies on. It was urged on behalf of Mr. W. B. Pantón that, in a case of this peculiar description, namely, where a large benefit is given to the party by whom the papers were prepared, in whose house they were executed, by whose servants they purport to be attested, and where there is such a departure from former testamentary intentions, the duty lay upon him, the party propounding them, to discharge the onus of proof. On the other hand, it was contended (and, I think, properly contended), that if Mr. Williams was able to prove by satisfactory testimony the execution of these papers, the signature of the deceased, he being a person of perfectly sound mind, memory, and understanding, which is not denied, he had thereby *primâ facie* discharged the burden of proof upon him; and then it lay upon the other side to support, by as credible testimony, the charge of fraud imputed to him; and I think that this is the mode in which the different burdens are to be discharged by the different parties. Where the person by whom a will is prepared propounds it, the propounding of that will necessarily requires a certain degree of proof; but when it is proved that it was executed by the deceased, being of perfectly sound mind, memory, and understanding; that it was read to him, and he knew the contents; then *primâ facie* the onus is discharged, and if nothing to the contrary is shewn, the paper will be entitled to the probate of the Court. When incapacity or doubtful capacity is brought forward, or circumstances to shew that the deceased executed the paper with-[556]-out a knowledge of its contents that he was imposed upon, or was compelled by force to execute it contrary to his own will, it lies upon the parties who make the charge to substantiate it. Therefore, though this case comes before the Court under circumstances of very considerable difficulty and very considerable suspicion upon the face of it, the Court must consider it with reference to all the circumstances of the case, and pronounce whether the onus of proof on either side has been adequately discharged.

In all these cases, whether of impaired capacity, of weak capacity, or where there are any other grounds of opposition, the first question is, the probability of the disposition contained in the papers propounded; because, if a natural foundation is laid for the disposition, a slighter degree of proof will probably satisfy the Court,

than where the disposition is improbable in itself to any great degree. Now I have already stated that, with respect to Mr. W. B. Panton, it is contended there is laid a very strong foundation for a large benefit to him, from the manner in which the deceased and he lived together; from their mutual affection and attachment, and from the continuance of that affection down to the latest period of the deceased's existence, and increased, if possible, by what took place during his last illness. With respect to Mrs. Williams, the case seems to be this: she certainly is proved by Mr. Roberts, and by other witnesses, to have been at least as great a favourite with the deceased, previous to her marriage, as Mr. W. B. Panton was. She was the youngest daughter of the deceased; she was the last married, and Mr. [557] Roberts states that he did, from his observation, believe that the deceased entertained a most sincere regard and affection for her; that she was a favourite daughter; and it appears that, though there had been some interruption to their frequent communication and visits, yet a reconciliation had taken place, and that, from the year 1829 (when the action was brought, which was the first cause of dissatisfaction on the part of the deceased), they were in the habit of visiting each other; that he went to pay a visit to them, three, four, or five days continuously in the spring and autumn, and that Mr. Williams and his wife, though not in the habit, after the quarrel with Mr. W. B. Panton, of sleeping there, yet went frequently to call upon the deceased; and Mr. Williams was in the habit of going there, and his visits were usually paid on a Sunday, that being the day on which the deceased was most likely to be found at home. And there can be no doubt there was a considerable degree of attachment between the deceased and Mrs. Williams, and a certain degree of regard towards Mr. Williams, her husband; for it is stated on testimony, which the Court sees no reason to distrust, that when Mr. Williams came to the deceased's house he was received by him in a kind and friendly manner; and it is also proved that a certain degree of confidence was placed in Mr. Williams by the deceased, for he entrusted to him the management of his London estates, and consulted and advised with him as to the proposed partition of the estates between himself and Mr. Hurlock, with whom he jointly held them, and that the negotiation was conducted on behalf of the [558] deceased by Mr. Williams; and it should also seem that this confidence in Mr. Williams was unknown to Mr. W. B. Panton and other members of the family, for it was not till after the death of the deceased that they were aware that Mr. Williams was ever employed by him as his agent.

Now it certainly would not have been a matter of surprise if, at a late period of the deceased's life, after the year 1833, when the intercourse between him and Mrs. Williams had been renewed (if in fact it had ever been interrupted for any length of time), he should have made a larger provision for her than she took under the codicils of 1831 and 1833, and that he should have replaced her in the situation in which she stood under the will of 1828, before it was altered by those codicils; but that Mrs. Williams should be entirely substituted in the room of Mr. W. B. Panton, against whom the deceased appears to have had no cause of complaint whatever, is a circumstance which the Court cannot well account for. There is no trace in the evidence from which the Court can collect that there was any diminution of regard and affection on the part of the deceased to his son, or anything but the most respectful attention on behalf of the son to his father; and it is a question which requires to be minutely investigated and sifted, how it was, under the circumstances in which the deceased was placed with respect to these two branches of the family, that he was led to make this alteration in favour of Mrs. Williams to the prejudice of Mr. W. B. Panton. I have stated he had confidence to a certain extent in Mr. Williams, but that confidence does not appear to have been unlimited, because it [559] turns out, upon the answer of Mr. Williams, it was not until after the deceased's death that he heard or knew of Mr. W. B. Panton being in possession of the will of 1828, or of a will of that description. It is certainly an extraordinary circumstance, looking at what is said to have taken place, that the deceased, when he gave instructions for the will of 1834, and for the codicils of 1836 and 1837, never intimated to Mr. Williams that such a will had been executed by him. It is quite impossible that he could have forgotten that such a will had been executed by him, because that will of 1828 was contained in a considerable number of skins of parchment, was of great length, recited the settlement made on the marriage of his son in 1824, and the disposition of the property in favour of Mr. W. B. Panton, Mrs. Hamilton and Mrs. Williams; and yet it does appear

that Mr. Williams was not aware of the existence of the will till after the death of the deceased, who, consequently, had not communicated to him that such papers had been executed. And this gives rise to another observation, that at least no reason arising from Mr. W. B. Pantón's conduct to his father was assigned as a ground for excluding him and giving the property to Mr. Williams.

The case, then, as to the probability arising from the state of the deceased's affections, certainly does not place Mr. Williams' case upon very high ground. There was a probability that, if the deceased did make any alteration in his testamentary disposition, he would have given a larger portion of his property to Mrs. Williams than she takes under the codicils of 1831 and 1833; but I do not think that [560] there was any probability laid for so complete a departure from his original intention as is contained in this will and these codicils now propounded.

On the part of Mr. W. B. Pantón several distinct grounds were alleged of opposition to these papers. It has been stated that his case was multifarious—that it laid many grounds of opposition which were different and distinct from each other; and it was rather insinuated than urged that too much indulgence had been given to him in the early part of the proceedings. But it appears to the Court that this was a case which, from the commencement, necessarily required that the party who opposed such papers as these, who charged fraud in procuring them, and who was so materially prejudiced by the papers, should not be too much confined and restricted in his line of pleading; and accordingly the Court did admit allegations which contained a case, which cannot properly be denominated multifarious, because all of them tend to shew that this was not an act of the testator, made with his full knowledge and privity, but that it was a case of fraud, the particular nature of which Mr. W. B. Pantón, being originally ignorant that such papers were in existence, was altogether unable to discover; and accordingly he did plead in such a manner as to infer that he doubted the signature to the several papers to be that of the deceased; that he to a certain extent impugned the capacity of the deceased—that is, he pleaded inferentially, in this manner; that these papers, so contrary to the whole tenor of the deceased's behaviour towards him, and to the declarations he had made, could not have been obtained from him at a time when [561] he was in a state of capacity—that he must either have been induced to execute the papers at a time when he was in a state of intoxication, or excited by spirituous liquors or wine. Mr. W. B. Pantón also went into circumstances, from which, if they were true as pleaded, it could not be doubted that a fraud had been practised. Amongst other things, he pleaded that two of the subscribing witnesses to the will, Ann Williams and John Williams, could not write at the date of the execution; that the codicil of the 7th of May could not have been executed at the time at which it appears to bear date, for that, in point of fact, Mr. Williams had not been at the deceased's house upon the 7th of May, and the deceased had not quitted his house upon the 7th of May, and consequently that the codicil could not have been executed at Plasgwyn on that day. But it was objected, when that allegation was given in, that there was no plea from which it could be collected whether it was executed at Plasgwyn or Brynbas, Mr. Williams' residence, or where it was executed; for though it was in the handwriting of Mr. Williams, it might have been transmitted to Plasgwyn by post, and might not have been executed by him in the presence of Mr. Williams; and therefore to plead that it was neither executed at the deceased's, nor at Mr. Williams', and that Mr. Williams was not at Plasgwyn, was irrelevant. Accordingly, that allegation was altered by pleading that Mr. Williams, when he visited the deceased on the 9th of April, had got a severe cold which confined him to his house, and neither he nor his wife had visited the deceased from the 9th of April till the time of his death, and that no commu-[562]-nication, by letter or otherwise, passed between them.

Now it certainly turns out, with respect to the latter ground, it is not truly pleaded; for it is admitted that, at least upon two occasions, Mr. Williams was at the deceased's house after the 9th of April, and that his wife was there upon the 15th of April; the deceased having been taken ill upon the Thursday or Friday preceding, Mr. Williams had gone, accompanied by his wife, to Plasgwyn, to call on the deceased; and that Mrs. Williams, unaccompanied by her husband, had also gone to Plasgwyn on the 24th of May, two days before the deceased's death, and had slept at the house of Mr. O. G. Williams, and was at Plasgwyn on the morning of that day. But with regard to the 7th of May, Mr. Williams expressly pleaded that he was there upon

that day ; that the codicil was executed at a time when he and the deceased were alone together in a room called the blue parlor, at Plasgwyn, and on that occasion he was seen on the road, going towards the deceased's house, and afterwards dined at the house of his brother, about three quarters of a mile from Plasgwyn ; and, consequently, that there is abundant proof that upon the 7th of May he was at Plasgwyn, and, consequently, the codicil might then have been executed. It being averred, specifically, that he was there upon that day, another allegation was given in, pleading that Mr. Williams was not there on that day ; that it was impossible for him to have gone to Plasgwyn, and to have been with the deceased, without being seen by some of the servants or inmates of the house ; that a Mr. Price, Comp-[563]-troller of the Customs at Beaumaris, was at the house on a visit to Mr. W. B. Pantton that day, and was never so far from the house, or so long absent from it, as to leave it possible for any person to have visited the deceased without having been seen by him ; that Mr. Williams was in the habit of coming in his phaeton to Plasgwyn ; that the road was cut out of the solid rock, and that he could not pass without the carriage being heard, and also, from the situation of the windows, he must have been perceived by the servants, who did not see him. Upon these allegations, contradictory as they are, a vast number of witnesses have been examined. A plan of the house was exhibited ; and that plan was pleaded, on the other hand, to be incorrect, and it does turn out that it is not very correctly drawn. A model was brought in by Mr. Williams, stating the particular site of the house, and the position of the several windows, with reference to the road from his own house to Plasgwyn, from which it would appear it was probable that Mr. Williams might have gone into the house without having been seen by the servants ; and there were other circumstances which rendered it probable or possible that such might be the case.

I will first consider what is the state of the case with respect to the two witnesses who, it was pleaded, were not able to write. It is admitted now that Ann Williams was capable of writing at that time ; it cannot be denied. When the allegation was originally given in, it struck the Court to be superfluous to plead that she could not write ; because, when the depositions came to be opened, it would be seen whether she subscribed [564] her signature or not. But it was answered that she might have been taught to write since, and therefore her capability to write her name to her deposition now would not be proof that she could at the time at which the will bears date. Now the case turns out to be this : she apparently has signed the will and duplicate, and she also states that she signed, and her name appears to, a scrap of paper produced (No. 6), part of a will of May, 1834, and there is abundant evidence to shew that this witness had been at school, where she had been taught to write to a certain extent, and the handwriting of the signature to the will and the signature to the deposition are so much the same as to make it impossible that it should have been the writing of any other person. But, independently of this, there is this strong fact ; this will was executed in November, 1834, and this witness quitted the service of Mr. Williams in May, 1835, and it does not appear that there had been any communication between her and the persons in the house till after the death of the deceased, in June, 1837, when she was brought up by Mr. Williams from Carnarvon, for the purpose of being examined as a witness in the cause. Therefore, it is beyond all doubt that, at the date of the will, Ann Williams could write her name, and, therefore, might have written the subscription to the testamentary act which she is stated to have attested ; and, therefore, that part of the fraud imputed to Mr. Williams, it is admitted, is not sustained. But it has been charged against Mr. W. B. Pantton and his friends that this is part of the conspiracy ; that it demonstrates that this was a mere invention and fabrica-[565]-tion, and that witnesses have been suborned by the advisers of Mr. W. B. Pantton to depose to the incapacity of this person to write her name at the time the will bears date ; and, therefore, it becomes of importance, with respect to these gentlemen, to consider whether they are liable to such an imputation.

Now, there is one thing to be observed with respect to this witness ; with the exception of the signature to the will of May, 1834, and of the signature to her deposition (which, of course, was known to none of the persons examined), not a single scrap has been produced in her handwriting ; though it does appear by the evidence (though these documents are not produced) that, upon the day the will bears date, two deeds were executed by the deceased, and attested by this witness. And, in fact, she herself admits, on interrogation, that during the whole course of her life,

notwithstanding the instruction she received at school, she never wrote or signed a letter to any individual whatever. Therefore I cannot think that it is a ground to affix on Mr. Rumsey Williams, Mr. Bettiss, Mr. Jones, Mr. Spencer, or any other person, a charge of conspiracy, and perjury, and subornation of perjury. I think there was reason to believe the declarations spoken to by many persons that the witness could not write, though the declaration must be taken with some degree of qualification, namely, that she could not write beyond her name, or had never written a letter. I am not prepared to say, on this part of the case, though the fact is otherwise than has been stated, that the parties are chargeable with fraud and other charges made [566] against them. I cannot think that there is any ground for imputing fraud, or conspiracy, or concoction of this part of the story, because the fact turns out that the witness could write, though witnesses swear she declared to them she could not write. And there are persons who saw her in a situation where writing would have been of importance, and she said she could not write.

With respect to the other witness, John Williams, who is dead, the case is not quite so clear. He was in Mr. Williams' service about this period, and had been for some little time before. He was employed to superintend some labourers who were engaged in different works by Mr. Williams, and to pay them their wages, receiving money from Mr. Williams for that purpose; and his name, subscribed to the will, appears to be not very well written—certainly shewing, though it is stated by many witnesses that he had been at school, and learned to a certain degree to write, that he was not a great proficient. But many witnesses speak to the fact that he could write. It is somewhat extraordinary that Ellen Evans, one of the subscribing witnesses to the will, states in her first deposition (for she has been examined twice), that he was taught to write after he came to Mr. Williams, and she gives a reason for it: Mr. Williams, finding it inconvenient to have a person about him who was to receive and pay money on his account, and who was not able to write, instructed him, so as to enable him to sign his name to receipts and other papers: other persons depose that he learned writing at school. Now, with respect to this witness, the same observation applies, [567] that there is not a single document produced which purports to be in his handwriting (with one exception I will presently advert to), except the scrap of paper which purports to be the attestation clause to the will of May, 1834, and the will and duplicate of November in the same year; there is no scrap produced, except a receipt for a certain sum of money paid for hay sold by Mr. Williams to a person named Jones, and there does appear on the receipt the name of "John Williams," pretty much in the same character as that which appears upon the will and duplicate and the other scrap of paper. But the extraordinary part of the case is that this paper is not pleaded; it is annexed to an interrogatory. The person to whom this money was paid by the John Williams whose name appears on the paper is not produced and examined, but this interrogatory is addressed to another person, who knows nothing at all of the circumstances of the case, but only deposes to the fact that a person named Jones, who received the money from John Williams, is in existence; but he knows nothing of John Williams or his writing, and his notion is he could not write at all. A number of witnesses swear that he could write; that they have frequently seen him write, not only his name, but have seen him enter in a book certain accounts, the demands of the labourers of Mr. Williams for work they had performed, and, amongst others, persons employed in cutting turf by Mr. Williams; and there were (as Ellen Evans states) entries of money received once a fortnight for the payment of these men. Elizabeth Evans swears that when Mr. Williams went down from London to fetch her up [568] to be examined as a witness upon that part of the allegation which pleaded the character and death of John Williams, he shewed her a book on the journey to London, which, as she says, being signed both by herself and John Williams, she was enabled to identify as his signature. Yet, strange to say, that book, proved to be so lately in the possession of Mr. Williams, is not produced, nor any other document to satisfy the Court on the important point that John Williams could write, and did write his name upon more occasions than that of the will and duplicate. But the copy of the entry of his marriage is produced, and that is signed with a mark. His wife swears he could write at that time—she herself is a marks-woman. Two books were produced on the trial at the Central Criminal Court, but it is very extraordinary that these books are not produced here. At the hearing of the cause the proctor offered to produce the books, but this offer at that

late period, of course, was very properly rejected on the other side. Now, if this person was in the habit of writing, and of keeping accounts for Mr. Williams, surely Mr. Williams must have had it in his power to produce some of the documents, more particularly that turf account, which he shewed to the witness who came to town with him to prove the identity of John Williams, who subscribed his name to the will, with that John Williams who kept the accounts. Where there has been not one scrap of paper produced, the fact rests on parol testimony, upon the evidence of the two subscribing witnesses, that he did upon this occasion write his name. This is not the way in which a fact of this kind ought to [569] be proved: and it being in Mr. Williams' power to produce this book, he ought to have produced it; and, therefore, upon that ground the Court is not prepared to say that all doubt is removed upon this point, except so far as it may hold it to be so by the evidence of the subscribing witnesses who depose to seeing him write his name on that occasion. I confess that, on reading the deposition of Elizabeth Evans, in chief, the Court was at first very much struck with the manner in which she deposed, when speaking to his identity—for it is a remarkable circumstance that the handwriting is not pleaded in that allegation which she is called to speak to—she says, "I know his handwriting very well, because he used to make the 'I' for his Christian name in a peculiar manner, with three strokes through it;" and so it appears upon the instrument propounded. But when I came to read this interrogatory, and found that Mr. Williams, on his way up to town, had produced a book, and asked her if she knew the writing there, her name and that of John Williams, the whole effect of what is stated in the deposition in chief was lost to me, because, having her memory so refreshed, she was not speaking from recollection, but from the exhibition of this book. Therefore, in reference to this part of the case, the Court is not able to say that the doubt is removed; if it is removed at all, it must be by the witnesses who attested the execution of the will, and who depose to having seen him write on that occasion.

But upon this part of the case there is no ground on which the Court can presume that it is a mere invention and fabrication; and that there were no [570] grounds for the belief that this person could not write, arising from his own declarations and conduct. Why a number of receipts are produced for money paid for work done by John Williams; receipts for dividends paid on a bankrupt's estate, all signed by a mark, as if he had been a person who could not write. Although it may be true that he might have been capable of writing his name, and yet might not choose to take the trouble, and, therefore, preferred making a mark; still, when all these instances are produced of his having signed with a mark, those who depose that he was not able to write may so depose from a sincere conviction of its truth.

Having disposed of these two points, the next is that of the absence or presence of Mr. Williams at Plasgwyn upon the 7th of May, the day on which the last codicil is alleged to have been executed. This codicil, perhaps, is not of very material importance, as matters have turned out; but it might have had a very material bearing upon the case. The only ground upon which a codicil was required at this time was to give a legacy of 20l. to Jane Thomas, the deceased's upper housemaid—a legacy of no great amount, of no great moment; an act which the deceased might have done without having recourse to the professional assistance of Mr. Williams (who is both a solicitor and a proctor); he might have drawn a codicil with his own hand to give 20l. to a servant. It is the more extraordinary as it appears by one of the papers produced, and which bears date June, 1836, that the amount of the legacy to be given to this upper housemaid was to form a subject for future [571] consideration; it is expressly so mentioned at the bottom of one of these papers, that it was to be a subject for future consideration; and yet so important, so momentous was the legacy to this housemaid considered, that when the codicil of October, 1836, was executed, the deceased had not even then made up his mind as to the amount, and it is not till this 9th of April (according to Mr. Williams) that he had made up his mind to give her 20l. Then, Mr. Williams pleads (of which there could be no proof) that, upon the 9th of April, the deceased directed him to draw up a codicil to give her 20l., and to bring it over at his next visit, and that was, according to Mr. Williams, the 7th of May. He was prevented from calling on the deceased by the state of the weather, or by other circumstances, and between the 9th of April and the 7th of May no intercourse took place between them, except by letter, but no letters have been produced, which, I think, would have been, if any had passed with reference to this

codicil. However, upon the 7th of May it seems that Mr. Williams, according to his plea, visits the deceased; that the door of the house being capable of being opened from the outside as well as the inside, he admitted himself to the house without disturbing any of the servants; that he saw the deceased in the blue parlour, and then and there the codicil is executed—not drawn, because the codicil is brought ready prepared for execution, with the exception of the insertion of the date; and so careful is Mr. Williams that there shall be no possibility of this testamentary act being discovered by any of the persons about the deceased that he [572] takes his own ink-stand with him (as appears from the evidence of Grace Jones), and this is one of the proofs that the visit took place. Therefore, this is a matter done clandestinely, as, indeed, the whole of the proceedings have been with respect to these testamentary acts. No person is present but Mr. Williams and the deceased. This codicil not only gives a legacy of 20l. to the servant, but it also confirms expressly, and by reference to the date, the will of 1834; and, therefore, might have been a very material document with reference to certain circumstances alleged to have taken place on the 4th and 12th of May. The great object is, apparently, to carry down the intention of the deceased till the date of the codicil itself, and it might have recognised the will as an operative will so late as the 7th of May, 1837, thereby amounting to a republication of the will on that day, and so have superseded any intermediate act done by the testator between the date of the last codicil and the 7th of May. And that seems to have weighed upon the mind of Mr. O. G. Williams, the brother, because he says, "There may be a will of later date than yours; therefore I advise you not to claim your rights as executor; till the will is produced you will not be competent to assert your right as executor without producing the documents on which the right exists; these are with your bankers in London; though you have these, carrying it down to the 7th of May, and the deceased died on the 26th, it is not impossible that another will may have been executed in the meantime. Do not produce this codicil till you know the date of the latest codicil in the hands of Mr. [573] W. B. Panton." But Mr. O. G. Williams had no power to act for his brother, as to a later will, until he had specific instructions for that purpose; and his brother had left Carnarvon on the 9th of June, or a day or two afterwards; and when, upon the 9th of June, Mr. O. G. Williams is informed of the date and contents of the will, and of the dates of the codicils, that they are anterior to that of the 7th of May, he did not feel himself, I presume, authorized to state that his brother was named executor by the will of 1834, confirmed by the codicil of the 7th of May, of which he was apprised by Mr. Thomas Williams. However, so it is, whatever the reason may have been, nothing is said of the existence of the codicil.

Now it does seem to me a question of importance whether Mr. Williams was or was not at Plasgwyn on the 7th of May. Originally, it was pleaded generally that the will was executed on that day—in whose presence, or where, was not stated. The general averment, in answer, was that Mr. Williams had not been there, and had had no communication with the deceased between the 9th of April and the time of his death; and two witnesses have deposed to their belief that he was not there after the 9th of April. They are certainly not correct in so stating, because it is admitted that, on the 15th of May, Mr. Williams was there. But the 7th of May is pleaded afterwards as the day he was there; and Mr. Williams has produced a great number of witnesses, who depose to their perfect recollection of the day, as that on which he was seen on his way to Plasgwyn, and to the fact of his having dined with his brother on that day, [574] after having been at Plasgwyn; and the evidence, undoubtedly, is very strong on this point. Mr. O. G. Williams is a clergyman, who resides in the parish adjoining that in which Plasgwyn is situated, at a distance of three quarters of a mile. He says that, upon that day, his brother, unaccompanied by Mrs. Williams, came to him from Plasgwyn, and dined there, and he perfectly recollects the day—it was the Sunday before Whitsunday, two days before the deceased was taken ill, of which he informed his brother on the 15th. Miss Morris, a companion of Mrs. O. G. Williams, deposes to this fact, and her recollection of the day is founded on the fact of Mr. Williams having that day seen his brother's wife seated in a bath chair, which he had sent from London for her use; and the evidence of witnesses, in that situation of life, is, undoubtedly, entitled to considerable weight. Mr. Williams has also produced Thomas Owen, his coachman, who drove him, and though he is a witness not to be relied upon, since he deposes as to the day of the week, not to the day of

the month; he says it was the Sunday before Whitsunday, a circumstance which seems to have impressed itself on the mind and memory of every witness examined in the cause. Mr. Williams has produced other witnesses, who say that, on that day, they saw him on the road, and in the neighbourhood; and the only question seems to be whether the witnesses on the one side or the other have deposed accurately as to their recollection of the precise date. Now, they are examined after an interval of two years from the date of this transaction. The allegation was not given in till after the trial at the Central Criminal [575] Court; therefore it is possible that the witnesses on both sides may have deposed inaccurately as to their recollection; and it is difficult, therefore, for the Court to determine between them and witnesses who depose with equal confidence as to their belief that Mr. Williams was not there; I say it is difficult to decide upon which side the truth lies, where both, intending perhaps to speak accurately, may not have retained a sufficient recollection to depose with certainty as to the day on which the transactions took place. Mr. Williams was seen by persons, who depose to that fact, upon the road to Plasgwyn; and one person, who states himself to have been in a public-house near to the entrance to Plasgwyn, states that he saw Mr. Williams, both in the morning and in the afternoon of that day, returning from Plasgwyn to Brynbas, having been to dine with his brother. On the other hand, there are a number of witnesses who depose with equal confidence that Mr. Williams was not there. Amongst the witnesses produced, to the number of ten, to prove that Mr. Williams was not there, is a gentleman of the name of Price. He states that he was in the habit of going to Plasgwyn, for the last months of the deceased's life, on Saturday, remaining over Sunday, and going back to Beaumaris on Monday morning; and he has deposed that, on that day, it was proposed that he and Mr. W. B. Panton should ride to Penrhos, the residence of Mr. Rumsey Williams, the father-in-law of Mr. W. B. Panton; but, in consequence of the rain, they were unable to go, and remained at Plasgwyn during the whole day; and he believes that it was utterly impossible that Mr. Williams could be [576] there without his knowledge, though he was occasionally absent from the house during the morning. Witnesses depose to the state of the weather, and on both sides they agree that though the morning was rainy and showery it cleared up in the middle of the day. Hugh Evans, the huntsman, deposes that the morning was extremely wet; that a pony was borrowed for Mr. Price to accompany Mr. W. B. Panton on a ride to Penrhos; that it cleared up about twelve o'clock, and some little time before that they started on their journey. He states that Mr. W. B. Panton swore at the rain; and he says he thought, when he heard a few days afterwards that the old gentleman was taken ill, it was a judgment on Mr. W. B. Panton for the way he expressed himself on the occasion. Many others depose to the state of the weather that morning; some say they were prevented from going to church; and others that they did go to church. The great doubt is, as to the borrowing of this pony, which Mr. Price was to ride. Hugh Evans states that he went to borrow the pony the Sunday before Whitsunday, and that he borrowed it of a person named Jones. Mr. Jones has been examined on the other side; he says it is very true the pony was borrowed; but, in consequence of the state of the weather, the ride was given up, and the pony was returned between twelve and one or two o'clock that day. But there is a witness on whom the Court is inclined to place great reliance—John Owens, a preacher in the Wesleyan connexion—who fixes the day by reference to his notes and memorandums of the places at which he preached, and by a paper [577] shewing the tour of preaching to be observed by the members of that persuasion. He identifies the day on which he saw Mr. W. B. Panton and Mr. Price, near the Menai-bridge (within four miles), between twelve and two o'clock. Now, this witness, speaking from a memorandum, says he saw Mr. Price and Mr. W. B. Panton on horseback on that day, near the Menai-bridge. Looking at all the circumstances of the case, the inclination of my mind is, that Mr. Williams was at Plasgwyn on that day, rather than the contrary. I think that Mr. Williams might be there without being seen by the servants, because, about this period of time, the servants assembled at dinner—about one o'clock. One witness says she saw him come to the house that day; but the Court can place no reliance upon her, she being the person for whose benefit the codicil was executed; and yet she had a better opportunity of seeing him than the other servants, who were in the servants' hall, at dinner; whereas she was attending upon a superannuated nurse. She says she saw Mr. Williams going towards the blue parlor, which was usually occupied as a sitting-room by her master,

and this witness does not take upon herself to depose positively as to the day on which she saw Mr. Williams there, but states it to have been a few days before the deceased was taken ill, of which illness he afterwards died. Therefore, I think, taking all the circumstances together, the evidence is rather that Mr. Williams was at Plasgwyn than that he was not, and that is the utmost length to which the Court can go; because, though it is possible that the codicil might have been executed in the pre-[578]sence of Mr. Williams, yet there is no evidence to shew that it was executed at that time.

These three points of the case are therefore disposed of, and I think on these three points fraud has not been established. It has not been established that Ann Williams could not write; it has not been clearly established that John Williams could not write; it has not been established (I think the evidence is rather the other way) that Mr. Williams was not at Plasgwyn that day.

The probability is, as I have said, contrary to the act propounded by Mr. Williams. The probability is that, although the deceased was, to a certain degree, eccentric, and prone to take offence with his children (perhaps without sufficient cause), yet as far as the Court is able to trace, there were some of his own children with whom he continued to be on terms of affection, and it is probable that they would be partakers of that large benefit to be derived from the diminution of other branches of his family; and there is no reason to suppose that the deceased was of that temper and disposition to take away the whole of his personal property from that son whom I must consider to have been a great favourite, if not the favourite child, to give it to another person not connected with him by blood, though married to his daughter, and who, upon the death of his daughter (there being no family, and they had been married, at the date of the will, six years, and at the date of the codicil of 1837 nine years, without any family), would have had the bulk, to transmit in any other channel he might choose; there was no provision for the separate use of his wife, but upon her death this [579] became the sole property of Mr. Williams, to be disposed of as he might think proper.

The remaining part of the evidence in this stage of the case is that obtained from the subscribing witnesses, Ellen Evans and Ann Williams. These persons were both in the service of Mr. Williams. Ellen Evans appears to be a person of a somewhat superior description; Ann Williams is of rather a low description. But is the account these witnesses have given credible in itself? Is it consistent, not with probability, but in the details of the circumstances? Are the witnesses consistent with themselves and each other, and have they been consistent in the declarations they have made, and the accounts they have given, at various times upon the subject? It will be necessary for the Court to advert to this part of the evidence rather more in detail than with respect to the other parts, because in the other parts it is not necessary, in the view the Court takes of the case, to examine with great minuteness the evidence of the witnesses in detail; but, where an act sets out with great improbability on the face of it, the Court is bound to look very carefully at the account given by the witnesses who were present at the transaction.

Now Ellen Evans says, "I witnessed the signing of several papers by the deceased. To my recollection he never paid a visit to Brynbras Castle in my time, that I was not called upon by Mr. Williams, my master, to be a witness to the signing of some paper or other by him." It seems, therefore, that Mr. Williams was transacting business for the deceased which required his signature, and that signature to be attested by a witness. She did not know [580] the contents of any of the papers she witnessed. She says, "I witnessed a will for Mr. Panton, whilst he was staying at Brynbras Castle, in May, 1834." With respect to that will, the only information the Court has is from this witness and Ann Williams, and the production of a scrap of paper (No. 6), upon which there is an attestation-clause, and the name of the two witnesses and John Williams subscribed. What were the contents of that paper the Court has no evidence. It was executed May 31st, 1834, and that paper is pleaded to have been destroyed at the time when the will of November, 1834, was executed. She says, "I witnessed another will for him, the will in question in this cause, whilst he was staying there in the latter part of the same year." It has been proved that the deceased was in the habit of visiting Mr. Williams at Brynbras Castle in the spring and autumn of each year. I should have observed, with respect to the will of May, 1834, that there is a letter in the handwriting of the deceased, addressed to Mr. Williams, in which he requests him to go over to Plasgwyn, with reference to the

settlement made on his son's marriage, and with which he appears to have been extremely dissatisfied, when he found, after the death of his son, that his interest was confined to a life interest in the property; and he wrote to Mr. Williams, desiring him to go to Plasgwyn, and he would shew him how he had been robbed by the person whose daughter his son had married, and by other persons who were concerned in the preparation of that instrument; that he had been robbed by the widow of his eldest son. That is pleaded as leading up to the execution of the will of 1834, though I [581] confess it does not appear very clearly to my mind how it should have that effect, it being only in reference to the property subject to settlement, which is not referred to in the will of November, 1834, further than this—he gives to Mr. Paul Griffith Panton all his estates in Anglesey, among which was the estate of Plasgwyn, where the deceased resided. But there is that letter of the deceased to Mr. Williams, which shews that he was in communication with him, and with reference to the settlement he had made, and which, it appears, he had declared his intention to endeavour to set aside by an application to a Court of Equity. Evans states, "There were two copies signed of this last mentioned will; the one on the Thursday, and the other on the Friday," that is, the 6th and 7th, the papers themselves being both dated the 6th, though the duplicate was executed on the 7th. She says, "John Williams, who is now dead, but who then acted as bailiff to Mr. Williams, and Ann Williams, the then housemaid, were present, and witnessed the signing of these last wills, as well as myself. On the occasion of the signing the first of the two wills we were called up by my master into his small sitting room up stairs, where he and Mr. Panton were alone together. We neither of us knew for what purpose we were called up, further than that, an hour or so before, my master told us to be in readiness, that he should want us to witness Mr. Panton's signing a paper. He did not say what the paper was, nor did we know that it was Mr. Panton's will, till Mr. Panton, at the time of signing it, declared it to be so."

"It was just after kitchen dinner, about two o'clock [582] in the afternoon, when my master called us up into his room for the purpose he had mentioned. On our entering the room we found Mr. Panton, the deceased, sitting in the arm chair, at the round table, in the middle of the room, looking at the paper, the will of which I am deposing, which he held in his hand." Therefore, supposing this account to be true, the deceased read the will, and there is not only the execution of the will but a knowledge of the contents; at least it would be his own fault if he did not know what the contents were. "Mr. Williams then proceeded to tell us that Mr. Panton wished us to be present to see him sign a paper. My master said this in Mr. Panton's hearing. He spoke the words first in English, and then repeated them to John Williams and Ann Williams in the Welsh language; he repeated the words to them in Welsh, apparently to make sure that they understood what he said. They, both of them, understood Welsh better than English, though they were in the habit of speaking and understood the English language very well. I do not remember that Mr. Panton himself then made any observations, but upon my master saying what I have stated, he (Mr. Panton) put the paper (the will) down on the table before him, and proceeded to sign it. My master handed the inkstand, which was on the table, towards him, and he (Mr. Panton), of his own accord, took a pen and signed his name, 'Jones Panton,' at the bottom of the will, opposite to the impression of a seal in red sealing-wax, which was already affixed to the will. Before signing his name Mr. Panton inquired of my master where he was to sign the will; he pointed to the [583] place where he afterwards signed his name, and said to my master in a tone of inquiry, 'Here?' and upon my master telling him 'Yes, that was the place,' he signed his name there. John Williams, Ann Williams, and myself stood close by him at the table as he signed the will, as did also my master. Mr. Panton then, by direction of my master, put his finger on the seal, and repeated after his words some words to this purport;—'I deliver this my last will and testament.' When Mr. Panton had thus signed and sealed the will, my master took it up and carried it to another table in the room, at which I and the other two witnesses, John Williams and Ann Williams, under my master's direction, all signed our names to it.

"Mr. Panton, after he had signed the will, got up from the table where he had done so and came to the table where we were signing, and stood by, looking on whilst we signed. I signed first, then Ann Williams, and lastly John Williams. Directly John Williams had signed, my master told us he had done with us and that we might

go; and as we were leaving the room he told us not to mention what we had been doing; that Mr. Panton did not wish us to be talking about it. He said this in Mr. Panton's hearing." So this was to be a secret kept from the knowledge of any person but themselves; and certainly it does appear to have been very completely kept, for no person seems to have had a knowledge of the existence of these papers until after Mr. Williams came to London and obtained them from his bankers. And I must here observe that Mr. Williams must not be surprised if suspicions and jealousies should have been excited by his [584] acquiring so large a portion of the deceased's property in a secret and clandestine manner. He is the party to blame for the suspicion, if it be unjust, from the clandestine manner in which he has been the agent in transferring so large a portion of the deceased's property to himself from Mr. W. B. Panton. The witness says: "When we had signed the will my master took it up from the table, and it was in his hand when we left the room. We were in the room, I dare say, as much as ten minutes. Mr. Panton, by his manner, seemed to be pleased and satisfied with what was going on throughout the execution of the will, but he took no further part in it than what I have stated. He signed and executed the will just in the same way as he did all the other papers I ever saw him sign—quite of his own accord. I have no doubt of his knowing the contents of the will at the time he so signed it, for he had it in his hand and was reading it at the time we entered the room. The will was written upon a sheet of paper of the same description as that upon which my evidence is being taken, only it appeared to be opened wide, and not folded in the same way." In point of fact, the paper, being open, as she describes, is written across from one side to the other, so that the fold is perpendicular and not horizontal. "I did not read the will any more than I did any other paper I witnessed of Mr. Panton's; and except as Mr. Panton delivered it as his last will and testament, I should not have known it to be a will. I remember that, at the time I was about to sign it, I cast my eyes over it, and my master, seeing me looking at its contents, put the blotting-paper over it to prevent my reading it. I did not [585] see any other papers about besides the will which was signed. After breakfast, on the following Friday morning, between ten and eleven o'clock, my master called me and John Williams and Ann Williams into one of the sitting-rooms, and Mr. Panton then, in our presence, signed another paper, being, as I believe, a copy or duplicate of the will which he had signed in our presence the day before. I think that it was in the breakfast room down stairs, Mr. Panton, the deceased, being about that day to return home, he having gone from Plasgwyn to Brynbras Castle in Mr. Williams' carriage, and not accompanied by his own servant, and returning in the same manner, accompanied by Mr. Williams, or Mr. and Mrs. Williams. All the same forms were gone through on this occasion as on the day before. Mr. Panton, in the presence of John Williams, Ann Williams, and myself, signed his name at the foot of the paper, and put his hand on the seal, and repeated after my master the words, "That he delivered the paper as his last will and testament." She then goes on to identify the papers produced to her as executed on the 6th and 7th of November, and states that both of them are in the handwriting of Mr. Williams. The account she gives upon the interrogatories does not, as it seems to me, vary in any of the particulars from her deposition in chief, as to the manner in which the execution took place. After having spoken of the execution of the codicil of October, 1836, she states that in the beginning of 1837 the papers were deposited by her, by Mr. Williams' direction, at Messrs. Childs, the bankers (not the bankers of the deceased, which was the natural place they should [586] be taken to, but the bankers of Mr. Williams); and not only the will was there deposited but the duplicate and the several papers annexed to Mr. Williams' affidavit as to scripts. The parcel lay at Messrs. Childs till it was received from the bankers after the deceased's death. Therefore, whatever was the state and condition of the papers in the years 1834, 1835, and 1836, or rather, when she says she took them there in the beginning of the year 1837, they remained in that state till they were taken out of the bankers' hands, and out of the case in which they were enclosed by Mr. Williams; for no access could be had to them without the knowledge of the bankers; and it is not suggested that they had been removed, or the deposit had been meddled with, in the intermediate time.

This witness had stated, with respect to John Williams, that he had been taught to write in the service of Mr. Williams, and she certainly does depose, upon her first examination, in a very strong and particular manner as to that fact. She says, "I

cannot say that I know of the said John Williams having ever written or signed his name to any letter to any one; to my knowledge I never saw him write but on three occasions, and those were the times when he signed, as a witness with me, the three different wills of Mr. Panton's to which I have referred in my evidence. He could only write his name. He was taught to do so by my master at the time we went first to live at Brynbras. My master found it inconvenient that John Williams could not sign receipts or bills for hay and that, and he himself wrote John Williams' name for him to copy, to learn him to do it. I [587] remember that well, and that John Williams used to be writing his name on the stable-door, and about, in chalk, till he had learned how to do it; it was very soon after we went to Brynbras that my master taught him how to write his name. I have no doubt that John Williams signed his mark to the entry of his marriage, because, to my knowledge, it was not till after he was married that he learned to write his name." This throws some discredit on that part of the case which witnesses are called to prove, namely, that he had learnt to write at school, that he could write at the time he was married, and that he was able to keep books with respect to labourers employed by Mr. Williams.

This witness has been examined a second time, after the trial at the Old Bailey, and she there certainly does vary, in some respect, as to the ability of this person to write. She says, upon the interrogatory: "I never saw him write anything but his name, and the names of the different workpeople who were employed at Brynbras. He used to pay them their wages every fortnight, and keep the account of the time they worked. I have often seen him putting down on paper and in a book the names of the workmen, with the amount of the wages due to each; and I have often seen him sign the paper containing the account of the money which the producent gave him once a fortnight to pay the men's wages. I have taught him to write at times. I used to teach him to write his name better than he did, and to make capital letters; for he was always very wishful to be able to write better. I do not know that he was taught to write whilst in the producent's service. He certainly [588] could write his name when I first knew him. I did not know where he learned to write until the time of the trial, but since then I have heard that he had been at school at Bangor, where he had been taught." This witness, in her second examination, seems to differ from the account originally given by her on this point, and it is possible her recollection may have been drawn to the fact from the circumstance of having known what was deposed to by persons who were at school with him at the time when he learned to write.

The other witness to the will is Ann Williams, and she states herself to have been in the service of Mr. Williams on two occasions—from the 12th of May, 1834, to the 12th of May following, and for three months in the year 1832. She says, "I was present when Mr. Panton signed papers as his will at Brynbras; three times I was present when he signed—once when he was on the first visit there, in May, 1834, about a fortnight after I went to live at Brynbras; the others on two following days, whilst he was on the second visit to Brynbras, in November in the same year. I don't remember in what part of the month, but I know it was in November, for my master and mistress left Brynbras and went to town a few days after, and I was left behind. I did not know what the contents of the wills were; I only knew them to be wills, because Mr. Panton signed them as such. Of the two wills which were signed in November, one was signed just after kitchen dinner, the other next morning, just after breakfast, just before master and mistress went out in the carriage. On the occasion of the signing of the first of the two last [589] wills (those signed in November), Mr. Williams, my master, called me, and Ellen Evans, and John Williams up stairs into the sitting-room there. We did not exactly know for what purpose we were wanted, only we thought it was for the purpose of seeing Mr. Panton sign some paper, as my master had that morning told Ellen (Ellen Evans) and me, and John Williams also, I believe, that he should want us in the course of the morning to come up to Mr. Panton. When my master called us up into the said sitting-room we found Mr. Panton there alone with him. Mr. Panton was sitting at a large table, in the middle of the room, with several papers before him. I think he was writing, but what I don't know, unless it was the papers we signed; my recollection at this distance of time is not very distinct as to that. I remember that we then stood by the table, and Mr. Panton wrote his name to a paper before him—it was a large sheet of paper, and he wrote his name, 'Jones Panton,' in one corner of it. There were, I think, several other papers

before Mr. Panton, but what they were I did not know. I don't remember that anything was said before Mr. Panton signed his name to the said paper. There was a large seal on the paper, and Mr. Panton, after he had written his name, put his hand on the seal and said, he delivered the paper as his last will and testament, 'I deliver this as my last will and testament,' he said. I perfectly remember his using those words. To the best of my recollection my master repeated them after him, in order that we might all understand them; for Mr. Panton was a very old gentleman and, like other old people, he did not speak [590] very distinctly; but I heard what he had said well enough. He signed the will and spoke the said words quite of his own accord. I don't remember that my master told him what to do. There was pen and ink before him on the table, but I think my master pushed it a little nearer to him when he signed; my master did not assist him in any other respect. When Mr. Panton had signed, my master took up the paper, and brought it to the side table. He then, in Mr. Panton's hearing, told us that Mr. Panton requested us to be witnesses to that paper. He repeated these words, I remember, both in English and Welsh; he said them in Welsh also, because John Williams and I understood Welsh better than English; I understood English pretty well then, but not so much of it as I do now; John Williams only understood it a little. Ellen Evans signed her name first, then, I think, it was I who signed next, and then John Williams signed his. Nothing was said whilst we were signing our names, but my master shewed us where we were to sign; and when we had all three signed, and were about to leave the room, he told us not to talk about what we had been doing; that we were not to mention it to anybody. We then left the room. I will not be positive whether it was on this or the following morning, but, on one of the two occasions, I recollect that after the will was signed and witnessed, there was another paper signed, a larger paper than the will, a good deal larger. I do not recollect very particularly what passed about the signing this second paper, but to the best of my recollection Mr. Panton returned to the table in the middle of the [591] room and signed the larger paper, and then it was signed by the others. My master, I remember, signed it for one, and Ellen Evans also, but I can't be sure whether I signed it or not—I could not tell unless I was to see the paper. I don't recollect that Mr. Panton signed this larger paper also as his last will and testament. My master, I remember, said that he would write his name to that—the larger paper, but not to the first—the will." And it does appear by the evidence of Mr. Boys, taken upon a subsequent allegation, that Ann Williams, Ellen Evans, and Mr. Williams had attested the execution of a deed for the partition of the London estates upon the morning of the day on which this will was executed; but these papers are not produced. "My master also, to the best of my recollection, repeated the words after him the same as he had done the day before. He then took the paper to the side table, and said, as before, that Mr. Panton wished us to witness the paper. I only know that Mr. Panton delivered it as his last will and testament; whether it was a copy of the paper we signed on the day before, I did not hear. It was signed in the corner by Mr. Panton, like the one the day before. I think that one of the two, but I don't recollect which it was, was rather larger than the other, but like it in other respects."

Therefore, from the evidence of these witnesses, supposing they are to be credited, there can be no doubt that the deceased not only executed the paper as his last will, but knew, or had an opportunity of knowing, the contents of the instrument; there is the evidence of these two persons, speaking most positively to all that is material to the fact of [592] the execution; and that evidence is met only by the evidence which arises out of the strong improbability against the deceased having executed that act, knowingly and willingly, with a full knowledge of its contents. If these two witnesses are to be believed, there is an end of the case, so far as the Court has hitherto gone; and the question will be hereafter, when it comes to consider the whole of the circumstances together, whether their evidence is sufficient, as given in the first instance, shortly after the death of the deceased, for he died in May, 1837, and these witnesses are examined in September—though Mr. Williams (rather an extraordinary step before it was known whether the will would be opposed or not) brings these subscribing witnesses up to London, and keeps them after the allegation was given in, after the examination of witnesses had been commenced, though under suspension; it has been suggested, in argument, that he thought it right to keep Ann Williams, who was no longer in his service, from being tampered with or attempted to be influenced by other persons.

The next part of the case, and the last part to which the Court will have occasion to refer, is that extraordinary circumstance with respect to the alleged discovery of certain pencil-marks on these papers, which, it was pleaded, were, at the time of the discovery, to be traced upon them with the assistance of a strong light, by magnifying glasses of great power. It is pleaded that particular witnesses were able to trace certain pencil-marks, from which it is collected that when the deceased signed his name to the papers they did not bear a [593] testamentary character; that they were, in fact, plans and maps of that property possessed by the deceased jointly with Mr. Brook Baines Hurlock, in different parts of this town, and with respect to which there had been negotiations for a partition, as early as 1832, and which was not finally executed till November, 1834, when the deed of partition was executed. Now, this is a part of the case in which the Court has felt very much the circumstances under which it has been produced; because, as it was alleged on the one side that these papers, when signed by the deceased, were merely maps or plans of houses, or leases, or agreements for leases, in pencil, to which his name had been signed in ink; and it is alleged that, in a late period of the proceedings, namely, after the close of the commission for the examination of witnesses, or shortly before, these marks were discovered on the papers, the existence of which at the present time is admitted on all hands, it does seem to imply, possibly, that there has been some negligence in the care and custody of these papers, if the marks have been impressed upon them, since they were delivered into the registry, and the Court has looked with a great deal of anxiety, in order to trace out, if it possibly could, the time at which the marks were impressed on the papers; if they were not on them when the signature of the deceased was obtained to them, it is a case which may involve very seriously the character of persons in this profession. I have looked anxiously into the depositions on both sides, with respect to these papers, as to their state and condition when they first came into the registry of this Court, and for [594] the purpose of discovering, if they had not these marks upon them at the time when they were brought into the registry, at what time after that they could possibly have been impressed upon them.

Now the additional articles were admitted in the summer of 1838, and fac-simile copies of the papers, with these pencil-marks upon them, were annexed to that allegation; but the Court was of opinion that the witnesses to be examined on that allegation ought not to come prepared with the exhibits annexed to the allegation, to state what marks they were able to discover; but, having examined the papers previously, they were to come and depose to what they had been able to decypher. Therefore, it was a mere plea of the facts what the papers were, without specifying the particular marks upon them.

Now three persons have been examined who have been accustomed to decyphering hands, and to make out obscure and nearly unintelligible writing, and they do depose to certain marks, which they have been able, by the assistance to which I have alluded, to discover on these instruments, which shew that the marks themselves were evidently those of maps, or plans, or agreements for leases, and they also depose that, in many instances, they are able to trace the ink-writing over the pencil-marks. I have no doubt they are speaking that which they believe to be the real state of the facts when they state that the pencil-marks were first impressed on the paper; that though there had been attempts to obliterate the pencil-writing, sufficient remains upon them to enable them to depose in the manner they state. But the Court would not [595] place too much reliance on evidence of this description, for it is liable to this objection; that the persons come to give evidence, having been impressed with a notion that they have come to detect a fraud; and it does appear that some of the witnesses were impressed with that notion. They had been examined, before they were examined here, at the Old Bailey; they had given evidence there, and the Court must receive it here; but it must be careful not to place too much reliance, on a case of this description, upon the evidence of such an inspection as these gentlemen have given to these papers.

Now it appears that in 1822 the deceased came into possession of property in different parts of the town, some in Cursitor-street, some in Castle-street, some in Devonshire-street, and some in Cavendish-court, jointly with Mr. Brook Baines Hurlock, under the will of Mrs. Mathews; and some disagreement as to the letting of leases of these houses subsisted between him and Mr. Hurlock. The result of the evidence is that Mr. Panton having proposed to let a lease of some part, or the whole,

of the property, it was objected to by Mr. Hurlock, for the purpose of inducing Mr. Panton to consent to a partition, and that negotiations for the partition of the property were going on, commencing in 1832, and finally arranged in 1834, when a deed of partition was executed upon the 6th of November, the day on which the original will propounded was executed. Now I take the evidence of Mr. Boys, who was examined on the part of Mr. Williams, after these additional articles had been given in, but not with reference to them. He was a clerk in the house of Messrs. Forbes and Hale, who were employed on [596] behalf of Mr. Hurlock, and who were also advised or conferred with upon the part of Mr. Panton, through the agency of Mr. Williams. He states: "The matters transacted in our office, relative to the allotment or partition of the premises of which the deceased and Mr. Hurlock were the tenants in common, were all within my knowledge, and, in a great measure, under my general superintendence. It was on the 2nd of August, 1834, that the allotment or partition of the premises was made by the referees appointed for the purpose on behalf of the respective parties. The deed for carrying such partition into effect was prepared by us, acting for both parties, a few months afterwards. It was ready for execution in the October following, it having been previously settled and approved of by the producent (Mr. Williams) on the part of the deceased. The property, the subject of the partition, consisted of the following premises, all freehold, and in London:—Two houses, being Nos. 12 and 13, in Cursitor-street, in the parish of Saint Andrew, Holborn; two houses, being Nos. 24 and 25, in Castle-street, in the same parish; two houses in Norwich-court, in the same parish, being No. 1 and No. 2; also eight houses, being No. 2 to No. 9, in Devonshire-street, Bishopsgate-street; also a piece of ground in Cursitor-street, on which two other houses formerly stood, and another piece of ground in Cavendish-court, the site also of two houses which had been pulled down. I cannot state of my own knowledge when it was that the management of the interest of the deceased in the aforesaid premises in London was first entrusted to the producent. I only know that he put the matters relating to them into our [597] hands at the end of 1832, or in the following January, and that the first thing we had to do in respect to them was to obtain a settlement of accounts from the party who it appeared had previously collected the rents for the deceased. No map or plan, nor copy of any map or plan, of the premises partitioned between Mr. Hurlock and the deceased, or any part thereof, was at any time to my knowledge made or prepared by the producent or any other person, or signed by the deceased, with the privity or within the knowledge of the producent or otherwise. So far as we were concerned everything was done in the matter of the partition without any plan or map whatever. The premises were partitioned by two referees or arbitrators named for the purpose—the one on behalf of the deceased, and the other on behalf of Mr. Hurlock. The premises were not partitioned according to any agreement for the partition or division thereof between the deceased and Mr. Hurlock. An agreement had been previously entered into between the parties, binding them to abide by such allotment as the referees might make of the premises; and, pursuant to the agreement, the referees partitioned the premises into two separate allotments, and such allotments were drawn by lot, either by Mr. Forbes, my partner, and the producent, who were present; the producent on the part of the deceased, and Mr. Forbes on the part of Mr. Hurlock; or else by the respective referees in their presence. I was myself in and out of the room on the occasion, and, to the best of my recollection, I was present when the allotments were drawn. The whole transaction, however, passed [598] within my knowledge. The allotment or partition of the said premises, as so drawn, was there-upon compulsory upon the deceased, and did not in any way require or, to my knowledge, at any time have the sanction of his signature thereto:" it having been pleaded that the deceased had signed the papers with pencil to signify his assent to them, for the partition between himself and Mr. Hurlock; and it is true that the partition was afterwards made in the manner here described, though it will presently appear that there were negotiations for the division of the property between the parties, and which might therefore possibly require the sanction of the deceased, as supposed, though finally he signed an agreement to abide by the decision of the referees.

He goes on, in answer to an interrogatory, to say: "Mr. Hurlock did not, to the best of my recollection, in September 1832, or at any other period, object to join in granting leases of the houses, or of any of the houses, in Devonshire-street, either on the ground suggested in the interrogatory, namely, until the said property was divided,

or any other ground. To the best of my recollection there never were any leases prepared or suggested of the houses in Devonshire-street. A negotiation was entered into, whilst I was in the employ of Messrs. Forbes and Hale, between the producent, on behalf of the deceased, and Messrs. Forbes and Hale, as the solicitors of Mr. Hurlock, for the partition of the property. To the best of my recollection the negotiation was depending some months at the end of the year 1833 and the commencement of 1834; it may possibly have been commenced in 1832. Mr. [599] Curtis was instructed to make an estimate of the relative value of the property, with a view to effect such partition. To the best of my belief it was in 1833 that he was employed so to do; but at what period of the year, whether in or about the month of April, I am not aware. Mr. Curtis did make his report thereon in or about the month of June, 1833. The producent did not, to my knowledge, in or about July, 1833, write, address, and send a letter to Messrs. Forbes and Hale, proposing on behalf of the said Jones Pantan, deceased, to take the Devonshire-street houses as his share of the property, and for Mr. Hurlock to take the Cursitor-street houses as his share thereof"—which is suggested in the interrogatory; that there was to be a voluntary division of the property. Then he states: "The fact is that there were so many communications passed, and so many propositions made in respect to the partition of the property, that it is impossible for me to recollect what the propositions were which were made and rejected. There was a negotiation for a partition of the property entered into at the beginning of the year 1834, or at the end of the preceding year, I forget the exact period, and such negotiation had reference to a proposed division of the property, either by drawing lots or by arbitration. The mode of partition ultimately agreed to combined both the modes interrogate; the agreement being that the property should be divided by arbitration, and the two divisions taken by the parties drawing lots for the same. An agreement to arbitrate was prepared accordingly by Messrs. Forbes and Hale. I believe that the agreement was executed by the deceased and Mr. [600] Hurlock. I was not, to my recollection, present when it was executed by either party, but we acted upon it, and it was in our hands as executed. To the best of my recollection the agreement bore date the 31st of May, 1834, but I cannot speak positively to the date. I do not recollect who attested the execution of the agreement by the deceased. An award, in the nature of an allotment to each party, was made under the agreement on the 2nd of August, 1834. I do believe that the papers and documents of the producent, which were seized when he was apprehended upon the charge of forgery, in February, 1838, were kept by Ruthven. After the trial the originals were returned. I have, since my former examination, referred to the papers in our office, to enable me to answer more positively to some of the questions put to me. I have now ascertained therefrom that Mr. Hurlock did, as suggested in or about September, 1832, object to grant leases of the houses in Devonshire-street, until the property should be severed. I can now also answer that it was, as suggested, in April, 1833, that Mr. Curtis was instructed to make the estimate of the value of the property, with the view to the partition. I have also ascertained that in July, 1833, Messrs. Forbes and Hale did receive a letter from the producent, proposing on behalf of the deceased that the deceased should take the Devonshire-street houses, with the addition, however, of those in Cavendish-court also, as his share of the property. The letter does not go on to specify that Mr. Hurlock should take the Cursitor-street houses as his share, but that was intended, I presume, by the proposal. I believe that a copy of such letter [601] was sent by Messrs. Forbes and Hale to Mr. Hurlock. The proposition the producent just referred to was not acted upon; I do not know that it was rejected by or on behalf of Mr. Hurlock. There was a good deal of correspondence passed on the subject of it, and eventually it was not acted upon. I still am unable to answer positively as to the date of the agreement to arbitrate, or as to the names of the witnesses to its execution by the deceased; but I have found a memorandum in my own handwriting, in which it is stated that the names of the three witnesses were 'T. Williams' (the producent, I presume), 'E. Evans,' and 'Ann Williams.'"

I have read the deposition on this part of the case, because it is suggested in one of the additional articles that one of the papers, indeed two of the papers, do contain plans of houses which were possessed by the deceased and Mr. Hurlock in Cursitor-street, Castle-street, Bishopsgate-street, and Cavendish-court, and upon the face of these papers, as they now appear, the witnesses do depose they trace the word "map"

on one of these papers, and the designation of the houses, the numbers of the houses; and upon another the word "ground," which is stated to be a piece of vacant ground, the site on which two houses formerly stood in Cursitor-street and Castle-street, and also another space in Cavendish-court and Devonshire-street or Devonshire-place, and, therefore, whoever impressed these marks on the papers must have been pretty well acquainted with the site and nature of the premises described upon it; for, unless it were so, it would scarcely be possible for any person to have so marked the site of [602] the premises and description of the property upon these papers; and Mr. Boys, when he had refreshed his memory by a reference to the papers, does depose that a plan was suggested for a voluntary partition of the estate, by Mr. Panton taking possession of the houses in Devonshire-street and Cavendish-court, the other to be the portion of Mr. Hurlock.

The next subject of inquiry is, how and when were these marks discovered on these papers, and by whom? It may be right, in the first instance, to state the manner in which these papers came out of the possession of Mr. Williams himself, so far as those persons through whose hands they passed are enabled to state it. I have already stated that these papers were deposited at Messrs. Childs' banking-house in January, 1837; that they were removed from the banking-house on the 13th or the 30th of June, 1837—I say either the 13th or the 30th, because Mr. Boys, who deposes to the dates, states in his examination in chief the 13th, and to an interrogatory the 30th. It is very possible it may have been a mistake of the examiner in taking down the depositions. They were delivered from Messrs. Childs' banking-house into the possession of the proctor for Mr. Williams. They first came to Mr. Williams through Ellen Evans, who had deposited them there, and who removed them thence; from the proctor's hand they seemed to have passed into the hands of another proctor of the Court, merely for the purpose of being brought in annexed to an affidavit of scripts; they were then brought in by that proctor to the Court; then taken into the care and custody of the registrar—that care and custody is necessarily confided to clerks in [603] the office, persons who, from the experience which the registrars have had of them, must necessarily be supposed to be persons of trust, in whom perfect confidence may be placed, and from all the Court has ever seen of the custody of papers in the office, and the experience of a great number of years, the greatest care is taken of papers of this description; from the registrar they are delivered into the hands of the examiner, who takes the deposition of the witnesses on the condidit. Upon the conclusion of these depositions they were again returned to the custody of the registrar.

Now the proctor for Mr. Williams has been examined as to the state and condition of the papers when he received them, and he swears that he never observed any marks on the papers during the time they were in his possession. The gentleman to whom they were delivered, for the mere purpose of being brought into the Court, has also been examined, and though his recollection is only called to the circumstance by the assignation book—shewing that he did bring in an affidavit of scripts—he observed no marks, nor was it likely he should. The examiner, into whose hands they were delivered for the purpose of taking the evidence on the condidit, has also been examined, and he observed no marks of the description of those now stated to be on the papers. He says that, when he examines them now, he thinks he sees certain marks and blurs on them, which, if they had been there when they were in his possession, would have attracted some attention. The registrar has been examined, and he deposes not to have seen any marks on the papers, though when an interrogatory is put he [604] says, "It is possible that some marks like those pointed out might possibly have appeared on the papers without my attention having been called to it, as suggesting anything unusual in the appearance of the papers." The clerks who have the custody of the papers have been examined—one, whose examination was completed, positively swears he did not observe any marks on the papers—the other clerk unfortunately died while undergoing his examination, but I think it is clear that, if his examination had been completed, he must have deposed to the same effect; and all the witnesses concur in stating that these papers, when passing through their respective hands, were precisely in the same condition as when they received them. They, therefore, are not the persons by whom these marks were made on these papers, and the Court has no suspicion that any of these gentlemen could have been concerned in such a transaction. The papers then passed into the hands of the examiner (Mr. Jennings), who took the depositions of the witnesses under the commission at Carnarvon,

and that examiner, who has been produced as a witness, is the person by whom the discovery of these marks is said to have been, in the first instance, made. The account which he gives is, that he attended at Carnarvon as an examiner, and arrived there on 5th of January, 1838. An error was discovered in the commission, and it was returned to London, and a fresh one was obtained, which was opened in the parish church at Llanbeblig, in the county of Carnarvon, on the 10th of January, though I believe it turns out to be the 11th of January; he says: "The commission I am now [605] speaking of was extracted on behalf of Mr. William Barton Pantan. There was another commission extracted on behalf of Mr. Thomas Williams. There was an error in that commission also, and it was returned to London and a fresh one obtained, which was opened in the parish church of Llanbeblig, which is about a mile distant from Carnarvon, on the same day that the first-mentioned commission was opened. On or about the 16th day of the same month the execution of the commission extracted on behalf of Mr. Williams was completed, sealed up, and delivered to his proctor to return into Court, and his proctor left Carnarvon therewith. I was employed only on the evening of the 15th, and until noon on the 16th, as nearly as I can recollect, in executing the commission extracted on behalf of Mr. Williams. Immediately between the morning of the 10th and the evening of the 15th of January I had been employed in executing the commission extracted on behalf of Mr. Pantan. Having finished Mr. Williams' commission and delivered the same to his proctor, I resumed the execution of Mr. William Barton Pantan's commission, and continued employed therein until nearly midnight, when the term probatory expired. On the following morning, the 17th of January, 1838, I received notice of that date from Mr. Williams himself, who was conducting his own examination in the absence of his proctor, and I discontinued the execution of the commission until the 22nd of January, when I resumed the execution of the commission, and was occupied therewith until the 2nd day of February. About the 14th or 15th of January, on the occasion of Mr. Wadeson, Mr. Williams' proctor, bringing [606] his witnesses, or one of them, to inspect the scripts, Nos. 1, 2, 3, 4, 5, 6, 8, 10, and 11, or some of them, prior to producing such witnesses or witness, I observed something remarkable in the signatures of the attesting witnesses to the scripts Nos. 1, 2, and 6." That was, I suppose, the different manner of signing the name. In one place E. Evans is spelt apparently without the "s." No. 2 is now described as a duplicate to the will, and it was upon that paper that the marks were also first discovered by the substitute for the proctor, on behalf of Mr. W. B. Pantan, "I did not attribute any particular importance to the circumstance. I was aware that there were the remains of pencil-writing on the script No. 2 on the 17th of January; I have no doubt of that fact. I did not inspect the scripts, or in any way refer to them between the 17th and 22nd of January exclusively; but after my return to Carnarvon on the latter day I inspected them all narrowly from time to time, as opportunities occurred for my so doing. I subsequently discovered the remains of pencil-writing upon all the scripts. On or after the 22nd of January William Kenney Tyrer, the substitute of Mr. French, the proctor of William Barton Pantan, asked me if he was not entitled to inspect the said papers, which he stated he had never before seen. I informed him that he had a right so to do, and advised him to inspect the same carefully. He did accordingly, thereupon, inspect the papers in my presence, and thereupon observed pencil-writing upon some of them. Having carefully inspected the several scripts in the course of my present examination, I have no hesitation in deposing that [607] the same are now in the same plight and condition as they were in when first entrusted to my charge, save that they seem to have been much handled since, whereby part of the pencil-writing or marks have been effaced." So that Mr. Jennings had discovered something remarkable in the signature of one of the witnesses on the 15th of January, and upon the 17th (before the 17th) he observed some pencil-marks on No. 2; afterwards, upon his return to Carnarvon, after the extension of the term probatory, he took the opportunity of examining the papers more particularly, and then discovered pencil-marks on all the writings. That is the history of the discovery of these marks, and this circumstance occurs: Mr. Wadeson, the proctor for Mr. Williams, and several other witnesses had been called in to inspect these papers. Mr. Jennings states that, on the occasion of Mr. Wadeson bringing his witnesses, or one of them, to inspect the scripts, or some of them, prior to producing such witnesses or witness, he observed something he had not before observed upon these papers, I refer to this to found the observation that these pencil-marks did not

obtrude themselves on Mr. Wadeson's notice at this time, and they were not likely to have been more prominent, more clearly traceable on the face of the papers then, than they were when he finally parted with them.

Mr. Jennings has also been examined on interrogatories, and the great point to be ascertained is the custody of these papers whilst they were in his possession. He says, "I did arrive at Carnarvon with, and for the purpose of executing, the com-[608]-missions for the examination of the witnesses in this cause, on Friday the 5th of January. The commission on the producent's allegation was opened on that day in Llanbeblig church, and George Bettiss was produced and sworn as a witness under the same. My fellow witness, W. K. Tyrer, did act as the substitute of the producent's proctor. The commission was adjourned to the Goat Inn at Carnarvon. The examination of George Bettiss was afterwards commenced. An error was discovered in the commission by me. I communicated the same to other persons, and the proceedings under the same commission were consequently discontinued. I did leave Carnarvon after discovering the error, and I did return thereto on Wednesday the 10th day of January. I had been to the following places, and I disposed of myself in the following manner in that interval. Having communicated on the morning of the 6th of January the error which I had discovered in the commission on the previous evening, I remained in Carnarvon that day until about six o'clock in the evening, when I left Carnarvon by the mail and went to Bangor;" stating the places he was at till his return to Carnarvon on the morning of the 10th of January, that being the day on which fresh commissions were receivable at Carnarvon. He says, "I so disposed of myself, rather than stay at Carnarvon, because I understood from Mr. Wadeson, the ministrant's proctor, that a strong feeling of jealousy existed between the parties in this cause, who were very hostile to each other; and, Carnarvon being a small place, I should probably have come in contact with the parties or their friends had I re-[609]-mained there, which I considered it was desirable for me, as the examiner in the cause, to avoid doing. The new or second commission, for the examination of witnesses on the producent's allegation, was opened on the 10th of January, in Llanbeblig church, and two witnesses, namely, George Bettiss and Robert Spencer, having been then produced under the same, the commission was then adjourned to the Goat Inn, and there executed. The rooms which I occupied as my examining and sleeping rooms at the inn on the 5th and 6th of January, whilst engaged under the first commission, were two adjoining front rooms on the first floor of the inn, both with windows looking on to the square at Carnarvon—the examining-room being on the right hand side when you gain the landing place on the first floor. They were the same rooms as those occupied by me on my return to Carnarvon on the 10th of January. I dined in my examining-room on the 5th and 6th days of January. I am not quite sure whether Mr. Tyrer then dined with me, but before dinner on that day I well remember informing Mr. Tyrer that it was usual for the commissioner to be asked to dine with us, and that it was his place to invite him, which was done, but he declined the invitation; and also that I wrote a note to Mr. Wadeson on the subject of the dinner, and he declined. The same room was used by me for an examining-room from the 10th of January, and from the period of my first arrival at Carnarvon, and so long as the ministrant's proctor remained thereat. During the time that I was absent from the Goat Inn, [610] previous to my departure, and during the time occupied in the opening of the two commissions, and of the commission afterwards opened for the examination of witnesses on the allegation of the ministrant, I had not the testamentary papers about my person; but during such time the papers were locked up in my portfolio, which was secured by one of Bramah's patent locks, the key of which I had in my pocket, and the portfolio itself was also locked up while the commissions were being opened, either in my examining-room or my bed-room, at the inn, and while I was absent from the Goat Inn, previous to my departure from Carnarvon, in a cupboard in my bed-room, and I had the key of the bed-room or the cupboard in my pocket at such times, as well as the key of the portfolio." So that, at the time Mr. Jennings was at Carnarvon, between his arrival there, and the discovery of the error in the commission, and his departure from Carnarvon, it is quite impossible that more care should be taken of the papers, and more caution used, than by him; but I do not perceive from any part of this evidence that Mr. Jennings deposes that whilst he was absent from Carnarvon the papers were with him. He does depose that, when he was absent afterwards from the 17th of January to the 22nd, the papers were with

him during the whole of that time ; that he brought them to London, and they returned with him to Carnarvon. But there is this circumstance, though not expressly stated by Mr. Jennings ; that it was after his return to Carnarvon that these papers were again inspected by Mr. Wadeson, and the marks upon them did not [611] attract his observation. Therefore it was not probable that during this interval these marks should have been made on these papers.

Mr. Jennings proceeds to state, "I did on the Sunday attend evening service at a Wesleyan chapel in Carnarvon"—that is the 14th of January, when he had attended the church at Llanrug, for the purpose of inspecting an entry in the register book—"in consequence of that being the only place where the service was conducted in English, the service in the Established Church being performed in Welsh. I did mention to the proctor to the ministrant that I had done so. I had not the testamentary papers annexed to the affidavit of scripts of the ministrant's in my actual personal charge, either when I so went to Llanrug, or whilst I was so attending service at the said chapel, but the papers were locked up during such time in a cupboard in my bed-room in the inn, in which the portfolio in which they were locked was deposited, and I had the key of the cupboard, and also of the portfolio, in my pocket, and therefore in my own personal charge during such time."

In answer to the interrogatory, whether he did not swear upon the trial at the Old Bailey, with respect to particular facts, he says : "I was examined as a witness on the prosecution of the ministrant, on the charge of forging the testamentary papers in question. I did not in answer to a question put to me by Mr. Jervis say 'I was there, meaning at Carnarvon, three weeks ; I believe I happened to be there three weeks from the time I opened the commission, and I am not aware that I left it, meaning the said Goat Inn, three minutes [612] without the papers, that is to say, I might have gone out for a walk for a few minutes, but certainly not for any length of time ; I am sure that I never was out for half an hour at any one time ;' the church at Llanrug being about three miles, the chapel being about a quarter of a mile, and the church at Llanbeblig, where the commissions were opened, being more than a mile distant from the inn. I did not also, in reply to a question put to me by Mr. Jervis 'why I did not lock them (meaning the testamentary papers) up in the cupboard,' answer as follows : 'Why, sir, the room I was in, I was going back to immediately. I was not at any time one hundred yards from the house all the time I was there.' I have referred to the short-hand writer's report of the trial, and I find that those words are therein attributed to me ; but they are incorrectly attributed to me, and I most positively and unqualifiedly deny that the above-mentioned answers were ever given by me. The report is not in those respects in accordance with what I actually said. I do not pretend at this distance of time to state correctly what I did actually say in lieu of the above-mentioned words attributed to me ; I may have said, 'I am not aware that I left it (meaning my room in the inn) three minutes without locking up the papers, &c. ;' and if I said 'I was not at any time one hundred yards from the house all the time I was there,' I must have meant under the circumstances stated or implied in the questions which had been put to me. Again I deny that I ever spoke the words attributed to me in this interrogatory, in the sense which they imply as therein quoted." And it is hardly possible he should have given such an answer [613] to the effect of stating what is there suggested, because to have said that he had gone to a church two miles distant, to another place of worship a quarter of a mile, and never was absent from the house one hundred yards, would be to impute to him the grossest absurdity.

He says : "The proctor of the ministrant did leave Carnarvon on Tuesday, the 16th day of January, for I did not see him there after that day. I changed my examining-room after my return, on the 22nd of January, to Carnarvon, after having been in London. I did, myself, leave Carnarvon, and proceed to London, on Thursday, the 18th day of the month ; it was not till after my return thereto that I changed my room. I had the testamentary papers in question with me when I was in London, and during my absence from Carnarvon, to wit, from the 18th to the 22nd of the month." So that these papers could not have been tampered with during this time by any person remaining at Carnarvon. "It was previous to my leaving Carnarvon, on the 18th day of January, that I first observed marks on some, or one, I cannot say which, of the testamentary papers ; but I did not give any attention to such marks, in the way of making them out, until after my return to

Carnarvon. William Kenney Tyrer did usually dine with me during the execution of the said commissions. We dined sometimes in another room, on the same floor with my examining-room and bed-room, and sometimes in a room on the ground floor." And it appears that Mr. Tyrer did dine with him generally during the execution of the commission. Mr. Wadeson had declined to dine with Mr. Jennings and the [614] substitute, he being at that time upon a visit to his client Mr. Williams; and the commissioner also declined; and Mr. Jennings and Mr. Tyrer were dining together generally, during the progress of the commission, by themselves, at the Goat Inn, at Carnarvon. I must again express my wish, as I did during the argument, that Mr. Jennings had used the same caution which induced him to leave Carnarvon between the 5th and the 11th of January, as he knew the parties were hostilely inclined towards each other; yet, after his return from London, with the papers in his possession, and after he had made the discovery of the marks on these papers, he does abandon and depart from that caution which he had so properly used in the first instance, and suffer Mr. Tyrer to be alone with him on many occasions, during dinner, during the execution of the commission. I wish Mr. Jennings had said, "Though it is usual for the practitioners and the examiner to dine together during the progress of a commission, yet, upon this occasion, you know, as well as I do, the hostile feeling subsisting between the parties, and it would be much better that we should have as little intercourse as possible, except in the presence of the other parties."

He goes on to state: "I did not communicate during such time with the proctor of the ministrant, or ever signify to him or let him know of my presence in London. I went to Mr. French, the producent's proctor, to ascertain that the term probatory in this cause was extended, and to urge him to attend at Carnarvon; but I had no occasion to see the ministrant's proctor during such time." The ministrant's commission had been closed, the [615] witnesses examined, the examination of the witnesses returned to London, therefore there was no communication afterwards which Mr. Jennings had to make; but, as the other commission was to proceed, and the term probatory was extended, it was natural enough that Mr. Jennings should see the other proctor, and state the inconvenience that would ensue from no practitioner being there.

From the general tenor and effect of this evidence of Mr. Jennings it should seem that he had, after these papers had been entrusted to his care as an examiner of the Court, carefully placed them so as to prevent access by other persons without his knowledge and consent. I think it is impossible that any person could have had access to the papers for any purpose—certainly not to make those marks which are stated to be now visible.

Another witness, who has been examined with respect to these alleged discoveries, is Mr. William Kenney Tyrer, the substitute for the proctor for Mr. W. B. Panton; and he also has been examined upon the additional articles. He says: "On the 24th or 25th of January, it was possibly on the 26th, I asked Mr. Jennings, who was still employed in examining our witnesses, if I might look at 'the wills,' or 'Williams' documents.' I wanted to look at the signatures of the attesting witnesses to the deceased's will, it being part of our case that two of such witnesses could not write. Mr. Jennings' answer to me was, 'Certainly; you have a right to look at them, and I should advise you to look at them very carefully.' Accordingly, I did thereupon proceed to inspect the scripts, in Mr. Jennings' presence, and I then, for the first time, [616] observed pencil-writing upon some of them. It was on the script No. 2 that I first saw the pencil-writing, and I shall never forget my feelings on so doing. On the 7th of February, Mr. W. B. Panton being at the house of Mr. Henry Rumsey Williams, on other business (relative to his being appointed high sheriff of the county of Anglesey), the latter referred him to me, telling him that I had some news to tell him about this cause; and I then told him of my having discovered pencil-marks on the scripts." That is a subsequent communication made on the 7th of February to Mr. W. B. Panton; but it appears by the evidence of the witness on interrogatories that, having made the discovery, which he says produced feelings such as he shall never forget, he communicated it to Mr. Rumsey Williams, who was at that time under (or had just completed) his examination as a witness in the cause. On the interrogatories he states the circumstances rather more in detail, but still to the same effect.

I am not aware that the case is carried any further by this witness, as to the

alleged discovery, than it is in his deposition in chief, namely, as to the manner in which Mr. Jennings was employed in taking the depositions, and in which he was employed as the substitute for Mr. French, and the circumstances which afterwards took place with respect to the fac-similes made of these papers. This witness stated he had not before inspected the papers; but I think he says, in one of the interrogatories, he had looked cursorily at one of the papers, but not for the discovery of anything particular on the face of it; but he did look, when [617] his attention was called to them particularly by Mr. Jennings, and he then made the discovery which he alleges to have produced feelings which he cannot forget. It was observed, with respect to this witness, that it was somewhat extraordinary that, as part of his case was that two of the attesting witnesses could not write, he had not called on the witnesses to inspect their alleged signatures. I confess that objection does not strike me forcibly, because, as the plea was on behalf of the parties whose substitute he was, that the witnesses could not write, and as the witnesses were to be produced to prove that fact, what was the use of shewing them the handwriting? It was not a case of doubtful handwriting; where it is pleaded that witnesses could not write it does not occur to me that there was any imperative need of calling the attention of the witnesses to the particular signature of the attesting witnesses, the allegation being that they could not write at all.

This witness goes on to state: "I usually dined with Richard William Jennings, the examiner, during the execution of the commission; Mr. Henry Rumsey Williams dined with us twice." Again, I think that was not quite a correct mode of proceeding, considering all the peculiar circumstances which at this time surrounded the case, and after the discovery had been made; Mr. Rumsey Williams, more especially, being a witness to be examined, or under examination, about the time this discovery took place.

Now, upon the discovery being made upon the 17th, and afterwards more exactly followed up, Mr. Jennings proceeds to make fac-simile copies [618] of the papers. He applies to Mr. Tyrer to procure tracing-paper, which is procured somewhere about the 25th or 29th of January, and the fac-simile copies are made by the examiner, and afterwards collated by Mr. Tyrer. I think here, again, that Mr. Jennings should have abstained from communication with Mr. Tyrer, the substitute of one proctor, in the absence of the other proctor; I think it would have been better if other persons had been applied to, or Mr. Jennings had done it himself; the commissioner would have been much a more proper person, and more impartial between the two parties. But I do not think that anything very material arises out of this, for as Mr. Tyrer had discovered these marks, his proceeding to examine the copies of Mr. Jennings proves nothing against the authenticity of the copies so made; but it creates strong jealousy in the minds of these persons who were concerned in a litigation carried on in such a hostile manner.

When this discovery is made, and these fac-simile copies are taken, the commissions were closed, and were returned to the Court, and some communication was made to some individuals with respect to the discovery; and, amongst others, a communication was made to the Court—not in the channel it ought to have come through, in the first instance, but from a person to whom it was communicated by the examiner. But it struck the Court as a most improper channel to receive that communication by, and, therefore, directed that person to tell Mr. Jennings his duty was to communicate through the registrars. Accordingly, some communication was made to the Court through [619] the registrars, and the Court was applied to, to know whether it would sanction any steps that might be taken by Mr. Jennings. The Court declined giving any such instructions, for at that time communications had been made in another quarter, to what extent the Court was not informed—Mr. Tyrer and Mr. Rumsey Williams had been informed of what had passed, and the Court was called upon to say whether it would sanction ulterior proceedings by the examiner, which examiner had already communicated the facts to other parties. It was not for the Court to direct what future proceedings should be taken, and it was, therefore, left to the examiner to pursue his own course.

The course the examiner pursued was this: he communicated with other persons out of the profession; having, as he believed, discovered traces of a gross fraud attempted to be practised, he took the steps he thought his duty dictated, for the purpose of bringing the parties guilty of the fraud to justice. Accordingly, upon his

representation, a warrant was issued for the apprehension of Mr. Williams and the two attesting witnesses to the will, and they were brought to London; the papers of Mr. Williams were seized, including the correspondence with his proctor in this cause; and the parties were committed to take their trial at the Old Bailey. There Mr. Jennings was examined as a witness, and the result was the acquittal of all the parties.

But there is another circumstance in the proceedings to which the Court must advert, that is, although Mr. Jennings does not himself interrogate [620] these witnesses as to what had passed at the execution of the will, he is present when Mr. Tyrer puts questions to them with respect to the manner in which the will had been executed; although it is the duty of the examiner, in all these cases, to caution witnesses against the disclosure of any part of their evidence till publication shall have passed in the cause. I cannot think that Mr. Jennings did right in suffering questions to be addressed to the witnesses by another witness, which might have led to a premature disclosure of the evidence. I cannot also but remark that I think the character Mr. Jennings assumed, that of an Irish gentleman, and entering into conversation with the witnesses on the subject, is not precisely that line of conduct which should have been pursued, notwithstanding he might consider it his duty to do all he could to bring these parties to justice.

But the great point is, if possible, to discover when the marks were impressed on the papers. Now, I must say it seems utterly impossible, almost incredible, that these marks should have been impressed upon them after they came into the registry of the Court; for I have traced them through the hands of all the parties they must have passed through. It seems to me also that they must have been impressed on the papers by some person who knew the nature and situation of the property the subject of partition, and that it would occupy a considerable time for any person to make these plans on the papers, well acquainted as he might be with that property; and I find the greatest difficulty to come to any conclusion on the point, because I do find it stated positively, in the evidence of Ellen [621] Evans and Ann Williams, that, at the time they saw the papers executed by the deceased, there was ink-writing on them, and not pencil-marks. And even if there had been these pencil-marks at that time, if there was ink-writing, which forms the will of the deceased, he was in possession of the contents of the writing; for he had it in his hand, and was apparently reading it, when the witnesses went into the room; and he executed it with the knowledge that this writing was on the papers. The Court must entirely disbelieve the subscribing witnesses before it could come to the conclusion that this was a fraud practised by Mr. Williams, by getting the deceased to execute the papers as plans for the proposed partition; though there is a veil of obscurity through which the Court cannot penetrate; a mystery which it cannot disperse. My difficulty increases every time I look at the proceedings, because, on the one hand, I find a disposition contrary to every probability, namely, the exclusion of Mr. W. B. Panton and the substitution of Mr. T. Williams in his place; and there is a circumstance which I have purposely reserved to this moment, namely, the occurrence on the 4th and 12th of May. Mr. Bettiss deposes that, upon the 4th of May, he and Mr. W. B. Panton, having been engaged to go together to Chester races, were requested by the deceased, though they had taken their places by the mail, to continue at home, as he had something important to say. On the 4th of May Mr. Bettiss expressly deposes the deceased did make a donation, as it is called, of the whole of the property he possessed—pictures, books, and wine; the key of the cellar and the [622] library, and the places where the property was kept were delivered out of his hands to Mr. W. B. Panton, and stock receipts to the amount of 19,000*l.*, on part of which no dividends had been received for years, he was put in possession of by the deceased. But it is said that Mr. Bettiss is a witness who cannot be believed; that he is the adviser of all the proceedings on behalf of Mr. W. B. Panton; that he has sworn that the first intimation he had of the existence of the will was on the 26th of July, whereas it was brought into Court at an earlier period; and, therefore, he is not to be believed where he is not confirmed by other credible witnesses. I have already stated what I believe to be a fair explanation of Mr. Bettiss's evidence on that point; but, in point of fact, Mr. Bettiss is not unsupported by other witnesses, because, upon that very day, the deceased directs him to apply to Mr. Rumsey Williams for a parcel in his possession; and accordingly Mr. Bettiss does see Mr. Rumsey Williams on the subject, and asks him for a parcel,

and Mr. Rumsey Williams states he does not know what the testator means. The result is, a letter is written, and it is produced and spoken to by Mr. Rumsey Williams and Mr. Bettiss. Mr. Bettiss, writing to Mr. Rumsey Williams on business, states that it was the will he meant. Mr. R. Williams writes to him that he is going to Plasgwyn, and will bring it with him. That takes place on the 8th of May—one day after the execution of the codicil to confirm the will of 1834. On that occasion the will is taken over, and delivered to the deceased, cursorily read by him, according to Mr. Rumsey Williams, and he declares his intention to alter his [623] will at some future time, and make some provision for the young daughter of Mr. W. B. Panton, to whom it is proved by all the witnesses he was very much attached; and, afterwards, when he has so cursorily read the will, he delivers it to Mr. W. B. Panton as his last will, and desires him to take care of it. Now, why is the Court to consider all this as a mere fabrication on the part of Mr. Rumsey Williams and Mr. Bettiss? The former part, if it stood by itself, is somewhat extraordinary, that the deceased represented not to have been a man of business, and to have been deceived in the settlement upon his eldest son, though afterwards his caution is aroused and awakened—that he should have made this donation in the formal manner here represented, followed up by the delivery of the key of his plate, his library, and so forth, and that he repeated this upon the 8th of May. But with respect to the other transaction deposed to by Mr. Rumsey Williams, I know of no reason why he should not be believed on his oath, but that he is the father-in-law of Mr. W. B. Panton, and has been consulted in the course of the proceedings. But he is confirmed by Mr. Jones of Glanbenno, who was there at the time, having gone on business to Mr. W. B. Panton, though it is said he came in, in the nick of time, to dovetail the evidence! Then there is a further conversation with respect to the regard and affection the deceased had for Mr. W. B. Panton, in the presence of Mr. Spencer. They are stated to be all the personal friends of Mr. W. B. Panton; but they are persons upon whose general character there is no imputation whatever, and it is only because they depose adversely to the [624] case set up by Mr. Williams that the Court is to conclude that this is a mere fabrication. I am not prepared to go to such a length; therefore do believe that these transactions took place on the 8th and 12th of May, after the date of this codicil confirming the disposition of 1834, and also a few days before the deceased was taken ill of the illness which terminated in his death.

All these circumstances have created the greatest difficulty in the mind of the Court, which is left in the greatest uncertainty; there is a mystery which it cannot penetrate. In examining the depositions over and over again I cannot bring my mind to any conclusion as to the persons by whom, or the time when, these marks were made upon the papers; I am left in a state of the greatest doubt.

Observations have been made on the appearance of the papers, and it is extraordinary. They are not in the form (papers 1 and 2) usually adopted by solicitors in drawing wills, if they use brief paper; or if on a common sheet of paper; it is usually written upon from the top to the bottom; whereas these papers open like maps, with the fold between the pages perpendicularly, and not horizontally; and there are certain indications upon the papers from whence the Court might be led to conjecture that there had been a crowding in of certain words, to bring the contents down to that part of the paper to which the signature of the deceased is affixed; and with respect to the disposition in the first paper, there is no recital of the settlement of the real estates alluded to, and the length of the will executed in 1828, in which that settlement is recited, is a circumstance which tends, in some [625] degree, to lead to a conjecture that it is possible they might have been used for other purposes than those for which they now serve. But the Court cannot act upon such conjectures against the testimony of the two subscribing witnesses. And there was great force in the remark of the learned counsel for the executor (Dr. Addams) that the most improbable thing which could have occurred would be Mr. Williams' placing himself at the mercy of Ann Williams, who left his service in 1835, and was living as she could at different hotels and public houses; it does seem one of the improbabilities with which this case abounds from beginning to end.

The instructions for the will are very strange; undoubtedly they are in the handwriting of the deceased, but they are such as the Court can hardly decipher, and it is difficult to suppose they could be intended for the disposition of such a property as this; and the other papers, the scrap No. 6, exhibited as containing the attestation of

the witnesses to the will of the 31st of May, 1834, which is to form the foundation of these proceedings, all tend to the conjecture that these papers might have been used for the purposes represented. It might have been the case of Mr. Williams that, in fact, he had used paper which he employed for drawing plans for the preparation of the will; but the Court cannot have recourse to such solution of the difficulty, because Mr. Williams has expressly stated that there were no such marks upon the paper; that he never used them for any other purpose, and that they have been tampered with since they came into the registry of the Court. The Court is thus driven from a possible solution of that kind, though it [626] might be an improbable story that these papers should be so casually taken up, at the house of Mr. Williams a solicitor. I say the papers themselves are suspicious, and some circumstances about them do seem to me very extraordinary. The paper No. 5 purports to be the draft will of November, 1834, and had been converted from the draft of the will of May, 1834. The paper No. 11 is the draft of the codicil of the 15th of October, 1836. Now it is proved that both these papers are made by the same manufacturer, and in the same year. No. 11 appears to be the right hand leaf of a sheet of paper similar to that upon which the draft will of 1834 was drawn, and the mode of division of the property proposed to be made, according to Mr. Boys' evidence, is to be traced from the one to the other of these two papers. That is a most remarkable circumstance; it seems to have been done by some person employed to draw out a plan for the approbation of the person who is to agree to this partition, and who, at the bottom of these papers, writes, "I approve of this," as if it was something different from the instructions for a will—as if approving of something proposed to be done, not a testamentary act. Mr. Boys says it was in agitation that Mr. Hurlock should take part of the property, and the name "Hurlock" appears on one side of the paper, and "Panton" on the other—"Cursitor-street" and "Castle-street" are placed under the name of Mr. Panton, and other parts of the property under the name of Mr. Hurlock—and this does create considerable suspicion that all is not right; and, without going further into an examination of the papers, it does appear to me to be one of [627] those cases in which there is a mystery, which the Court cannot penetrate. It is true, when a party sets up papers of this description, he is bound to prove that the testator executed them with a full knowledge of their contents, and with an intention to give effect and operation to them as his last will and testament; and if the witnesses on the conditit had varied in any material degree, the Court would have had great difficulty in coming to the conclusion that this was the genuine act of the testator. But when I see these witnesses consistent from the beginning to the end, not varying in one single particular as to the facts from the first moment when they were examined in the cause on the conditit, though they were examined extra-judicially by Mr. Tyrer, afterwards judicially at the Old Bailey, and afterwards twice in this Court—when I find them consistent throughout, and adhering to the story originally told, I cannot feel myself at liberty to say that I entirely disbelieve the witnesses; and if I cannot disbelieve them, why then it is proved that the deceased did execute this as his last will and testament, with the full opportunity of knowing the contents of the papers; and being so, the Court can pronounce no other sentence than in favour of their validity. And, accordingly, the Court does pronounce for them, though not without great doubts, great difficulty, great misgiving, in its own mind, with respect to the real state of facts.

I, therefore, pronounce for the validity of the papers, and, amongst them, that of the 7th of May, because, if the other part of the story is true, with respect to the execution of the will and the first codicil, the codicil of the 7th of May does not par-[628]-take of the improbability which exists in respect to the will, if it stood alone. The transaction of the 7th of May is a very doubtful and a very questionable one; but if the Court feels bound, as it does, to pronounce for the will and the first codicil, it cannot pronounce against the codicil of the 7th of May; therefore I pronounce for all these papers.

IN THE GOODS OF JAMES DAVIES. Prerogative Court, August 4th, 1840.—The Court will grant administration to a son, in preference to a widow who had been divorced for adultery committed by her.

Motion.

The deceased died 24th of July, 1840, intestate. In 1835 he had been divorced

a mensâ et thoro from his wife, by a decree of the Consistorial Court of London, on the ground of her adultery. She afterwards went to America, and married in that country, where she still remained.

Burnaby moved for administration to the son of the deceased, in preference to the widow. He cited Williams on Executors (p. 321), and the cases there mentioned.

Sir Herbert Jenner. Although this Court has a discretion granted by the statute, the practice, which is the law of the Court, is to consider the widow as entitled to the administration in the first instance, and although divorced a mensâ et thoro, she is the widow still. But where she has been divorced from her husband [629] for adultery on her part, I think the case is a proper one for the Court to exercise its discretion.

Administration decreed as prayed.

BELCHER against MABERLY. Prerogative Court, Nov. 6th, 1840.—Where an administration is granted, without a personal service of a citation on the parties having the prior title, the Court requires the sureties to justify. In the case of a bankrupt deceased, the Court declined to dispense with such rule in favour of the official assignee.

Motion.

The deceased, Mr. John Maberly, died 4th of October, 1839, intestate, leaving a widow and children, two of them minors. In 1832 he had become bankrupt, and Mr. Alexander Belcher had been appointed his official assignee. Two of the sons resided abroad, one in the East Indies. A decree with intimation issued at the instance of the official assignee, which was served in the usual way. The property was under 50l.

Deane prayed the administration to Mr. Belcher, and that the Court would dispense with his giving justifying security.

Sir Herbert Jenner. The Court cannot hold that the official assignee is in a different situation from other persons where there has not been a personal service on all the parties. The administration is prayed without justifying security: I can see no reason why it should be so. The property is at present small, but if it should be larger, the grant of administration will remain. The usual course is, where there has not been personal service upon all the parties, [630] that there shall be justifying security; and in this case the Court is not inclined to depart from the rule. The official assignee must take the grant, subject to the usual conditions attached to it.

GODRICH against JONES. Prerogative Court, Nov. 6th, 1840.—A witness having admitted that he was answerable to the proctor in the cause for his costs, the Court held that the witness was incompetent, but allowed the conclusion of the cause to be rescinded for the purpose of the witness being released, and re-produced and re-examined as a witness. At the same time stating that in future the Court would not make such an order.

[See further, p. 671, post.]

This was a business of proving the will, with two codicils, of Harriet Lloyd, deceased (see ante, p. 453).

The cause now stood for hearing, when

The Queen's advocate and Haggard for Mr. Jones objected to the testimony of Mr. Kirkman Lane, the drawer of the will in question, on the ground that he had an interest in the event of the suit. In answer to an interrogatory he deposed: "It is the fact that I employed Messrs. Smale and Son, the proctors, to conduct the suit on behalf of the producent (Mr. Godrich); there was no arrangement between us as to the payment of their costs; but I certainly am answerable to them for their costs; they will look to me, and I shall look to the producent." In *Handley and Jones v. Edwards* (1 Curt. 722) the Court held that such a liability disqualified a witness.

The Court being of opinion that the witness was incompetent,

Addams and Robinson prayed that the witness might be re-produced, and upon his being released [631] repeated to his deposition. In the case of *Harrison v. Lane* the same objection was raised, and it was cured by the Court rescinding the conclusion of the cause, in order that the witness might be released and re-examined. The proctor is ready to release the witness in this case.

The Queen's advocate and Haggard. The evidence having been seen, it is

dangerous to allow a witness to be re-examined; he can now shape his testimony to the exigency of the case. The application should have been made earlier, before publication. The proctor produced this witness with a full knowledge of his incompetency.

The minute of the Court, in *Harrison v. Lane* (7th May, 1830), being referred to, it appeared that the Court rescinded the conclusion of the cause, and gave leave to the proctor to re-produce the witness "for the purpose of his being re-sworn, re-examined, and again repeated to his deposition."

Sir Herbert Jenner. Upon this precedent the Court will, on this occasion, rescind the conclusion of the cause, for the purpose of allowing Mr. Lane to be re-sworn and re-examined; but the Court will not consent in future (except in special cases) to rescind the conclusion of a cause for the purpose of re-examining a witness under similar circumstances. It must be considered to be a rule of this Court, till reversed by a superior Court, that a person responsible for the proctor's costs will not be considered a competent witness, and consequently his evidence will not be admitted; and that it is not [632] competent to a party to wait till after publication of the evidence before he releases the witness, and then to apply to have the conclusion of the cause rescinded. The release must be made at the earliest opportunity, before the witness is examined; this must be considered as the rule of the Court.

The case must stand over for the re-examination of the witness; his original deposition must be retained in the office.(a)¹

BAKER, JEPP AND MOSS *against* THOROGOOD. Consistory Court of London, Nov. 10th, 1840.—Under the stat. 3 & 4 Vict. c. 93, enabling the judge of an Ecclesiastical Court, in a suit for church-rate not exceeding 5l., to discharge a party from custody, who had suffered imprisonment for six months and upwards, upon payment of the rate and "the costs lawfully incurred by reason of the custody and contempt of such party," costs in the Ecclesiastical Court only are intended.

[Discussed, *Ex parte Cox*, 1887, 19 Q. B. D. 307, 20 Q. B. D. 18.]

This was a suit for subtraction of church-rate, brought by the churchwardens of Chelmsford, Essex, against John Thorogood, an inhabitant, for the recovery of two rates, amounting to 9s. 2d. The defendant had refused payment, and, neglecting to appear to the citation, had been pronounced in contempt, and a writ de contumace capiendo having issued, he was, in the early part of 1839, [633] committed to prison, where he still remained. Since that date the Act 3 & 4 Vict. c. 93 had passed (10th August, 1840), which enacted, that it shall be lawful for the Judicial Committee of the Privy Council, or the judge of any Ecclesiastical Court, if it shall seem meet to the said judicial committee or judge, to make an order upon the gaoler, sheriff, or other officer in whose custody any part is, or may be hereafter, under any writ de contumace capiendo already issued, or hereafter to be issued, in consequence of any proceedings before the judicial committee or the judge, for discharging such party out of custody; provided that no such order shall be made without the consent of the other party or parties to the suit; provided that, in cases of subtraction of church-rate for an amount not exceeding 5l., where the party in contempt has suffered imprisonment for six months and upwards, the consent of the other parties to the suit shall not be necessary to enable the judge to discharge such party, so soon as the costs lawfully incurred by reason of the custody and contempt of such party shall have been discharged, and the sum for which he may have been cited into the Ecclesiastical Court shall have been paid into the registry of the said Court, there to abide the result of the suit.

The registrar reported the bill of costs in this cause at 16l. 13s. 8d.

The Queen's advocate for the churchwardens. I understand that the costs taxed by the registrar [634] (at whose instance I am not aware; (a)² for it does not appear

(a)¹ In the case of *Carter v. Rolph and Clark* (16th December, 1840) the same course was followed with respect to the drawer of a will, who, by retaining the proctor, had rendered himself liable for his costs. The motion for rescinding the conclusion of the cause was opposed, on the ground that no responsive allegation was given in by reason of the known incompetency of the witness. Notice of appeal was given in this case.

(a)² The rate and costs were paid by an individual, or by individuals, who desired to remain unknown to the defendant.

that there is anybody before the Court against whom an objection could be taken, and who would be liable to the costs of an act on petition) are the costs of the proceedings in the Ecclesiastical Court. But the question is, what are the "costs lawfully incurred by reason of the custody and contempt of the party," which must be paid before he can be discharged? Costs have been incurred in consequence of two applications to a Court of law by the party to be liberated from imprisonment,^(b) to the amount of 75l. Can the Court order the release of the party till all the costs lawfully incurred, in the Court of law as well as in this Court, are paid? I submit that the amount of costs lawfully incurred is 91l.

The Court. Has the party been condemned in the costs in the Court of Queen's Bench?

The Queen's advocate. Nothing passed there with respect to costs. The application was resisted by the churchwardens successfully.

The Court. I have no means of ascertaining what the costs in the Court of Queen's Bench are.

The Queen's advocate. John Thorogood has.

[635] *Judgment*—*Dr. Lushington*. I am now, for the first time, to carry into effect a new Act—totally different from any other—passed with a view of authorizing the release of a person in custody, and in consequence it becomes the duty of the Court to be guided by the true meaning of the Act.

In order to ascertain the true construction of the statute, I think it necessary, in the first instance, to consider the state of the law prior to the passing of it, and then to see how far the law has been altered by the statute.

The person committed in this case for contempt was sued in the Ecclesiastical Court for church-rate, a subject over which the Court had undoubted jurisdiction. He refused to appear, or to submit to the judgment of the Court; he was consequently pronounced in contempt, his contempt was signified, and he has been for a considerable time past in custody. If no such statute had passed, the course of proceeding would have been this: the Court would have been called upon, at the instance of the party imprisoned for contempt, to allow his contempt to be purged, and that could only be done on the payment of the costs incurred in this Court in consequence of his contempt, and on his taking the usual oath to submit to the lawful commands of his ordinary. Now, let us see whether, under these extraordinary circumstances, the Court would have required anything more to be done on the part of Mr. Thorogood. Suppose application had been made, either for a writ of habeas corpus, or for the purpose of quashing the writ de contumace [636] *capiendo*, to a Court of common law, and that Court had been of opinion that the Consistorial Court of London had properly exercised its jurisdiction, and it had refused the application; unquestionably, the other party must have incurred certain costs. Now, whatever those costs may have been, it is perfectly clear that, previous to this statute, I could have taken no cognizance of them at all; because the proceedings would have been before another jurisdiction, which was alone competent to decide whether a party was liable to the costs, and to cause the costs to be paid. I now consider the provisions of the present statute, and to what extent it has altered the antecedent law.

I have observed that, prior to the passing of this statute, it was requisite for a party to submit himself to the jurisdiction of the Court, and to take an oath of obedience. I apprehend that, unless under very peculiar circumstances, it would not have been competent to this Court to allow a party to purge his contempt without taking the oath of obedience. This is a question which I have endeavoured to investigate to the utmost of my ability, and I do not find that it has ever been done, unless under very peculiar circumstances. This having been the state of the law, what change has been made by the present Act? It empowers the Judicial Committee of the Privy Council, or the judge of an Ecclesiastical Court, if it shall seem meet to the said committee or judge, to make an order for the discharge of a party out of custody; so that the Act confers a discretionary power, which the Court, under ordinary circumstances, had no right to exercise. It then provides that no such order shall be

(b) In June, 1839, a writ of habeas corpus was applied for to one of the judges of the Court of Queen's Bench, and refused. In May, 1840, a rule was obtained in that Court, calling upon the churchwardens to shew cause why the writ de contumace *capiendo* should not be superseded, but which was discharged.

[637] made without the consent of the other party: that is, that the Court can dispense with the oath of obedience if the other party consent. The next proviso, which is applicable to the present case, is, "that, in cases of subtraction of church-rate, for an amount not exceeding 5l., where the party in contempt has suffered imprisonment for six months and upwards, the consent of the other party to the suit shall not be necessary to enable the judge to discharge such party, so soon as the costs lawfully incurred by reason of the custody and contempt of the party shall have been discharged, and the sum for which he may have been cited into the Ecclesiastical Court shall have been paid into the registry of the said Court." The effect of this proviso is to give the Court a power, where these circumstances concur, namely, in a church-rate case, where the amount does not exceed 5l., and the party in contempt has been imprisoned for six months, to discharge the contumacious person without the consent of the other party; but it requires that the costs lawfully incurred by reason of such custody and contempt shall be previously paid. The question, then, is narrowed to this: Whether the costs taxed by the registrar are the costs intended by the statute; or whether I am bound to take into my consideration the costs alleged to have been incurred in the proceedings adverted to by the Queen's advocate?

I think it is obvious that "costs lawfully incurred by reason of the custody and contempt" must mean, primarily at least, costs incurred in this Court; because it is over such costs alone that this Court had jurisdiction before the passing of the Act; and it is with respect to these costs alone [638] that this Court has the means of ascertaining their due and proper amount. It would be singular if this Court had conferred upon it the extraordinary power of ascertaining, and not only of ascertaining but of deciding, upon a party's liability to the costs in another Court. I do not know, in this case, whether the Court of Queen's Bench has condemned the party in the costs, or what is the amount of the costs, if it has so condemned him, and I do not possess the means of ascertaining either question. Again, it would be singular if this Court should be invested with the power of keeping a person in prison till the costs in another Court were paid, that other Court being invested with power infinitely superior, and able to exercise it, for enforcing the payment of any costs it may condemn a party in. Therefore it does appear to me that, unless the words of the statute were so extremely strong as to leave the Court in no doubt as to their meaning, I should act most in accordance with the ancient practice of these Courts if I were to confine their meaning to the costs incurred in this Court. I do not think, indeed, that it is consistent with the object and intention of the Legislature that these words should include the costs of an opposition to an application for a writ of habeas corpus, or for a rule to quash a writ de contumace capiendo.

Then the single question is, what I ought to do in this case with reference to the discretionary power conferred upon me by this statute. The amount of the rate sued for is 9s. 2d. It is admitted that the party, not only refusing to pay but setting the authority of the Court at defiance, has been in prison for a period twice the length of [639] time mentioned in the Act. In exercising the discretion conferred upon me by the statute, I must act according to its true meaning and intention, without reference to any opinion which may be entertained as to the propriety or impropriety of the conduct of the party in any part of the case. I think it is clear, from a perusal of the Act, that under ordinary circumstances, considering that the amount of rate sued for in this case is considerably under 5l., and that the party has been imprisoned for much longer than six months, the Court (unless under very peculiar circumstances) is bound by the words of the Act, and will, in this case, exercise a just discretion in directing the party to be released from confinement.

The course I shall adopt is this: On the amount of the costs, as taxed by the registrar, being paid into Court, and also the charge incurred for the warrant, and also the amount of the rate sued for, as stated in the libel, to direct John Thorogood to be released from prison, without any further order.

[640] IN THE GOODS OF HENRY HARDINGE, Deceased. Prerogative Court, Nov. 14th, 1840.—The Court granted administration to the sister of a bachelor intestate, upon a proxy of renunciation from the mother (a married woman) without her husband joining in it, she living separate from her husband, and all right to the estate and effects of the deceased having been conveyed to her under a deed of separation.

Henry Hardinge, late of Bangalore, in the Presidency of Madras, in the East Indies, a lieutenant in the 39th Regiment of Foot, died on the 8th of June, 1839, a bachelor, and intestate, without a father, leaving Elizabeth Caulfield (wife of Daniel Caulfield) his lawful mother and next of kin.

The said Elizabeth Caulfield is now and has been for some time past living separate from her husband, a deed of separation having been entered into between them. Under that deed it was agreed that she should receive and retain for her own sole and separate use, independent of the debts, control, and engagements of her said husband, all her wearing apparel, jewels, &c., also the pension to which she was entitled as the widow of Lieutenant Colonel Hardinge, deceased, and also all other the income and property whatsoever to which she or the said Daniel Caulfield in her right, or through her, was entitled, or during their joint lives might become seised, possessed of, or entitled to, except certain settled property, not including her interest in the personal estate and effects of the deceased.

Mrs. Caulfield had in her own name executed a proxy renouncing her right to the letters of administration of the effects of the deceased, and con-[641]-sented that the same might be granted to Parnell Hardinge, the sister of the deceased.

Haggard, under these circumstances, prayed administration to be granted to the sister without the husband's joining in the proxy, he having no interest in the property of the deceased; citing the case of *Jeffreys, Deceased*, 15th January, 1835, which was precisely similar.

The Court, after directing that case to be looked up, granted the administration as prayed.

EDMUNDS against UNWIN. Prerogative Court, June 6th, Nov. 21st, 1840.—When the costs of a party opposing a will are directed to be paid out of the estate of the party deceased, such costs are taxed not as between proctor and client although more liberally than between party and party.

On petition.

This was originally a cause of proving the will of Mr. Rowland Unwin, deceased. The Court pronounced for the will, and directed the costs of Mr. Edward Unwin, the brother, and one of the next of kin, the opposer of the will, to be paid out of the estate.

The registrar reported the bill at 563l. 7s. 1d.

The proctor of Mr. Unwin objected to the report, and an act on petition was entered into.

The Queen's advocate and Addams in objection to the report. The question is as to the mode of taxing expenses, and the object is to settle the principle on which the proctor's bill should be taxed. The principle ought to be as between practitioner and party, and not as between party and [642] party, the principle which the registrar has adopted. The terms of the sentence are, "The expenses to be paid out of the estate:" that means the fair expenses of the suit, not only in the proctor's own office, but in all necessary matters. It is proper, for the interests of the public and the purity of our proceedings, that these expenses should be under the direction of a practitioner of this Court, the dominus litus.(a) The practice has been to tax costs to be paid out of the estate as between proctor and party. Suppose it is an executor's duty to bring a will before the Court, and the Court should be of opinion that he had done his duty by so doing, if he recovered only a part of the expenses, as between party and party, he would be out of pocket. The Court, when it directed the expenses of the opposing party to be paid out of the estate, in effect told the proctor, instead of taking his bill to his party (Unwin), to take it to the executor. The question is, what bill? The same bill which the proctor would have presented to his party. In order that the executor may know the sum that he is to pay, it is referred to the registrar, not for taxation, but to report on the fairness and reasonableness of the charges, that is between proctor and client, not between party and party. The registrar has no jurisdiction to tax costs but where costs are decreed. The true principle is stated by Mr. Swabey, Mr. Sharpe, and Mr. Pulley.(b)

(a) *Mynn v. Robinson*, 2 Hagg. Ecc. 195; reference was also made to the evidence of Dr. W. Adams, p. 146 of the report of the Ecclesiastical Commissioners.

(b) They made affidavits to the following effect:—

Mr. Swabey deposed that he was the deputy-registrar attending the Judicial

[643] Nicholl for the executor. The representatives of this estate must administer it under the directions of the Court of Chancery, and can only pay legal charges. The argument on the other side goes only to this extent, that it is desirable that the Court should have the power of charging these expenses to the estate; but the question is whether the Court has power to exercise such a jurisdiction.

[644] The decreeing of costs out of an estate is a modern practice; at the beginning of this or the end of the last century it was doubtful, until the decision in the Court of Delegates in *Passy v. Heming*,^(a) which gave this Court authority to decree costs out of an estate as against a party with adverse interest. Even if the registrars may have acted on a different principle, the practice may be novel and incorrect, this Court having no jurisdiction to order or enforce costs between practitioners and client.

The Court. Do you contend that?

Nicholl. I mean on the general principle, as the Court has no power to interfere, except in cases of exorbitant charges, or where the proctor's conduct is called in question, and it proceeds against him *ad publicam vindictam*. The Court has no jurisdiction to enforce the payment of a bill delivered by a proctor to his client; he must proceed to recover it as a tradesman's bill.

In the next place, how can this Court exercise any further jurisdiction? The equity and common law Courts have full jurisdiction as to costs, not only between party and party, but between attorney and client. A Court of Equity can order costs to be taxed in any way it may think fit; but I cannot find any instance in which the registrars have ever taken upon themselves any taxation of costs out of the estate, as between proctor and client, without the express direction of the Court.

Suppose an executor, representing an estate, had propounded a paper, and after probate a legatee [645] came forward and satisfied the Court that the executors had been guilty of fraud towards him in so doing, and the Court should be of opinion that the executor ought to be condemned in the costs; all the costs the party could recover would be the costs as between party and party; and why should an executor and residuary legatee acting honorably be exposed to greater costs?

The Court. The executor propounds a paper on behalf of the party. The principle on which costs are given out of the estate arises from something having been done by the testator himself.

Committee of the Privy Council on hearing of Ecclesiastical and Admiralty appeals to her Majesty in Council, that he was also one of the deputy-registrars of the late High Court of Delegates, and in which two capacities he had acted for twenty-nine years and upwards. That ever since he had discharged the duties of the said office, and also during the whole time he was one of the deputy-registrars of the late High Court of Delegates, it has been the practice of himself and the other deputy-registrars to tax costs as were decreed to be paid out of the estate of a party deceased, as between party and practitioner, as well with regard to proceedings in the aforesaid Court, as to expenses previously incurred in this Court and other Courts from whence such appeals came.

Mr. Pulley deposed that in 1815, in the case of *Hoare and Blencowe* against *Etheridge*, he was proctor for the defendant, that the suit went to a hearing, and that his party's costs were directed to be paid out of the estate of the party deceased; that various objections were made to his bill of expenses by the adverse proctor, and the same were referred to the three deputy-registrars, who were, as he well remembered, unanimously of opinion that, the Court having decreed the expenses of his party to be paid out of the estate, he was entitled to have such expenses taxed as between party and practitioner; that the same were taxed accordingly, and afterwards paid.

Mr. Sharpe deposed that in 1816 the late Mr. Moore was retained as proctor to conduct a suit in this Court respecting the will of the late John Scarnell, which suit went to a hearing, and the judge pronounced for the validity of the will, but decreed the expenses of George Scarnell, one of the parties opposing the will, to be paid out of the estate of the deceased. That he, as clerk to Mr. Moore, attended the deputy-registrar in the taxation of the said expenses, and he well remembered the deputy-registrar distinctly saying that, under the decree of the Court, it was his duty to tax such expenses as between proctor and party, although the deponent strongly objected thereto; nevertheless the said expenses were accordingly so taxed, and afterwards paid.

(a) Note to *Dean v. Russell*, 3 Phill. 334.

Addams. If the Court has power to order costs to be paid out of the estate, has it not the power to enforce it? The one follows the other.

The Court wished to have the cases and practice inquired into.

Nov. 21st.—*Judgment*—*Sir Herbert Jenner*. This is a petition in objection to the registrar's report of the costs due to the party opposing a will, under the order of the Court, which was of opinion that he was entitled to have his costs paid out of the estate.

The act on petition states the rule in such cases to be this; that where costs are directed to be paid out of the estate, the principle of taxation ought to be that adopted in the case of practitioners and clients; in other words, that the party ought to be considered in the same light as if he employed the proctor on the other side; that, accordingly, costs of all description which he may have incurred ought to be [646] charged to the estate. On the other hand, it is contended, that whenever costs are paid out of the estate, it is the same as if a party were condemned in costs—in short, that the principle of taxation ought to be that as between party and party.

The Court is not prepared to accede to either of these positions; that all costs which may fairly be charged by a proctor to his client are to be charged in such cases to the estate, or that the strict principle of taxation between party and party is to be the test of the costs to be allowed. I see many inconveniences if the Court were to hold that the whole costs were to be paid out of the estate—that is, the full costs between the proctor and his client—because a client may direct his proctor not to take any step whatever in the cause without consulting counsel, which may be prudent and proper; but as the other party has no means of checking the number of consultations it would be very hard if a party entitled to the property were to be saddled with costs of this description. On the other hand, it would lead to great inconvenience, and in some cases to great injustice, if the Court were to hold that the strict mode of taxation should be followed as between party and party.

The Court is not inclined to go into the particular items in this case; but it will refer to one or two of them, to shew that the proper mode of taxation, where costs are directed to be paid out of the estate, should be by a more liberal test than between party and party, and still not to so wide an extent as between proctor and client.

One item is a charge made for attendance in the neighbourhood of the habitation of the deceased, during his lifetime; and where the sanity of the [647] deceased is the point at issue, it may be necessary to see a number of witnesses, and learn the nature of the evidence they could give; and the Court had considerable doubt on this point, whether such costs were proper to be allowed, considering that the conduct of the cause should be with the proctor and not with any other agent. But the Court was of opinion that it would be better (unless any precedent were found) not to permit such charges against the estate, but to suffer them to be defrayed by the party employing the proctor; for it is clear that, in many cases, great abuses might be practised by parties, who may think proper to bring forward a vast number of witnesses, more than was necessary, or whose evidence had no bearing on the question before the Court.

I have looked for, and have requested to be furnished with, cases in which such charges have been allowed; and two cases have been furnished to me in which it would seem that there had been charges of this kind in a proctor's bill. One (which was mentioned in the argument) is that of *Hoare and Blencowe v. Etheridge*, in 1815, in which I find that charges for attendance of the proctor, for the purpose of seeing witnesses, were apparently allowed and paid to the proctor; but I do not collect, from an inspection of the bill itself, whether there was a regular taxation, and attendance before the registrar, or whether there was an agreement between the parties. I do not find any decree for costs out of the estate; but from my recollection of the case, if I do not mistake, it was a case in which a legatee propounded three codicils, of which the executor declined to take probate, and the Court having pronounced for the codicils, thought that the per-[648]-son discharging the duty of the executor stood in the same position as the executor himself would have stood if he had propounded them, which is a very different case from that where a party opposes a will for his own interest. The other case was that of *Armstrong v. Armstrong*; but that case does not support the proposition, for the Court decreed the whole costs against the party. The Judicial Committee thought this Court was wrong in that respect, and reversed its sentence so far as the condemnation of the party in the whole costs; and on looking

at the bill, I find no charges by the proctor for attending to see the witnesses at Hertford and his travelling expenses—all those charges were taken out of the bill, and not allowed by the registrar of the Judicial Committee. Being taken off the bill and disallowed, this disproves the existence of such a rule for allowing such charges against the estate. The Court does not mean that these are improper charges; they are quite reasonable and exceedingly proper charges; but they should fall upon the party employing the proctor and producing the witnesses, and who sent the proctor down to different places to procure evidence. They are expenses which should be reimbursed to the proctor, but are not, under all circumstances, to be charged to the estate. I am therefore of opinion that, although such charges are proper to be incurred, and the cause is benefited by the inquiries being made by the proctor rather than by a person over whom the Court has no control, they are not such as, under all circumstances, are to be allowed as against the estate.

With respect to the other costs, the Court has no doubt except as to one point. When a charge is [649] made for acts done, which, under ordinary circumstances, is limited to a certain sum, in the usual course of taxation, I do not know that the Court has any power to increase it, and give a different sum for the same acts. It is a different case where a certain sum, to be paid by the estate, is calculated as between party and party; but it is difficult to say that a particular act is to be done for which a certain sum is payable, and that sum may be increased. Having a control over the acts of proctors, but no control over these charges, and having no means of enforcing the payment of their costs (which must be recovered by an action at law), the Court does not feel itself at liberty to allow such charges to be paid at a higher rate. The charges may be all fit and proper to be made, and the Court does not intend to intimate an opinion that the charges are improper; but it has no means of controlling these charges, and, this being the case, it cannot take a different scale of remuneration in one case from another.

Looking at all the circumstances of the case, it appears to me that the taxation which has been made is fit and proper to be sustained. All that has been done is fair and just; but I have no precedent before me which leads me to believe that it has been the course and practice of the Court to allow against the estate the proctor's charges of attendance at the place of the deceased's residence, and although it is fair and reasonable that those charges should be incurred, it is not, in my opinion, fit and proper that they should be paid out of the estate, since it might possibly lead to an abuse of the general practice of the Court.

[650] I have little doubt of the power of the Court to compel the payment of the costs due to the party out of the estate. I pronounce for the sum reported by the registrar.

GLADSTONE *against* TEMPEST AND OTHERS. Prerogative Court, Nov. 14th and 21st, 1840.—Cheques written in 1833 by the deceased upon his bankers, but not intended to have effect until after his death, pronounced for as part of the testamentary disposition of the deceased; he having in 1834 formally executed a will, disposing of the whole of his property, and containing a full clause of revocation.

This was originally a cause of proving the last will and testament of Charles Robert Blundell, Esq., late of Ince Blundell, Lancashire, who died in 1837, contained in several testamentary papers. He left behind a very large property, real and personal, amounting to 300,000*l.*, which was disposed of by a will dated in 1834. This will, with two codicils, was propounded by Mr. John Gladstone, the surviving executor, against Elizabeth Tempest, widow, the sister and next of kin of the deceased and Lord Camoys and Sophia Charlotte Stonor, widow and representative of Charles Henry Stonor, deceased, his nephews. After the attesting witnesses had been examined in support of the will the opposition to the will was withdrawn, in consequence of a verdict found in favor of it in an action at law. And it was admitted that it was sufficiently established. The two papers propounded as being part of the will were, however, opposed by the residuary legatees, Dr. Walsh and Dr. Branston, who had intervened in the suit. These two papers bore date in September, 1833, and were in the form of drafts or orders on the deceased's bankers, to pay 500*l.* to a person named Hall, a servant who had lived with him for some years, and 300*l.* to his housekeeper, Ann Harris, and it was pleaded that they were delivered by the deceased shortly after

they were [651] written to the parties, sealed up, endorsed in his own handwriting and addressed to the bankers, and directed to be presented by Hall and Harris. The papers, it was pleaded, remained in the possession of these parties till after the death of the deceased, shortly after which they were presented to the bankers, who declined to pay them.

The case was argued on the second session of Michaelmas Term; the Queen's advocate and Phillimore in support of the cheques as part of the will; Addams and Curteis contra.

Nov. 21st.—*Judgment*—*Sir Herbert Jenner*. It is pleaded that the testator delivered these papers to the parties, Hall and Harris, sealed up, and told them that they were not to be presented till after his death; but as to what actually passed between the deceased and them, no evidence could be produced. That they were sealed up and remained so until they were produced to the bankers are the only circumstances to lead the Court to conclude whether they are to be regarded as testamentary, or as gifts *inter vivos*. The form of the papers is not testamentary; but they were delivered by the deceased (as the Court must assume) sealed up, and they were not to be made use of at the time when they were delivered. It is true nothing was said as to whether they were to be presented during his life or after his death; still, I think it is clear that payment was to be postponed for some time, and the question is, Were they intended to have effect and operation before death or after? I have no difficulty in saying it appears to me that it was intended by the deceased that they should not have [652] effect during his life, but were to be paid after his death, and although he may not have originally intended them as part of his will, yet they may be pronounced for as part of his will. This has been done in various cases; a paper clearly not intended as a part of the will of a testator, nor on the face of it testamentary, yet, where it was not to have consummation till after his death, has been held to be part of his will, if not revoked by subsequent acts. In this case I have no doubt that the deceased did intend the money to be paid without reference to his executors; still, as the effect of the papers was to be consummated on his death, they are to be considered as a part of his testamentary disposition.

The next point is whether they are revoked by any subsequent act. Now this question may be decided by the construction of the will simply, without reference to any clause of revocation: there may be other legacies substituted for those given by these two papers, and this question may be in some degree solved by reference to an intended substitution of other legacies, or by reference to the former part of the deceased's testamentary life.

The deceased executed a will in the year 1827, and by that will it may be seen that he had given an annuity of 100*l.* to Hall for life, and in 1833 he also gave him the sum of 500*l.* Now it is quite clear that the 500*l.* could not be considered a substitution for the annuity of 100*l.*, and, therefore, if the deceased had died without executing the will of 1834, or doing any other act, the party would have been entitled to the 100*l.* a-year, and also to the 500*l.*, given by the codicillary disposition contained in the paper of 1833. It shews at this time an increasing regard for his servant for the continuance [653] of his services. But it appears that, in 1834, the deceased by will gave him an increased annuity—augmenting the annuity of 100*l.*, given by the will of 1827, to 200*l.*; and the question is whether this increase was a substitution for the sum of 500*l.*? I am of opinion that it cannot be taken to have been the intention of the deceased to revoke the legacy of 500*l.* by this additional annuity of 100*l.*; that he intended that both should operate, and that the party should have the benefit of the 500*l.*, as well as the increased annuity, though perhaps the deceased did not intend that both should operate in the way of testamentary disposition, but that the sum should be paid by his bankers without the intervention of his executors. Looking to the intention of the deceased (which is all the Court can look to), it is not the substitution of a legacy *ejusdem generis*—one is an annuity, the other a specific sum; and there is nothing to lead the Court to believe that it is improbable that he should have given this in addition to the sum of 500*l.*

With regard to Harris, there was no provision for her in the will of 1827; but in 1833 he gives her this specific legacy of 300*l.*; that was all the provision he made for her at that time. But, in the will of 1834, he gives her an annuity of 60*l.* for life, and there is no ground for supposing that the deceased intended that this annuity should be a substitution for the 300*l.* I am of opinion that it was no substitution.

But there is a clause of revocation in the will of 1834, and, generally speaking, there is no doubt that by such a general clause there is a revocation of all prior testamentary acts. But it has been over and over again laid down that probate of a [654] paper may be granted of a date prior to a will with a revocatory clause, provided the Court is satisfied that it was not the deceased's intention to revoke that particular legacy or benefit. In this case, I have said, it is probable that the deceased did not intend that these papers should form any part of his will, and he intended to revoke such dispositions only as were contained in a will or codicil. I am of opinion that the deceased did not intend to revoke these bequests, and although he was not in possession of the papers at the time, he could not have forgotten that he had sealed them up, and directed that they should be presented to his bankers at some time or other. In the case of *Denny v. Barton* (2 Phill. 575), where there was a letter to the executors directing the payment of a legacy, and a clause of revocation in the will, it was held that the legacy was not revoked by a general revocatory clause.

With regard to the intention of the deceased, if he intended to revoke these bequests, it is extraordinary, as he could not have forgotten the papers, and that he had delivered them to the parties, that he should not have taken some steps to recover them or to apprise his bankers of the substitution he had made for the legacy he had intended to give by them.

I am of opinion that these papers are sufficiently established as the act of the deceased, that they are testamentary, that they are not revoked, and therefore that they are entitled to probate as part of the will of the deceased.

[655] IN THE GOODS OF JOHN PERRY. Prerogative Court, December 3rd, 1840.—An application by the executor of an executor to be permitted to renounce the execution of the former will and take probate of the latter rejected.

[Followed, *In the Goods of Griffin*, 1868, Ir. R. 2 Eq. 320. Applied, *In the Goods of Delacour*, 1874, Ir. R. 9 Eq. 86.]

Motion.

This was an application on behalf of the executor of an executor, to be allowed to renounce the probate of the will of the first testator, before taking probate of the will of the second testator. According to the ordinary practice of the office the executor of an executor becomes, on taking probate of his will, the executor of the first testator.

Nicholl in support of the motion submitted that, in principle, there could be no objection to such renunciation, although it might be contrary to the practice. In *Williams' Law of Executors* (a) it is laid down that the executor of an executor may take the administration of the effects of the second testator, and refuse that of the first. The authorities referred to are *Touchstone* and *Wankford v. Wankford*.

Sir Herbert Jenner. It has been for many years the practice in this Court that an executor, taking probate of the will of an executor, becomes executor of the will of the first testator, and is not permitted to renounce probate of the first will and take probate of the second. I am not aware of any instance of departure from this rule, and unless there be some clear principle or authority, the general rule of practice must be observed.

Motion rejected.

[656] IN THE GOODS OF DAVID ROGERSON. Prerogative Court, Dec. 3rd, 1840.—Administration of the effects of a domiciled Scotchman granted to the brother (the next of kin of the deceased) without citing the widow, a similar grant having been already made in Scotland.

[Referred to, *In the Goods of Earl*, 1867, L. R. 1 P. & D. 452.]

Motion.

The deceased, a domiciled Scotchman, died 20th July, 1840, intestate, leaving a widow and an only brother. By the law of Scotland the widow, though she would take half the property (the brother taking the other moiety), would not be entitled to the administration, the brother being the person to take administration. A grant of administration of the effects in Scotland had been decreed to the brother by the Commissary Court at Dumfries.

Jenner in support of the motion for a grant of administration to the brother cited the case of *Isabella Stewart* (1 Curt. 904).

Sir Herbert Jenner. If there had been no grant in Scotland, and this had been a motion for an original grant, the Court would have hesitated whether it would have granted administration to the brother in preference to the widow; but as the Court in Scotland has decreed administration to the brother, this distinguishes it from other cases, and it would be too much for the Court to hold itself debarred from the exercise of the discretion given to it by the Act of Parliament. It is for the benefit of the estate that there should be the same administration in Scotland and in England; and it is in my opinion a very proper case for the Court to exercise its discretion, and to decree administration to the brother without calling upon the widow to shew cause why administration should not be granted to him.

[657] IN THE GOODS OF ALFRED SHIRLEY. Prerogative Court, Hilary Term, Jan. 15th, 1841.—Probate allowed to pass of a will made previously to 1st of January, 1838, the testator having married in 1839, as unrevoked by stat. 1 Vict. c. 26, s. 18.

Alfred Shirley died on the 6th of September, 1840. He left a will dated in 1806. In 1839 he married his present widow, who had had no child, and who stated in an affidavit that she was not enceinte.

A doubt having arisen in the registry whether or not the will was revoked under the stat. 1 Vict. c. 26, s. 18,

Addams prayed administration with the will annexed to the widow: he submitted that the will was not revoked, the 34th section of the stat. 1 Vict. c. 26 declaring that the "act shall not extend to any will made before the 1st of January, 1838."

If the statute were held to apply to such a case, see the consequences.

The 7th section enacts that no will of a person under twenty-one shall be valid.

By the 9th every will must be signed and attested.

By the 15th a legacy to an attesting witness is void.

By the 18th a will is revoked by marriage.

By the 20th a will can be revoked only by certain acts.

By the 21st unattested alterations can have no effect.

By the 22nd no will revoked can be revived except by certain acts.

Then the 34th section enacts that the act shall "not extend to any will made before the 1st of [658] January, 1838," not that it shall not come into operation before that date.

Suppose the act had contained only two clauses, one enacting that the will of a single person should be revoked by marriage, and the other that the act should not extend to any will made before the 1st of January, 1838—would a will made before 1838 be revoked by marriage?

The 34th section also enacts "that every will re-executed or republished, or revived by any codicil, shall for the purposes of this act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived."

Supposing the act did apply notwithstanding the 34th section, see the consequences. A person in his minority makes a will, and after the 1st of January, 1838, makes a codicil, which would bring down the date of the will to that of the codicil, and consequently under the 7th section revoke the will. Again, a person makes his will before 1838, leaving his property to an attesting witness, and after the 1st of January, 1838, executes a codicil, which making the will speak from the date of the codicil would, under the 15th section, make the will void.

The act is not clearly expressed, but these results could never have been intended.

Sir Herbert Jenner. The Court has held that, with regard to alterations in any will after 1838, they must be made with reference to the provisions of the act; but as to the present point, I am inclined to agree with the learned counsel as to the construction of the act; I think that the present will is not revoked.

[659] It is unfortunate that questions of this sort should arise in this shape where the Court has no opportunity of having the case argued.

GRAHAM v. MACLEAN. Prerogative Court, Jan. 20th, 1841.—Administration with will annexed (the executors and residuary legatees in trust having renounced) granted to the attorney resident in this country of the guardian elected by a minor sole legatee resident abroad, in preference to the attorney of a creditor.

Petition.

Roderick James Maclean, Esq., late a major in the 3rd Regiment of Foot, died at Boulogne on the 9th of May, 1836. By his will, dated February, 1836, he appointed his brother James Maclean, and Alexander Bain, Esquires, executors and residuary legatees in trust, and guardians of his only child, a daughter, whom he named residuary legatee on her attaining the age of twenty-five years, or marrying previously with the consent of her guardians. By a codicil of the same date as the will he directed some property in the French funds to be transferred into English securities, in the name of his daughter. The testator at the time of his death was alleged to be indebted to the firm of Mackintosh & Co., of Calcutta, in the sum of 5000*l.* and upwards. Mackintosh & Co. having become bankrupt, J. W. Alexander, Esq., of Calcutta, was appointed assignee of their estate, and he executed powers of attorney in order to enable Thomas Graham, Esq., of Mitre Court, Temple, to recover the debts due to Mackintosh & Co. The assets of the testator, including Dutch bonds transferred into the name of his daughter, amounted to about 3200*l.* [660] In 1840, no steps having been taken to prove the will, a decree was extracted at the instance of Mr. Graham, calling upon the executors to prove the will, and in case of their renouncing, calling upon the daughter to accept or refuse administration with the will annexed, or shew cause why the same should not be granted to him (Graham).

The executors renounced; the daughter, who was a minor of the age of sixteen years, having elected as her guardian Mrs. Smith, a lady residing at Bruges, under whose care she had been placed by the testator in his lifetime, administration with the will annexed was prayed by an attorney of Mrs. Smith, for the use and benefit of the daughter, and until she should attain the age of twenty-one years. The attorney of the creditor objected to this grant, and prayed to be heard on his petition against it.

Haggard in support of the petition on behalf of the creditor. The administration in this case is in the discretion of the Court. The Court is not bound by the statute, nor is the Court bound to accept the guardian elected by the minor—here the daughter has chosen as her guardian the lady with whom she is residing abroad, and who has appointed a gentleman also resident abroad, her attorney, for the purpose of taking this administration; it is true that the daughter was placed by the testator under the care of this lady, but the lady was then unmarried, and if the Court accepts this election, the husband of this lady will, in effect, be the guardian—a person probably wholly unknown to the deceased. It would further not be advantageous to the estate to grant the administration as prayed, for [661] part of the property claimed by the creditor as belonging to the deceased (the Dutch bonds) is said by this person to be the daughter's property.

Addams *contra*. In the first place, the party before the Court has no right to oppose the issuing of this administration, the power of attorney is in as general terms as can possibly be, there is no authority to apply for administration to this deceased or any other; had no appearance been given to the decree, it is doubtful whether this power of attorney would have enabled the party to take the administration, but it is clearly insufficient to authorise the party to oppose the grant of administration to the daughter.

But granting that the authority is sufficient, still the Court by its universal practice never grants administration to a creditor while a party having a prior title is ready to take the grant. It is said that this administration is in the discretion of the Court; certainly the Court is not bound by the statute, but the discretion is not an arbitrary discretion, but is subject to established rules and practice. Again, it is said that the Court is not bound by the election of the guardian; true, if any objection exists to the person elected, but here nothing is alleged against this lady.

Sir Herbert Jenner. The question in this case respects the grant of administration to the estate and effects of Roderick James Maclean, who died on the 9th of May, 1836. He made a will and appointed executors and his daughter residuary legatee. Upon the death of the [662] testator no steps were taken to prove the will, and in 1840 a decree was taken out, calling upon the executors to take probate, and in case

of their renunciation, calling upon the daughter to accept or refuse administration with the will annexed, or to shew cause why the same should not be granted to the creditor. Upon that decree being returned the executors renounced, but the daughter appeared by her guardian elected by her and prayed the administration. That is objected to by Mr. Graham, as the attorney of a creditor of the deceased. Now, assuming that Mr. Graham represents the creditor, he objects first to the guardian elected by the minor, that she is not in the same circumstances as when the testator confided his daughter to her care, that he probably would not have so confided her had he expected that she would marry; but there is no proof of this, nor that this lady is an improper person to take the administration, except that she is abroad, and that is an objection, but that objection is removed by an offer on her part to appoint an attorney resident in this country to take the grant.

Another objection is that part of the property of the deceased, consisting of Dutch bonds, was transferred into the name of the daughter, and is stated by the guardian to be the daughter's property, and a question may arise whether these bonds were legally transferred as against the creditor, the deceased's estate being insolvent. That is a question which this Court cannot determine, and the grant of administration to the guardian will not prejudice that question, as the creditor can sue the administratrix. Although the grant of an adminis-[663]-tration of this kind is in the discretion of the Court, it is undoubtedly the practice of the Court not to grant administration to a creditor while there is a party ready to administer who has a prior title.

Besides, there is a dispute as to the debt or its amount, and as to the interest, whether it should be English or Indian; and, with respect to the power of attorney, I doubt very much whether it is sufficient to authorise the taking of the administration; although it was executed since the testator's death, there is no reference to his estate nor the taking of this or any other administration.

There is no ground, therefore, why the Court should depart from its usual course.

Petition rejected.

FIELDING against STANDEN AND COOK AND OTHERS. Arches Court, April 22nd, 1841.—Upon an affidavit that a parish church was in need of repair, and that the majority in vestry refused to make a rate, the Court directed a monition to issue against the churchwardens and parishioners to meet in vestry on a particular day, and make a rate for the necessary repair of the church.

[S. C. 5 Jur. 371.]

In this case a decree or citation had issued from this Court (by virtue of letters of request from the commissary of the archdeaconry of Canterbury) calling upon the churchwardens and parishioners of the parish of Headcorn in the county of Kent to shew cause why a monition should not issue against the former, requiring them to take the necessary steps towards putting the church in repair, and for providing necessities for the decent celebration of divine service, and, amongst other things, to call a [664] vestry for a certain day, to be specified in the monition, for the purpose of making a rate for and towards the necessary repairs of the church, and providing necessities for the decent celebration of divine service and offices therein, and for and towards the other expenses necessarily and legally incident to the office of churchwarden for the year ensuing, and against the parishioners to meet and make such rate.

This decree was served on the churchwardens and on some of the parishioners personally, and also affixing the same on the outer door of the parish church. An appearance was now given by the churchwardens, Messrs. Standen and Cook, who stated that they were ready and willing to submit to the law and justice of the Court and to obey its lawful commands.

Haggard now moved the Court to direct a monition to issue according to the tenor of the decree, on an affidavit of the Rev. Charles Fielding, the vicar of the parish, to the following effect:—That the parish church is now, and has been for some time past, in a dilapidated state, and in urgent want of repair, and by reason of its unfitness for the performance of divine service no service has been for some time passed performed therein; that, on the 23rd of June, 1837, the church being then in need of repairs, no rate having been made for the repair thereof since October, 1835, and a balance being then due to the churchwardens, at a vestry duly held, a rate

of fourpence in the pound was proposed by the churchwardens, but that the majority of the parishioners then and there assembled refused [665] to make a rate for such purpose; that, on the 29th of August following, a rate of threepence in the pound was in like manner refused, and on the 21st of November, 1838, a rate of fourpence in the pound; that on the 26th of December, 1838, a survey of the church and an estimate of the expense of repairing the same were made by desire of the churchwardens, which amounted to one hundred and four pounds, and on the 18th of July, 1839, at a vestry duly held, the survey and estimate were laid before the parishioners then and there assembled, and a rate of fourpence in the pound asked for by the churchwardens for such repairs and other legal purposes, but was refused by the majority, although warned by the churchwardens that proceedings would be instituted against them to compel them to make a rate; that on the 19th of September, 1840, a rate of sixpence in the pound was in like manner refused, and that on the 29th of that month, at the visitation of His Grace the Archbishop of Canterbury, holden at Ashford in the county of Kent, the churchwardens of Headcorn made a presentment that the fabric of the parish church was in a dilapidated state, and that they had no funds in hand to repair the same, and the parishioners had repeatedly refused to make a rate to effect the necessary repairs, whereupon Dr. Nicholl, the vicar-general of the archbishop, personally monished them to take the necessary steps towards repairing the said church; that in obedience thereto the churchwardens did summon a vestry of the parishioners for that purpose, which was holden on the 19th of October, when a rate of [666] ninepence in the pound was demanded by the churchwardens, but was refused by the majority of the vestry, a survey and estimate of the necessary repairs being laid before them. That on the 21st of November last a survey and estimate of the expense of repairing the church were made, and amounted to two hundred and four pounds; and at a vestry holden on the 25th of March last such survey and estimate were laid before the parishioners assembled by the churchwardens, and a rate of one shilling in the pound proposed by them for the repairs of the church and other necessary and legal expenses for the year ensuing, which rate would not have raised a sum exceeding such estimate by more than ten or fifteen pounds, and that the parishioners were informed that the churchwardens, though satisfied that a rate of one shilling was necessary, were ready to accept any smaller rate which the vestry might be willing to grant, provided the same were not merely colourable and evasive; that, notwithstanding, the majority of the parishioners refused to make any rate, and that on all such occasions when they (the majority) refused to make a rate the church was, and is now, in urgent need of repair, and that they did not at any time, when so assembled, deny that the church was in need of repair, nor allege any reason for refusing to make a rate, save that such repairs ought to be effected by voluntary subscription, and that they were not by law bound to make a compulsory rate; and that it was probable that an alteration in the law of church rates would be shortly made. He cited the case of *Harrington and Stone v. Francklin* [667] and *Others* (a) in the Consistory in 1731, in which Dr. Henchman, the then chancellor, granted a similar monition.

Sir Herbert Jenner. There is quite sufficient stated in the affidavit to induce the Court to direct the monition to issue. The proceeding is new, but a very reasonable one. The time and place must be stated in the monition. (b)

SMITH *against* FELL. Prerogative Court, April 19th, 22nd, 1841.—Declarations made by a party in the cause to a solicitor whom the party had requested to act on his behalf, rejected as privileged communications.

On the admission of an allegation.

This was a cause of proving the will of the Rev. George Gordon Smith, who died on the 16th of May, 1840, in the Queen's Bench Prison. The will was dated on the 12th of May, 1840, and was propounded by James Fell, the sole executor and universal legatee named in it, and an allegation was now offered on behalf of Charles Mackintosh Smith, a brother of the deceased, in opposition to the will; the admission of this allegation was opposed by Nicholl and Harding, and objections were

(a) Dr. Haggard cited this case from a work published by Archdeacon Hale, entitled *Precedents in Causes of Office against Churchwardens and Others*, p. 67. London, 1841.

(b) The day stated was the 7th of May.

[668] taken to various parts of the allegation, and, amongst others, to the 25th article, which pleaded, "That the death of the said deceased was communicated to his solicitor, Mr. Goren, on the day thereof, in and by means of the letter hereunto annexed, marked No. 10,(a) written, addressed, and sent on that day to him, the said Mr. Goren, by the said James Fell; that pursuant to the wish therein expressed by the said James Fell the said Mr. Goren immediately upon the receipt of the said letter, to wit, on the same day, proceeded to the Queen's Bench Prison, and then and there had an interview with the said James Fell; that immediately upon seeing the said Mr. Goren on that occasion the said James Fell, who was greatly elated, said, addressing Mr. Goren, 'Mr. Goren, I am extremely well satisfied with your exertions on Mr. Smith's behalf, and now I wish you to continue to act for me,' and upon the said Mr. Goren asking in a tone of surprise, 'How?' or 'In what respect?' added, 'That Mr. Smith had made a will, of which he did not know the contents, only that he was the sole executor;' and [further, 'that he] would take [or introduce] him to the gentleman who made it.' That the said Mr. Goren thereupon replied, 'Why, that, Mr. Fell, will require some consideration, particularly as your present statement does not agree with your conduct in Mr. Smith's lifetime;' that the said James Fell, without any more being said [not dissenting, the said James Fell], then took him to the room of, and introduced him to, a person named James Bowditch, then also a prisoner in the Queen's Bench, a witness since produced and examined on [669] his, Fell's, part, and by whom the said pretended will is understood to have been drawn up and prepared. That on Mr. Goren begging to see the will, as he did immediately after their formal introduction to each other by the said James Fell, the said Mr. Bowditch exclaimed, 'Will! but are you friend or foe?' though after some little demur he produced and handed to the said Mr. Goren what purported to be the draft of the will for his perusal. That the said Mr. Goren having read the same, and asked Mr. Bowditch from what or whose instructions the same had been drawn up, he, the said James Bowditch, replied that the said James Fell had brought him the copy of a mortgage deed, and that from such and his, Fell's, verbal instructions, the said draft had been prepared, and that the said James Bowditch, in further answer to questions of Mr. Goren, admitted that the said pretended will had not been read over to or by the said deceased previous to its execution by him. That the said Mr. Goren was then proceeding to ask the said James Fell some questions as to the said pretended will, when the said James Bowditch all at once drew up and said, addressing the said James Fell, 'Don't answer any more questions, I see what Mr. Goren's at,' or they, the said Mr. Goren and Mr. Bowditch, and the said James Fell, respectively, then and there respectively expressed themselves to that precise effect."

It was contended that this article was inadmissible, that the communications and declarations to Mr. Goren were made to him in his character as solicitor to Mr. Fell, that they were privileged communications, and could not be divulged; that the privilege [670] was the privilege of the client, and not of the solicitor himself. *Greenhough v. Gaskell* (1 Mylne & Keen, 98), *Doe d. Shellard v. Harris* (5 Car. & P. 593).

The Queen's advocate and Addams contra, denied that Mr. Goren ever acted or intended to act as Mr. Fell's solicitor, that what was said by Fell did not amount to a retainer of Mr. Goren as solicitor, and therefore that the communications were not privileged.

Sir Herbert Jenner (after reading the article). These communications, in the way pleaded, must have been made under the apprehension that Mr. Goren consented to act as solicitor to Mr. Fell, and are, therefore, privileged communications. When Mr. Fell said to Mr. Goren, "I wish you to act for me," he must have meant that he should act as his solicitor, and Mr. Goren then, "not dissenting," is introduced to Mr. Bowditch, when the communications and declarations are pleaded to have taken place, and surely such communications would not have taken place but under the idea that Mr. Goren had accepted the offer made to him to act as Mr. Fell's solicitor; it appears to me that these are of the nature of privileged communications. I am of opinion that this article of the allegation is inadmissible, and I reject it.

The allegation having been referred back for reformation as to other objections which were taken, [671] the above article was also altered by striking out the words between the brackets in the 24th, 25th, 30th, and 31st lines, and inserting the words

(a) The letter was annexed.

in italics, and the allegation came on again for admission as reformed on the 19th of June, but the Court, having rejected the article at the former hearing, would not again enter into the question of its admissibility.

From the rejection of the article an appeal was prosecuted to the Privy Council, and the Judicial Committee affirmed the decision of the Prerogative Court; they stated that they would not have precluded the party from amending the article, but they held that the article, even as amended, was inadmissible.

GODRICH *against* JONES. Prerogative Court, April 26th, 1841.—A witness (the solicitor who drew the will propounded) having in his deposition referred to certain entries in his books with reference to the drawing of the will, and having, as required by an interrogatory, given copies of those entries, and allowed the examiner to collate them with the originals: motion to compel the witness to produce the books themselves rejected.

[S. C. 1 Notes of Cases, 2.]

Mr. Lane, the solicitor who prepared the will in question, having been re-examined (*vide ante*, p. 630), the cause now came on for hearing. This witness having stated in his first examination that he had made certain entries in his books with reference to the drawing of the will, he was required by an interrogatory to produce to the examiner and to let the examiner copy the extracts, to leave fac-simile copies thereof, and to be asked if the copies were correct, and if the originals were in the same state as when first written. This interrogatory had been answered by the witness, and the examiner had collated the copies with the originals.

[672] The Queen's advocate and Haggard now moved the Court to direct Mr. Lane to produce the books themselves. The witness admits that he was sent for by Mr. Godrich to draw the deceased's will, that he had no previous acquaintance with the deceased, and he states that he made minute entries in his books of certain interviews he had with Mr. Godrich and the deceased, *recenti facto*, and in his evidence he speaks not from recollection only, but from what he put in writing at the time. The witness having been re-examined after he had seen the evidence of the other witnesses in the cause, the fullest means should be afforded of testing his credibility. The entries being made at the time may be considered as the instructions for the will, there being no other instructions.

The witness being produced by Mr. Godrich, his client, the production of the books cannot be resisted on the ground of privilege; all privilege has been waived.

Addams and Robinson *contra*.

Sir Herbert Jenner. This is quite a novel application. I never remember to have heard it contended that because a witness in his deposition has referred to certain entries in his books in relation to the transaction of which he speaks, and to which he may refer to refresh his memory, that he is bound to produce the books themselves. No authority has been adduced to shew that under such circumstances a solicitor may be required to produce his books, that an adverse party may see what they contain, not [673] only with reference to the transaction in question, but to any other matters. It would have been a different case if the extracts had been pleaded by the party propounding the will. No precedent or principle, nor anything in the nature of authority has been given in support of the application. Can every witness, solicitor or not, where fraud is suggested, be compelled to produce all his books in order that they may be inspected?

I am of opinion that Mr. Lane has answered the interrogatory sufficiently and properly, and that I cannot compel him to produce his books, or give any further extracts.

The cause was afterwards argued upon the evidence at great length, and the Court, being of opinion that the will was sufficiently proved, pronounced for its force and validity.

ELLIS AND GOUGH *against* GRIFFIN. Archæ Court, April 30th, 1841.—A church rate to raise 400*l.*, a part of which, amounting to 250*l.*, was intended to pay debts incurred in the previous year by reason of the parishioners having refused a rate, pronounced against with costs.

[S. C. 1 Notes of Cases, 4.]

This was a cause of subtraction of church rate, brought by the churchwardens of

Portsea against Wm. Griffin, a parishioner. The amount sued for was seven shillings and sixpence.

The cause commenced in July, 1835, in virtue [674] of letters of request from the chancellor of the diocese of Winchester. The libel pleaded in the usual way the making of the rate (of threepence in the pound) on the 29th of October, 1834; that the party had been summoned for payment, and that he objected to the validity of the rate, &c.

An allegation was admitted on the part of the defendant, pleading that the sum to be raised by the rate in question, 400l., was not needed for the repairs of the church for the current year; that the sum necessary for the current year was about 148l., and that the remainder was intended to pay debts which had been previously incurred, of about 252l.

In reply to this, on the part of the churchwardens, an allegation was offered, pleading that they entered upon their office in April, 1833, that they summoned a vestry on the 17th of October in that year, at which a rate was proposed to sustain the fabric of the church and for the performance of divine worship; that an amendment was moved and carried "that it is the opinion of this vestry the rate proposed is unjust and oppressive on the inhabitants at large, and that, therefore, that this meeting do adjourn to take the subject under its consideration on the first Wednesday in October, 1834;" that the churchwardens, being thus left without funds, incurred debts during that year to the amount of 250l. That on the 29th of October, 1834, the same churchwardens, who had been re-elected for another year, called another vestry, when they stated that they had been obliged to incur debts and liabilities owing to the refusal of the rate in 1833, which they proposed to pay out of the rate, and although an amendment was moved to adjourn the consideration of a rate for another [675] twelvemonth, a rate of threepence in the pound was carried by poll.

This allegation was opposed; it was contended that the allegation was not an answer to the plea set up by the defendant; that, in point of law, it amounted to an admission of the invalidity of the rate; that the rate was made principally for the purpose of reimbursing the churchwardens' expenses and debts incurred by them in a previous year. The Court, however, admitted the allegation, observing that there was not in the case such a state of admitted facts as would enable the Court to dispose of the case in its then shape; that in order satisfactorily to decide the questions raised, it would be necessary to see what the proofs in the case would be.

The Court having admitted this allegation, a prohibition was applied for to the Court of Queen's Bench. A rule nisi having been obtained, the cause was suspended in this Court; the party was afterwards directed to declare in prohibition, which declaration being demurred to, the case was argued at the sittings after Trinity Term, 1839 (11 Ad. & Ell. 743), when the Court sustained the demurrer on the ground that if the judgment of the Court of Arches was erroneous, it was not a matter for prohibition but of appeal, the suit itself being of ecclesiastical cognizance. The cause then proceeded in this Court, and evidence having been taken upon the pleas, now came on for hearing.

Addams in support of the rate. The factum of the rate is not denied, and the objection now is [676] that the rate is retrospective. The doctrine as to retrospective rates has been much misunderstood. *Lanchester v. Thompson* (5 Madd. 4), and the other cases similar to it, have no application; those were attempts to compel the making of rates to reimburse; here the churchwardens asked for a rate in 1833, and a question is adjourned by the vestry until the next year, and in the meantime the churchwardens incur certain necessary expenses, and in the next year, after laying before the vestry a statement of the debts and responsibilities they had incurred, obtained the present rate of threepence in the pound by a majority of the parishioners. This is not such a retrospective rate as renders it incumbent on this Court to refuse to enforce it. In *Farlar v. Chesterton* (b) the illegality of the rate was founded upon its having been made for the purpose of liquidating large outstanding demands, incurred in several previous years; here the rate was made not to pay off debts incurred in former years. From the judgment of the Court of Queen's Bench in this case, which allowed the demurrer, it is clear that that Court did not consider the rate

(b) *Chesterton v. Farlar*, 1 Curt. pp. 345, 367, 371; and *Farlar v. Chesterton*, 2 Moore, P. C. Cases, 330.

retrospective, or it would have granted a prohibition; the inference is that the Court considered the retrospective purpose of this rate justified under the circumstances.

Parishioners assemble in vestry to do what is obligatory upon them by the common law, and not to shift off obligations and evade the law. Parishioners are not to take advantage of their own wrong.

Nicholl and Harding contra.

[677] *Judgment*—*Sir Herbert Jenner*. In this case the question is now confined to this point, whether the circumstances are such as to distinguish it from *Farlar v. Chesterton*, for if the cases are not to be distinguished, this Court is bound by the decision in that case to pronounce against the validity of the rate.

In the case of *Farlar v. Chesterton* the vestry of the parish of Kensington, with a full knowledge of the facts, granted a church rate to liquidate debts incurred in former years. In this case a vestry was called by the churchwardens in the parish of Portsea, in October, 1833, to make a rate for the necessary repairs of the church, and expenses incidental to the office of churchwarden, when an amendment was moved and carried that the question be adjourned till the first Wednesday in October, 1834. The churchwardens, on this refusal, for in law it was a refusal, proceeded by their own authority, and that of the minority in vestry, to make a rate, but were advised that they could not sue for it, and it was, consequently, abandoned. No proceedings were adopted to call another vestry till the 29th of October, 1834, the same persons being still the churchwardens. I see no distinction between the cases where the same individuals are in office a second year, and where they are different individuals; it is as churchwardens that they sue, and as churchwardens their year of office expired in Easter week; if re-elected, they are the same as new churchwardens, and they are to make their declarations as new churchwardens. These churchwardens, in 1833, called no vestry until October, and it is said that they were guilty of laches in that [678] respect, but I cannot assume that there was any laches on their part in the execution of their duty, for it is impossible to say that they must not have had time to consider what repairs or expenses were necessary, and to be prepared with estimates to lay before the vestry. It appears that in 1833, up to the period of the termination of the ecclesiastical year, if I may so term it, in 1834, the churchwardens had incurred debts, and at the vestry in October, 1834, a rate was made for 400l., including 250l. for expenses incurred in the previous year (of which a statement was laid before the vestry), in consequence of the refusal of the vestry to make a rate. Now I cannot say that there is such a distinction between this case and that of *Farlar v. Chesterton* as to authorize me to hold this to be a rate which can be supported without a well-grounded apprehension that if I were to pronounce in favor of its validity, my judgment would be reversed by the Judicial Committee. With every desire to give proper support to the churchwardens, who were placed in a situation of great hardship and difficulty by the refusal of the rate in 1833, I feel that the case of *Farlar v. Chesterton* is a decision which must govern this Court, unless there are circumstances of distinction, which, it appears to me, do not exist in this case. I must, therefore, pronounce against the rate, and dismiss the party.

The Court has been prayed to condemn the churchwardens in the costs. Now, where churchwardens sue upon a valid rate, it is a rule that they should have their costs, and I fear that where they fail, as in this case, the Court is bound to condemn them in costs. I feel the hardship of the case, but I think I am bound by the rules and practice of the Court to condemn them in costs.

[679] *MORGAN against MORGAN*. Consistory Court of London, March 3rd, May 7th, 1841.—A father appointed curator ad litem to his son a minor, resident in the East Indies, for the purpose of proceeding against his wife for divorce by reason of adultery. The sanction of the son to be afterwards obtained.—Objection to the evidence of a witness, who after his examination was reproduced to prove the identity of the wife, not sustained.—Divorce by reason of adultery committed by the wife is not barred by a previous wilful desertion of the wife by the husband.

[S. C. 1 Notes of Cases, 23. Referred to, *Hodgson v. Hodgson*, [1905] P. 240.]

This was a suit of divorce by reason of the adultery of the wife. Mr. Herbert Morgan, the husband, a minor (born 17th of May, 1820), was a cornet in the 15th Hussars, stationed at Bangalore in the East Indies. On the second session of Trinity

Term (1840) the Queen's advocate prayed the Court to appoint the father of the husband his guardian, for the purpose of carrying on the suit on his behalf; he submitted that unless the Court were to do so, great injury might be sustained by the husband, as the evidence of adultery might be lost; the case was similar in principle to that of a lunatic, where the Court allowed proceedings to be carried on by the committee (*Parnell v. Parnell*, 2 Hagg. Con. 169). This case is not like that of *Beauraine v. Beauraine* (1 Hagg. Con. 498), as the father here is desirous of acting on behalf of his son. The father has already been permitted to proceed for his son in the Court of Exchequer.

Dr. Lushington. I am disposed to grant this application. I shall allow the proceedings to go on, and witnesses to be examined, but before making any decree I shall expect to have the sanction of the son.

[680] The case is not like that of *Beauraine*, nor have I been able to find a similar case.

March 3rd.—A citation was then taken out and the libel was afterwards brought in, which was not opposed; it pleaded that the marriage took place at Isleworth on the 24th of April, 1837; that the husband was at the time sixteen and under seventeen years of age; that the wife was twenty-one and upwards; that the husband was at school at Ealing, and that the wife's mother kept the post-office there; that immediately on the discovery of the marriage the husband was removed from school by his father, and in June, 1837, was sent to the Continent, where he remained till October, 1839, when he obtained a commission in the 15th Hussars, and proceeded to India; that by reason of the premises there had been no cohabitation between the parties as husband and wife, and only stolen interviews; that previous to the autumn of 1839 Mrs. Morgan resided with her mother at Ealing, since which time she had carried on an adulterous intercourse with a person named Alexander Thorn, and that in 1840 she was delivered of a child.

Witnesses were examined in support of the libel, and the cause now came on for hearing.

The husband executed a proxy in India appointing his father guardian, &c.(a)

[681] Haggard for the wife. I shall contend that there is no evidence in the suit. The objection [682] arises upon the proxies that have been exhibited. The suit originated upon an affidavit that the husband was a minor, upon which a guardian was appointed for the purpose of proceeding. I am not aware of any case where the Court has appointed a guardian to a minor not an infant; the appointment in this case I understood was made subject to confirmation by the party; in all such cases there has been an election. In *Barham v. Barham* (1 Hagg. Con. 5) there was an election, and here the party is competent to elect. In *Beauraine v. Beauraine* (1 Hagg. Con. 498) the son elected his father as guardian. Here the husband may be cohabiting with the wife.

(a) The proxy was as follows:—

"Whereas a marriage was had and celebrated, to wit, on or about the 24th day of April, 1837, in the parish church of, &c. between me the undersigned Herbert Morgan and Elizabeth Morgan then Lawford, spinster: and whereas since the said marriage the said Elizabeth Morgan hath committed the crime of adultery, by reason whereof I the said Herbert Morgan am desirous of procuring a divorce from bed, board, and mutual cohabitation with her: and whereas I the said H. M. am now a minor, to wit, of the age of twenty years but under the age of twenty-one years, and therefore by law incapable of acting in my own name, and I am desirous of appointing a curator or guardian for suits, but more especially for the purpose of instituting and carrying on such causes and suits as may be necessary and proper, in order to procure me, the said minor, to be legally divorced from my said wife: and whereas certain proceedings have been already had and taken on my behalf by Henry Mannington Morgan, my natural and lawful father, for the purpose of procuring the said divorce.

"Now know all men by these presents, that I the said Herbert Morgan, now at Bangalore in the East Indies, a cornet in H. M. 15th Regiment of Hussars, for divers good causes and considerations me thereunto especially moving, have elected and chosen, and do hereby elect and choose, the aforesaid H. M. Morgan, of, &c., my natural and lawful father, to be my curator and guardian for suits, but more especially for the purpose of citing my wife, the said E. M., to answer to me acting by my said

Dr. Lushington. Can that be so? The Court granted the application upon being informed that the wife was resident here and the husband in India.

Haggard. That was the case then, but the parties might be cohabiting now; the minor may be doing something in opposition to the father; he may have condoned the adultery.

Then are the instruments before the Court sufficient for the purpose? First, there is a proxy of election, dated the 1st of September, 1840, signed by Herbert Morgan, the son. And there is the acceptance by the father, dated on the 18th of November, 1840; at that time all the important witnesses had been examined. What does the instru-[683]-ment from the son authorize the father to do? it is entirely prospective, for the purpose of instituting proceedings—of citing the wife, &c., and carrying on the said cause. There is nothing of recognition of the present proceedings—nothing retrospective, no ratification of the proceedings then taken by the father.

Pratt on the same side. This is a special proxy, which, according to all authorities, is limited to the precise purpose for which it was granted.

The Queen's advocate and Addams contra.

Dr. Lushington. I see no reason to repent the course I pursued in the commencement of the proceedings. On the facts stated in the affidavit of the father, that the son was a minor and resident in the East Indies, the father residing in England, and that the wife had committed adultery, I apprehend that it was the duty of the Court to interfere to prevent a failure of justice; had the Court declined to interfere, the whole of the evidence (assuming the charge to be well founded) might have been lost before the husband could have duly authorized the commencement of proceedings. My impression was, that justice required me to do what I did, and what I meant to do was to prevent the party from being prejudiced by his absence, and from being concluded by any acts done by his father during his absence, and I expressly stated that before giving my final judgment I should require a confirmation by the son of the proceedings taken by the father.

[684] These proceedings may be divided into two parts: first, the institution of the suit and the proceedings carried on by the father without the knowledge of the son; and, secondly, the proceedings had in virtue of the proxy executed by the son. With regard to the former, it is said that they acquire confirmation and approval by the son; the latter, it is admitted, do not require any further confirmation.

The objection, in regard to the first, is that it is not what was required by the Court, that it is not a confirmation of the proceedings; the proxy undoubtedly is not retrospective, but it is executed with the view of the father's obtaining a divorce for the son, by reason of his wife's adultery, and, in my opinion, it indirectly confirms everything previously done. The proxy in strictness ought to have set forth the institution of the suit by the father, stating what the Court had directed, and it should

guardian in a certain cause of divorce or separation from bed, board, and mutual cohabitation, by reason of adultery committed by the said E. M., and of carrying on the said cause or business for me and on my behalf; and in case of the death of my said father or of his refusal or declining to act, I do hereby elect and choose Jonathan Morgan, of the city of Bath, Esq., my grandfather, to be my curator or guardian for the purposes aforesaid: and to the end that this my special proxy may have its due effect in law, I do hereby nominate, constitute, and appoint F. S. and J. H. P. notaries public and two of the procurators-general of the Arches Court of Canterbury, or in their absence any other proctor, &c. for me, &c., to appear before the Right Honorable Stephen Lushington, Doctor of Laws, vicar-general of the Right Reverend Father in God, Charles James, by divine permission, Lord Bishop of London, and official principal of the Consistorial and Episcopal Court of London, his surrogate, or any other competent judge of the said Court, or of any other court or courts whatsoever; and to exhibit this my proxy, and pray and procure the same and the election and choice herein contained to be admitted and enacted, and the said H. M. Morgan or the said J. Morgan to be assigned my curator or guardian to the intent and for the purposes aforesaid: and generally to do, perform, and execute all such acts, matters, and things as shall or may be requisite and necessary to be done for me and in my name, in and about the premises: and I do hereby promise to ratify and confirm all and whatsoever my said proctors or proctor shall lawfully do or cause to be done therein." In witness, &c.

have gone on to confirm all that had been done and should be done by the father under the direction of the Court. But the question is whether the proxy is not sufficient evidence of the consent on the part of the son to the proceedings which have been taken, so as to authorize the Court to proceed to sentence. In *Fraser v. Fraser* (a) the brother of the party instituted the suit as his agent under a power of attorney, but Lord Stowell declared that he would not sign the sentence unless the proceedings were confirmed by the brother himself. The point comes to this, whether the proxy is sufficient or not to justify the Court in signing a sentence of separation? if not, still I ought to proceed to hear the [685] cause, because if I am of opinion that the husband is entitled to a separation, I might delay signing the sentence until a proxy should be received from the son confirming all that had taken place. I need not, therefore, decide as to this objection now, but may proceed with the hearing of the cause.

Haggard then contended that there was not sufficient proof of the identity of the wife, and objected to the evidence of one of the witnesses who had been re-examined upon an article upon which he had been previously repeated.

Dr. Lushington. If the witness had been examined to make up any further proof upon the article, I might have had some doubt as to receiving the evidence, but here the witness is reproduced for the purpose only of proving identity. At his examination the witness might not be able to identify the party, but upon seeing the party afterwards, he might be able to do so; it is not like a witness setting about afterwards to refresh his memory in order to make up the proof; there the Court would not admit the evidence. I shall overrule the objection; but I wish to put it to the counsel for the husband whether the Court ought in this case to pronounce a divorce in favour of the husband, assuming that the marriage took place in April, 1837; that the husband was seventeen years of age, and the wife eighteen or nineteen; that there was a cohabitation for only a few days, when the wife was abandoned; it not being pleaded that she had any maintenance, and the adultery being committed in the autumn [686] of 1839, two years after the marriage, and no action for damages being pleaded.

The Queen's advocate and Addams. The husband in this case had no means; he was a minor at the time, and was sent abroad by his father; he is still a minor, and is unable to support his wife, having nothing but a cornetcy in the Hussars. But suppose there had been a wilful desertion of the wife, that is no bar to a divorce. *Reeves v. Reeves* (2 Phill. 125), *Sullivan v. Sullivan* (2 Add. 299).

The Court took time to deliberate.

May 7th.—*Judgment*—Dr. Lushington. In this case some preliminary objections were taken, which it will be convenient first to dispose of. The first is whether the suit has been so commenced and conducted as to justify the Court to determine at all as to its merits? The suit was commenced by the father of the husband, a minor, in India, who was permitted by the Court to carry on the suit on his behalf. I am of opinion that I was authorized to take this step both on precedent and on principle, to prevent a failure of justice. With regard to proceedings here, a father as guardian, and a committee in cases of lunacy, is in a case of minority permitted, although he cannot be compelled to institute proceedings. In *Fraser v. Fraser* a brother, upon a mere power of attorney, was allowed to institute a suit, the Court being anxious to prevent an injury being suffered by [687] parties unable to protect their own interests from absence. If there were no means of proceeding immediately in such cases evidence might be lost, and parties might be deprived of remedy. No real injury can result to the party proceeded against, for the same means of defence are open to her, and of cross-examining witnesses, and of pleading and producing witnesses, and if the answers of the other party were required, the Court has the power, and, if necessary, would exercise it, of suspending the hearing of the cause until those answers were brought in.

In this case, as in *Fraser v. Fraser*, the Court required a proxy from the husband in order to be satisfied that he sanctioned the proceedings. At first I had some doubt as to the form of the proxy, whether it ought not merely to authorize the suit to be instituted and carried on, but also to confirm all previous proceedings, and I was the

more impressed with this notion from the case of *Dennis v. Dennis*,^(a) which was a suit in the Arches Court by the husband against his wife for nullity of marriage brought by his guardian ad litem during his minority. The husband before the hearing came of age, and on an objection being taken that there was no proxy from the husband, the Court directed the cause to stand over, in order that he might give a proxy, and that being done, the Court signed the sentence, pronouncing the marriage null and void. And I find in my note of the case this observation, as falling from the Court, "If the suit had been by a testamentary guardian, quære if any proxy at [688] all necessary." In that case the whole of the proceedings had been brought to a conclusion before any proxy was required or produced. In the present case the suit was commenced and then came the proxy, when witnesses were examined, and the case goes on. Now, he who authorizes a suit to be carried on to a conclusion must have intended to authorize the proceedings then had. In *Fraser v. Fraser* the proxy ultimately executed was not confirmatory of all that had taken place, but simply to carry on proceedings. I am of opinion then, that there is no legal impediment to considering the merits of the case. The next objection is, that there is no proof of the identity of the wife. In all these cases the identity must be proved; with respect, first, to the marriage; secondly, to the sexual intercourse; and, thirdly, as to the party in the suit. In this case the proof is perfectly satisfactory, it is so free from doubt that it would be useless to state the evidence in detail.

To come then to the merits: I will first observe that the adultery is admitted—indeed it is incontestably proved. Then is the conduct of the husband such as to bar him of his remedy? The marriage took place on the 24th of April, 1837, Mr. Herbert Morgan being at the time not quite seventeen, and Elizabeth Lawford of the age of eighteen or nineteen; there was therefore no great disparity in their ages, although there was as to their relative stations in life. Mr. Morgan, who was at school, had considerable expectations from his father and grandfather. Elizabeth Lawford lived with her mother, who kept the post-office at Ealing. There is no [689] evidence that the mother in any way endeavoured by advice or assistance to procure the marriage, nor is there any evidence of any misconduct on the part of the wife previous to the marriage, or of any deviation from the paths of virtue, till the autumn of the year 1839, two years and a half after the solemnization of the marriage. The marriage was clandestine, and therefore in fraud of the father's rights; but nevertheless in point of law it was a legal marriage; it was obligatory on both parties to fulfil their vows; he was bound by his solemn declarations "to love her, comfort her, honour and keep her in sickness and in health, and to keep only to her as long as they both should live." That was the obligation the law fixed upon the husband, although a minor; let us see how he has performed it.

In a very few days after the marriage the husband, no doubt by parental authority, was sent to the Continent, and subsequently to India, where he now is. That the smallest consideration was paid to the wife, either for her protection or for her maintenance, there is no evidence whatever. She, a girl of nineteen, of great personal beauty (as stated by all the witnesses), recently married, is at once left—I will not say to the risk, but almost to the certainty of destruction.

To the wife, this marriage, followed up by a divorce, leaving her without any claim for maintenance, has proved utter ruin. I do not extenuate her guilt, but I cannot forget the situation of a young married woman thus suddenly separated from her husband. To the husband, the consequences have been some expense, some trouble, exile from home during the period he has been in India (where [690] the wife has had no means of watching his conduct), and a judgment in this Court, by which, if it decrees a divorce, he will be absolved from all legal obligation of maintaining his wife, and, it may be, an act of the legislature dissolving the marriage. That such an example can be otherwise than prejudicial to public morals cannot for a moment be stated, but it is only justice to Mr. Morgan to say that he, being a minor, dependent on his family, it would be going too far to impute to him a wilful abandonment of his wife. Then does such conduct bar the husband of a divorce? and is the violation of the marriage obligation on the part of the wife to be followed by no penal consequences?

The first inquiry is, whether such a case is to be decided upon principle, or by the

(a) Arches, 1815, not reported.

authority of precedents. During the absence of a husband, by the law of England, the wife has no direct remedy; she may pledge his credit for necessities, but she cannot resort to a Court for a direct remedy; but although left destitute of aid, it does not follow that she has a license to commit adultery. In some cases very strong observations have fallen from the Court as to the duty of a wife in cases of separation. I have a note of what fell from Lord Stowell in the case of *Dennis v. Dennis* (Consistory, 1808, not reported; referred to 1 Hagg. Con. 446, and 3 Hagg. Ecc. 348, 353), but all such observations ought to be taken with reference to the particular circumstances of the case. I have not been able to find a single instance of an actual decision upon the point; two cases were cited in the argument, *Reeves v. Reeves* (2 Phill. 125) and *Sullivan* [691] v. *Sullivan* (2 Add. 299), but in those cases the learned judge declared that there was no wilful and deliberate desertion, so that the point was not actually decided. But I find, from my own notes, that on the admission of the allegation in *Reeves v. Reeves*, Sir John Nicholl expressly declared that a wilful desertion of a wife was no bar to a suit against her for adultery; and in *Sullivan v. Sullivan* (2 Add. 302) the doctrine is repeated; he says, "I am still to learn that even a malicious desertion of the wife by the husband is any bar to a sentence of divorce prayed by the husband for adultery committed by the wife." Here then the authority of Sir John Nicholl is repeated in these two cases, and although they are not to be considered precisely as decisions upon the point, yet they are authorities of the highest weight, not only as coming from a judge of a superior Court, but from a judge of the greatest learning and experience. The present case cannot be carried beyond wilful desertion, and I am bound to administer the law as I find it, and I cannot say that it is not founded on just grounds, although in particular cases great hardship may fall on the individuals. I pronounce for the divorce.

[692] THE OFFICE OF THE JUDGE PROMOTED BY MASTIN *against* ESCOTT. Arches Court, Hilary Term, Jan 28th and 30th, Feb. 3rd and 5th, 1841.—A child baptized with water and in the name of the Trinity by a person having no authority to administer the rite of baptism, although irregularly baptized, is not unbaptized according to the meaning of the rubric prefixed to the order for the burial of the dead in the Book of Common Prayer. A clergyman refusing to perform the office for the interment of the dead over the body of a parishioner so baptized, due notice of the death having been given him, suspended for three months.

[Affirmed 1842, 4 Moore P. C. 104; 13 E. R. 241 (with note). See also *Titmarsh v. Chapman*, 1844, 3, Curt. 840; *In re Perry Almshouses*, [1898] 1 Ch. 391: affirmed [1899] 1 Ch. 21.]

This was a proceeding instituted by Mr. Frederick George Mastin of Gedney in Lincolnshire against the Reverend Thomas Sweet Escott, the vicar of that parish, "for refusing to bury the corpse of Elizabeth Ann Cliff, the infant daughter of Thomas and Sarah Cliff, of the parish of Gedney, convenient warning having been given him thereof." The proceedings commenced in this Court by virtue of letters of request from the chancellor of the diocese of Lincoln.

The articles, which were admitted without opposition, were in substance as follows:—

The 1st, 2d, and 3d articles pleaded the incumbency of Mr. Escott, and his obligation as a priest or minister of the Church of England to observe the laws, canons, and constitutions ecclesiastical of this realm.

4th. That by the 68th canon, entitled "Ministers not to refuse to christen or bury," it is decreed, ordained and contained as follows:—"No minister shall refuse or delay to christen any child according to the form of the Book of Common Prayer that is brought to the church to him upon Sundays or [693] holydays to be christened, or to bury any corpse that is brought to the church or churchyard, convenient warning being given him thereof before, in such manner and form as is prescribed in the said Book of Common Prayer; and if he shall refuse to christen the one, or bury the other (except the party deceased were denounced excommunicated majori excommunicatione for some grievous and notorious crime, and no man able to testify of his repentance), he shall be suspended by the bishop of the diocese from his ministry by the space of three months."

5th. That notwithstanding the premises, and in contempt of the law and canon

aforesaid, Mr. Escott did, on two several occasions, happening respectively on the 16th and 17th of December, 1839, expressly declare his determination not to bury in the churchyard of Gedney aforesaid the corpse of Elizabeth Ann Cliff, the infant daughter of Thomas Cliff and Sarah Cliff, his wife, of the parish of Gedney aforesaid, if brought for burial to the said church or churchyard: and that accordingly, and in pursuance of such declared determination, the said T. S. Escott, on the 17th day of the said month of December, or on some other day in the said month, did, contrary to his duty, refuse to bury in the churchyard of Gedney aforesaid the corpse of the said Elizabeth Ann Cliff, then brought to the said church or churchyard, convenient warning having been given him thereof.

6th. That the said Elizabeth Ann Cliff, the infant aforesaid, died within the parish of Gedney, and that such infant, being the daughter of Thomas Cliff and Sarah Cliff, his wife, who are Protestants [694] of the class of people commonly called or known as Wesleyan Methodists, and who were in the months of August, September, October, November, and December, 1839, and had been for some time previous thereto, in the habit of frequenting or resorting to a chapel or place of religious worship established by, or for the use of, a congregation of the said class of people, situate within the said parish of Gedney, had been first, to wit, on or about the 1st day of October, 1839, baptized according to the rite or form of baptism generally received and observed among the said class of people commonly called or known as Wesleyan Methodists, that is to say, with water, and in the name of the Father, and of the Son, and of the Holy Ghost, by the Reverend Elisha Balley, a minister, preacher, or teacher of the said class of people. That of the aforesaid fact of baptism the said Thomas Sweet Escott was informed, as well on the 16th day of the said month of December, 1839, by the said Thomas Cliff, as on the morning of the said 17th day of the said month, by the Reverend Robert Bond, also a minister of the said class of people commonly called or known as Wesleyan Methodists, when they respectively urged and intreated him, on such two several occasions, to consent to bury the corpse of the said infant; and that by means of such information, as well as by other means, the said Thomas Sweet Escott was, previous to, and at the time of his refusal to bury the said corpse, well and sufficiently apprised and aware of such fact of baptism; and that on each of the two several occasions aforesaid, as also subsequently on the said 17th day of December, when the corpse of the said infant having been [695] brought to the churchyard of the said parish, application was made to him for the burial thereof in the said churchyard, in the manner and form prescribed by the Book of Common Prayer, he did make or assign the aforesaid fact of baptism expressly as the pretext or ground of refusing to comply with such entreaties and application.

7th. That Mr. Escott, for such the offence in the preceding articles set forth, ought to be canonically corrected and punished.

8th, 9th, and 10th. The usual formal articles.

The whole of the articles, with the exception of the 5th, 6th, and 7th, were admitted to be true: and for the proof of those articles witnesses were produced and examined on the part of Mr. Mastin.

A defensive allegation, on the part of Mr. Escott, was afterwards admitted, pleading—

First, that in forming his determination not to bury the corpse of Elizabeth Ann Cliff, and in refusing to read the burial service at its interment, he did not act in contempt of the laws, canons, and constitutions ecclesiastical of the Church of England; but that, on the contrary, he acted in obedience to, and in conformity with, the obligations by which he bound himself when he became an ordained minister of the Church of England.

Second, that in the preface to the Form and Manner of Making Deacons, as established by the liturgy of the Church of England, it is expressly set forth and provided "that none shall be accounted or taken to be a lawful bishop, priest, or deacon, in the United Church of England or Ireland, or sufficient to execute any of the said functions, except he be called, tried, examined and [696] admitted thereto according to the form hereafter following, or hath had formerly episcopal consecration or ordination."

Third, that whereas it is pleaded in the sixth article that the deceased had been baptized by a minister, preacher, or teacher of the class called Wesleyan Methodists; such minister was unordained; and that any rite or form of baptism performed by

him is to all intents and purposes null and void, in the sense of, and according to, the articles, canons, and rubric of the Church of England.

Fourth, that from and after the conferences holden at Hampton Court, in 1603, the practice of the Church of Rome, which had hitherto permitted the rite of baptism to be performed by laymen and midwives, under license from the bishops of their respective dioceses, and which practice had up to that period been tolerated by the reformed Church of England, was repudiated by the ecclesiastical authorities of this realm assembled at the said conferences; and in order to give effect to such repudiation, King James I. directed an alteration to be made accordingly in the liturgy of the Church of England, and from that period the Liturgy has not allowed the rite of baptism performed by unordained persons to be valid, but has held the direct contrary.

Fifth, that in the liturgy, "imprinted by the deputies of Christopher Barber, printer to the Queen's most excellent Majesty, A.D. 1595," in the part entitled "Of them that be baptized in private houses," the rubric directs as follows:—"First, let them that be present call upon God for [697] His grace, and say the Lord's Prayer, if the time will suffer, and then one of them shall name the child, and dip him in water, or pour water upon him, saying these words, 'I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost.'"

Sixth, that the liturgy of the Church of England, entitled, "The Book of Common Prayer, with the Psalter or Psalms of David, of that Translation which is Appointed to be Used in Churches, imprinted at London by Robert Barber, printer to the King's most excellent Majesty, 1606, cum privilegio," in the part entitled, "Of them that are to be baptized in private houses in the time of necessity by the minister of the parish, or any other lawful minister that can be procured," the rubric enjoins as follows:—"First, let the lawful minister and them that be present call upon God for His grace, and say the Lord's Prayer, if the time will suffer, and then the child being named by some one that is present, the said lawful minister shall dip it in water, or pour water upon it, saying these words, 'I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost.'"

Seventh, that in the rubric of the Book of Common Prayer, which is a part and parcel of the statute 13 & 14 Car. 2, c. 4, in the order for burial of the dead, it is enjoined that such office is not to be used for any that die unbaptized or excommunicate, or have laid violent hands upon themselves.

Eighth, that the 68th Canon of 1603, referred to in the fourth of the articles, can only be taken and [698] construed in conjunction with, and in reference to, the other canons promulgated in the same code: and that by the 9th canon it is decreed that "whosoever shall hereafter separate themselves from the communion of saints as it is approved by the Apostles' rules in the Church of England, and combine themselves together in a new brotherhood, accounting the Christians who are conformable to the doctrine, government, rites, and ceremonies of the Church of England, to be profane and unmeet for them to join with in Christian profession, let them be excommunicated ipso facto, and not restored but by the archbishop after their repentance and public revocation of such their wicked errors;" and by the 12th canon it is decreed that "whosoever shall hereafter affirm that it is lawful for any sort of ministers and lay persons, or either of them, to join together and make rules, orders, or constitutions, in causes ecclesiastical, without the King's authority, and shall submit themselves to be ruled and governed by them, let them be excommunicated ipso facto, and not be restored until they repent and publicly revoke their wicked and anabaptistical errors;" by the 5th canon it is decreed that "whosoever shall hereafter affirm that any of the Thirty-nine Articles, agreed upon by the archbishops and bishops of both provinces, and the whole clergy, in convocation holden at London in 1562, for avoiding diversities of opinions, and for the establishing of consent touching true religion, are in any part superstitious or erroneous, or such as may not with a good conscience be subscribed unto, let him be excommunicated ipso facto, and not restored, but only by [699] the archbishop, after his repentance and public revocation of such his wicked errors."

Ninth, that by the 23rd of the Thirty-nine Articles it is decreed that "it is not lawful for any man to take upon him the office of public preaching or ministering the Sacraments in the congregation, before he be lawfully called and sent to execute the same; and those we ought to judge lawfully called and sent which be chosen and

called to this work by men who have public authority given unto them in the congregation to call and send ministers into the Lord's vineyard."

Tenth, that by the 25th of the Thirty-nine Articles it is decreed that "there are two Sacraments ordained of Christ our Lord in the Gospel, that is to say, Baptism and the Supper of the Lord;" that Elisha Balley never was, and is not, a lawful minister, and never hath received episcopal ordination or consecration, and that by reason of the premises Elizabeth Ann Cliff was not in fact baptized by him; but the said pretended baptism, if performed as alleged, was altogether invalid, and contrary to, and in contempt of, the doctrine and discipline of the Church of England, and of the laws, canons, constitutions, and rubrics hereinbefore set forth.

The eleventh article was rejected.

The proctor for Mr. Mastin having "admitted that Elisha Balley, mentioned in the tenth article of the allegation, never had received episcopal ordination or consecration, and was and is not a [700] lawful minister of the Church of England," no further proof was taken upon the allegation, and the cause came on for argument.

The Queen's advocate, Haggard, and Nicholl for Mr. Mastin.

Phillimore and Harding contra.

May 8th.—*Judgment*—*Sir Herbert Jenner*. This case was argued at great length, and with great learning and ability, in the course of the last term, and numerous authorities were referred to by the counsel on either side. The case itself is one of extreme importance, and the Court was therefore anxious, before pronouncing its opinion, to examine those authorities, and to compare them with the arguments adduced on the one side or the other.

This Court has no original jurisdiction in matters of this description. It is the general Appellate Court of the province, and it is only when requested to take cognizance of cases properly belonging to the Diocesan Courts that this Court entertains such suits. This case accordingly comes before the Court by letters of request from the chancellor of the diocese of Lincoln. It is a criminal proceeding, technically described as the office of the Judge promoted by Mr. Frederick George Mastin, a parishioner and inhabitant of the parish of Gedney, in the county and diocese of Lincoln, against the Reverend Thomas Sweet Escott, the vicar of that parish. The offence im-[701]-puted is, that Mr. Escott refused to bury the infant child of Thomas and Sarah Cliff, who were inhabitants of the parish of Gedney, convenient notice, according to the canon, having been given to him for that purpose.

The usual proceedings have been taken in this Court: the citation was returned; an appearance was given for the party cited; articles have been given in, and upon those articles eight witnesses have been examined. On behalf of Mr. Escott an allegation was given in, pleading the substance of his defence. Upon that allegation no witnesses have been examined. In fact, the allegation itself propounded rather matters of law than of fact, and referred in proof thereof to the laws themselves. They required in fact no evidence in support of them; and the only article as to which there was any necessity of adducing proof was that in which it was pleaded that the gentleman by whom the office of baptism in this case was administered was not an episcopally ordained minister, which was admitted in acts of Court.

Having thus stated the general nature of the proceedings, I will in the first instance refer to an observation very properly made by the counsel for Mr. Escott as to the motives upon which the refusal to bury in the present instance was founded.

In the year 1809 a case of a similar description to this, almost identical in its circumstances, was brought before the Court for the judicial determination of my learned predecessor in this chair; (a) and in the course of those proceedings articles [702] were given, and the discussion of the question was taken, and, in point of fact, the decision of the question was given upon the admission of the articles. That judgment appears to have been very generally acquiesced in, or at least no case has been brought before these courts calling it in question, or impugning the soundness of the principles upon which it was based. It might therefore have been supposed, after an acquiescence of nearly thirty years, that the point had been considered as finally settled and determined. But although that decision was generally acquiesced in; yet it is notorious that at the time when it was originally pronounced there were not wanting some among the clergy who dissented from it, and who openly and in strong terms,

(a) *Kemp v. Wickes*, 3 Phill. 264.

and in no measured language, expressed their dissatisfaction with the grounds upon which it proceeded, though few, I believe, acted in opposition to it.

Of late years, however, the question has been revived, and several of the clergy, influenced no doubt by the most conscientious motives, have thought it advisable to bring the matter again forward, in order to a revision of the judgment alluded to, that, if the grounds of that judgment be found erroneous, it may be reversed, or, if correct, affirmed by the decision of the highest Court in ecclesiastical matters—that of the Queen in Council, with the advice of the Judicial Committee; and accordingly, the time for appealing from the sentence in *Kemp v. Wickes* having passed, the question has been raised anew in the present case in this Court, as the only mode of obtaining the opinion of the ultimate Court of Appeal.

[703] In the present case the natural forum would have been that of the diocese in which the incumbent was beneficed, and where in point of fact the offence complained of was committed. But it was not thought convenient to institute proceedings there, and consequently the chancellor of that diocese, in the usual manner, signed letters of request to this Court, as its immediate superior.

The question having been thus raised, I have no inclination nor right to find fault with the parties for determining to bring the matter to an issue. On the contrary, I think it is extremely desirable that a question of this great importance, which has produced so much excitement, and created so great an interest, should be finally set at rest: that can only be done by having recourse to the judgment of the supreme Court of Appeal, which has jurisdiction over all the dioceses of this kingdom; whereas the jurisdiction of this Court is confined to the province of Canterbury only, and it is extremely desirable that the practice in all the dioceses, whether in the province of Canterbury or in the province of York, should be placed upon one and the same footing, that there should not be one practice prevailing in one diocese, and a different practice in another.

The case of *Kemp v. Wickes* was also a single decision. It was a case *primæ impressionis*, and, therefore, that judgment, however able, and however elaborate, could hardly be considered as conclusive and of binding effect, like a series of decisions by the Courts of law upon the same identical point. The Court, then, feels that no apology is due on behalf of Mr. Escott for having [704] again brought the question forward for judicial determination, feeling, as I have no doubt he conscientiously does, that the ordinances of the Church forbid him to perform the burial service over a child circumstanced as was the child mentioned in the present proceedings. No apology is due for seeking to obtain a final and conclusive adjudication upon this question. I think, therefore, that this question has been very properly raised upon the present occasion; and it is due to the parties to state that there does not appear to have been, either on the one side or upon the other, any wish to excite irritation further than that which naturally arises from the agitation of such a point.

This case, also, is of great importance to the body to which the father and mother of this infant child belong, involving much more serious consequences to them than the mere question whether a child baptized by one of their own body is entitled to the offices of the church at the time of burial. It is to them, I say, a matter of great importance; for if the Court should be of opinion that Mr. Escott was justified in his refusal to bury this child, on the ground that it had not received baptism at the hands of a lawful minister, it will almost amount to a declaration that in the eye of the law the great body of dissenters, who have mostly been so baptized, are not to be considered as Christians, as members of the Church of Christ. It is of the highest importance to them to know their real state and condition; for it is no light matter, as is expressed by Bishop Fleetwood, for a Christian man, living in the midst of a Christian country, to know whether he is to be considered as a Chris-[705]-tian or not. Therefore I dismiss this part of the case with the observation that I am extremely glad (except on one consideration, personal to myself) that this question has been raised, and that it will probably receive the adjudication of the ultimate Court of Appeal.

I may here also, before I proceed to consider the merits of the case, notice a preliminary objection taken to the competency of the promotor to originate these proceedings. This objection was founded upon the answer given to an interrogatory addressed to several witnesses examined upon the articles. The interrogatory was, "Bearing in mind the evidence you have already given in this cause, and the oath

you have taken, do you not admit that the Wesleyans do in fact, as a body, affirm that it is lawful for ministers and lay persons to join together and make rules, orders, and constitutions in causes ecclesiastical without the Queen's authority, and submit themselves to be ruled thereby? If you do not admit this absolutely and without qualification, will you take upon yourself conscientiously to deny that they do this in the ordinary sense of the above words?" And in order to fix Mr. Mastin, the promoter, as a member of the Wesleyan body, a further interrogatory was addressed to the witnesses, by which inquiry was made as to the profession, business, and station in life of the promoter, inquiring whether he was not a Wesleyan, and whether he does not now (at the time of administering the interrogatory), or has ever, borne any and what office in the Wesleyan body.

Among the witnesses to whom this interrogatory [706] has been addressed, one of them, Mr. Bailey, the gentleman by whom the office of baptism was performed to this infant, has answered the question in the terms of the interrogatory. Mr. Bond, who is also a minister of that class, also answered it in the affirmative; but Mr. Bailey adds this to his deposition upon this interrogatory; he says, "I certainly cannot take upon myself conscientiously to deny that the Wesleyans do this in the ordinary sense of the above words, although at the same time they profess to submit themselves to the Queen's authority implicitly." That is the qualification which Mr. Bailey makes in his answer to this interrogatory, admitting in the terms of the interrogatory that they do affirm the tenets there expressed; but that, notwithstanding they submit themselves to certain rules and regulations not imposed by the Queen's authority, they nevertheless do admit her authority most implicitly. It has been contended upon this answer that Mr. Mastin, as a Wesleyan, must be taken to support this doctrine, and that as such he falls within the provisions of the 12th Canon of 1603, which declares that persons who do so affirm are excommunicated *ipso facto*, and are not to be restored but by the bishop or by the archbishop after their repentance and public revocation of their wicked errors; and that in these Courts it is not necessary that, in a case of excommunication *ipso facto*, there should be a declaratory sentence, for that these Courts may take notice of the excommunication, although no such sentence may have been given; and it was contended that, as an excommunicated person, Mr. Mastin was disqualified from being promoter of the [707] office of judge, and consequently that all the proceedings in the present case were mere nullities. When this objection was first taken, I felt very considerable surprise; for, having practised for a great number of years in these Courts, it was the first time that I had heard that a person who was declared by a canon to be *ipso facto* excommunicated was (with, I should say, one exception, of a case to which I shall presently advert) disqualified from suing in these Courts; for in the course of my practice in these Courts I have known cases in which dissenters of all classes have been suitors in these Courts in matrimonial cases, in suits for restitution of conjugal rights, in cases of divorce, in cases of defamation, in cases of brawling, and I never heard the objection stated, nor ever knew that the objection had been raised, with the exception of one class of cases which has been adverted to, and one of them mentioned by name by Dr. Harding, who argued in support of this objection.

If this objection were to be upheld, it would have a most extraordinary effect; the whole class of Wesleyans would be disqualified from suing in these Courts in consequence of this Canon of 1603 declaring that persons who maintain the doctrines there stated are *ipso facto* excommunicated. The Court would be certainly most cautious in expressing an opinion that a canon of such a description could have such an operation; but in support of the objection so taken, reference was made to the case of *Scrimshire v. Scrimshire* (2 Hagg. Con. 395). In that case Sir Edward Simpson said that "it was [708] the constant practice in the Ecclesiastical Courts to repel the testimony of persons present at clandestine marriages till they have been absolved. Persons present at such marriages are excommunicated *ipso facto*; and in our Courts it is not thought necessary to have a sentence declaratory of an excommunication *ipso facto*; for the Court can *ex officio* take notice of it;" and he referred to the case of *Colli*, which had been so determined by Dr. Andrew in the Consistorial Court of London, in 1751, the date of Sir Edward Simpson's decision being 1752.

The case of *Scrimshire v. Scrimshire* was a suit brought by the wife against the husband for restitution of conjugal rights, and was founded upon a secret and clandestine marriage. The observation of Sir Edward Simpson occurred in speaking of

the objection raised to the sufficiency of the proof, the witnesses to the marriage being, it was contended, incompetent to give evidence, as they were ipso facto excommunicate. In that particular case it seems that the incompetency of the witnesses had been removed by special act of grace; whether that act of grace extended to Mrs. Scrimshire as well as to the witnesses does not appear. Nothing was said as to her competency to bring the suit. Sir Edward Simpson certainly there said that but for that act of grace, or by reason of absolution, before they gave their evidence, their testimony could not have been received; and it was accompanied with the observation that in these Courts a declaratory sentence was not necessary in cases where the parties were ipso facto excommunicated. However, about two years afterwards, 17th June, [709] 1754, there occurred in the Court of Peculiars, before Sir George Lee, then Dean of the Arches, a case of a similar description, being also a case for restitution of conjugal rights founded upon a marriage in the Fleet, which was therefore a secret and clandestine marriage. That was the case of *Grant v. Grant* (1 Lee, 592). In the course of the proceedings Dr. Collier, who was counsel for the husband, objected that the woman, by her own shewing, was, by the constitution in Lyndwood, De claud. dispens., under sentence of excommunication for being clandestinely married and was not absolved, and therefore could not sue; and that the witnesses who were present at the clandestine marriage, and were therefore ipso facto excommunicated, had been, in order to render them competent to give their testimony, absolved in the Court of Peculiars, where the suit was pending, and not by the Chancellor of London, within whose jurisdiction the offence had been committed. He cites the before-mentioned case of *Colli*, in which Dr. Andrew had refused to pronounce his sentence till Mrs. Colli had been absolved. Thereupon Dr. Harris, who was counsel for Mrs. Grant, stated that Mrs. Grant was ready in Court to pray absolution as Mrs. Colli had done. Sir George Lee said that the case of *Colli* was new; that it had never been the practice of the Court of Peculiars to absolve a party to enable him or her to sue, and that he believed that it had not been the practice of the Consistory, except in that one instance. He says, "I was counsel in that cause, and was extremely dissatisfied with that judgment [710] at the time when it was given by Dr. Andrew, and saw no reason to alter my opinion: that I thought the practice, by interpretation upon that constitution, had gone full far enough in disabling witnesses upon an excommunication ipso facto, without a denunciation, and that I would not extend it further, and introduce a new practice, by disabling a party to sue, and therefore over-ruled the objection; and as to the witnesses, wherever the offence was committed, they must be absolved ad testificandum in that Court where they were produced as witnesses."

Now, therefore, it should seem that although under that particular canon witnesses were held to be disqualified and rendered incompetent to give their testimony who had been present at a clandestine marriage, yet Sir George Lee would not hold, and it never has been the practice to consider, that the party in the cause ought to be absolved for the purpose of instituting a suit in the Ecclesiastical Court. One can understand with respect to witnesses why a declaratory sentence was unnecessary; because the very first moment of their appearing to give evidence of the fact of marriage, they would prove their presence, which would convict them on their own shewing, of the offence to which the penalty of excommunication ipso facto was attached. But with regard to the party who was proceeding to enforce her rights, Sir George Lee held that excommunication ipso facto, without denunciation, was not sufficient.

The case, therefore, of *Grant v. Grant* over-ruled the single case, as Sir George Lee considered it, of *Colli v. Colli*, in the Consistory Court; and [711] so strongly did Sir George Lee feel upon the point, that he would not permit the party to come forward to be absolved, although she was ready in Court, and offered herself for that purpose. In no other case does the question appear to have been raised; and very shortly after the decision of *Grant v. Grant* the Marriage Act passed, which rendered all secret and clandestine marriages utterly null and void, and required all marriages to be solemnized in facie ecclesiæ. The case then of *Grant v. Grant* appears decisive as to the practice of the Court at that time; and it would certainly be somewhat strange after the Toleration Acts that the Court should pronounce that a party who held the doctrine imputed to him by this interrogatory, and every other individual of the same class and holding the same doctrine, were deprived, as persons excommunicate ipso facto, of the right of suing in the Ecclesiastical Courts.

The last act which passed with respect to ecclesiastical censure by excommunication, the 53rd of George III. c. 127, appears to me to be conclusive upon that point; for although the sentence of excommunication, as an ecclesiastical censure, is not abolished, yet no civil disabilities are to be incurred by a declaratory sentence or denunciation. The party, instead of being declared to be subject to all the pains and penalties, and to all the disabilities which formerly attached to an excommunicated person, is now to be imprisoned for such time as the Court may direct, under the particular circumstances of the case; and it is expressly enacted by that statute that no civil disability shall be incurred [712] thereby; and certainly it would be incurring a civil disability if a person were not allowed to sue in these Courts. But it must also be recollected that this is not a case in which the party promoting is suing for a right of his own. His own rights may, to a certain extent, be involved in the question; but he is only promoting the office of the judge in a suit in which the public are chiefly interested, although private interests may to some degree be concerned.

But, again, I think it may well be doubted whether the 12th canon was directed against such persons as the Wesleyan Methodists; that body, of course, was not in existence at that time. It seems to me that this canon was directed against persons of a very different description—persons who were much more sturdy opponents to the discipline and government of the Church than are the Wesleyans as a body. It seems to me that the class of persons against whom this canon was directed were those of whom Cartwright (whose name was repeatedly mentioned in the course of these proceedings) was at the head—who were strong opponents to the government and discipline of the Church, and of whom King James the First, about the time at which these canons were passed, says, “I have learned of what cut they have been, who, preaching before me since my coming into England, passed over in silence my being supreme governor in causes ecclesiastical.” (I am reading this from a note to Cardwell’s Conferences, at p. 136.) Those are the kind of persons against whom the canon was directed; those who denied the King’s supremacy. It was argued upon the answer given [713] by the witnesses to the interrogatory in question that the Queen’s supremacy was necessarily denied from the manner in which these persons submitted themselves to be governed by their own laws. I confess, however, it would be very difficult to persuade me, from that answer, that Mr. Mastin was to be convicted (if I may so express myself) of holding those tenets which are imputed by the questions, and against which the canon to which reference is made was directed.

I am, therefore, upon these grounds, clearly of opinion that Mr. Mastin, as the prosecutor in this case for the interest of the public, not for his own private individual interest, is competent to promote the office of the judge, and that consequently the Court is bound to proceed to the consideration of the merits of the case.

The facts of the case are pretty much admitted on all hands. The articles plead, first, that Mr. Escott, who is the party proceeded against, was the incumbent of the parish of Gedney, in the county and diocese of Lincoln; next, that he was bound to obey the laws, canons, and constitutions ecclesiastical of this realm.

The fourth article sets forth the 68th Canon of 1603, upon which the present proceeding is founded. That canon is entitled “Ministers not to refuse to christen or bury,” and ordained that “no ministers shall refuse or delay to christen any child, according to the form of the Book of Common Prayer, that is brought to church to him upon Sundays or holydays to be christened, or to bury any corpse that is brought to the church or churchyard, convenient warning being given him thereof [714] before, in such manner and form as is prescribed in the Book of Common Prayer; and if he shall refuse to christen the one or bury the other, except the party deceased were denounced, excommunicated, majori excommunicatione for some grievous and notorious crime, and no man able to testify of his repentance, he shall be suspended by the bishop of the diocese from his ministry by the space of three month.”

The fifth article pleads, “That, notwithstanding this canon, Mr. Escott had, upon two several occasions, the 16th and 17th of December, expressed his determination not to bury in the churchyard of Gedney the infant daughter of Thomas Cliff and Sarah Cliff, his parishioners, if brought for burial to the churchyard; and that, in pursuance of such declared determination, the said Thomas Sweet Escott, on the 17th day of the said month of December, or on some other day, did, contrary to his duty, refuse to bury in the churchyard of Gedney the corpse of Elizabeth Ann

Cliff, which was then brought to the churchyard, convenient warning having been given for that purpose."

The sixth article pleads, "That the child died within the parish, consequently that that was the place in which it was entitled to be interred—that it was the daughter of Thomas Cliff and Sarah, his wife, who were Protestants, of the class of people commonly called or known as Wesleyan Methodists, and who had been in the habit of frequenting, for some time previous to the 17th of December, a chapel or place of religious worship established for that class, which was within the parish of Gedney—that the child had been bap-[715]-tized on or about the 1st day of October in that year, 1839, according to the rite or form of baptism generally received and observed among the said class of people known as Wesleyan Methodists, that is to say (for this is the important point), that the child was baptized with water, and in the name of the Father, and of the Son, and of the Holy Ghost, by the Reverend Elisha Balley, a minister, preacher, or teacher of the said class of people commonly called or known as Wesleyan Methodists—that of the aforesaid fact of baptism Mr. Escott was informed, both on the 16th of December, 1839, by the father of the child, and on the 17th of that month by Mr. Bond, also a minister of the Wesleyan Methodists, who urged and entreated him upon those occasions to consent to bury the corpse, and that he was at the time of his refusal to bury the corpse sufficiently apprised and aware of the fact of baptism—that, upon those occasions, as well as at the time when the child was brought to the churchyard for the purpose of interment upon the said 17th of December, application was made for the burial thereof in the manner prescribed by the Book of Common Prayer, and that Mr. Escott refused to comply with such entreaties."

The seventh and eighth are merely general articles, stating that the offence is one which subjects Mr. Escott to ecclesiastical proceedings, and that by virtue of the letters of request he is subject to the jurisdiction of this Court.

Such are the articles upon which the present proceeding is founded: and all that was necessary for the purpose of these articles was to prove that this child was baptized by a Wesleyan minister—[716] that Mr. Escott, the minister of the parish within which the child was born and died, was informed of that fact—that he was informed that they meant to bring the child for burial upon the day following that upon which the notice was given, and that, being fully apprised of that fact, he refused to attend, and that the child was accordingly interred without the burial service being read over it.

All the facts thus stated in the articles are either admitted in acts of Court, or fully proved by witnesses. I do not mean to refer in detail to the evidence. It is extremely desirable that all angry feeling should be laid aside in the consideration of this case, and that the question should receive its determination upon the true and proper ground, namely, whether a child who had received the outward and visible form of baptism (that is, had been sprinkled with water in the name of the Father, and of the Son, and of the Holy Ghost) by a dissenting minister, not being a lawful minister of the Church of England, nor episcopally ordained, as it is admitted was the case with respect to Mr. Balley who administered the rite, is to be considered as unbaptized and not entitled to have the burial service read at its interment, or whether the refusal to read the service over the child so baptized does or does not bring the party so refusing within the provision of the canon.

I have already said that the allegation of Mr. Escott propounds matters of law rather than of fact. The first article of his allegation, after reciting the fifth of the promoter's articles, pleads, "That Mr. Escott, in forming the determination of refusing to read the burial service at the interment [717] of the corpse of Elizabeth Ann Cliff in the churchyard of the parish of Gedney, was so far from acting in contempt of the laws, canons, and constitutions of the Church of England, that he acted in obedience to, and in conformity with, the laws and constitutions to which he had bound himself when he became an ordained minister of the Church of England."

The second article pleads, "That in the preface to the form and manner of making deacons, as established by the liturgy of the Church of England, it is expressly set forth and provided, 'That none shall be accounted or taken to be a lawful bishop, priest, or deacon in the United Church of England and Ireland, or sufficient to execute any of the said functions, except he be called, tried, examined, and admitted thereunto according to the form hereafter following, or hath had formerly episcopal consecration

or ordination.” Therefore putting in issue the fact of the validity of the administration of the baptism of this child.

The third article recites the sixth article, which I have read, in which it was alleged that the child had received baptism according to the Wesleyan rite by a minister of that class of people, and it pleads, “That such minister, teacher, or preacher was unordained, and that any rite or form of baptism performed by any such minister, teacher, or preacher is to all intents and purposes null and void in the sense of, and according to, the articles, canons, and rubric of the Church of England.”

The fourth article pleads, “That from and after the conferences holden at Hampton Court in the year of our Lord 1603, the practice of the [718] Church of Rome which had hitherto permitted the rite of baptism to be performed by laymen and midwives under license from the bishops of their respective dioceses, and which practice had been up to that period tolerated by the reformed Church of England, was repudiated by the ecclesiastical authorities of this realm assembled at the said conferences of Hampton Court as aforesaid; and in order to give effect and force to such repudiation, King James I. directed and caused an alteration to be made accordingly in the liturgy of the Church of England.” And Mr. Escott alleges and undertakes to prove that from that period, namely, the period of the Hampton Court conferences of 1603, to the present day the liturgy of the Church of England has not allowed the rite of baptism performed by unordained persons to be valid, but has held the direct contrary. That is the proposition which Mr. Escott undertakes by his counsel to establish.

The fifth article sets forth the liturgy of 1595 (that is, the liturgy in the time of Queen Elizabeth), in order to shew the variations between the liturgy of 1595 and those which are pleaded in the subsequent article, and in order to shew the alterations which had taken place in the opinions of the heads of the Church assembled together to consider the revision of the liturgy in 1603. And it then sets forth the rubric of 1595 as to the baptism of persons in private houses, “First, let them that be present call upon God for His grace and say the Lord’s Prayer, if the time will suffer, and then one of them shall name the child and dip him in water, or pour water upon him, saying these words, ‘I [719] baptize thee in the name of the Father, and of the Son, and of the Holy Ghost.’” And it pleads that this book is now remaining in the British Museum.

The sixth sets forth the liturgy printed in 1606, in which the rubric is as follows:—“First, let the lawful minister and them that be present call upon God for His grace and say the Lord’s Prayer, if the time will suffer; and then the child being named by some one that is present, the said lawful minister shall dip it in water or pour water upon it, saying these words, ‘I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost;’” and it pleads that this book also is now remaining in the British Museum.

The difference between those two liturgies consists in this, that whereas by the first, that of 1595, one of the persons present was to call upon God for His grace, and, if time would permit, to say the Lord’s Prayer, and then one of them was to dip the child or pour water upon it, and to pronounce the words “I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost;” by the liturgy printed in 1606 it is directed that that should be done by the lawful minister. That is the distinction between those two liturgies as set forth in this allegation.

The next article, the seventh, sets forth the rubric to the order for the burial of the dead, which was confirmed by act of Parliament in 13 & 14 Car. II. and which enjoins that such office is not to be used for any that die unbaptized or excommunicated, or have laid violent hands upon themselves. That is the law now in force.

The eighth recites the fourth article on behalf of [720] the promoter, which sets forth the 68th Canon of 1603, and in contradiction, or rather, I may say, in explanation of that canon, it alleges that that “canon can only be taken and construed in conjunction with, and in reference to, the other constitutions and canons promulgated in the same code.” And it goes on to plead, “That by the 9th of those canons, entitled ‘Authors of Schism in the Church of England censured,’ it is ordained that ‘Whosoever shall hereafter separate themselves from the communion of saints, as it is approved by the Apostles’ rules in the Church of England, and combine themselves together in a new brotherhood, accounting the Christians who are conformable to the doctrine, government, rites and ceremonies of the Church of England to be profane and unmeet for them to join with in Christian profession, let them be excommunicated

ipso facto and not restored but by the archbishop after their repentance and public revocation of such their wicked errors.” And it further refers to the 12th canon, entitled “Maintainers of Constitutions made in Conventicles censured,” and recites those words which are embodied in the 14th interrogatory, addressed to the witnesses with a view to shew that they held those tenets and therefore were under sentence of excommunication ipso facto. It is not now necessary to repeat those words as they have already been read by the Court. It then refers to the 5th canon, entitled “Impugners of the Articles of Religion established in the Church of England censured,” in which it is ordained that “Whosoever shall hereafter affirm that any of the Nine and Thirty Articles agreed upon by the archbishop and [721] bishops of both provinces, and the whole clergy, in the convocation holden at London in the year of our Lord 1562, for avoiding diversities of opinions and for the establishing of consent touching true religion, are in any part superstitious or erroneous, or such as they may not with a good conscience subscribe unto, let him be excommunicated ipso facto and not restored but only by the archbishop after his repentance and public revocation of such his wicked errors.”

The ninth pleads the 23rd Article of the Thirty-nine Articles, by which it is decreed that “It is not lawful for any man to take upon him the office of public preaching or ministering the Sacraments in the congregation before he be lawfully called and sent to execute the same, and those we ought to judge lawfully called and sent which be chosen and called to this work by men who have public authority given unto them in the congregation to call and send ministers into the Lord’s vineyard.”

The tenth refers to the 25th of those Articles in 1561, which ordained as follows:—“There are two Sacraments ordained of Christ our Lord in the Gospel, that is to say, Baptism and the Supper of the Lord.” And it alleges that Mr. Bailey, referred to in the sixth article on behalf of the promoter, “is not a lawful minister and never hath received episcopal ordination or consecration, and that by reason of the premises Elizabeth Ann Cliff was not in fact baptized by the said Elisha Bailey, but the said pretended baptism, if performed as therein alleged, was altogether invalid and contrary to, and in contempt of, the doctrine and discipline of the Church of England, and of the laws, canons, constitutions, [722] and rubric hereinbefore more especially propounded and set forth.”

The eleventh article was rejected by the Court for these reasons, that it set forth the discipline of Mr. Wesley which he imposed upon his followers, and in which he strongly repudiated the notion that by sending them forth to preach they had authority to administer the Sacraments of Baptism and the Lord’s Supper. The Court thought that by no possibility could this enter into the consideration of the question as to the validity or invalidity of the baptism which this child had received. That what Mr. Wesley might have enjoined upon his followers to do, or to leave undone, could have no effect upon the decision of this question, and that such averments would involve the necessity of allowing the other side to set forth that which is stated in the answer to the interrogatory addressed to one of the witnesses, that at the later period of his life Mr. Wesley changed his opinion, and that either the great increase in number of his followers, or some other cause, rendered it necessary that he should depart from that rule which he had prescribed to them, and allow them to perform the office of baptism and to administer the Sacrament of the Lord’s Supper. But in fact, whatever their discipline might have been, whatever orders or rules might have been issued by Mr. Wesley for their government, that could not affect the determination of the Court upon the question which, as I have already stated, it is called upon to decide, viz. whether a child that had received the outward and visible form of baptism—that is, which had been in this case sprinkled with water in the name [723] of the Father, and of the Son, and of the Holy Ghost by a dissenting minister, that minister not being an ordained minister of the Church of England, nor episcopally ordained, as the fact is admitted to be with respect to Mr. Bailey—whether that child so sprinkled was to be considered as within the terms of the rubric unbaptized, and not entitled to have the burial service read at its interment—or whether the refusal to bury that child and to read the service over it did or did not bring the party who so refused within the provisions of the 68th canon.

That canon expressly declares that ministers who shall refuse to bury a corpse that is brought for that purpose, convenient notice having been given, shall be subject to the penalty of three months’ suspension, unless in the case of a person who had

been denounced excommunicated majori excommunicatione. This, however, is not the only case in which a clergyman may refuse to bury; because by the rubric of 1661, which is the rule by which this Court must now be governed as the rule of the Church, that service is not to be read over persons who die unbaptized or excommunicated, or who have laid violent hands upon themselves. The rubric of 1661 includes the disqualification mentioned in the canon, and adds these other two disqualifications, namely, that of dying unbaptized or of being *felo de se*. These excepted cases being in derogation of a general right are to be construed strictly. The object of the Church and of the legislature, which confirmed the rubric, must have been to exclude from the offices of the church all those who had never been admitted into it by baptism, [724] those who having been once admitted into it had for some grievous offence been excluded from it; and, thirdly, those who, dying in the commission of mortal sin, had by their own act renounced the privileges of Christianity; the principle applicable to these three classes of persons being, that this service was not to be performed over those who were not at the time of their death members of the Church of Christ. Such I take to be the sum and substance of the disqualifications which are mentioned in the canon and in the rubric.

The question, then, may now be assumed to be the validity or invalidity of a baptism administered by a person in the situation in which Mr. Balley stood at the time this child was baptized; whether a baptism so administered would be acknowledged by the Church (I mean acknowledged as sufficient to remove the disqualification mentioned in the rubric), whether, in point of fact, this child was or was not "unbaptized;" for it is obvious that the child could not fall under the class of persons who were excommunicated, nor under that third class of persons who had laid violent hands upon themselves. In short, the question which the Court has to determine is, whether the term used in the rubric, of persons dying unbaptized, is to be applied only in cases where there has been a total absence of the rite, or whether it is to be applied in cases where there has been a want of qualification in the person by whom it was administered.

The first inquiry then is, what is essential to the administration of this Sacrament? It is admitted on all hands that no baptism is valid unless the matter and the form of words prescribed at the in-[725]-stitution of the Sacrament are observed and used, that is, that the child shall be immersed in or sprinkled with water, in the name of the Father, and of the Son, and of the Holy Ghost. That form was used with reference to this child, and therefore, so far, those things which on all hands are admitted to be essential to the validity of baptism were duly complied with.

But it is contended, on behalf of Mr. Escott, that it is not enough that the outward and visible form or sign should be ministered, but that it must be administered by a person duly authorized and commissioned for that purpose; that is, since the year 1603, and more particularly since the year 1661, by an episcopally ordained minister, for that is the meaning of the words "lawful minister" mentioned in the rubric which forms the present law upon the subject; and that in fact the minister is a necessary part of the Sacrament, so necessary that without him the administration becomes null and void.

The question, therefore, in this case, must eventually turn upon this, whether since the alteration in that rubric an episcopally ordained minister is, as contended for by Mr. Escott's counsel, absolutely necessary to the valid administration of this rite? If this be so, it will follow as a matter of course that this prosecution must fall to the ground, and the defence set up by Mr. Escott will be completely established, namely, that in refusing to read the burial service over this child he was acting in conformity with, and not in opposition to, the law of the Church of which he is a minister. On the other hand, if it shall appear that the minister is not a necessary part of the Sacrament, [726] but only to the orderly and proper administration of it, and that the Sacrament itself is sufficiently administered, even when administered by uncommissioned or unauthorized hands, then Mr. Escott will have offended against the law, and will have incurred the penalty of the canon.

When I state that the question is whether baptism administered by any other than a minister who has received episcopal ordination is valid or invalid, I entirely disclaim any intention of entering into the theological discussion of this much controverted point, which has employed the talents and pens of so many able, learned, and pious men. The decision of that question belongs not to this Court; all that it has

to do is to endeavour to ascertain whether the Church of England has expressed any decided opinion upon it, and what that opinion is; and according to that opinion to pronounce its decision. The law of the Church is that alone which this Court is called upon or is competent to administer; and by that law the Court must be governed, without indulging in speculations of its own, whether the law is founded in error or in truth.

After the admission in Mr. Escott's allegation that the practice of lay baptism was tolerated by the Church of England down to the year 1603, it may at first sight appear superfluous to travel back to any earlier period for the purpose of ascertaining the time at which, and the extent to which, this practice had been admitted into the Church. But as the admission itself was in some degree qualified in Mr. Escott's allegation, which stated that the practice of the Church of Rome, permitting baptism [727] by laymen and by midwives, under license from the diocesan, had been tolerated by the Church of England down to the year 1603, and as it was strongly urged in the course of the argument that the introduction of baptism at all by laymen and by women was one of the corruptions of the Church of Rome, of which it was the object of the Reformation to purge the Church, it may not be altogether useless shortly to trace its progress from the time of its introduction into the Catholic Church to the period of the Reformation, in order that we may be enabled the better to judge how much is to be charged to the corruption of the Romish Church, and whether any and what part of it has been derived from the ancient or primitive Church. "By the custom of the primitive Church we mean (say the reformed divines in the first proposition disputed in Westminster Abbey, in 1559) the order most generally used in the Church for the space of five hundred years after Christ, in which times lived the most notable fathers, as Justin, Irenæus, Tertullian, Cyprian, Basil, Chrysostom, Hierome, Ambrose, Augustine, and others" (Cardwell's Conferences, p. 56).

In order to arrive at a correct view of the present state of the law it is necessary to see how the law stood at the time in which the alleged alterations are represented to have taken place. It was stated in the case of *Kemp v. Wickes* (3 Phill. 276), and is undoubtedly true, and cannot be controverted, that "the law of the Church is to be deduced from the ancient general canon law, from the particular constitutions made in this country to regulate the English Church, [728] from our own canons, from the rubric, and from any acts of Parliament which may have passed upon the subject, illustrated by the writings of eminent persons." Those are the guides which this Court must take for its direction in the investigation into the former and present state of the law of the Church upon the subject of baptism, for the inquiry into the present state of the law may be very materially assisted by its former state.

It was observed in argument that at the first institution of this Sacrament the administration of it was confined to the Apostles, and afterwards descended to their successors, the bishops of the Church, and to those who were duly commissioned by them, and that this continues to be the law down to the present time. This proposition will admit of no dispute, so far as effects the orderly and regular administration of the rite; although it is matter of dispute, and is indeed the whole subject of dispute in this case, whether the administration of it by others than persons so commissioned is or is not within the view of the Church a valid administration of the rite.

I need not state that the practice of the primitive Church is that to which the Court would pay the greatest attention. Now, in the very early, if not in the earliest, ages of the Church, baptism by lay hands, in the name of the Father, Son, and Holy Ghost, was practised, and was allowed to be valid, and upon no account to be repeated.

It appears that, so early at least as the end of the second or beginning of the third century, the practice had obtained to a certain extent; for Tertullian, who lived at that time, wrote upon the very subject; [729] and reference might be made to a vast number of passages in his works, in support of the validity of lay baptism under certain circumstances. He thus expresses himself in the 17th chapter "De Baptismo." "Dandi quidem habet jus summus sacerdos, qui est episcopus. Dehinc presbyteri et diaconi non tamen sine episcopi autoritate, propter ecclesiæ honorem, quo salvo salva pax est. Alioquin etiam laicis jus est; quod enim ex æquo accipitur ex æquo dari potest."

It has been indeed said that the reason given by Tertullian for admitting the validity of lay baptism is so weak and unfounded as to detract from the weight to

which the opinion of so learned a person would otherwise have been entitled. But his authority is not appealed to for the purpose of asserting the validity of lay baptism, but in order to shew that the practice had obtained, to some extent at least, at this very early period of the Church, and as a necessary consequence, that it was not a part of the corruptions of the Romanists which had been introduced into and adopted by the Church of England.

Whether, therefore, the grounds upon which Tertullian advocated and maintained the validity of lay baptism be sustainable or not, he is at all events a most valuable witness (and has been always so considered) to the existence of the practice of lay baptism in his time.

On the other hand, St. Cyprian and Firmilian, who lived at a later period of the same century, maintained that baptism by any other than those who were duly and properly commissioned was altogether null and void, and that persons baptized [730] by heretical and schismatical priests, during the time of their heresy and schism, were not sufficiently baptized, and ought to be baptized again, because by their heresy and schism they had been reduced to the state, if not below the state, of laymen; for all these discussions arose upon the point whether baptism was or was not to be repeated, it being the general, indeed universal, doctrine, according to the general meaning which had been attributed to this passage in St. Paul's Epistle to the Ephesians, "One Lord, one faith, one baptism," that baptism once validly administered was not to be repeated. St. Cyprian and Firmilian maintained that those sprinklings were null and void ab initio, in consequence of the heresy and schism of those by whom the rite was administered, and consequently that there was in such cases no reiteration or repetition of baptism, because, in point of fact, baptism had never been administered.

But this opinion of St. Cyprian and Firmilian was not generally adopted; it was expressly overruled by the Council of Arles: for it was said that the priestly character being once impressed was indelible, and that the commission could not be revoked or lost by any acts of those to whom it had been entrusted. And therefore the opinion seems to have prevailed that schismatical and heretical baptisms, being performed by persons who had been originally duly commissioned, were good and valid, provided the proper matter and form were used and observed.

These writers, again, are referred to only to shew that at this time the controversy upon the point continued, and not for the purpose of establishing [731] the validity or invalidity of the administration of the rite.

A great division of opinion upon this point prevailed for a considerable time. The Eastern and Western Churches embraced different sides of the question. The Eastern Church did not adopt lay baptism till long after the time when the Western Church had embraced it. But towards the middle or the end of the fourth century, or the beginning of the fifth century, the legality of baptism administered by laymen was upheld by St. Austin, who has ever been looked upon as one of the most learned and pious of the fathers of the Church. From this time the practice prevailed, and was allowed in both the Eastern and Western Churches; and the great objection which appears to have been made, not to the character of the testimony as to the existence of the practice, but to the value of the opinion as to the validity of that practice, was that St. Austin had embraced that opinion, upon an erroneous notion that baptism was absolutely necessary to salvation—that no person could by possibility be saved unless he had been previously baptized; founding it upon an erroneous application of the text of Scripture, "Unless a man be born of water and of the Spirit he cannot enter into the kingdom of Heaven." Now, supposing St. Austin had embraced that opinion, and supposing he had embraced it to such an extent as is contended for by the writers who maintain the opposite doctrine, upon an erroneous application of this passage of Scripture, it would make nothing against his testimony as to the existence and adoption by the Church of the practice of lay [732] baptism; and if the practice did exist in, and was adopted by, the Church at that time, that is all that is necessary for the present consideration of the Court. The existence of the practice at this very early period—during the first four or five centuries, the best and purest ages of the Church—shews that the practice does not owe its origin to the corruptions of Rome. That many superstitions were engrafted upon this practice is true, but that will not affect the present question. And the evidence of Tertullian, St. Austin, and St. Jerome is sufficient to establish the fact that the practice existed at this time.

After the time of St. Austin the ancient canons bear ample testimony to the universal adoption of it as the rule and order of the Church. That such was the rule and order of the Church is to be collected from a vast number of passages to be found in the different books which constitute the canon law. It would be useless for the Court to refer to the particular canons and constitutions which apply to this subject. It is sufficient to state that the validity of lay baptism was recognized, not only by the general canon law of Europe, and throughout the Eastern and Western Churches, but also by the law of England, and of the English Church, long before the Reformation.

The titles of many of the paragraphs in the third part of the decree "*De Consecratione*" were enumerated by my learned predecessor, in his judgment in the case of *Kemp v. Wickes*, and are to be found in the report of that judgment, and every one of them is strictly applicable to the present proceeding; and, therefore, the Court [733] would refer to, and invoke them as a part of its judgment in, this case. The passages there cited are derived from St. Austin and St. Isidore. Though the catalogue might be increased almost ad infinitum, I will only at present refer to one or two additional passages from the particular law of our own Church, which shew that the doctrine of the ancient Church was adopted in this country to its fullest extent, and that a great part of our baptismal service has been formed with reference to these particular canons and constitutions. These passages are to be found in the provincial constitutions made by the several archbishops of Canterbury and the provincial synods, from the time of Stephen Langton in the reign of Henry III., down to the time of Henry Chicheley in the reign of Henry V., and thenceforward to the time of the Reformation. Such of these constitutions as were in existence in 1463 were in that year adopted by the province of York; and the whole body of these constitutions were declared by the statute of 24th of Henry VIII. to be part of the law of England, so far as they were not inconsistent with, and opposed to, the common law, the statute law, or the prerogative of the Crown; and they consequently remain at the present day the law of the Church of England, provided they do not fall under either of those exceptions.

Lyndwood has collected those several constitutions, and has also in a most learned gloss upon them set forth what the law was at the time at which he wrote. Though Lyndwood may be styled a Roman Catholic canonist, and on that account not to be relied upon on a question which [734] relates to the law of the Church at the present time, yet he is a most learned and sound expositor of the law as it stood at the time when he wrote his gloss, and the standard authority on all points of the canon law which may arise in the administration of justice in these Courts. Still, I do not refer to Lyndwood as an authority for the law of the Church at the present day, except so far as that law remains unaltered from his time.

Under the title "*De Sacramentis iterandis vel non*," book i. title 7, page 40, is a constitution of Archbishop Peccham in the year 1281. "*Baptismus etiam a laicis ritè administratus non est a sacerdote iterandus.*" It has been argued in this case that lay baptism was tolerated only by the Romish Church, and by the Church of England, in cases of absolute necessity. Lyndwood, however, has a gloss upon the word "*necessitatem*," which occurs in the constitution just mentioned, and I refer to that gloss for the purpose of shewing that in cases of absolute necessity lay baptism was not only tolerated but enjoined; and that though no absolute necessity might exist, yet baptism once administered *modo et formâ*, which Lyndwood explains to be with water in the name of the Father, and of the Son, and of the Holy Ghost, was a sufficient baptism and was not permitted in any way to be repeated. In commenting then upon that word "*necessitatem*," he says, "*Quia forsan timetur de ejus morte imminente quo casu cuilibet licet baptizare etiam patri: unde et hæreticus tempore necessitatis potest baptizare, dum tamen cum debita intentione baptizandi sicut forman ecclesiæ.*" He then mentions other cases in which such baptism [735] might be administered, and he concludes with these words, "*Scias tamen quod laicus sine necessitate baptizans peccat, nam baptizare sacerdotis proprium est officium, et hoc verum solemniter. Quod licet presbyter baptizare possit præsentè episcopo quia de officio suo est: tamen præsentè presbytero clericus baptizare non debet, nec laicus præsentè clerico, nec mulier præsentè viro.*" So that here he says that though the priest, whose proper office it is to administer the Sacrament, may administer it in the presence of the bishop, yet the "*clericus*," that is, a person in office below that of the priesthood, could not

and ought not properly to administer the Sacrament in the presence of the priest—that yet in his absence he might administer it; and though a layman might not administer it in the presence of the “clericus,” nor a woman in the presence of a man, yet they were all of them at liberty to administer the Sacrament, provided the necessity was absolute at the time.

Then under the title “De Baptismo et ejus effectu” (book iii. tit. 22, p. 241), there is a gloss pretty much to the same effect, with respect to the offence which is committed by a layman baptizing a child without any necessity. The effect for which I at present cite that, is to shew that the baptism, administered by a layman where there existed no necessity for that administration, arising from the dangerous illness of the child or from other circumstances was itself good. He says, “Pro vero tamen teneas quod extra casum necessitatis solus sacerdos est debitus minister ad Sacramentum baptismi. Pee-[736]-caret mortaliter aliquis non sacerdos baptizans præter quam articulo mortis. Si tamen de facto aliquis non sacerdos baptizaret extra articulum necessitatis, cum tamen debitâ intentione et in formâ Ecclesiæ, tenet Baptismus ad effectum, quod sic baptizatus non debet rebaptizari. Et idem dico de non baptizato baptizante, quia bonitas sive sanctitas ministri non est de necessitate baptismi, sed de congruentiâ.” Therefore it is quite clear from this passage that at this time, at least in the Church of England, baptism, though administered by a person who was not duly qualified for that purpose, if administered in the proper form and with the proper words, was a good and valid baptism, at least to the extent that the baptism was not to be reiterated. And there are passages in the law which shew that the repetition of baptism once administered modo et formâ, that is, with water and in the name of the Trinity, was to be punished, in the case of a person in holy orders, by deposition or by other severe punishment, and in the case of a layman by excommunication.

I have referred to these passages for the purpose of shewing that by the law of the Church of England at this period the validity of lay baptism, to the effect at least that it was not to be repeated, was admitted; and consequently, as all this remained unrepealed and without any alteration up to the time of the Reformation, that it is to be taken to have been the actual law to be observed by all persons in the Church of England at that time—that baptism so administered was to be considered as good and sufficiently administered. So important, moreover, did the Church consider the adminis-[737]-tration of this rite, that it enjoined the ministers to instruct their parishioners in the proper form of baptism, that in case of necessity arising, in case of circumstances occurring, which imperatively called for the administration of it without delay, there might be no difficulty in administering that right which, whether wrongly or rightly, was considered necessary to salvation.

Such was the law of England up to the time of the Reformation. I have already stated that the canon law, so far as it had been received in this country, and these provincial constitutions were confirmed by an act of Parliament of the 24th of Henry VIII., so far as they were not repugnant to the common law, to the statute law, or to the prerogative of the crown; and, therefore, so far as they have not been altered by later statutes, thus continue to be the law at the present day.

At the time of the Reformation various alterations took place. The first of those alterations to which I shall refer is that which took place in the reign of Edward VI., for although the Reformation had made considerable progress during the reign of Henry VIII., it does not appear, I think, that any material alterations were made in the liturgy of the Church until the reign of Edward VI.

In the time of Edward VI. the liturgy of the Church of England was reduced into order and revised. There were during his reign two liturgies in Prayer Books published, one in the year 1549, and the other in the year 1552; and in those books the title of the form of private baptism was as follows:—“Of them which be baptized in private houses in time of necessity.” Then fol-[738]-lowed this rubric, “The pastors and curates shall warn their parishioners that they defer not the baptism of infants longer than the Sunday, or other holyday, next after the child shall be born, unless upon a great and pressing necessity, to be allowed by the curate; and also they shall warn them, that without great cause or necessity they baptize not children in their houses: and when great need shall compel them to do so, that they administer it in this fashion: First, let them that be present call upon God for His grace, and say the Lord’s Prayer, if the time will suffice; and then one of them shall name the child, and dip him in the water, or pour water upon him, saying these words, ‘I baptize

thee in the name of the Father, and of the Son, and of the Holy Ghost.” This having been so done, those persons having thus called upon God, and one of them having thus dipped the child into water, and said the proper form of words over it, this declaration as to the validity of the baptism so administered follows, “And let them not doubt but that the child so baptized is lawfully and sufficiently baptized, and ought not to be baptized again.”

Nothing can be more plain and express upon the face of this direction in the rubric than that the child is to be in cases of necessity baptized by one of the persons present, and that being so baptized it is beyond all doubt sufficiently baptized; for it is said, “Let them not doubt but that the child so baptized is lawfully and sufficiently baptized, and ought not to be baptized again.”

So far as this Prayer Book of Edward VI. goes (and the second Prayer Book is pretty much to the [739] same effect, and without any material alteration), it is in confirmation of that which I have already shewn, by various authorities, to have been the ancient law of the Church. It proves that after the Reformation, at least to the time of Edward VI., lay baptism in cases of necessity in private houses was considered to be a good and sufficient administration of the Sacrament, so that the child ought not to be brought to the church for the purpose of being again baptized.

But the rubric goes on to direct that if the child lives it is expedient that he be brought to the church to the intent that the priest may examine whether the child be lawfully baptized or not. Now, considering what the law of the Church was at this time, it is hardly capable of being made a question whether this was not a direct and positive authority for the administration of baptism by laymen. Before this time, as we have seen, it was the universal practice of the Church to acknowledge such baptism as valid, and if an alteration in that respect was intended, care would have been taken to guard against the continuance of the ancient practice. In the rubric there is not a single allusion to the “priest” in the administration of the rite. But when the child is directed to be brought to the church, then for the first time the priest is mentioned. From this it would seem that, in cases of necessity, the absence of the priest at the time of baptism and its administration by a layman and not by a priest were almost necessarily presumed. The mention of the priest is first introduced when the child is directed to be brought to the church in order to ascertain that all things were done as they ought to [740] have been done, then he was to satisfy himself by inquiry of those who brought the child to the church in what manner and form the child had been baptized, and being satisfied upon that head, he was to certify that in that case they had done well and according unto due order in baptizing the child. Neither is the reception of the child into the Church of Christ of the essence of the Sacrament. The baptism is complete when the child is named and when it is sprinkled with water, in the name of the Holy Trinity, for it is then that the sufficiency of it is declared. If the child had died at that moment there could be no doubt, as the law then existed, that the baptism itself would have been good, valid, and sufficient. But as matter of expediency, in order that the congregation might be informed whether the child had been duly and sufficiently baptized or not, it was thought expedient that the child should be brought to the church, in order that the priest might satisfy himself that all things were done as they ought to be by those who were present at the time of the baptism, and might certify to the congregation that all was well done and in due order. Here, then, lay baptism is declared to be valid; and this rubric was confirmed by act of Parliament.

The first Prayer Book of Edward VI. in 1549 was revised in the year 1552, but no material alteration in this service appears to have been made. Upon the death of Edward VI., when Queen Mary succeeded to the throne, everything was restored to the state in which it stood previous to the Reformation; the Romish ritual was again brought into use, and the acts of Parliament which had been passed [741] in the former reign with respect to religious matters were repealed. But upon Queen Elizabeth’s accession to the crown those acts of Mary were in their turn rescinded; and then the Prayer Books of Edward VI. were again published, and again became the rules by which the offices of the Church were to be governed.

Those Prayer Books, with the rubric which I have already stated, with respect to private baptism in houses, and with respect to the sufficiency of private baptism by a person other than a priest, continued to be the law during the reign of Queen Elizabeth, with certain exceptions, to which I shall presently allude. No other Prayer

Book was published, I think, till the year 1595, when Queen Elizabeth's Prayer Book was published, which was to all intents and purposes the same as (at least there was no material variation from) the book of Edward VI. During the interval, however, between 1559 and 1595, various conferences had taken place upon the subject of alterations proposed to be introduced into the Book of Common Prayer, and, amongst other things, it was required by the Puritans that the liturgy should be so altered as to exclude women from administering the Sacrament of Baptism. In the year 1565 a long correspondence upon the subject took place between Bishops Grindal and Horn with Bullinger and Gualter of Zurich. In their letter, Bullinger and Gualter complained very much of the continuance of abuses in the Church—those abuses are specified at very great length in a letter which is to be found in the third volume of Burnet's History of the Reformation—and amongst others (which alone it is necessary at [742] present to advert to) they complained that the baptism by women in cases of necessity was still retained as part of the order of the English Church; they complain "*Mulieres in casu necessitatis privatum posse et debere baptizare infantulos.*" This shews that in 1565, at the date of this correspondence, the practice was still continued in cases of necessity, not only of women baptizing infants, but *a fortiori* that baptism was administered by laymen.

In reply to this, Bishops Grindal and Horn, in a joint letter, express their opinion in these words, "*Mulieres et posse et debere baptizare infantulos nullo modo prorsus assentimur.*" They did not agree to the doctrine of the Church—that it was right and proper that women should still baptize children. That, however, continued to be the law, and unless that law has been altered it must continue to be the law of the Church: nothing appears to have been done till the convocation of 1575. At that convocation, which was a general convocation of the province of Canterbury (I think it does not appear that the province of York had any concern or connexion with that convocation), certain canons, fifteen in number, were made and agreed upon; and, amongst others, there was one which went directly to prohibit the administration of private baptism by any but a lawful minister, or by a deacon called to be present for that purpose. Great stress has been laid by those who deny the validity of lay baptism upon that article, as the object of it purports to have been to remove any ambiguity and doubt as to the persons by whom private baptism was to be administered.

The history of this canon is involved in great mystery and obscurity. The canons, I have stated, [743] were originally fifteen in number; the fifteenth, I think, was withdrawn in consequence of the Queen having refused her assent; thirteen only were printed. This canon, in particular, which related to the subject of lay baptism, was not printed with the others, though it is asserted that it was published, and possibly may have been circulated in manuscript. Gibson, in his first volume, page 369, says that, "This article was not published in the printed copy, but whether on the same account that the fifteenth article was left out, that is, because it was disapproved by the crown, I cannot certainly tell." Such is Gibson's observation with respect to this article.

Collier, in his Church History (vol. 2, p. 552), has given a copy of this canon. It is the 12th Canon of 1575, and he states, "This article being particularly remarkable I have given it in the words of the record." And therefore he must, I presume, have had access either to one of the original copies of the canon or to the canon itself.

The canon is in these words, "And whereas some ambiguity and doubt has arisen among divers, by what persons private baptism is to be administered, forasmuch as by the Book of Common Prayer allowed by statute, the bishop of the diocese is to expound and resolve all such doubts as shall arise concerning the manner, how to understand, do and execute the things contained in the same book, it is now by the said archbishop and bishops expounded and resolved, and every of them doth expound and resolve, that the said private baptism, in case of [744] necessity, is only to be administered by a lawful minister or deacon called to be present for that purpose, and none other." So that here there are words affirmative and negative. It is "to be administered by a lawful minister or deacon called to be present for that purpose and none other," and that "every bishop in his diocese shall take order that the exposition of the said doubt shall be published in writing before the 1st day of May next coming, in every parish church of his diocese in this province, and thereby all other persons shall be inhibited to intermeddle with the ministering of baptism privately, it being

no part of their vocation." As I have already stated, this is given in the words of the original canon according to Collier.

This undoubtedly is a very strong expression of the opinion of the convocation, that private baptism, in cases of necessity, was only to be administered by a lawful minister, or by a deacon called to be present for that purpose, and none other; and shews that though up to this time lay baptism was considered sufficient for certain purposes at least, and ought not to be repeated, yet now there was a great alteration in the opinions of the heads of the Church and of the crown, if assented to by the Queen, and that that which had been the law under the rubric of Edward VI. was no longer to be tolerated.

If the mandate for its publication (for it is the mandate of the archbishop) was obeyed the copies of it must have been very numerous, yet no copies of it have been found. It is on all hands agreed that it was not printed and published in that form with the rest of the canons. And that no trace of it should be found except two or three copies preserved in the [745] public repositories—that there should not be found in the books or registries of any of the dioceses any allusion to its publication in the parish churches of those dioceses, is most extraordinary, considering the very great importance which must be supposed to have been attached to such a canon at the time. No allusion whatever is made to it that I have been able to find in any contemporary writer. It does not appear to have been mentioned at the Hampton Court conferences in 1603. It is not mentioned by Hooker, who wrote in 1585 or 1586. This document seems, so far as I have been able to ascertain, either to have been suppressed immediately after it was passed, or, if it was published at all, was never considered to have any binding authority.

That canon must, however, have been agreed upon by the convocation, because the archbishop's mandate for its publication is added to it, and it is not impossible that it might have received the Queen's assent, but for some reason or other it never appears to have had effect or operation given to it: whether it was that it went too far as an act of the convocation, in purporting to repeal the rubric of Edward VI., which had been confirmed by act of Parliament, and, therefore, it was not thought proper to publish it with the rest, though two or three copies might get abroad: whether it was supposed that the bishops had exceeded the authority given to them by the preface to the Book of Common Prayer, which is also confirmed by the statute to expound doubts and ambiguities in the respective dioceses, upon application made to them by the clergy for the purpose, and that they had not only [746] expounded, but in point of fact repealed, the statute—what, in short, was the ground upon which it was not published the Court is unable to conjecture. But certain it is that the only copies to be found of it are those two or three which I have mentioned, from one of which that which is printed in Collier was taken. Surely the effect of this canon being to introduce an entirely new principle, to supersede a practice which had endured from the third or fourth century down to the time of the Reformation, and which had been continued through the reigns of Edward VI. and Queen Elizabeth down to the time of 1575, it would have been most important to shew that it was observed and acted upon.

And the non-appearance of this very important document is rendered still more extraordinary by the circumstance that in the year 1584 a memorial or address was presented to Archbishop Whitgift by the Puritans, nine years after the passing of this canon, praying, amongst other things, "That all baptizing by midwives and women may from henceforth be inhibited and declared void." That is to be found in Strype's Life of Archbishop Whitgift (vol. 3, p. 135). If this act of convocation had been acted upon and had been put into operation, the practice of baptism by midwives and women must have been suppressed from that time. If this was the law which was to be carried into execution, it would have had its effect, and that effect would have been to abolish the practice of baptizing by midwives and by women. But so far is it from having had that effect, that to this address, presented [747] to him on the part of the Puritans, the archbishop replied, "That the baptism ministered by women," and, therefore, a fortiori by laymen, "is lawful and good, howsoever they minister it, lawfully or unlawfully (so that the institution of Christ, touching the words and elements, are duly used), no learned man ever doubted until now of late, some one or two, who, by their singularitie in some poynts of religion have don more harme and given to the adversarie greater advantage than any thing ells could doe."

This was in 1584, nine years after the passing of this act of convocation. "Neither," says he, "any of the fathers nor that counsell," referred to in the address—the Council of Carthage, "ever condemned the baptizing of women in the case of necessitie and extraordinarilie. But that they should baptise ordinarilie and without necessitie the Papists themselves doe not allow. I never herde that any bishopt, professing the gospell, did give any such authoritie to midwives," that is, to baptize ordinarily, except in cases of necessity. Therefore Archbishop Whitgift maintains the sufficiency of lay baptism by women up to the year 1584, nine years, as I have already said, after the passing of this act of convocation.

We do not find that the practice was discontinued after 1584. On the contrary in the year 1595 Queen Elizabeth's Prayer Book is published, containing the very same rubric and the same directions for the performance of private baptisms as were contained in Edward the Sixth's Prayer Books in 1548 and 1552, and it is most extraordinary if this act of convocation was supposed to have, or intended to have, the effect which has been contended for in [748] the argument, that this practice should have continued, and that no notice should have been taken of it in that Prayer Book which was published by Queen Elizabeth in 1595, but that the rubric therein contained should be of precisely the same tenor as that which had been contained in the Prayer Books of Edward VI. in 1548 and 1552, and should have directed that one of the persons present should dip the child in water, or pour water upon him, using the proper form of words; and that having so done, they were not to doubt that that child was well and sufficiently baptized, and ought not to be baptized again.

Nor is it contended that the practice of lay baptism ceased at this time. It is admitted on the part of Mr. Escott that the practice of lay baptism, which had prevailed for nearly 1200 years before, continued to be tolerated, though not approved, down to the period of the Hampton Court conferences in 1603.

Immediately upon the accession of James I. the Millenary Petition, as it was called, from the great number of names subscribed to it, was presented to him, in which the Puritans of that time complained again of the existence of the practice of baptism by women, and required that baptism should not be administered by women, and that it should be so explained; at this time, therefore, it is evident that the practice still continued. It is remarkable that in this address of the Puritans their demand was limited to the abolition of the practice of baptizing by women and by midwives. Their objection was not to the practice of baptism by laymen according to the practice of the primitive Church.

[749] The consequence of this petition was, that a conference was held at Hampton Court between a certain number of persons selected on the part of the Puritans, and certain bishops, eight in number, six deans, the dean of the chapel royal, and two doctors of divinity. The first of these conferences was held on the 14th of January, 1603, in the presence of the King and the lords of the council.

A short account of what passed at that conference was communicated to some friends in Scotland by Dr. James Montague, the dean of the chapel royal, in a letter dated 18th of January, 1603, and is to be found in the History of the Conferences on the Book of Common Prayer, page 128, published by Dr. Cardwell. It is there stated that the points propounded by the King for discussion were six; three were respecting alterations proposed in the Common Prayer Book, two with respect to the bishop's jurisdiction, and one with respect to the kingdom of Ireland. The three alterations proposed in the Book of Common Prayer related to the general absolution, to the confirmation of children, and the private baptism by women. The latter is that to which alone it is necessary that the attention of the Court should be addressed for the present purpose.

The discussion upon private baptism, as Dr. Montague states, occupied three hours at least, "the King alone disputing with the bishops so wisely, wittily, and learnedly, with that pretty patience as I think never man living heard the like;" and then he states that "in the end he won this of them, that baptism should only be administered by ministers, yet in private houses if occasion required, and that whosoever else should baptize [750] should be under punishment." Not that the baptism should be annulled, but that if any person except a lawful minister should take upon himself to perform the ceremony of baptism, that person should be punished. It was not that the person so baptized should be rebaptized, but that the administrator, who had usurped the priest's office without authority, should incur the censure of the law.

"To this narrative," says Cardwell, "was added the following note of such things as shall be reformed." Then follows a summary of the result of the discussion, under fifteen heads: and Dr. Cardwell states in a note, "This is copied from Strype (Whitgift, vol. ii. page 501), who took it from a paper in the hand-writing, as he believed, of Bishop Bancroft (of London)," one of the bishops who were present at this conference. The third head is, "The private baptism now by laymen or women shall be called 'the private baptism by the ministers only, and all those questions in that baptism that insinuate it to be done by women taken away.'"

A more particular account of what passed, and of the views entertained by the several bishops who attended at that conference, is given by Dr. Barlow, who was Dean of Chester, and who was also present upon that occasion (Cardwell's Conferences, p. 169); it is headed, "The Summe and Substance of the Conference which it pleased His Excellent Majestie to have with the Lords, Bishops, and others of his Clergy (at which most of the Lords of the Councill were present), in his Majestie's Privy Chamber at Hampton Court, January 14, 1603. Contracted by Wm. Barlow, Doctor of Divinity, [751] and Dean of Chester." He gives a history of the first day's conference, and the names of the bishops who were present, and then states the points for discussion as they had been stated by Dr. Montague. He says, "The third was private baptism; if private for place, his Majesty thought it agreed with the use of the primitive Church; if for persons, that any but a lawful minister might baptize anywhere he utterly disliked; and in this point his Highnesse grew somewhat earnest against the baptizing by women and laikes." He goes on to state (in page 174), after some discussion upon other points, "In the third place, the lord archbishop (that is, Whitgift) proceeded to speak of private baptism, shewing his Majestie that the administration of baptism by women and lay persons was not allowed in the practice of the Church, but inquired of by bishops in their visitation, and censured; neither do the words in the book infer any such meaning."

Now, if Archbishop Whitgift meant to say that the words of the rubric of Edward VI. did not contain any permission for laymen to baptize, it is certainly extremely difficult to know what words could express that meaning with more perspicuity and more expressly. But if he meant that it was not intended to encourage, or to sanction, the administration of that rite except in cases of necessity by women or by laies, then we can understand his meaning when he says that the words do not infer any such meaning, that is, that baptism by women and laymen was not allowed by the Church except in cases of necessity, and that inquiry was made by the bishops, in their visitation, and a censure passed upon persons who so administered it without neces-[752]-sity. That would be perfectly intelligible. "The Bishop of Worcester said that indeed the words were doubtful, and might be pressed to that meaning;" that is, giving permission to women and lay persons to baptize; "but yet it seemed by the contrary practice of our Church (censuring women in this case) that the compilers of the book did not so intend them, and yet propounded them ambiguously, because otherwise perhaps the book would not have then passed in the Parliament." Dean Barlow adds, "And for the conjecture, as I remember, he cited the testimony of my Lord Archbishop of York," that is, Hutton, who was Archbishop of York at that time; and there is a letter inserted in this Book of Conferences to the effect which is here stated, that he was informed by some of the reformers that they had left those words so ambiguously, in order to prevent any successful opposition being made to the passing of the act of Parliament. Whereunto the Bishop of London, "Bancroft," replied, "that those learned and reverend men who framed the Book of Common Prayer intended not by ambiguous termes to deceive any, but did indeed by those words intend a permission of private persons to baptize in case of necessity, whereof their letters were witnesses." So that he puts it upon that which is stated in the title, "Private Baptism in Houses in Cases of Necessity." Then he refers to some parts of those letters in order to shew "that the same was agreeable to the practice of the ancient Church; urging to that purpose both Acts ii., where three thousand were baptized in one day, which for the Apostles alone to do was impossible, at least improbable, and also the authority [753] of Tertullian and St. Ambrose, and the fourth to the Ephesians," which I mentioned before, "plain in that point, laying also open the absurdities and impieties of their opinion, who think there is no necessity of baptism; which word 'necessity' he so pressed, not as if God without baptism could not save the child, but the case put, that the state of the infant,

dying unbaptized, being uncertain and to God only known; but if it die baptized, there is an evident assurance that it is saved:" and then he continues, "who is he that having any religion in him would not speedily, by any means, procure his child to be baptized, and rather ground his action upon Christ's promise, than his omission thereof upon God's secret judgment."

"His Majesty replied first to that place of the Acts of the Apostles that it was an act extraordinary, neither is it sound reasoning from things done before a church be settled and grounded, unto those which are to be performed in a church stablished and flourishing; that he also maintained the necessity of baptism, and always thought that the place of St. John to which he referred, '*nisi quis renatus fuerit ex aqua,*' &c., was meant of the Sacrament of Baptism, and that he had so defended it against some ministers in Scotland. 'And it may seem strange to you, my Lords,' saith his Majesty, 'that I who now think you in England give too much to baptism did, fourteen months ago, in Scotland, argue with my Divines there for ascribing too little to that Holy Sacrament.'"

Then he refers to that which it is not necessary to read; a conversation between himself and "a pert minister," as the King describes him, with [754] respect to the extent to which baptism was necessary. Then after that it is stated: "But this necessity of baptism His Majesty so expounded, that it was necessary to be had where it might be lawfully had, *id est*, ministered by lawful ministers, by whom alone, and by no private person, he thought it might not in any case be administered, and yet utterly disliked all rebaptization, although either women or laikes had baptized."

So that the opinion of the King was, that though he disliked the administration of baptism by any but by lawful ministers, and thought private persons ought not in any case to be permitted to administer it, yet, notwithstanding all this, if there had been a *de facto* baptism, he disliked all rebaptization, although women or laics had baptized. That is the expression he makes use of. In other words, as Lyndwood expresses it in his Commentary, which I have already referred to, "*quod sic baptizatus non debet rebaptizari.*"

The King having expressed this opinion, "the Bishop of Winchester spake very learnedly and earnestly in that point, affirming that the denying of private persons, in cases of necessity, to baptize, were to cross all antiquity, seeing that it had been the ancient and common practice of the Church, when ministers at such times could not be got, and that it was also a rule agreed upon among divines that the minister is not of the essence of the Sacrament," as Lyndwood expresses it in one of the glosses to which I have already adverted. "*Bonitas aut sanctitas ministri non est de necessitate baptismi, sed de congruentiâ.*" "The King answered: 'Though the minister be not of the essence of the Sacrament, [755] yet is he of the essence of the right and lawful ministry of the Sacrament.'" But still his Majesty adhered to this opinion, that though he disliked the administration of it by any but a lawful minister, yet he utterly disliked all rebaptization, and therefore affirmed that the baptism was good and effectual, at least to a certain extent.

The result, as I have already stated from Dr. Montague's letter was the insertion of the words "lawful minister" in the rubric; so that whereas in the former rubric it had been "one of them that be present," it was to be altered that a lawful minister was to call upon God for his grace, and a lawful minister was to administer the Sacrament; that was the utmost extent to which the King could prevail upon the bishops to agree. They would not agree to abolish altogether the administration of the Sacrament by laymen or by women; but they consented to insert, which must therefore necessarily have been as a measure of order and of regularity only, the words "lawful minister," he being the proper administrator of the Sacrament, but not essential to its validity. The result of this long debate being that the seeming or actual sanction given by the rubric of Edward VI. to private baptism by laymen should for the future be omitted.

It is quite clear, I think, that the discussion must have been upon the propriety of distinctly and expressly prohibiting lay baptism, if not of declaring it absolutely null and void. Otherwise, what was there for the bishops to "stick at." They did not "stick so much" at the insertion of the words "lawful minister;" therefore they must have [756] "stuck at" something else; and, from the very nature of the discussion, the question must have been whether or not lay baptism was to be peremptorily prohibited, or perhaps even pronounced and declared null and invalid to all intents and

purposes. But the utmost extent to which the King could prevail upon the bishops to go, was to insert the words "lawful minister" where the words "one of them that be present" had been previously inserted.

I think the result of this conference at Hampton Court is not that which is alleged by Mr. Escott in his allegation, namely, that from that period to the present day, that is, from 1603, the liturgy of the Church of England has not allowed the rite of baptism, performed by unordained persons, to be valid, but has held the direct contrary. It appears to me, that though the persons engaged in that conference did all that they could to discourage the administration of baptism by laymen and by women, yet that they could not prevail upon themselves absolutely and expressly to prohibit, still less to declare, such baptism altogether null and void.

The liturgy and rubric were afterwards altered according to the decision of the King and of the bishops at that time, and the King, by a proclamation which he issued very shortly afterwards, which is found in page 225 of the same book, recited generally what had taken place at Hampton Court upon the occasion of those conferences, the result of which he states in the proclamation to have been that he thought no alteration necessary; that he thought "that some small things might rather be explained than changed; not that the same might not have been very well borne with by men who [757] would have made a reasonable construction of them." This, certainly, is not the language which would have been used if so great an alteration as that which is contended for had been contemplated in the ritual of the Church as to the mode of administering baptism in private houses. Could he have said "that some small things might rather be explained than changed," if the whole system or practice of twelve or thirteen hundred years was to be entirely swept away, and, contrary to that system and practice, the administration of baptism expressly confined to the lawful minister; and if not so administered, that the ceremony was to be altogether invalid.

The language employed, to say the least of it, must be considered as extremely ambiguous; and I cannot understand, if the King and the bishops had been at that time of opinion that lay baptism was invalid, why they should have scrupled to express their opinion upon the point as plainly as was done in the Articles of 1562, with respect to the doctrine of purgatory, of pardons, of the worshipping and adoration of images and relics, and the invocation of saints, and with respect to the number of the Sacraments, and many other corruptions of the Church of Rome, from which the Church of England was at that time purged. This point was of equal importance with those; and one upon which, with reference to the comfort of the people, it was absolutely necessary to have spoken plainly, in order that all doubts might be removed from the minds of the King's subjects as to the sufficiency or insufficiency of baptism administered by any other than a lawful minister. It never could have been [758] intended by those who attended this conference for the purpose of determining this very important point to have left the matter still in doubt and ambiguity, if they had been clearly and decidedly of opinion that a baptism administered by laymen was altogether null and invalid.

Under these circumstances the Court is, I think, warranted in saying that up to this time the Church had not pronounced, and at this time did not pronounce, by any express act or declaration, lay baptism to be invalid, and that if the law at the present be that lay baptism is invalid, it must have grown out of some subsequent alteration. Undoubtedly at this time the inclination of the Church was to discourage lay baptism to the utmost extent; but I cannot think it is to be inferred that the King or the bishops were of opinion that it was invalid. Indeed, the more important they thought it to discourage it, the more it would be incumbent upon the Church to declare, in express and positive terms, its opinion that it was invalid, if they had arrived at any such opinion.

The practice does not appear, after this period, to have ceased, because we find an objection to the practice formed part of the representations made by the Presbyterians to the crown at the time of the Restoration. Indeed, it is quite clear that, at the time of the Restoration, and for the last ten or twelve years at least before that period, there could have been no public administration of the Sacrament of baptism by lawful ministers.

That which took place at the time of the Restoration was undoubtedly of very considerable importance, because those alterations which had, pre-[759]-vious to that time, stood on the sole authority of the King, not as an act of convocation (for it was only the

King and a certain number of the bishops who had been assembled for the purpose of discussing these points), became then the law of the land, inasmuch as the liturgy and rubric of 1661 was not only adopted and subscribed by the clergy of both houses of convocation and of both provinces, but was confirmed by an act of Parliament passed in the 13th and 14th years of the reign of Charles II. The alteration determined upon by James I. and the bishops could not repeal the Act of Uniformity by which the rubrics and Prayer Books of Edward VI. had been confirmed; and therefore, up to this time, those Prayer Books were in point of fact the only legal form to be observed as to the several services which were contained in those books. The alteration made by James I. had not the authority of law, though it might be submitted to for convenience, and because it was thought that the alterations which were made in those instances which I have mentioned were right and proper to be made.

But at the time of the Restoration in 1661 certain other alterations were made in the Book of Common Prayer. We all know that various conferences were held at the Savoy, for the purpose of endeavouring to reconcile the objections of certain divines to the Book of Common Prayer. Certain of the bishops and certain of the leaders of the Presbyterians met for the purpose of seeing whether they could not agree upon such alterations as would be satisfactory to both parties; but in consequence of the extent of the demands made by the Presbyterians, which, if agreed to, would have required [760] not an alteration only, but an entirely new modelling of the liturgy, those conferences became ineffectual for their purpose, and were accordingly broken off. The two houses of convocation, however, proceeded to the revision of the Prayer Book, and the book so revised was approved by the King, and afterwards by the two houses of Parliament, and, as I have already stated, was confirmed by the statute of the 13th and 14th of Charles II. From this time, from the year 1661, little or no alteration has been made in it. In substance it remains as at that time. The rubrics form a part of the statute law, to which every person, both clerical and laic, is bound to conform, except so far as in any particular case special exemptions have been introduced by subsequent statutes.

Now the important part of the rubric to be considered at this time is that which is prefixed to the service for the burial of the dead, because by that rubric, for the first time, it is declared that persons who die unbaptized are not to have that service read over them. It may be here observed, however, that though the word "unbaptized" was then inserted for the first time in the rubrics of the Church, yet the old law equally prohibited the interment with the prayers of the Church of those who had died unbaptized by their own fault. Some difference was made, as we know by reference to writers upon the subject, and as a matter of history, between those who died wilfully unbaptized and those who died so by unavoidable misfortune or accident. But it is stated in this rubric that the burial service is not to be used over persons who die "unbaptized;" and the question to be con-[761]-sidered is whether this word "unbaptized," with reference to this rubric, bears any interpretation different from that which it bore in the ancient canon law, or which was given to the term "not baptized" in the former rubrics.

In its usual and general sense the word "unbaptized" would only apply to persons to whom the Sacrament had not been administered at all, without respect to the person by whom it was administered. But it has been contended that at this time the Church and the legislature must have used the word in a more restricted and narrow sense, namely, that they must have intended to apply it to persons who had not been baptized by a person who, according to the rubric for baptism, was alone authorized and commissioned to administer baptism, namely, a lawful minister; and that is contended to have meant in 1661, and at the present time to mean, a minister episcopally ordained, so that the expression "lawful minister," as used in the rubric of 1661, would bear a different interpretation from that which must have applied to it in the reign of James I., because in the year 1661 the preface to the ordination service, which is also confirmed by act of Parliament, directed that no person should be taken or accounted to be a lawful bishop, priest, or deacon in the Church of England, or suffered to execute any of the said functions, who was not in holy orders, or had not been previously called, tried, examined, and admitted thereunto according to the form hereafter following, or hath had formerly episcopal ordination. Whereas down to that time a person who had been admitted bishop, priest, or deacon by competent authority (not ne-[762]-cessarily implying by these words episcopal authority)

was permitted to continue to exercise his functions, and consequently his administration of the Sacrament was good and valid, and persons baptized by him were considered as members of the Christian Church. The alteration, however, made by the preface to the ordination service in 1661 disentitles any person to the appellation of "lawful minister," within the meaning of the rubric, who had not obtained episcopal ordination, not necessarily by a bishop of this realm; for the practice has been and still is to admit and receive into the Church of England, and to permit to exercise spiritual functions in the Church of England, those who have received ordination at the hands of foreign bishops, particularly Roman Catholic bishops—and this without conferring fresh orders, but only upon a renunciation of the errors of the Church to which they had previously belonged.

The act of Parliament of 1661, therefore, makes it necessary that a person shall be episcopally ordained in order to be a bishop, priest, or deacon of the Church of England, or to hold any preferment in the Church of England. But supposing that a Presbyterian should present himself for ordination to the bishop, and if upon examination he was found duly qualified for office in the Church, I apprehend that there would be no difficulty whatever in admitting that person to holy orders, and ordaining him, without his being rebaptized. Supposing that a Presbyterian, having been baptized in his own country by a Presbyterian minister, had come to this country, and had presented himself for ordination, it would not be requisite, either before [763] he was admitted into communion with the Church, or before he was ordained a minister, that he should be rebaptized. And therefore, although in using the words "lawful minister" in the baptismal service, the law intended a person who was a lawful minister according to the law of England, that is, since 1661, an episcopally ordained minister, it does not follow that acts performed by persons who were not so ordained are invalid. I apprehend that no question would arise as to the validity of a baptism performed by a Presbyterian minister, for the purpose of enabling a person so baptized to receive orders.

Bishop Fleetwood argues very strongly upon this point in his work "Judgment of the Church of England on Lay and Dissenting Baptism." In (page 554) speaking of lay baptism, he says, "For the first fifty years after the Reformation the Church of England allowed of baptism performed by neither bishop, priest, nor deacon, and declared that a child so baptized was fully and sufficiently baptized, and ought not to be baptized again." That is, with reference to the rubric of Edward the Sixth. And then he says, secondly, "The Church of England in the next fifty years—that is, from James the First to Charles the Second—did call for a lawful minister to baptize children, but she did not say all that while that all they who were not episcopally ordained were not lawful ministers, for she admitted and instituted into her parish cures such as had not been episcopally ordained, and consequently admitted their baptism to be good and valid. Thirdly, it is not a due nor just, much less a necessary, consequence, that because the Church of England calls [764] for a lawful minister to baptize, and calls none but such as have been episcopally ordained a lawful minister, she should therefore appoint no baptism valid but such as is administered by an episcopal hand." And then he proceeds to shew that, "if such were the interpretation put upon the rubric, it would exclude all administration of the rite of baptism by Presbyters of France, Germany, Scotland, and Holland, whose acts, however, they say would not be sanctioned or allowed here—that is, by the law of the Church."

He goes on to say: "The Church of England will have none but episcopally ordained ministers to baptize in England." But does "she thereby disannul (in her judgment and opinion) the baptisms of all those countries that are administered by Presbyters? Was it ever understood that, if a French, Helvetic, German, Scottish, or Dutch Presbyterian should desire to communicate with the Church of England, he was to be first baptized? If he desire to be a clergyman, and hold a benefice or obtain a dignity in the Church of England, he must indeed be ordained according to the English form, or by some episcopal hand elsewhere, for that has been the law since 1661; and no one can since that time be accounted a lawful minister but such a one. But does it follow from thence that all the children they had formerly baptized were not Christians? For that is in fact the question. Will it be contended that those who are not baptized by a lawfully ordained minister are not Christians? This is indeed a consequence made by those rebaptists, but this consequence is not made by the law of England."

He then proceeds to shew that many foreign [765] Protestants, and several dissenting ministers at home, had been ordained without having been baptized anew; and he argues from thence that they must have been considered Christians though baptized by Presbyterian hands, otherwise they would not have been ordained. "For when was it heard," he says, "either of old or late, that a man could be ordained a priest who had not been baptized?"

Therefore he shews most clearly and conclusively that baptisms by Presbyterians, by persons who were not of Episcopalian ordination, nevertheless were good and valid baptisms, though a Presbyterian could not be considered as a lawful minister under the rubric of 1661. The whole of the work of this very learned prelate is extremely worth perusal and study. It embraces the whole of the arguments both for and against lay baptism, as sanctioned by the Church of England; not, indeed, as to its abstract validity or invalidity, but entirely confining himself, as he expressly states, to an inquiry into the judgment of the Church of England upon it.

But, as I have stated, this rubric as to private baptism was at that time altered, and if the administration of baptism was thenceforth to be strictly confined to a lawful minister—that is, an episcopally ordained minister—then no baptism could be valid without the intervention of an episcopally ordained minister; and none of the privileges consequent upon valid baptism would be imparted to those who had been baptized by any other than a lawful minister.

But if this were so, it is extraordinary that the only instance which can be found of a proceeding with respect to the refusal to inter a child or person [766] baptized by a dissenting minister, or by any person other than a lawful minister, is the case of *Kemp v. Wickes* in 1809. I pass by that case which was mentioned as arising at Daventry, which in fact has not any bearing upon this part of the case, because when that case came to be examined it appeared that a criminal information had been moved for against the clergyman of Daventry for refusing to admit to interment the body of an Anabaptist. In the first instance, upon affidavit stating that interment had been refused in the churchyard, a rule nisi for a criminal information was granted by the Court, but when it came to be explained that what he had refused to do was not to permit the body to come into the church, or to be interred in the churchyard, but to read the service over the body, because he was not satisfied that the person had been baptized, that rule was dismissed. It was dismissed without costs; because, as I apprehend, it appeared that through inadvertence the gate of the churchyard through which the body was to be carried had been locked, and, therefore, there was not access had to the churchyard for the purpose of that common law right which could be enforced by application to a Court of Common Law. I apprehend that is the whole of that case. A rule for a criminal information was in the first instance granted, and afterwards dismissed upon the ground that it was only the performance of the burial service over the body that was refused, and not the interment in the churchyard; and the doctrine laid down in that case was that the common law right of interment in the churchyard belonged to every parishioner, and [767] that could be enforced in a Court of Common Law, but that the manner in which the service was to be performed was to be left to the Spiritual Court, and there to be enforced.

I have said that it seems to me extraordinary that the case of *Kemp v. Wickes* is the first case that appears upon the records of this Court that I am aware of, and the only case that has occurred with the exception of that which took place at Gloucester, at about the same period, or, rather, antecedently to the decision of the case of *Kemp v. Wickes*; and which, upon the explanation which was given of it on the second day's argument by Dr. Nicholl, turned out to be no precedent at all, or, rather, something worse than a precedent, looking at the nature of the proceedings in that case. The case, therefore, of *Kemp v. Wickes* is the only case which has occurred in which the question has been raised as to the right of interment of persons baptized by any other than an episcopally ordained minister. This, I say, is somewhat extraordinary, considering that the construction contended for is that since the year 1661 no person could be validly baptized by any but an episcopally ordained minister. Yet such is the fact. We do not find from historical writers that any of the bishops, at their visitations held after the Restoration, either refused to confirm persons who had been baptized (as many must have been from the year 1648 to 1660), by persons who were not episcopally ordained, or that they impressed upon the clergy the necessity of

rebaptizing them. This is in substance the argument used by Bishop Fleetwood in his work. For it must be apparent to every body who has [768] heard this case discussed that we are all drawing our information from the same sources—the writings of those who have discussed this subject at great length, and with great acuteness and ingenuity. We do not find that the bishops in their visitation charges impressed upon their clergy the necessity of rebaptizing those who had received baptism from unauthorized hands. Nothing of the kind appears, nor does it appear that those persons who had been so baptized were excluded from the Sacrament of the Lord's Supper, or that the clergy were advised that they should not admit such persons to Christian burial, as a lawful minister was the only person who could validly baptize, and as the rubric had expressly declared that the service was not to be read over those persons who had died unbaptized.

The absence of all allusion to these circumstances shews that, in the opinion of those by whom the law was framed, it was not intended to include within the term "unbaptized" those who had been baptized with water, in the name of the Father, and of the Son, and of the Holy Ghost, though not by a lawful minister, which from 1661 meant a minister who had received ordination from episcopal hands. In fact, the practice continued: it was irregular, undoubtedly, but not null and void.

Nothing can shew this more clearly than that which took place at the beginning of the last century, in the year 1712, which led to certain conferences at Lambeth upon the subject—the last epoch before the case of *Kemp v. Wickes* upon which any very great discussion arose with respect to the validity or invalidity of lay baptism; and it was about that time that all those writers who had [769] espoused one side or other of the subject ushered their productions into the world.

Bishop Burnet, in his History of his Own Times, says, "Another conceit was taken up of the invalidity of lay baptism" (he is now writing of the period of 1712), "on which several books have been written: nor was the dispute a trifling one, since by this notion the teachers amongst the dissenters passing for laymen said this went to rebaptizing them and their congregation." He says "Dodwell gave rise to this conceit. He was a very learned man and led a strict life—he seemed to hunt after paradoxes in all his writings, and broached not a few. He thought none could be saved but those who, by the Sacraments, had a federal right to it, and that those were the seals of the covenant—so that he left all who died without the Sacraments to the uncovenanted mercies of God, and to this added that none had a right to give the Sacraments but those who were commissioned to it, and these were the Apostles, and after them the bishops and priests ordained by them. It followed upon this that Sacraments administered by others were of no value."

He then goes on to state, "This strange and precarious system was in great credit among us, and the necessity of the Sacrament, and the invalidity of ecclesiastical functions when performed by persons who were not episcopally ordained were entertained by many with great applause." He says, "This made the dissenters pass for no Christians, and put all thoughts of reconciling them to us far out of view; and several bitter books were spread about the nation to prove the necessity of rebaptizing them, and that they were in a state [770] of damnation till that was done. But few were by these arguments prevailed upon to be rebaptized. This struck even at the baptism by midwives in the Church of Rome, which was practised and connived at here in England till it was objected to at the conference held at Hampton Court soon after James the First's accession to the crown, and baptism was not till then limited to persons in orders." He says, "Nothing of this kind was so much as mentioned in the year 1660, when a great part of the nation had been baptized by dissenters." That is, that lay baptism was invalid, and that parties so baptized were not entitled to be considered as Christians. "But it was now," he says, "promoted with much heat. The bishops thought it necessary to put a stop to this new and extravagant doctrine; so a declaration was agreed to, first, against the irregularity of all baptisms by persons who were not in holy orders, but that yet, according to the practice of the primitive Church and the constant usage of the Church of England, no baptism (in or with water in the name of the Father, Son, and Holy Ghost) ought to be reiterated."

Then Burnet goes on to state that which perhaps is not quite strictly correct, but his statement is rectified in the life of the prelate to whom I am about to refer, which was written by his son, and corrected, as he states, from papers in the hand-

writing of his father. Burnet says, "The Archbishop of York at first agreed to this; so it was resolved to publish it in the name of all the bishops of England: but he was prevailed on to change his mind, and refused to sign it, pretending that [771] it would encourage irregular baptism; so the Archbishop of Canterbury, with most of the bishops of his province, signed it and resolved to offer it to the convocation. It was agreed to in the Upper House—the Bishop of Rochester only dissenting. But when it was sent to the Lower House they would not so much as take it into consideration, but laid it aside, thinking it would encourage those who struck at the dignity of the priesthood." He says, "This is all that passed in convocation."

In the "Life of Archbishop Sharp," published by his son, a somewhat different version of the story is given. But the facts are substantially the same. The ground of rejection of the declaration appears to be the same according to both accounts, namely, that there was a danger of encouraging dissenting baptisms, by publishing a declaration of the bishops of the Church. So that, instead of being issued as a declaration of all the bishops of both provinces, it was confined to the province of Canterbury, signed by the archbishop and most of the bishops of his province, and was agreed to in the Upper House of Convocation, the Bishop of Rochester only dissenting; and it declared that though baptism by persons not episcopally ordained was irregular, yet according to the practice of the primitive Church it was valid.

In the account given in "Archbishop Sharp's Life," from papers in his son's possession, and which, therefore, in addition to being published by his son, may be supposed to be correct, he says, "Tuesday, April 22nd, at eleven o'clock, I went to Lambeth. We were in all thirteen bishops. We had a long discourse about lay baptism, which [772] of late hath made such a noise about the town." So that it is clear that at this time lay baptism was practised, though not considered regular. "We all agreed that baptism by any other person except lawful ministers, ought, as much as may be, to be discouraged." This is in 1712. The rubric had been confirmed by act of Parliament in 1661, to the effect that lawful ministers were the persons by whom baptisms ought to be administered. "We all agreed that baptism by any other person except lawful ministers ought, as much as may be, to be discouraged, nevertheless, whoever was baptized by any other person, and in that baptism the essentials of baptism were preserved, that is, being dipped or sprinkled in the name of the Father, &c., such baptism was valid and ought not to be repeated." That is the declaration of the Archbishop of York, of what was the opinion of all the bishops at that time in town: that lay baptism in the name of the Father and of the Son and of the Holy Ghost was valid, and ought not to be repeated.

His son, Archdeacon Sharp, goes on to say, "This indeed is the sense of the Church of England, as will appear to any person who considers the rubrics in the office for private baptism, and compares them with one another, and with the previous questions in the office itself. From all which laid together it may be plainly collected that where the essentials, matter and form, have been preserved, though administered by another hand than that of a lawful minister, the baptism shall not be so much as hypothetically repeated; yet nevertheless it is so far condemned and dis-[773]-approved, as irregular and uncanonical, that the child or person so baptized shall not be received into the congregation. But the officiating minister must have recourse to the directions of his ordinary, as in other irregular, and uncommon, and difficult cases. But as our church hath nowhere openly and expressly declared for the validity of lay baptism, or allowed it to be administered by laymen, in any case, how extraordinary soever, some handle is left for disputing or speaking doubtfully about her sense of the matter. Therefore his grace of Canterbury, finding so many bishops unanimous in their opinion that it would be of public service if they all joined in publishing a declaration of their sentiments, which would appear as a kind of decision of the point, and might help to make the minds of some men more easy, at least to shorten the disputes then raised upon this question."

He then inserts a letter of the Archbishop of Canterbury to the Archbishop of York, to this effect: "In pursuance of the agreement made here by your grace and the rest of my brethren the bishops, when I had the favour of your good companies on Easter Tuesday, I met yesterday with some of them, and we drew up a paper suitable (as we judge) to the proposal then made. It is short and plain, and I hope inoffensive, and for a beginning, as I humbly conceive, full enough. I here enclose a copy of it for the perusal of your grace, and of as many others as your grace shall

think fit to shew it to." He says, "I send this declaration unsigned, because we who were present desired first to have the opinions of your [774] grace and others who were absent, and should be glad to know whether you would have anything added to it, or altered in it, for we affect not the vanity of dogmatizing."

Now the declaration is to this effect, "Forasmuch as sundry persons have of late, by their preaching, writing, and discourses, possessed the minds of many people with doubts and scruples about the validity of their baptism, to their great trouble and disquiet, we the archbishops and bishops, whose names are underwritten, have thought it expedient on us to declare our several opinions, in conformity with the judgments and practice of the Catholic Church, and of the Church of England in particular, that such persons as have been already baptized in or with water, in the name of the Father, Son, and Holy Ghost, ought not to be baptized again. And to prevent any such practice in our respective dioceses, we do require our several clergy that they presume not to baptize any adult person whatsoever, without giving us timely notice of the same, as the rubric requires."

This declaration, drawn up and issuing from the bishops, directly shews that in the opinion of all those persons the law of England and of the English Church remained as it was before the Reformation—as it was during the time of Edward VI.—as it was from the time of James I. to the Restoration, namely, that baptism administered with water in the name of the Trinity, though by a lay person, was nevertheless good and valid, and ought not to be repeated. It affords, I say, a strong indication of the opinion of persons who lived at [775] this period of time, and who were acquainted with the law and the practice of the Church at that time.

Now the Archbishop of York in reply writes in these terms, "I had the honour of your grace's letter (with the declaration inclosed) the last night. I am entirely of the same sentiments that we all declared we were, when we had the honour to dine with your grace the last week. But yet, for all that, I can by no means come into the proposal your grace has now made in your letter; in that we should all *declare* (which is printed in italics) under our hands the validity of lay baptism." He had agreed with the others as to the validity of lay baptism, and there is no alteration in the archbishop's opinion as to the validity of lay baptism; but he doubted the expediency of declaring such an opinion. He says, "I can by no means come into the proposal your grace has now made in your letter, in that we should declare under our hands the validity of lay baptism"—for this reason, "for I am afraid this would be too great an encouragement to the dissenters to go on in their way of irregular uncanonical baptisms. I have, as your grace desired me, communicated this matter to three of our brethren, the Bishops of Chester, Exeter, and St. David's, and we have have had a full discourse about it, and we are all of the same opinion that I now represent."

And then the son of the archbishop states the reason why he had thus given this at length. He says, "The account of this matter is the more fully set down here, because Bishop Burnet has not represented it in a favourable light with respect to [776] Archbishop Sharp." And then he gives the account I have already read from Burnet.

This, therefore, is beyond all doubt, that up to 1712 the opinion of the Church of England was, that lay baptism was valid—that it was not to be repeated—and that a person who had been baptized by a layman was not a person unbaptized; and up to this time there had been no notion that a person so baptized was not entitled to the rites of Christian burial. Indeed, the very first time, as was pointed out in the argument by one of the learned counsel, at which any notion of this kind seems to have been entertained, or even to have been hinted at, is by Bishop Fleetwood, who, in summing up his argument, amongst other things, says that he never would believe that the Church of England did not hold the validity of lay baptism, though irregular, until the bishops should order their clergy, both by preaching, writing, and discoursing, to tell their congregation that unless they have been baptized by episcopal hands they are not Christians; they must not come to the blessed Sacrament; they ought not to be married by the appointed form which supposes both parties to be Christians; nor can they, nor ought they, to have Christian burial; the rubric (confirmed by act of Parliament and convocation) expressly excluding unbaptized persons. Here is the first time at which any suggestion seems to have been made by any of the writers whom I have been able to consult upon this occasion, that one of the con-

sequences of the denial of the validity of lay baptism would be the exclusion of persons so baptized from Christian burial.

[777] Now, I say that at this time it is quite clear that the opinion of the Church was that lay baptism was valid. I do not say, nor am I called upon to say, whether in my opinion that which was maintained by all the bishops present at Lambeth in 1712 is well founded or not. Whether baptism administered by laymen is abstractedly good and valid according to the intention of the Divine founder of the Sacrament, or not, is not the question for me. The question for me to determine is, what has the Church of England said upon the subject? Nothing can be more clear, from the whole history of the Church from its very early ages, or at least from the time when St. Augustine flourished in the fourth and fifth centuries, down to the time of the Reformation, and from that time down to the year 1712, than that the baptism of persons who were baptized according to the proper form by any person other than a lawful minister was considered to be a valid and sufficient baptism; and if it was valid and sufficient at that time, it is equally valid and sufficient now; for no alteration whatever has taken place in the rubric since that time. Nothing can be more clear than the view which the Church of England has taken upon the subject. It is very true that a great number of writers, men who have argued the question with great ability, with great ingenuity, and great learning, have espoused different opinions upon this subject; and the references to authors of that description would be endless if the Court were inclined to enter into the question at all.

Bishop Van Mildert, in his *Life of Waterland*, expresses himself in these terms: "The truth" [778] (as to the validity or invalidity of lay baptism) "to be established must primarily depend upon its agreement with the word of God, and the concurrent practice of the primitive Church. On a point not absolutely of fundamental importance, to espouse on the one side the opinions of such men as Lawrence" (who was the author of the *Invalidity of Lay Baptism*)—"the opinions of such men as Lawrence, Brett, Leslie, and Waterland; or, on the other, those of such opponents as Bingham, Burnet, Kennet, and Kelsall" (and to these may be added most unquestionably Bishop Fleetwood), can hardly be deemed discreditable to either party. We know that great and good men have differed, and still differ, from each other on this point, without any diminution of mutual respect, or any intentional deviation from the doctrine or discipline of the Church."

Many authorities have been cited in the argument, and the Court has thought it its bounden duty to look into and examine the authorities so cited, and other parts of the writings of those authorities, for the purpose of seeing whether they do or do not differ in other parts of their works from that which is stated to be their opinion in the passages cited, and I find them strongly adhering to the opinions they had originally formed upon the subject.

Waterland, however, is an exception to this, for he, having originally espoused the doctrine of the validity of lay baptism, was afterwards converted to the opposite doctrine, and strongly and most ably and learnedly contended that lay baptism was invalid. He states, in the tenth volume of the edition of his works by the Bishop of Durham, in [779] a letter written in the year 1713 (for all these books were written about this period of time when this conceit of Dodwell is stated to have been put forth), "I am not at all surprised at Mr. Kelsall" (who was in favour of the validity of lay baptism)—"I am not at all surprised at Mr. Kelsall's judgment on the case. It is not very long since I was myself of the same opinion, being led to it, as I suppose he may partly by the good nature of it, and partly by the authority of great names, as the Bishops of Sarum and Oxford, &c.; besides some passages of antiquity not well understood, and I was pleased, I confess, to see all as I thought confirmed by Mr. Bingham's *Scholastical History of Lay Baptism*. But second thoughts and further views have given a turn to my judgment, and robbed me of a pleasing error, as I must now call it, which I was much inclined to embrace for a truth, and could yet wish that it were so."

So that Waterland was in the first instance in favour of the validity of lay baptism, but was afterwards converted, as it appears from other parts of his works, by the writings of Mr. Lawrence. Mr. Lawrence, it appears, was a layman in the city of London who had been baptized by a dissenting minister; he was dissatisfied in his own mind as to the validity of lay baptism, and he procured himself to be rebaptized by a curate of one of the parishes in London, and upon that occasion he wrote a very

learned book on the subject of the validity or invalidity of lay baptism, and discussed it with great ingenuity, with great learning, and with great ability. But his book, though extremely strong in argument against the validity of lay bap[780]-tism, does not go directly to ascertain the view which had been taken of it by the Church of England. The argument of Lawrence, and the argument of Waterland after he came round to the opinion espoused by Lawrence, is against the abstract validity of it; that is, that it was invalid, as inconsistent with the intention of the Founder. They do not attempt, either the one or the other, except in a very few passages, to deny that the Church of England had practised it, and that it was the practice of the Church. On the contrary, Waterland expressly states, though he is of opinion that lay baptism is invalid, that the practice of the Church of England and the stream of her divines are directly against him. Though upon second thoughts (sincere as he was in his latter opinions, as from every part of his works it is clear) he regarded the practice as invalid, yet nevertheless he admits that the Church of England had adopted a different opinion with respect to it.

The opinion of Bingham, as I have already stated, was strong that lay baptism was valid in the view of the Church of England, so was Mr. Kelsall, to whose letter Waterland is replying in part of the work to which I have been adverting. He states that the Church of Rome, ever since St. Austin, hath allowed not only laymen but even women, in cases of necessity, to baptize. And he states that he "can produce canons of that Church requiring the curates to instruct their people in the form of baptizing, that where necessity should require, they might know how to do it aright," to which canons I have before adverted; "which practice was so exceeding frequent among them [781] that it was morally impossible but that many of their clergy must be such as had in their infancy been so baptized." He also states "that in some cases baptism by lay hands hath been permitted by the Church, and in no case (if administered with water, in the name of the blessed Trinity) altogether disannulled, so as that the receiver should be baptized anew. Most writers on both sides of the question allow this to have been the case ever since St. Austin, at least in the Western Church. And if we derive our sacraments, as we do the succession of our priesthood, through the corrupted channels of the Church of Rome, then I am very much afraid that an invalidity proved in the first will infer an invalidity in the latter too."

Bishop Fleetwood also, as I have already stated, expressed himself strongly in favour of the validity of lay baptism, according to the doctrine of the Church of England. It is unnecessary to refer more fully to him than I have already done, for the purpose of shewing that his opinion was, that although the Church of England considered lay baptism to be irregular—though the bishops were to inquire after it in their visitations, and to censure the persons who had usurped the office of priest without authority, and subject them to punishment, yet nevertheless the baptism was good, and ought not on any account to be repeated.

I will not therefore travel further into the authorities which have been cited upon this subject, with the exception of one upon whom great stress was laid in the course of the argument, and that is Wheatley upon the Common Prayer. He does certainly very strongly express his opinion as to the [782] invalidity of that rite, when administered by laymen, in the chapter "Of the Order for the Burial of the Dead," the first section "Of the First Rubric." "Whether this office is to be used over such as have been baptized by the dissenters or sectaries, who have no regular commission for the administering of the Sacraments, has been a subject of dispute, people generally determining on one side or the other according to their different sentiments, of the validity or invalidity of such disputed baptisms. But I think that, for determining the question before us, there is no occasion to enter into the merits of that cause, for whether the baptisms among the dissenters be valid or not, I do not apprehend that it lies upon us to take notice of any baptisms, except they are to be proved by the registers of the church."

This will carry the doctrine a great deal too far, because it would apply to a great number of persons who, from misfortune in regard to their baptisms, had not been registered. And such an argument, therefore, detracts to a certain extent from his authority.

But Wheatley differs from other writers—from Nicholls, from Shepherd, and from Cosin, the Bishop of Durham.

The question, therefore, comes to this, as far as I have hitherto gone, namely,

whether, as far as we can rely on the authority of persons not entitled to lay down or to enact the law, but deserving of great attention as persons of great learning, piety, and ability, there is not sufficient to shew—notwithstanding all the writers on the other side of the question—that the Church of England at least [783] has looked upon lay baptism as valid, for the purpose for which it is at present necessary to consider the question.

There is, however, one writer upon the subject whose opinions it is not improper that the Court should refer to, because he is universally looked up to as one of the most judicious writers in the Church, and that is Hooker. Now Hooker was decidedly of opinion that lay baptism was valid. He says in his fifth book, which was first published in 1597 (c. 62), "Hence the Church of God hath always hitherto constantly maintained that to rebaptize them which are known to have received true baptism is unlawful. If, therefore, at any time it come to pass that in teaching publicly or privately, in delivering this blessed Sacrament of regeneration, some unsanctified hand, contrary to Christ's supposed ordinance, do intrude itself to execute that whereunto the laws of God and His Church hath deputed others; which of these two opinions seemeth more agreeable with equity, ours (of the Church of England) that disallow what is done amiss, yet make not the force of the word and Sacraments, much less their nature and very substance, to depend on the minister's authority and calling, or else theirs (alluding to the Puritans) which defeat, disannul, and annihilate, both in respect of that one only personal defect, there not being any law of God which saith, that if the minister be incompetent his word shall be no word, his baptism no baptism?" Again, "The grace of baptism cometh by donation from God alone. That God hath committed the ministry of baptism unto special men, it is for order's sake in His [784] Church, and not to the end that their authority might give being, or add force to the Sacrament itself." He says lastly, "Whereas general and full consent of the godly learned of all ages doth make for validity of baptism, yea albeit administered in private and even by women; which kind of baptism, in case of necessity, divers reformed churches do both allow and defend; some others which do not defend, tolerate; few in comparison, and they without any just cause, do utterly disannul and annihilate; surely, howsoever, through defects on either side, the Sacrament may be without fruit as well in some cases to him which receiveth, as to him which giveth it; yet no disability on either part can so far make it frustrate and without effect, as to deprive it of the very nature of true baptism, having all things else which the ordinance of Christ requireth."

Nothing can more strongly shew that this most learned and pious person, and most zealous supporter of the Church of England in his time, that is, at the time of Queen Elizabeth, notwithstanding that Canon of 1575 (for this is twenty years afterwards), held that lay baptism was valid, though it was irregular, though it was an intrusion upon the priest's office and subjected the party to punishment for such intrusion.

I will not proceed any further with the examination of the writers upon this subject, whose names I have already mentioned. The different authorities, from the time of Tertullian down to the time of the Reformation, and the acts of the Church afterwards, to which most of these writers refer, necessarily lead to the conclusion that, though lay baptism [785] itself is irregular, the Church of England has always held it to be good and valid baptism, and by no means to be repeated.

The different parts of the baptismal service seem to confirm that conclusion. The rubrics of Edward VI., of James I., and of Charles II. have been already quoted. The rubrics of Edward VI. were to the effect that, in the administration of baptism in private houses, a layman, "one of them that were present," was to perform the ceremony, and the baptism so administered was declared to be sufficient. The rubric of James I. mentions a lawful minister as the person by whom the rite was to be performed. The rubric of Charles II., which was confirmed by act of Parliament, directs that the minister of the parish (or in his absence any other lawful minister that can be procured), with them that are present, shall "call upon God and say the Lord's Prayer, and so many of the collects appointed to be said before in the form of public baptism as the time and present exigence will suffer; and then, the child being named by some one that is present, the minister shall pour water upon it, saying these words, 'I baptize thee,'" and so on; and in the rubrics, both of James and Charles, instruction is given to the friends of the child that they shall not doubt that the child is lawfully and sufficiently baptized, and ought not to be baptized again. The same expression

is made use of in the rubrics of Edward VI., where a baptism of a child in a private house has been administered by a layman; and all the four rubrics contain a direction that the child shall be brought into the church, to the intent that the con-[786]-gregation may be satisfied that the child has been sufficiently and lawfully baptized.

Now the questions which are to be addressed to the persons who bring the child to the church differ in some respects. In the liturgies of Edward VI. the questions addressed are six, they are as follows:—By whom was this child baptized? Who was present when this child was baptized? Whether they called upon God for His grace and succour in that necessity? With what thing and matter did they baptize the child? With what words was the child baptized? And whether they think the child was lawfully and perfectly baptized?

These were the questions according to the rubrics of Edward the Sixth, which were addressed to the persons who brought the child to be received into the Church, after it had received private baptism from the hands of a layman, and they followed each other in immediate succession without break or interruption. The rubric then proceeded, "If the minister shall find by the answers of such as brought the child that all things were done as they ought to be, then shall he not christen the child again," but he shall certify that all has been well done and according to due order concerning the baptizing of this child, and then he is to proceed in the form that is there pointed out.

Now, at the conclusion of the rubric of Edward the Sixth we read, "But if they which bring the infant to the church do make an uncertain answer to the priest's questions, and say that they cannot tell what they thought, did, or said, in that great fear and trouble of mind (as oftentimes it chanceth), then let the priest baptize him in form [787] above written concerning public baptism, saving that at the dipping of the child in the font he shall use this form of words: 'If thou be not baptized already, I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost.'" That was the form to be observed, when it appeared that the persons from trouble of mind at the time could not answer certainly as to what had been done. That confirms the presumption that this private baptism was not expected to be administered by a person in holy orders, who could hardly be supposed to be in such trouble of mind as to be unable to state what passed at the time.

So the matter stood till the rubric of James the First. Then the questions were in some degree altered. The third question was omitted, and a most important variation took place with respect to the manner in which the questions were to be addressed to the parties. The two first questions in all the three rubrics were: "By whom was this child baptized?" and, "Who was present when this child was baptized?" In the rubric of James the First, instead of the question, "Whether they called upon God for His grace?" This observation or caution, which appears to me most important in the consideration of this subject, is introduced before what were the fourth and fifth, and now are the third and fourth, questions. "And because some things essential to this Sacrament may happen to be omitted, through fear or haste in such times of extremity, I therefore demand further of you, 'With what matter was this child baptized? With what words was this child baptized?'" The question, which was the sixth in Edward the [788] Sixth's rubric, became the fifth here in the rubric of James, and is omitted in the present rubric, "Whether they thought the child to be sufficiently baptized?"

The introduction of the observation that the matter and words are essential to the Sacrament appears to me to exclude the notion that the minister was an essential part of the administration of the Sacrament. For if he was an essential part of the administration of the Sacrament the observation would have been introduced at the commencement, before the first question was asked: "By whom was the child baptized?" And it would then have run thus: "Because some things essential to this Sacrament may happen to be omitted, therefore, I ask you by whom was this child baptized?" But that observation as it now stands in the rubric has no reference to the two questions that have gone before, it is directly applied to those which follow: "With what matter was this child baptized?" and, "With what words was this child baptized?" Clearly, as it appears to me, shewing that the matter and the words were the important parts of the Sacrament, and that the minister, though for order and regularity's sake he ought to be present at the time, and to administer the Sacrament, yet was not an essential part of it. The same observation occurs in the same place, and precedes and

introduces the same two questions in the rubric of Charles II. An analogous alteration is made in the concluding rubric of the liturgies of James I. and Charles II., and limits the conditional baptism to cases where "it cannot appear that the child unbaptized [789] with water, and in the name of the Father, and of the Son, and of the Holy Ghost" (which are essential parts of baptism), for so the present rubric is worded.

All the other parts of the services which apply to it seem to confirm this view of the law. In the Church Catechism, for instance, it is asked, How many Sacraments there are, and the answer is, "Two:" again, "How many parts are there in a Sacrament?" the answer is again, "Two, the outward and visible sign, and the inward and spiritual grace." Then comes the question, "What is the outward and visible sign or form in baptism?" to which the answer is, "Water, wherein the person is baptized, in the name of the Father, and of the Son, and of the Holy Ghost;" no mention being made of the minister as an essential part, and nothing even suggested as to his being an essential part of the Sacrament, which is complete when the child has been baptized according to the rubric of Edward VI., with water, in the name of the Father, and of the Son, and of the Holy Ghost. I am clearly, then, of opinion that the Church has not considered the minister as an essential part of the Sacrament of Baptism. It is very desirable that he should be present to administer it, and highly improper, excepting in cases of absolute necessity, that it should be administered by any other person, who, in so doing, usurps an office which does not belong to him: is meddling with things which are not within his vocation, and, therefore, is liable to censure and to punishment. But, nevertheless, the services of the Church of England, as well as all the acts and declarations [790] of the Church, when considered and compared together, appear to me perfectly consistent with each other in treating baptism administered in the name of the Father, and of the Son, and of the Holy Ghost, with water, as a sufficient administration of that Sacrament; and shew that the Church of England is as strongly against the repetition of baptism as was the Church in the early ages.

Something was said, in the course of the argument with respect to the articles of the Church; and Mr. Escott's allegation in proof that the validity of baptism by laymen is inconsistent with them, refers to the twenty-third article, which declares that "It is not lawful for any man to take upon him the office of public preaching, or ministering the Sacraments in the congregation, before he be lawfully called, and sent to execute the same." And this is undoubtedly true; so that when a person does take upon himself the office of public preaching (supposing that this article against public preaching, or ministering the Sacraments in the congregation, can by possibility be intended to apply to the private administration of baptism in cases of necessity) he is taking upon him the office of a minister, and, therefore, he is doing that which is not lawful, and is liable to punishment. But the article does not go on to say that if a person does so intrude himself the act which he does shall be invalid. What is there in the services of the Church of England, in the rubrics, or in the spirit of the law, to shew that an act done, though irregularly and improperly done, and though the person who does it is liable to punishment, is invalid, null and void?

[791] Again, lay baptism is not more inconsistent with this article at the present time than it was in the year 1552, when these articles were originally framed, and yet it is admitted by the defendant that baptism by a layman was at that time valid.

Again, reference was made to the sixty-ninth canon, which is intituled, "Ministers not to defer christening, if the child be in danger," and which declares, "That if any minister, being duly, without any manner of collusion, informed of the weakness and danger of death of any infant unbaptized in his parish, and thereupon desired to go or come to the place where the said infant remaineth, to baptize the same, shall either wilfully refuse so to do, or of purpose, or of gross negligence, shall so defer the time as when he might conveniently have resorted to the place, and have baptized the said infant, it dieth, through such his default, unbaptized, the said minister shall be suspended for three months, and before his restitution, shall acknowledge his fault, and promise before his ordinary that he will not wittingly incur the like again."

The argument founded upon this canon was that the Church necessarily presumed that if the minister did not go the child would die unbaptized, whereas if the Church had held that baptism by a lay person was valid, it could not have so presumed,

inasmuch as it would presume that, in case of imminent danger of the life of the child, the father or mother or other person would baptize the child.

This does not strike me as an argument of any great force. The Church supposes that every person will pay obedience to its laws, that no person [792] will, by baptizing a child, intrude into that which the rubric of such Church seems to imply is the proper office of a lawful minister—of a person in holy orders, and the Church possibly supposes that the more conscientious and the more scrupulous persons are in conforming to the law of the Church, the greater danger there will be of the child dying unbaptized, through the neglect of the minister in not attending when sent for. There is nothing, however, in this canon inconsistent with the validity of lay baptism. It merely proceeds upon the supposition that a person wishing to obey the law of the Church might decline taking upon himself the office of baptism, and that therefore the child might die unbaptized, in consequence of the minister not attending for the purpose of baptizing the child.

It has been also stated that much is to be gathered from the opinions of other reformed Churches upon the subject of lay baptism: that the Churches in France had declared that persons who had been baptized by laymen should be rebaptized, and I think a solemn declaration of the Scotch Church was cited to shew that they hold lay baptism to be invalid. Now if there was such a declaration in France, and not in other reformed Churches, it would seem to me to argue rather the other way. They may have been satisfied that lay baptism was invalid, and therefore they declared it to be so. The Church of England not being satisfied that lay baptism was invalid, on the contrary, holding it to be valid to a certain extent at least, did not issue any such declaration. When the Church of England holds out such an inducement as it does by the rubric at the end of the baptismal service, say-[793]-ing, that if the child dies, having been baptized without actual sin, it shall be saved; and when the parents are called upon to take the earliest possible opportunity to put the child in that state in which it may be considered entitled to salvation, I think it is beyond all possibility of doubt that, if it had been the doctrine of the Church of England that lay baptism was invalid, that Church would have expressly declared that a child baptized by lay hands was not lawfully baptized, and therefore must be rebaptized. The rubric says that "children which are baptized dying before they commit actual sin, are undoubtedly saved." The parents therefore are naturally anxious to put the child in a state in which it shall be entitled to salvation, and might take upon themselves the office of baptizing the child. The Church of England has made no declaration of the invalidity of baptism by lay hands, and I think it would have done so if its judgment were that lay baptism was invalid, contrary to the practice of the Church for twelve hundred years.

Then it seems to me upon the whole of this case that the law of the Church is beyond all doubt that a child baptized by a layman is validly baptized. It has not been shewn to my satisfaction that a Wesleyan minister is a schismatic or a heretic, and therefore it is unnecessary to inquire whether heretical or schismatical baptisms are or are not valid. There were many disputes in the early ages of the Church as to schismatical and heretical baptisms, and there are passages to be found in the canon law entering into discussions as to whether baptisms administered by schismatics or heretics ought to be repeated or not. The general opinion, I think, is that they ought not to be repeated, provided the [794] proper form was observed, for that was considered the essential point in these cases.

Therefore, in the view which I have taken to my mind, at least it is clear that the law calls upon me to pronounce that the articles admitted in this case have been proved; that the party promoting the office of the judge has established that Mr. Escott, the minister and incumbent of the parish of Gedney, being duly informed, and having due notice of the death of the child, and due notice of the funeral, and being also duly informed that the child had been baptized by a dissenting minister, refused to perform the office for the interment of the dead over the body of that child; and that Mr. Escott has failed in establishing, to my satisfaction at least, that the Church does consider a child baptized by an unordained minister, by a minister of the Wesleyan body who has no authority to baptize either from the Church, or from the body to which he belongs (though they could confer upon him no authority which the Church would acknowledge, beyond that of a layman), is not validly baptized; and consequently has failed to establish, to my satisfaction at least, that

the child in this case was unbaptized according to the doctrine of the Church of England, and according to the meaning of the rubric prefixed to the order for the burial of the dead. The sentence therefore which the Court must pronounce must be, that Mr. Mastin has sufficiently proved the articles by him exhibited, and that Mr. Escott has failed in proving the allegation by him given in.

The only remaining consideration is, what is to be the punishment to which the Court must necessarily subject Mr. Escott, under the circumstances [795] of the case? It has been very properly stated upon the part of the promoter that he had no wish whatever to follow up these proceedings in anything like a vindictive manner—that he should be perfectly satisfied if the Court would admonish Mr. Escott to abstain from like conduct in future, and to condemn him in the costs of these proceedings. In *Kemp v. Wickes* my learned predecessor contented himself with admonishing the party, and I should be glad to follow that example, if I could do so with propriety or safety. In that case there was no intention of appealing to a higher tribunal. But this case, I presume, will not stop here; it was stated in the course of the argument to have been brought here for the purpose of taking the opinion of the ultimate Court of Appeal upon the question, and if I were to give any sentence other than that directed by the canon, I might possibly defeat the intentions of both parties, of getting the decision of the Court of Appeal upon the point, whether a person so baptized is validly baptized within the meaning of the rubric, so as to entitle him to Christian burial. I am afraid I am bound by the canon, which requires a sentence of three months' suspension upon a person who refuses to christen or to bury a child after notice given him for that purpose. I cannot see my way to modify the sentence, this being a proceeding under the sixty-eighth canon, and that canon expressly fixing the punishment of suspension for three months.

The Court pronounced Mr. Escott subject to a suspension for three months, and condemned him in the costs of the proceeding.

[796] IN THE GOODS OF I. F. SMITH, Deceased. Prerogative Court, April 26th, 1841.—Probate granted of a will and two codicils, the first codicil not attested, but the latter being duly executed and referring to the former, and thereby operating as a due execution thereof.

[S. C. 1 Notes of Cases, 1. Referred to, *Allen v. Maddock*, 1858, 11 Moore, P. C. 457; *Watson v. Arundell*, 1877, Ir. R. 11 Eq. 60.]

The testator in this case executed a will in June, 1835; by this will he gave the whole of his property to his widow for life; and, after her death, left the principal to his children as settled in a deed of assignment, executed by him in 1833, on their behalf.

In May, 1838, the deceased wrote a codicil which he signed, but there were no witnesses to it. In August, 1840, he made a further codicil, which was signed by him at the foot and duly attested.

This was written on the second side of the paper on which the former codicil was written, and the deceased described it as "a second codicil to my last will and testament."

Haggard prayed probate of the will and two codicils, but without the deed as part of the will; he submitted that it was not testamentary, and that, if necessary, the trusts might be enforced in a Court of Equity.

Sir Herbert Jenner. The latter codicil being duly executed, referring to the former, is an execution of the former codicil also. Let probate pass of the will and codicils; the deed should also form part of the probate.

[797] GOLDIE *against* MURRAY. Prerogative Court, May 12th, 1841.—A party propounding a will, having become bankrupt, directed to give security for costs.

[S. C. 1 Notes of Cases, 35.]

This was a cause of proving, in solemn form of law, the will of John Kilpatrick, deceased, who died on the 4th of August, 1840.

The will dated on the 1st of August, 1840, was propounded by James Goldie, one of the executors named therein, and was opposed by Adam Murray, an executor in a former will dated July, 1839.

The will had been propounded in a condidit, and an allegation on behalf of Mr. Murray, in opposition to the will, had been admitted, and publication of the evidence

upon that allegation prayed; a responsive allegation was now asserted by Goldie, who had lately become a bankrupt.

The Queen's advocate and R. Phillimore prayed the Court to direct Mr. Goldie to give security for costs. The party, being an uncertificated bankrupt, could possess no property, and the allegation now asserted would, if brought in, occasion considerable expense, and which, if Mr. Goldie be condemned in costs, Murray would have no means of obtaining from him. They cited *Webb v. Ward* (7 T. R. 296), *Heaford v. Knight* (2 B. & Cr. 579), and *Mason v. Polhill* (1 C. & M. 620), to shew that at law an uncertificated bankrupt was required to give security for costs.

Addams opposed the application. By the rules in the Courts of Common Law the party benefited [798] by the suit should give security for costs; here the executor represents the legatees under a will and protects their interests, and the bulk of the deceased's property in this case is given to charities in Scotland. Whatever interest Mr. Goldie himself had now belongs to his creditors.

Sir Herbert Jenner. In this case the will has been propounded by Mr. Goldie in a condidit, on which the two subscribed witnesses have been examined. An allegation was then admitted on behalf of Mr. Murray, the answers of Mr. Goldie were taken to that allegation, and witnesses have been examined in support of it, and publication of the evidence was prayed by Mr. Murray, but that was stopped by the assertion of an allegation by Mr. Goldie; that allegation stands for admission on the next Court day, and certain costs must be occasioned by it.

Mr. Goldie, the party in the cause, has become a bankrupt, and it has been stated that a meeting of his assignees and creditors has taken place for the purpose of their determining whether the suit should be carried on in the name of the bankrupt in order to establish the will. Mr. Murray, on the other hand, prays that an order may be made that Mr. Goldie should give security for costs. It appears to me that this is peculiarly a case in which the Court should direct security for costs to be given. Mr. Goldie is now possessed of no property; whatever interest he takes under the will belongs to his assignees to be distributed amongst his creditors. What can the Court do in such a case? It cannot direct the assignees to give security, for they are [799] not before the Court. I can only direct Mr. Goldie to give security, and if the assignees think that the suit should be carried on, they must find security for him. The suit must be carried on in his name, and in case the Court should pronounce against the will, and condemn him in the costs, the other party, without security, would have no means of recovering his costs.

The Court directed security to be given in the sum of 250l.

In this case the will was eventually pronounced against, and Mr. Goldie was condemned in the costs, provided they did not exceed the sum of 250l.

THORNE *against* ROOKE (HERETOFORE WORRALL). Prerogative Court, Jan. 20th, July 8th, 1841.—An allegation setting up parol evidence in order to shew that two codicils were not intended to operate together, but that the latter revoked, the former rejected; there being no ambiguity on the face of the papers themselves.

[S. C. 1 Notes of Cases, 254. Discussed, *Jenner v. Flinch*, 1879, 5 P. D. 111.]

On the admission of an allegation.

This was a cause of proving a codicil to the will of George Rooke, Esq., deceased, who died on the 15th of December, 1839. Probate of the will and five codicils was taken, on the 20th of February, 1840, by George Worrall, Esq., the then surviving executor, who died on the 6th of May, 1840. On the 30th of May, 1840, a decree issued, at the instance of Frances Thorne, citing the executrix of Mr. Worrall (who had taken the name of Rooke) to take probate of a further codicil, dated the 24th of September, 1838, which she refused to do. The codicil was then propounded by Frances Thorne, [800] the legatee named therein, in a condidit, upon which the attesting witnesses were examined; the codicil was as follows:—"By this codicil to my will, I give and bequeath to Mrs. Frances Sophia Stafford, born Thorne, now residing at No. 18 Elm Tree Road, St. John's Wood, London, the sum of two thousand pounds, to be paid to her within three months after the date of my death. Dated this 24th of September, 1838. George Rooke. The above sum of 2000l. to be paid clear of legacy duty. G. R." The codicil was duly attested.

An allegation was now offered in opposition to the codicil, which pleaded in substance,—

First. That George Rooke, Esq. (the deceased), while resident in the Albany, carried on, in the year 1837, and for some time previously, an illicit cohabitation with Frances Thorne, one of the parties in this cause, and thenceforward continued so to cohabit with her until his death, and that he was very reserved on the subject of such cohabitation, &c.

Second. That the testator, in consideration of such cohabitation, on the 24th of September, 1838, wrote, with his own hand, the codicil now propounded. That the same, being executed, was sealed up in an envelope with three seals, and delivered by the deceased to Frances Thorne to take care of, that the deceased subsequently, but previous to the 26th of April, 1839, informed her of the amount that he had given her by the said codicil, and recommended, in case of his death, that she should sink the same in an annuity for her life.

Third. That in the early part of 1839 the deceased was taken seriously ill, and was advised [801] to remove from the Albany. That thereupon he took up his residence with the said Frances Thorne in a house rented by him for her; that the illness of the deceased, which was eventually the cause of his death, was a spine complaint, confining him to his bed; that the same to some extent affected his memory generally, and especially so when under accesses of pain; that soon after such change of residence by the deceased, Frances Thorne made frequent representations as well to the deceased as to other persons, that as she had lived and cohabited with the deceased for so long a period the amount left to her by the said codicil was not sufficient, and moreover expressed a desire that such codicil should be more formally executed, and she did not consider and had been advised that it was not safe, &c.

Fourth. That previous to the 26th of April, 1839, the deceased gave instructions to H. W., an acquaintance of his, and the solicitor of the said F. T., to have another codicil prepared in lieu and substitution of that of the 24th of September, 1838; that the same was executed on the 26th of April, 1839. That the deceased, acting under the reserve hereinbefore pleaded, abstained from employing his own confidential solicitor.

Fifth. That the deceased on several occasions, both before and after the execution of such codicil, informed the said H. W. or gave him to understand that the provision made therein was the sole or whole benefit which he intended the said F. T. to take on his death, or gave the said H. W. to understand that such codicil was in substitution for and in satisfaction of any benefit which he had pre-[802]-viously given to the said F. T. by any testamentary paper, and that he did not at any time subsequent to the execution of the said codicil intimate or give the said H. W. to understand that he considered the said codicil (of the 24th of September, 1838) as a valid subsisting instrument, or that would have any effect at his death; that the deceased, believing and intending the codicil of the 26th of April, 1839, to be a revocation of all previous testamentary benefits to the said F. T., did not take any further or other steps towards the destruction, cancellation, or other revocation of the said codicil of the 24th of September, 1838.

Sixth. That from the time when the codicil (24th of September, 1838) was delivered to the said F. T., it remained in her possession, and never afterwards came into the hands or possession, or under the notice or control, of the said deceased.

Seventh. That the said Hannah Rooke, then the wife of George Worrall, Esq., having been informed of the illness of the deceased, went to stay with him, and remained with him for several months to nurse him. That hearing his death was expected, she again accompanied by her husband, again proceeded to the residence of the deceased, but found that he had died before her arrival. That during the time she remained there with her husband, who was the surviving executor named in the will of the said deceased, the said H. W. attended as solicitor and legal adviser to the said Frances Thorne, and produced and delivered to the said George Worrall the codicil dated the 26th of September, 1839, and the two codicils of subsequent date, and also other papers belonging to the said [803] deceased, but neither he nor the said F. T. produced or made any reference to the codicil of the 24th of September, 1838, and that as well the said H. W. as the said F. T. then and about such time frequently declared that the papers so delivered up were the only papers which she the said F. T. possessed of or belonging to the deceased.

Eighth. That on the 20th of February, 1840, probate of the will, with five codicils, was granted to the said George Worrall. That the fact that probate of such papers was about to be applied for, and that such probate had been granted, were at and about the times when such application was made, and such probate granted, respectively severally well known to the said Frances Thorne, and also to the said H. W.

Ninth. That a bill was filed in the Court of Chancery by the said Frances Thorne for payment of legacies under the codicil of the 26th of April, 1839, that she did not therein in any manner refer to the codicil of the 24th of September, 1838.

Tenth. That in March, 1840, the existence of the said codicil was for the first time made known by the said H. W., a copy thereof being sent with a request that it should be proved by the said George Worrall, Esq.

Eleventh. That previously to the preparation and execution of the codicil of the 26th of April, 1839, the said Frances Thorne frequently conversed with Mary Street, a servant of the deceased, and who was one of the subscribed witnesses to the codicil of the 24th of September, 1838, on the subject of such codicil, and the sum of two thousand pounds which was therein left to her, that at such [804] times she frequently stated to the said Mary Street that she considered such sum to be too small, considering the time she had lived with the testator, and also that she did not consider such codicil was safely made, and that she had been so advised.

Twelfth. That after the said codicil of the 26th of April, 1839, had been executed, and at times when the said Frances Thorne was in the daily and constant habit of communication with the deceased, she also frequently informed the said Mary Street that every thing was now settled by an annuity, that it was very handsome, and that the codicil to which she and "Walker" had been witnesses was of no use, meaning thereby the codicil of the 24th of September, 1838, and the said Frances Thorne frequently used other expressions of that or the very like effect.

Thirteenth. That at the time the deceased removed to Elm Tree Road he was attended by Elizabeth Gutteridge as nurse; that the said Frances Thorne was in the habit of frequently conversing with the said Elizabeth Gutteridge; that in one or more of such conversations she informed her of the testamentary disposition made by the deceased in her favor. That in September, 1839, Frances Thorne, in one of such conversations, stated to the said Elizabeth Gutteridge the contents of the codicil of the 26th of April, 1839, and all its provisions and the trustees therein named, and also in reference to the former codicil, described the same as of no validity, and stated that it was remaining in her possession, but the deceased knew she would make no use of it, or she the said Frances Thorne intimated her knowledge and conviction from the [805] acts and expressions of the said deceased, that he the said deceased did not intend that it should take effect on his death, and did not consider it as an operative and subsisting instrument.

Fourteenth. That about the time of the death of the deceased, Frances Thorne again referring to her possession of such codicil, said to the said Elizabeth Gutteridge, that she had taken advice upon it, and that she had mentioned it to Mr. Ward, who had informed her that it was all right and correct, and that she ought to keep it, which she intended to do. That in very many conversations held between the said Frances Thorne and the said Elizabeth Gutteridge, the said Frances Thorne invariably expressed or implied the fact that one codicil was substituted for the other by the said deceased, and that consequently the former codicil was of no validity or use, and that such meaning and intention of the said deceased was clearly made known by the said deceased to all parties connected in any way with the taking instructions for and the preparation of such codicil, as also to the said Frances Thorne, &c.

The admission of this allegation was opposed by Addams and Waddilove. Under the present law no such case as this can be set up. The question must be governed entirely by the statute 1 Vict. c. 26. The codicil is dated long after that act came into operation. The 20th sect. of that statute is this, and be it further enacted, "that no will or codicil or any part thereof shall be revoked otherwise than as aforesaid (that is, by marriage under the 18th section), or by another will or codicil executed in manner hereinbefore re-[806]-quired, or by some writing declaring an intention to revoke the same and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying

the same by the testator or by some person in his presence and by his direction with the intention of revoking the same." Is then the present instrument revoked? It is unburnt and untorn—then is it revoked by any codicil? if so, by which? If neither of the codicils revoke this instrument, you cannot set up a revocation otherwise.

But independently of the statute the facts of this case would not amount to a revocation. In *Greenough v. Martin* (2 Add. 239, 243) the Court said, "The intentions of the deceased as to what instruments shall operate as and compose his will are to be collected from all the circumstances of the case taken together." The present allegation does not set up all the circumstances, it is an uncandid allegation. In *Smith and Blake v. Cunningham* (1 Add. 448) it was held that testamentary instruments regularly executed are hardly to be deemed revoked by inference and implication under any circumstances—the allegation does not contain facts which would unequivocally lead the Court to the conclusion that the deceased intended this codicil to be revoked.

The Queen's advocate and Nicholl. It is contended that this codicil is not revoked by reason of the statute 1 Vict. c. 26, s. 20, but that statute leaves the law as it was, provided the will or codicil be duly executed. It is not necessary, in order [807] to revoke a former will or codicil, that a later instrument should contain express words of revocation; it may be equally done by implication. In all the cases of that kind in this Court, parol evidence has been admitted, not for the purpose of revoking the former paper, but to shew with what intention the latter instrument was made. *Methuen v. Methuen*,^(c) *Greenough v. Martin*; *Smith v. Cunningham*; the allegations were admitted in all those cases. This was clearly the law before the recent statute, and had it been the intention of the legislature to alter the law in this respect there would have been some express enactment to that effect; but it is as it was previously, parol evidence is therefore admissible. As to the contents of the allegation, it is submitted that it is clear that the deceased in executing the latter codicil intended it as a substitution for that which is propounded in this cause.

The Court took time to deliberate, and on the 8th of July gave its opinion.

July 8th.—*Judgment*—*Sir Herbert Jenner*. This question arises on the admission of an allegation in opposition to a codicil to the will of Mr. George Rooke, who died on the 15th of December, 1839. The admissibility of the allegation was argued a considerable time ago, and the Court postponed giving its opinion until a decision had been given by the Lords of the Privy Council in the case of *Reeve v. Kent*, with respect to the admissibility of an allegation which had been rejected by [808] this Court, under circumstances not precisely similar to the present, but under the new statute relative to wills, and the Court thought that it might possibly throw some light upon the construction which is proper to be put upon that statute. The Court has been favored with the judgment delivered in that case, but it does not appear to bear materially upon the question now for the consideration of the Court.

The Court will now proceed to deliver its opinion in this case. The deceased was a bachelor, he died possessed of personal property to the amount of about 25,000l., and also of considerable real property, the amount of which does not appear; his nearest relation was a lady of the name of Rooke; she is stated to have been his nearest relation and that he was brought up by her. The testamentary papers left by the deceased were a will dated the 14th of May, 1827, and five codicils dated, the first in May, 1829; the second, in January, 1833; the third, the 26th of April, 1839; the fourth, on the 23rd of May, 1839, and the fifth, on the 14th of September, 1839; of these instruments probate was taken in February, 1840: some time, however, after that probate had been granted a further codicil was produced, of which the executors were called upon to take probate, but which they declined to do; and it is with regard to this codicil, dated the 24th of September, 1838 that the question now arises.

This codicil has been propounded in a conditit, by the party who is interested under it, and the attesting witnesses have been examined in support of it. This codicil purports to be in the handwriting [809] of the testator, it is signed by him and is attested by witnesses; it is to the following effect: "By this codicil to my will, I give and bequeath to Mrs. Frances Sophia Stafford born Thorne, now residing at No. 18 Elm Tree Road, St. John's Wood, London, the sum of two thousand pounds,

(c) 2 Phill. 416. See Williams' Executors, vol. 1, p. 118, and vol. 2, pp. 1020, 1023, 3rd edition.

to be paid to her within three months after the date of my death. Dated this 24th of September, 1838. "GEORGE ROOKE."

And under the name George Rooke is "the above sum of 2000l. to be paid clear of legacy duty. G. R." This codicil was delivered into the hands of Mrs. Frances Sophia Stafford, and sealed up at the time, and it remained in her possession without the knowledge of the executors, till the month of March, when it was first communicated to the solicitor to the executors.

Now this paper is regularly executed by the deceased and attested by witnesses in conformity with the act, as far as appears; it is uncanceled and perfect, and it is not denied that it is in the handwriting of the deceased and executed by him when in perfect capacity, and it is not alleged that any fraud was practised upon him in obtaining the instrument; therefore it is entitled to probate unless it should be revoked by some paper of a subsequent date.

The paper which is alleged to have that effect is that which is dated the 26th of April, 1839, which purports to give Mrs. Stafford a larger proportion of the deceased's property, to make a further provision for her than was made by the codicil of the 24th of September, 1838, and it is contended that the latter codicil revokes the former.

[810] The two papers being uncanceled at the death of the deceased, it lies with the party who contends that the one is a revocation of the other—that the one is substituted for the other—to prove the grounds upon which the Court is to come to that conclusion; for as the papers remain in the state I have described, they are *prima facie* entitled to probate, and both may stand, unless it can be shewn that there is by necessary implication, or in some way, a revocation of that originally executed by the deceased to make provision for this lady.

The purport of the latter paper is to give to certain trustees the sum of 13,433l. 6s. 8d., three per cent. consolidated bank annuities, and it directs that they shall pay the interest to Frances Thorne, passing by the name of Mrs. Stafford, during so long as she shall live, and shall not sell, mortgage, or otherwise charge or dispose thereof by anticipation, or become bankrupt or insolvent, or do any act whereby the same, if limited to her for life, would become payable to any other person; and subject to the trusts hereinbefore declared, shall permit the said trust monies, stock, funds, and securities to return to, and become part of, the residue of my personal estate disposed of by my said will. And I declare that the marriage of the said Frances Thorne shall not be a determination of the trust hereinbefore declared for her benefit, provided that previous to such marriage she shall settle her estate and interest under the trusts aforesaid for her separate use. It then goes on to give a legacy of 100l. to Mrs. Stafford, by the name of Thorne, to be paid within one month after his death, free of legacy duty. It also gave a legacy to [811] his faithful servant Charles White of fifty guineas during his life. It gave to his servants, Mary Streets and Knowles, and his groom Edward, the sum of 50l. a-piece, clear of legacy duty; and it gave his grey horse, Escape, to his friend Mr. Ward. It is signed and attested by two witnesses.

The contents of the will and other codicils are immaterial to be stated, except the last codicil, which has reference to that just read, namely, the codicil executed on the 14th September, in which he recites that he has given a legacy to Mary Streets. It revokes that legacy, and then confirms the codicil in all other respects. These then are the two testamentary papers upon which the opinion of the Court is called for.

Before considering the contents of the allegation it will be necessary to consider a little the principle on which these Courts proceed, with respect to papers which are not in themselves expressly revocatory of a former paper; to consider how far it is in the power of the Court to act on parol evidence against the contents of papers, which, if duly executed, must be presumed to contain the final intentions of the persons who executed them.

I apprehend that in all these cases the Court, in the first instance, must look to the papers themselves in order to discover whether there is anything in the nature of ambiguity, or any absurdity arising out of insertion or omission—which you please; and if it should find that the papers themselves, by necessary implication, or from an ambiguity raised on the contents of the instruments, shew that it was not the intention of the deceased that they were to operate, then the [812] Court may admit parol evidence to remove that difficulty. It appears to me, upon the rules acted upon in this Court, that it is not, without there is some doubt, some ambiguity, or some

absurdity arising from an insertion or omission, that this Court interferes to pronounce that the declaration of the one is revocatory of the other, or holds that it is a substitution of the other. I apprehend that this rule applies equally to this Court, as it does to the Court of Construction. In addition to that, where there is this ambiguity, the Court does not interfere unless it finds that the evidence offered to be produced is sufficient and satisfactory to explain the ambiguity or remove the difficulty that may arise on the construction of the papers. I find this laid down in a variety of cases in this Court, of which two or three were mentioned in the course of the argument. The cases more particularly referred to were *Methuen v. Methuen* (2 Phill. 416), *Greenough v. Martin* (2 Add. 239), and *Smith v. Cunningham* (2 Add. 448). One or two cases were referred to at common law, particularly *Campbell v. The Earl of Radnor* (1 Br. C. C. 271), in which the practice of the Ecclesiastical Court was alluded to without terms of disapprobation by Lord Loughborough, sitting as first commissioner of the Great Seal, in 1783. But in the first instance, it is necessary that the Court should look a little at the grounds laid down, and the decisions which have taken place in this Court, which are the sole authority in the first instance in all cases arising in the jurisdiction of the province of Canterbury. I find, in the first case, for [813] it is not by a reference to one or two cases only that the rule and practice of the Court can be satisfactorily ascertained, because they may turn upon particular circumstances occurring in those cases; but the rule and practice must obtain, from an examination of cases of a similar description, where the same principle is to be applied, under different circumstances; and the first case to which I will refer is that of *Fauccett v. Jones* (3 Phill. 434), which occurred in 1810. That case was not precisely similar to the present, for there the Court was prayed to insert a clause, from the instructions, which might give a different effect to an instrument of which probate had been taken. But the principles which the Court laid down, as those by which it acted with respect to the admissibility of parol evidence, were there stated in a very explicit manner, the learned Judge says (p. 476), "I apprehend it is a general leading principle that, when an instrument has been executed by a competent person, you must presume that the person so executing it knew the contents and the effect of the instrument;" that is the first point. "If the contents be doubtful, you may receive extrinsic evidence for the purpose of explaining and construing an instrument. But if a will speaks clear of all doubt, no parol evidence can be admitted to construe it. The Courts have only deviated from those presumptions where some ambiguity arises upon the executed instrument. There exists no very material distinction in principle between the Court of Probate and Courts of Construction, so [814] far as respects the present point," which was the admissibility of parol evidence to explain the circumstances under which the clause was omitted and overlooked; and in the course of that judgment, in illustration of the principle in which the Court acted, it referred to several other cases, as those in which there was an ambiguity as to the factum of the instrument; not in its construction. The first is *Mattheus v. Warner* (4 Ves. 186), where parol evidence was rejected by the Prerogative Court and the Court of Delegates, because they held that upon the face of the instrument there was no ambiguity; that was the principle upon which parol evidence was rejected in those Courts; it is true that in the Commission of Review in that case parol evidence was admitted, but it was on the express ground that upon the face of the instrument, which was headed "Plan of a will," and was written on a piece of office paper, ruled over with red lines, there was an ambiguity sufficient to let in parol evidence; therefore the principle upon which such evidence was rejected in the Prerogative Court, namely, that there was no ambiguity, was not impugned by what took place in the Commission of Review.

Another case referred to was, *Lord Cholmondeley v. Lord Walpole* (7 T. R. 138), in which there was a codicil which expressly referred to a will by date. The deceased had executed a subsequent will, and a doubt was suggested to which of the two wills he meant to refer. The Court of King's Bench rejected parol evidence, because there was no ambiguity.

[815] In *Lord St. Helens v. The Marchioness of Exeter* (3 Phill. 461, n.) the codicil in question referred to a will not existing; therefore there was an ambiguity, and parol evidence was admitted in that case, in order to ascertain to what will the codicil referred. Sir John Nicholl goes on to say, "I must here observe that in the Court of Probate there must be some ambiguity, not upon the construction, but upon the factum of the instrument—not whether a particular clause will have a particular effect, but

whether the deceased meant that particular clause to be part of the instrument; whether the codicil was meant to republish a former or a subsequent will; whether the residuary clause was fraudulently introduced, without the knowledge of the testator"—as in the case of *Barton v. Robins* (3 Phill. 455, n.) ("for fraud," he says, "of course would go to the foundation of the will"), "whether the residuary clause was accidentally admitted as in the case of *Janssen v. Damer* (reported as *Blackwood v. Damer*, 3 Phill. 458, n.); whether an instrument be subscribed in order to authenticate it as memoranda for a future will, or to execute it as a final will, as in *Matthews v. Warner*; these are all questions of ambiguity upon the factum of the instrument." Then he referred more fully to the case of *Damer v. Janssen*, which he considered to apply to the circumstances then under consideration. He also referred to other cases which contained the same principle—*Bridge v. Arnold and Cranke* (ib. 455), where an attorney had inserted "for his own use and benefit," instead of "as a trustee." The case [816] of *Gerrard v. Gerrard* (ib. 484) is alluded to, where there was the omission of the name of the person to be appointed executrix and residuary legatee, he appointed "her" executrix and residuary legatee, and there was no name to which the pronoun "her" referred; but by admitting the instructions, and receiving parol evidence, it was clear the words "my dear wife" had been omitted in writing over the will, and "therefore parol evidence was admitted to explain the ambiguity in the will itself." This is the case set forth in *Fawcett v. Jones*.

In the case of *Draper v. Hitch* (1 Hagg. Ecc. 674), in order to justify the introduction of parol evidence it was thought that there was an ambiguity with respect to a clause of revocation. In that case the party, a married woman, had a power under two separate instruments to make a disposition of her property, one her own marriage settlement, the other under a codicil to the will of her mother. There the will was drawn by a conveyancer, and she consented to revoke the disposition under the power which she had exercised under her mother's codicil, and without communication with the conveyancer, there was added a clause of revocation revoking all former wills, whereas it was only intended by her to apply to property which passed under her mother's codicil. The Court held that sufficient was shewn to justify it in admitting the allegation to proof, but when the evidence came to be considered, the learned judge was of opinion that there was no ambiguity at all on the face of the papers themselves; nor was there sufficient ambiguity raised [817] by the evidence to justify him in limiting the clause of revocation to that part of the testamentary disposition which had reference to the power under the second codicil. Accordingly, he directed the general administration which had been before granted, with will annexed, to be delivered out. He did not pronounce against the validity of the first will, because there was some doubt existing as to the manner in which the revocatory clause had been executed by the testatrix. That was determined by the Court of Construction.

In *Harrison v. Stone* (2 Hagg. Ecc. 537) the Court laid down the same principle, that there must be "some ambiguity on the face of the executed instrument," and the means of obtaining clear and indisputable proof that the omission of the clause was contrary to the intentions of the testator; and these circumstances together concurring, the Court has inserted a clause to give effect to that which there could be no doubt was the intention of the testator. These are the principal cases which have occurred.

It is true that none of these cases refer to the circumstances of two codicils making a provision for the same person, whether the latter operates as a substitution of the other, and thereby revokes it. But two cases were stated in the course of the argument which it was contended were direct upon this point, that parol evidence would be admitted against the contents of the codicil. These cases were *Methuen v. Methuen* (2 Phill. 416), and *Greenough v. Martin* (2 Add. 239).

Methuen v. Methuen occurred in 1817. The marginal note to that case is as follows:—"A codicil [818] virtually revoked by another codicil of a subsequent date, there being no express words of revocation in the latter instrument." So far as the marginal note goes, it is an authority for the admission of parol evidence to shew that a codicil may be virtually revoked by another of a subsequent date. In that case parol evidence was admitted, though no express words of revocation were contained in the latter codicil. In that case Mr. Paul Cobb Methuen made a will and three codicils, the will was dated in October, 1809, the first codicil in 1812, the second on the 10th of May, 1813, the third on the 1st of April, 1815; and the question arose with respect to these latter codicils of May 10th, 1813, and of the 1st of April, 1815.

The circumstances of that case were very peculiar; they arose partly out of a settlement upon the marriage of the testator, and partly out of a disposition made by his will with respect to his younger children, daughters more particularly, and also with respect to a settlement made upon the marriage of his second daughter after the date of the first codicil, and just immediately after the date of the second codicil. One of the daughters had been married before. Now in the first codicil the disposition made by the will was recited, as it was in the latter codicil also. The latter had reference to the marriage of the second daughter. He had also, by the first codicil, made a further provision for his wife by giving her the interest of 1200l. for her life, which, after her death, was to be divided amongst his four daughters. By the second codicil, April 1st, 1815, he also recited the disposition by the will, the settlement of the property that had [819] been made, and also the contemplated marriage of his second daughter, and the appointment made by the will was expressly revoked and annulled as far as regarded her; and this codicil also gave to his wife, as a further provision for her, an annuity or yearly sum of 600l., that is an annuity equal to the interest of the 1200l. at five per cent. given by the former codicil. In that case my learned predecessor said, "The first instrument remains uncanceled, and there are no revocatory words in the second. It is contended that the Court has no power to inquire any further, but the same rules do not apply in a case relating to the factum of a will, which would apply if the injury was concerning the construction of it." That is an observation made in reference to the peculiar circumstances of the case then under consideration. Though it may be true that we do not hold ourselves so strictly bound in a Court of Probate as to contents of instruments as they do in a Court of Construction, yet it is not intended by these words to say that we adopt false rules; that the principle on which we act is not definite, although we may be not quite so strict in the mode of applying it. He went on to say, "In the Court of Probate the whole question is one of intention." So I apprehend it is in a Court of Construction. "The animus testandi and the animus revocandi are completely open to investigation in this Court. Suppose," he says, "in a case of fraud or in a case of error," referring to some case to which he has not expressly alluded, "the residuary clause is omitted, it may be inserted by the Court." That was the rule, as it seems, at that time; but whether the Court has such power at [820] present is a matter for further consideration. He says, "It is admitted that, if there is any doubt on the face of the instrument, the Court may admit parol evidence. On the face of the papers it rather appears as if the testator intended one for the other." They were not both in his possession, one, the first codicil executed, was at his house in Wiltshire, and this was in London, or it might be vice versâ. He goes on, "It certainly is not absolutely impossible that the deceased might have intended to increase the portions of his daughters and the annuity of his wife, but circumstances render it highly improbable that he should so have intended." And these circumstances were that, if the codicil had been acted upon, the property of the deceased would not have been equal to the payment of all the legacies that had been given, but one of the daughters must have abated in some part of the share, which she took under the testamentary disposition. He says, "There is a strong probability that he intended it as a substitute, and not as an independent codicil. Evidence, however, being admissible, there can be no doubt whatever." He accordingly pronounced for the will and the two other codicils, holding this to be revoked.

The other case, *Greenough v. Martin* (2 Add. 329), occurred in 1824. In that case the testatrix was a very old woman living with her nephew. She had in her service two persons of the name of Martin, one her butler, who had lived with her many years, the other, whose name was originally Fletcher, had been her personal attendant for many years, and had married the butler; the testatrix, although [821] entirely blind, wrote a will and five codicils; and with reference to the particular question before the Court in that case, it is only necessary to state that by the will, dated in March, 1821, she gave to her butler the sum of 300l.; to her servant, Mrs. Martin, 300l., and an annuity of 50l. for life, and to each of these she gave 15l. for mourning. In May, 1821, by a codicil, also in her handwriting, she gave 200l. to each of these servants in addition to what she had given them in her will, as expressly stated in the codicil. In January, 1822, she executed a second codicil, also in her handwriting, by which she gave 400l. to each of these servants, in addition to what she had given them by "her will," making the benefits amount to 700l. each. By a third codicil in September, 1822, she gave to Mrs. Martin her round silver salt-spoons. By a fourth codicil in December,

1822, she gave to Martin and his wife 500l. each, but in that codicil she does not mention her will. She afterwards, on the 30th of December, 1823, executed another codicil, by which she revoked several legacies to her servants, with the exception of those to Martin and his wife, and then proceeds, "The legacies of 300l. and 300l., which I have by my will given to Henry Martin and Elizabeth Martin"—evidently referring to the bequest in the will, as that only meant at that time—"I hereby increase to the sum of 1000l. each." Then it goes on to state that the legacy to Elizabeth Martin is to be in addition to the life annuity; "and I further and additionally give to the said Henry Martin and Elizabeth Martin 15l. each for mourning; my said will having been this day read over to me, I confirm the same."

[822] These papers were propounded on behalf of Martin and his wife, and were opposed by the executor; and the Court, after stating the circumstances of the case, said, "In a Court of Construction, where the factum of the instrument has been previously established in the Court of Probate, the inquiry is pretty closely restricted to the contents of the instrument itself, in order to ascertain the intention of the testator. But in the Court of Probate the inquiry is not so limited, for the intentions of the deceased as to what instruments shall operate as and compose his or her will are to be there collected from all the circumstances of the case taken together." These circumstances were the progressive increase and her intention to make a new will, for that appeared to be her intention; but, on the suggestion of her solicitor, she changed her intention, and determined to carry it into effect by a codicil. The Court observed that these separate codicils so executed by the deceased were deposited by her at her bankers, and were not therefore immediately brought to the notice of her solicitor. She referred to the provision made by her will, not referring to the codicils, and entirely passing them by; and the Court, under these circumstances, was led to the conclusion—for very little parol evidence was admitted, and therefore the case must have been determined on its own peculiar circumstances—that the deceased did not intend that the codicils should form part of the will, and pronounced against them. From what the Court has said this must have appeared principally on the face of the instruments: for the evidence produced was very trifling. The deceased, [823] intending to make a new will, instead of that executed a codicil by the suggestion of the solicitor, without noticing the intermediate codicils, and the codicil confirming the will expressly was in itself quite sufficient to raise that ambiguity on the face of the instruments which justified the admission of parol evidence. I am not aware that there are any later cases which go into this point. Now these cases do not, as it appears to me, go further than this, that if there is a doubt upon the face of the instruments themselves—that is, upon the factum of the instrument—the Court has a right to satisfy itself, by all means, of the intention of the testator, whether one or other, or both of them, should form a part of his testamentary disposition.

In Courts of Equity cases have arisen, not precisely of a similar kind, but somewhat analogous, to these cases. Questions have arisen whether legacies were to be considered as accumulative or as a substitution, the one for the other, and how far parol evidence was to be admitted to explain these written instruments. Several cases have occurred; amongst others that of *Campbell v. The Earl of Radnor* (1 Br. C. C. 271), in 1783. The case was referred to in the argument for the purpose of shewing that the Ecclesiastical Courts admitted parol evidence in order to shew whether legacies were accumulative, or the one substituted for the other. In that case the testatrix, by her will executed in 1761, gave to Mary Call 10l., and she gave a legacy to Mary Wooldridge and Barbara Smith. She made a codicil in 1768, by which she gave Mary Call 40l. [824] instead of 10l. by the will, and she gave to Mary Wooldridge, for herself and her brother, 100l., and to Barbara Smith 200l. By a second codicil in 1777 she gave to Mary Call 40l., as she had done before, and she gave to Mary Wooldridge, for herself and family, 100l., which sum she had given to her and her brother in the preceding codicil; and she also gave to Barbara Smith 300l., which was an increase of 100l. to the sum under the former codicil. The prayer was to establish the will and have it declared that the second codicil had revoked the first; in the course of the proceeding the counsel for the executors offered to read the evidence of Hugh Jackson, the attorney who prepared the second codicil, which was opposed on the other side, the object being to shew that the testatrix at the time of the execution of the second codicil considered that the first was to be immediately destroyed; this was opposed, and Lord Loughborough is reported to have expressed

himself to this effect. "If the reading of the evidence of Jackson is opposed here, I think you had better go upon it to the Ecclesiastical Court for a repeal of the probate of the codicil; that evidence would have been a ground to exclude the codicil from probate." Undoubtedly the Ecclesiastical Court would not have decreed probate if it had been shewn that it was not the intention of the testatrix that both these codicils should operate. But Lord Loughborough does not state on what principle the evidence would be receivable here. I can understand that the evidence would have been received in the Ecclesiastical Court, for the same sum is given to Mary Call of 40l. instead of 10l. in the [825] will, which raised an ambiguity which would let in parol evidence. That is the utmost extent to which that case can be pushed. The result was, the Lords Commissioners decreed that the parties were only entitled to the benefit of the latter codicil.

Many cases have occurred since 1783, and the general result appears to be that no parol evidence is received in Courts of Equity in order to repel the natural construction of two instruments which subsist; but in the case of *Guy v. Sharp* (1 Myl. & K. 589) Lord Brougham, although he rejected the declarations of the testator, was inclined to admit, and did admit *de bene esse*, the evidence as to the circumstances of the deceased and his family as proper to be introduced, in order that he might, as he says, place himself in the situation of the testator as far as he could, and thereby enable him the better to understand his meaning. He rejected the declarations, and said, evidence, whether verbal or written, could not be received to control the construction of a written instrument that spoke for itself, but facts and circumstances relating to the deceased and his family might be admitted for the purpose of shewing what was the real nature of the deceased's intentions as to legacies by two instruments.

The case of *Hurst v. Beach* (5 Madd. 351) was referred to. The question in that case was whether a party was entitled to a legacy under a will and also under a codicil—whether the second legacy was accumulative or substitutional? In the will the deceased said, "I also give and bequeath to John Beach, now living with me, the sum of 300l., all which said [826] legacies I direct and desire may be paid immediately after my decease." By the codicil she gave "to my man servant John Beach a like legacy or sum of 500l.;" the testatrix then gave a like sum of 500l. to her maid servant; and all these legacies she directed to be paid at the end of six months after her decease, without saying anything about interest. In that case a question arose whether parol evidence could or could not be admitted. Sir John Leach's opinion was against the admissibility of such evidence, but he directed an inquiry to be made as to the rule in these Courts, and that a case should be prepared for the opinion of two civilians, and the opinion of Dr. Swabey and Dr. Lushington was taken as to whether there had been any decision in these Courts as to the admissibility of parol evidence in such cases; what was the course of practice here; and whether in such a case we should be governed by the rules of the civil law? The answer to that case was in effect that there was no rule of practice, no decided case of which they were aware, nor were they aware that the point had been brought under discussion; but that we should follow the rules laid down in Courts of Equity, but that in doubtful points, where the authorities did not apply, then the rules of the civil law would most probably be adopted here. They do not believe that the nice distinctions between parol and written evidence, or the admission of evidence in the construction of written instruments, were adopted in that law, but they thought that in the absence of any decided rule on the point in Courts of Equity, parol declarations of a testator would be received. [827] Sir John Leach held, there being no decided case and no rule of practice in this respect in the Ecclesiastical Court, and as the Court of Chancery had no original jurisdiction in such matters, he should follow the principles of the civil law, as they were acted upon in the Ecclesiastical Courts, to whom the decision of the question properly belonged, that parol evidence could not be received, and he rejected it. He says, "In some cases Courts of Equity raise a presumption against the apparent intention of a testamentary instrument, and they will receive evidence to repel that presumption;" he says, "There are obiter dicta for the admission of evidence against intending both to operate; but in *The Duke of Leeds v. Osborne* (5 Ves. 369) the point was fully argued, and Lord Alvanley appears to have inclined against receiving it. It did not, however, become necessary there to decide the question." He said, with reference to other cases that occurred, that Lord Thurlow was inclined to the admission of parol testimony; but he said Lord Thurlow

was frequently made to contradict himself; and Sir John Leach held that at this time there was no case in which parol testimony had been received, and that he could not receive such evidence without breaking in upon the rule that parol evidence is not admissible against the express effect of a written instrument.

Looking, then, at these cases which are said to be analogous to the present case, although not precisely similar to it, I think the Court is bound not to admit parol evidence until it is first satisfied that [828] there is that doubt and ambiguity on the face of the papers which requires the aid of extrinsic evidence to explain it.

Now, the codicil propounded (dated the 24th of September, 1838) gives the sum of 2000l. to Frances Sophia Stafford, born Thorne, to be paid to her within three months after the testator's death; and it was delivered to her, and remained in her possession at the time of the death of the deceased.

The object of the next codicil (of the 26th of April, 1839) was to make a provision of a different kind for her, namely, to give her an annuity in the dividends of 13,433l. 6s. 8d., three per cent. consols for life, taking particular care that she should not dispose of the property by way of anticipation; it also gave her 100l., to be paid to her within a month of the testator's death.

Looking at the face of this instrument there is no reference made to the former codicil; there are no words from which the Court can infer that it was intended as a substitute; it is deficient in those two points which are considered important in a Court of Construction to raise a presumption against the intention, namely, the same sum given for the same cause expressed. There are not the same causes expressed, nor the same sum given by both codicils; there are not things ejusdem generis; it is an annuity given her, secured for her benefit and provision hereafter, that she might not dispose of the annuity, that she might not charge it by way of anticipation; but that it might secure this provision during the whole of her life. It is quite impossible to say, on the face of the two papers, that [829] they do present such a case of ambiguity as render it impossible that the deceased did intend to make this provision for the lady in addition to what he had given her before. Surely there is nothing inconsistent on the face of the papers with each other. What is to prevent these papers from operating together? What is there from which the Court can presume that the deceased did intend to substitute one for the other? The only surmise is that the provision seems large (2000l.) and the annuity from the consols. But they are not ejusdem generis. There is no reason to suppose it was the deceased's intention, as far as the papers are concerned, to substitute the one of these papers for the other. It is possible that he meant to do so; but it is very possible that he might intend to make an addition to the provision formerly made. I cannot say, however, that upon the face of the instruments I can perceive anything in the nature of doubt and ambiguity sufficient to justify me in admitting parol evidence to shew that it was not his intention that the two papers should operate together.

The case, therefore, is very materially distinguished from *Methuen v. Methuen* and *Greenough v. Martin*; they bear in point of fact very remotely on this part of the question. They are not a departure from the principle to be extracted from *Fawcett v. Jones*. I do not think it is necessary to go into the case of *Smith and Blake v. Cunningham*, that turned upon the circumstances in which the codicils were themselves found; though there is a passage in the judgment which is not unimportant, "The intention to revoke must be clear and unequivocal in order to effect their actual revocation, [830] all legal presumption being obviously in favor of instruments so prepared and executed."

I consider, therefore, upon the face of these papers there is not such an ambiguity raised as would lead to the inference that it was not the intention of the deceased to give operation to both of them; supposing, however, that the circumstances were such that the Court could receive this allegation, are the contents of the allegation such as would satisfy the Court that the two papers were not intended to operate together? (The learned Judge, having then considered each of the articles of the allegation separately, continued.) If I were at liberty to admit parol evidence in this case, the facts offered in this allegation are not such as would satisfy the mind of the Court that the papers were not intended to have the effect and operation which *primâ facie* they are entitled to, being executed by the deceased and attested by two witnesses and rendered perfect and complete at the time of the death of the testator. I should therefore be of opinion under the old law that this allegation was not admissible.

The alterations effected by the new statute, it is not necessary to consider; the new statute is not more favorable to the admission of parol evidence. The statute tends very much to exclude revocation; indeed, as to revocations by implication, they are, with one exception, that of marriage, entirely swept away, and a subsequent marriage is now an absolute revocation of a previous will.

The Court rejected the allegation.

The cause subsequently (December 3rd, 1841) came on for hearing upon the evidence of the at-[831]-testing witnesses, when the Court, being of opinion that the execution was fully proved, pronounced for the validity of the codicil and directed the costs of the party propounding it to be paid out of the estate.

IN THE GOODS OF JANE SOTHERON, Widow, Deceased. Prerogative Court, 9th June, 1841.—Motion for probate of a paper as part of the will, it being referred to in the will and signed by testatrix, rejected, the paper not having been attested by the witnesses nor produced before them.

[S. C. 1 Notes of Cases, 73. Followed, *In the Goods of Countess Dowager of Pembroke*, 1856, Deane, 182. Referred to, *Allen v. Maddock*, 1858, 11 Moore, P. C. 461.]

The testatrix died on the 4th of April last. On the 11th of February she executed her will in the presence of two witnesses who duly attested it. In the will there was the following clause:—"And I also wish that my executors shall observe the instructions I have left respecting my jewels, trinkets, &c." Prior to the execution of the will the testatrix produced to one of the witnesses a paper in her handwriting and subscribed by her, dated the 12th of December, 1839, and said it was the paper referred to in her will; and the testatrix, at the suggestion of the witness, in order to identify the paper wrote upon it, "These are the instructions referred to in my will as having been left respecting my jewels, trinkets, &c.," and subscribed her name, "J. Sotheron, February 11th, 1841."

Curteis prayed probate of the will with this paper as being incorporated therein, it being referred to in the will and identified by the testatrix; there being no other instructions.

[832] Sir Herbert Jenner. The statute requires that a will or codicil shall be signed at the foot by the testator, in the presence of two witnesses present at the same time, and that they shall subscribe their names to it in the testator's presence. I am not aware of any case in which it has been held that a paper should form part of a will by merely being referred to in the will. A subsequent codicil duly executed has been considered to be an execution of a prior codicil, it being referred to in that subsequent codicil; although the first codicil had not been attested. But this paper was not produced to the witnesses, and is not attested. I must reject the motion.

IN THE GOODS OF F. B. COLBERG, Deceased. Prerogative Court, June 19th, 1841.

—A will being torn into four pieces by the testator is *primâ facie* revoked. The Court will not, on motion, upon an affidavit that the deceased tore the paper in a fit of anger, and did not intend to revoke it, decree probate of such a paper, in the absence of the next of kin.

[S. C. 1 Notes of Cases, 90.]

The deceased left a will dated September 2nd, 1840, with a codicil written on the same paper. The testator, in a moment of irritation, tore the will into four pieces, but afterwards, repenting of what he had done, desired his housekeeper to stitch the will together again, saying he did not mean to destroy the will.

Addams prayed probate, submitting that the will was not revoked, the deceased having torn it in a fit of momentary spleen, and not *animo revocandi*, as required by the act.

Sir Herbert Jenner. The deceased having torn the will into four [833] pieces, it must be presumed *primâ facie* that he intended to revoke it; if the paper were propounded in an allegation, and witnesses examined in support of it, I should probably be of opinion that it was not revoked, as in *Doe d. Perkes v. Perkes* (3 B. & Ald. 489); but the Court cannot upon an *ex parte* motion decree probate in the absence of the next of kin.

Upon a proxy of consent from the next of kin probate may pass.

BREALY, FALSELY CALLED REED *against* REED. Consistory Court of London, July 22nd, 1841.—Nullity of marriage by reason of undue publication of banns pronounced for; both parties being cognizant of the undue publication.

[S. C. 1 Notes of Cases, 121.]

This was a cause of nullity of marriage by reason of undue publication of banns promoted by Elizabeth Breal, falsely called Reed, against Robert Charles Reed, her pretended husband.

The libel pleaded—

First. The statute of the 4th Geo. IV. c. 76, the 2nd, 7th, and 22nd sections.

Second. The baptism of the man as Robert Charles Reed, on the 19th of July, 1809.

Third. Exhibited a copy of the entry of the baptism in the register book.

Fourth. That Elizabeth Breal, spinster, the party proceeding in the cause, was the only daughter of George Breal, deceased, and Jane Breal, his wife, and in the latter end of 1827, and the early [834] part of 1828, was residing with her said mother (since deceased) at the house or cottage of John Scott, her second husband, in Bedminster, where the said John Scott carried on his business of a carpenter, and a back-parlour in the said house or cottage was the only sitting-room, and was occupied in common by John Scott and Jane Scott his wife, and the said Elizabeth Breal, and Harriett Scott, her sister by the half-blood, now Harriett Morgan, wife of William Morgan.

Fifth. That the said Robert Charles Reed in 1827 and 1828 resided with his father, that he was commonly called or was known by the name of Charles, or Charley Reed only, by and amongst his family and friends, and by and amongst the neighbours, friends, and acquaintance of his said father and others, and not at all by the name of Robert, which was entirely dormant and disused.

Sixth. That in 1827 and 1828 the said Robert Charles Reed paid his courtship and addresses to the said Elizabeth Breal, who was then a spinster of the age of seventeen years, or thereabouts, without the knowledge of his father, with whom he then resided, and upon whom he was solely dependent for his support; that he frequently visited her in the presence of her family in the said back parlour of the house or cottage of the said John Scott; that she agreed to be married to him; that he represented that his marriage with her would be highly displeasing to his father; that thereupon and for the purpose of effecting the marriage clandestinely, and of concealing it from his father, it was concerted and arranged by the said Robert Charles Reed, Elizabeth Breal, John Scott [835] and Jane Scott, that the banns for their said marriage should be published in the name of Robert Reed only, and that the name of Charles, by which he was commonly known, should be omitted or suppressed—that although it was well known by the said Robert Charles Reed, Elizabeth Breal, John Scott and Jane Scott, that publication of the banns of the said marriage in each of the parishes where the said Robert Charles Reed and Elizabeth Breal resided respectively was required by law, and that directions to that effect were clearly set forth in the rubric, prefixed to the office of matrimony in the Book of Common Prayer of the Church of England, of which Church they, the said Robert Charles Reed, Elizabeth Breal, John Scott and Jane Scott were members; nevertheless it was further concerted and arranged by them that the banns of the said marriage should not be published in the parish of St. Nicholas, where the said Robert Charles Reed resided, but that a publication of banns, with the false name as aforesaid, should be made in the parish of Bedminster only. And that because it was well known by the said Robert Charles Reed, Elizabeth Breal, John Scott and Jane Scott that if the clergyman who should be required to solemnize matrimony between the said Robert Charles Reed and Elizabeth Breal in the said parish of Bedminster should know that one of them did not dwell within the said parish, the said clergyman would not solemnize the said marriage unless it should be certified to him by one of the ministers of the parish wherein the said Robert Charles Reed did dwell, that the banns had been thrice asked in the [836] said parish where the said Robert Charles Reed did so dwell. Therefore, and in order to deceive the clergyman who should be required to solemnize the said intended marriage, and to prevent his demanding such certificate, and for the purpose of effecting the said intended marriage clandestinely as aforesaid, it was further concerted and arranged by the said Robert Charles Reed, Elizabeth Breal, John Scott, and Jane Scott that in the notice for the

publication of banns which it was necessary to deliver to the minister of the parish where the said marriage was to be solemnized (Bedminster), it should be falsely stated that the said Robert Charles Reed and the said Elizabeth Brealy did then dwell in one and the said parish (Bedminster), and not, as the fact was, in divers parishes. That in pursuance of the said preconcert and arrangement the said Robert Charles Reed caused the banns of marriage to be published in the said parish church of Bedminster for three successive Sundays, &c., between the said Robert Charles Reed and the said Elizabeth Brealy, described therein respectively as Robert Reed, bachelor, and Elizabeth Brealy, spinster. That the said Robert Charles Reed was, as before pleaded, baptized by the names of "Robert Charles," and had constantly and upon all occasions previous thereto passed and been known by the Christian name of "Charles" only and not at any time by the name of "Robert;" and that as well before as after the said publication of banns, the said Robert Charles Reed was constantly in the habit of answering when spoken to in the name of Charles only, and so constantly spoke of and described himself, and by no other [837] Christian name, and had constantly and on all occasions omitted to use the name of Robert in signing his name or otherwise, save on the occasion of the said pretended publication of banns and of the pretended marriage pleaded; and that the said name of "Charles" was knowingly and wilfully suppressed or omitted by the said parties jointly and severally, for the purpose of deception and concealment, and with the intent to effect a clandestine celebration of the said then intended marriage.

Seventh. The celebration of the marriage on the 18th of February, 1828, in pursuance of the banns so unduly and illegally published; that the Reverend T. F. Jennings, the minister who performed the ceremony, was and is in the constant habit of inquiring and ascertaining from persons about to be married if the banns have been duly published, and that at the time of or previous to the pretended solemnization of the said marriage he asked and inquired of the said Robert Charles Reed and Elizabeth Brealy respectively if their names and residences had been and were truly set forth, or to that effect, and that the said Robert Charles Reed and Elizabeth Brealy then knowingly and wilfully suppressed the said name of "Charles."

Eighth. Exhibited copies of the entry in the banns-book and in the register-book of marriages.

Ninth. Pleaded the signatures in the marriage-register to be in the hand-writing of the parties in the cause.

Tenth. That immediately after the pretended marriage the parties took up their abode in the house or cottage of the said John Scott, and after-[838]-wards resided in various lodgings; and that the said Robert Charles Reed went and took his meals daily, or frequently, at the house of his father, until he discovered the marriage, when he forbade his son to enter his house, and refused him any pecuniary or other assistance, &c.

Eleventh. That the said Robert Charles Reed and Elizabeth Brealy, shortly after their said pretended marriage, and during the time they lived and cohabited together as man and wife, jointly and severally, and in each other's presence, frequently declared to Charles Morgan and his wife, Mary Ann Morgan, and others, that the said Robert Charles Reed was married in the name of Robert only, and that the banns for the said marriage were published in that name to prevent his father hearing of the said marriage, or declared to that or the like effect, and that the said Robert Charles Reed, within a short period of his marriage, so declared to his said father, or to that effect, &c.

Twelfth. That in 1832, unhappy differences having arisen between the parties, they ceased to cohabit together, and that in May, 1834, Robert Charles Reed intermarried with another wife; that Elizabeth Brealy was not until 1840 informed or advised that the marriage between her and the said Robert Charles Reed was null and void; that the said Robert Charles Reed frequently confessed that his former marriage was null and void, and, when questioned by Harriett Morgan, did distinctly affirm and declare that he never had been legally married to the said Elizabeth Brealy, &c.

The thirteenth and fourteenth were the usual concluding articles.

[839] Eight witnesses were examined in support of the libel.

Jenner for Elizabeth Brealy submitted that the libel was fully proved, and prayed a sentence of nullity.

No counsel appeared on behalf of Mr. Reed.

Judgment—Dr. Lushington. This is a suit brought by the wife for the purpose of having her marriage pronounced null and void, by reason of the undue publication of banns. The proper names of the husband are "Robert Charles" Reed: but, in the publication of the banns, that of "Charles" was omitted.

Now, there are certain facts in the case which are clearly and distinctly proved; they are the following: First, the marriage itself; secondly, the publication of the banns: for the extract from the banns-book, which is annexed as an exhibit to the libel, sufficiently establishes this fact; thirdly, that the husband was most usually called and known by the name of "Charles," and never (so far as appears from the evidence) by that of "Robert;" fourthly, that the marriage was clandestine, and clandestine for the purpose of concealing it from the knowledge of the father of the husband, who was in circumstances far superior to those of the wife's family. The last, and by far the most important, requisite is, that the undue publication shall have taken place knowingly and wilfully, as relates to both the parties [840] to the marriage. I apprehend it is now distinctly stated that this is what the law requires; and as the Court has some reason to believe that a sentence of nullity is desired by both parties, it has a grave duty to perform, in examining the evidence, to be thoroughly satisfied as to the proof on this important point.

The most material witness to this fact is Mrs. Morgan, the half-sister of Elizabeth Brealey, the wife, and the first circumstance which is calculated to alarm the jealousy of the Court is that she is deposing to facts which occurred thirteen years ago, she having been only fourteen years of age at the date of the transaction. Now it is certainly somewhat suspicious that, being so young, her memory, after so great a lapse of time, should be so retentive of the species of facts to which she has deposed, as to enable her to recollect precisely what occurred. Her evidence upon the sixth article is to the following effect:—"On several occasions, before the marriage took place, Mr. Reed, in the presence of my sister and my father and mother, talked over with them the matter, as to the best way of having it done to prevent it coming to his father's ears. I well remember that Mr. Reed said that, if the banns were put up in his name of 'Robert' only, he should not be known. I well remember that my sister had always called him 'Charles' up to that time. I also remember that when Mr. Reed urged my father to put up the banns in his (Reed's) name of Robert only"—I am a little staggered, I confess, at this—"my father, who is a straight-forward man, made some objections, but my mother being very anxious to have my sister married, he (my father) [841] was prevailed upon to put the banns up in the names as proposed by Mr. Reed. My sister was present and privy to all the conversations which took place between Mr. Reed and my father and mother about getting the banns put up. I myself have heard Mr. Reed ask my father and mother to have the banns put up in his (Reed's) name of 'Robert' only; my sister was present at the time;" fixing the presence of her sister precisely at the moment when it was very important, "she knew that the banns were to be so put up, in order to prevent the said intended marriage coming to the ears of Mr. Reed's father." She gives all these particulars with all this minuteness, deposing that they took place in the presence of her sister; that her sister was privy to all these conversations between Reed and her father and mother about putting up the banns in this manner, and that the banns were so put up in order to prevent their publication coming to the ears of Mr. Reed's father.

Now supposing the whole of the evidence of this witness to be deserving of credit, the effect of it will be this, that Reed, the husband, for the express purpose of having the marriage solemnized without the knowledge of his father, and to prevent the publication of the banns from coming to the ears of his father, did propose to Scott, his intended father-in-law, that he should leave out the name of "Charles," and that this was not only done by Mr. Reed himself, but done by him in the presence of his wife, so that we have both parties affected with the guilty knowledge. I confess the very strength of this evidence goes a great way not only to excite suspicion in my mind, but to make me doubt its [842] verity. But I go to the further evidence as to this fact, namely, the evidence of Mrs. Chettell, for I believe there is no other evidence of the fact.

This witness is a markswoman; she has been examined upon the sixth article, and she deposes to a conversation which took place thirteen years before, at which Mr. Reed was not present. She says that on one occasion Mrs. Scott said it was an improper thing for her daughter, Elizabeth Brealey, who was present, to marry a man

in the name of "Robert" when his name was "Charles"—a very improbable thing—and that such a marriage would not stand. She says, "My mother, I well recollect, said that if she (Elizabeth Brealy) was a child of hers she would not allow her to marry so. I also remember that Elizabeth Brealy, on the said occasion, jumped up from her chair, and in an angry manner said that she was determined to have Charles Reed, and that it did not signify if he was married by the name of 'Robert,' because he had promised at some future time to marry her in his own name. Charles Reed was not present when this conversation took place, neither was John Scott present; but I recollect that it was said by Elizabeth Brealy that they should be obliged to be married so, namely, Charles Reed by the name of 'Robert,' in order that his father might not hear of it." Here is evidence applying simply to Elizabeth Brealy, and in a very stringent manner, not only to her guilty knowledge, but making her a principal party in the transaction, not very consistent with the testimony of Mrs. Morgan.

Then the case comes to this, that the whole evidence as to the publication of the banns, and as to [843] the putting up of the banns with the omission of the name of "Charles," with the knowledge and consent of both of the parties, stands upon the testimony of one witness, a girl of fourteen years of age at the time.

If it stood only so, I confess I should entertain the greatest doubt as to the course I should pursue, and as to the decree I ought to pronounce in this case; because I must not forget that, in trying a case of this description, I should not look simply to the circumstances of the individuals in the cause, but also bear in mind that the rights of children may be involved, and that the decree of the Court may determine that they are in a state of illegitimacy; it is therefore highly incumbent upon the Court, in a case of this description, especially where there is reason to suspect that both parties are desirous of having the marriage annulled, to examine with great accuracy and care the whole facts of the case.

There are, in addition to what I have stated, certain declarations of Elizabeth Brealy pleaded in the eleventh article, that Mr. Reed was married in the name of "Robert" only in order to conceal the marriage from the knowledge of his father; and Mr. Charles Morgan has been examined on this article, and deposes to the fact that Mrs. Reed stated that her husband was married to her in the name of "Robert" in order to keep the marriage a secret from his relations; and Mr. Arnould, the uncle of Mr. Reed, states that his nephew told him, in the presence of his wife, that they had been so married in order that his father might not know of it. I place very little confidence in these subse-[844]-quent declarations, and I think a grave doubt may be entertained whether such subsequent declarations, in a case of this kind, made long after the marriage, are admissible as evidence, because, in these cases, one party or the other might by admissions affect the status of other parties, by reason that the interests of the parties in the cause are not confined to themselves, but extend to their children and to the public. The declaration of the wife may by possibility be evidence against the husband, or vice versa; but where it affects the children, I doubt whether such declarations could be received.

But there is another part of the case which it is my duty to notice, and it is a most important part, as relates to the publication of the banns; I mean the evidence of the clergyman, which satisfies my mind that the marriage was solemnized with the omission of the name of "Charles," and the entry in the register would satisfy me also of that fact if I had any doubt; and there is equally clear evidence to shew that the banns were put up with the omission of the name of "Charles." Now, how far do these two facts bear upon the question whether there was a guilty knowledge of the omission of the name? I think they have an important bearing, and so important that, although I do not credit the whole of the evidence of the two witnesses, yet, under all the circumstances of the case—the clandestinity of the marriage being proved, the constant use of the name of Charles being proved, and all the other facts—taking the whole of the case together, it seems to me difficult to come to any other conclusion that can be justified by the evidence, than that the omission of the name [845] of "Charles," wilfully and knowingly, is sufficiently brought home to both the parties; and I, therefore, may pronounce a sentence of nullity of marriage.

MENZIES *against* PULBROOK AND KER. Prerogative Court, August 3rd, 1841.—

A creditor has no right to oppose a will.

[S. C. 1 Notes of Cases, 132. Referred to, *Hawke v. Wedderburn*, 1868, L. R.

1 P. & D. 595.]

On petition.

In this case a question was raised whether a creditor has a right to contest the validity of a will and oppose probate passing to the executor.

Nicholl and Bayford for the creditor.

Addams and Curteis *contra*.

Sir Herbert Jenner. The present question comes before the Court by way of petition, to be heard against probate being granted to James Menzies, as executor of the will of Mr. James John Fraser, deceased. He died on the 3rd of June, 1839, leaving Jane Fraser, a sister, his next of kin; shortly after his death a will was produced, dated September, 1833; a codicil, dated July, 1834, and a second codicil, dated April, 1836, by which his sister was appointed sole executrix and universal legatee; she renounced her right to [846] probate, and a meeting of the creditors of the deceased having taken place in Edinburgh, at which Mr. Menzies was present, certain proceedings were adopted, in order to qualify Mr. Alexander Millar to take administration to the deceased's effects, and he was appointed executor *dative quâ* creditor by consent of all parties; he shortly afterwards applied in this Court for administration here; that application was opposed by Mr. Menzies as a creditor. I state these proceedings briefly to shew under what circumstances the question arises; although it is not material to the point now before the Court to do so. These testamentary papers were in the hands of the proctor of Mr. Menzies, but they were withdrawn by him, and a monition was prayed against him (Menzies) to bring them into Court; that monition was served upon Mr. Menzies, but not before he was pronounced in contempt did he produce the papers; he then declared that he proceeded no further in that case, and then produced a subsequent will. The Court was of opinion that Mr. Millar was entitled to his costs, and condemned Menzies in those costs; but no actual dismissal of the parties from that suit took place; the costs, however, were paid and the case was not continued in the books. Menzies was then about to take probate of this latter paper, when caveats were entered by Anthony Pulbrook and Thomas Collingwood Ker, creditors of the deceased, who prayed to be heard on their petition against the probate issuing: the Court was inclined to reject their claim to oppose the probate, but granted permission to them, under an intimation that they would do so at the risk of costs.

[847] A long petition has been entered into; whether a part of that petition has been properly introduced I shall not now stop to consider; the first question is whether the creditors have established their right to oppose the will? I shall confine myself to that point.

It was admitted, when the application was made, that a very strong feeling was entertained that creditors had no right to contest the validity of a will, and that there were very strong dicta to that effect; but it has been contended that there is no direct precedent establishing the point; and that the supposed rule depended upon one single case, that of *Burroughs v. Griffiths and Hall* (1 Lee's Cases, 545), in which the point was not expressly raised and determined, and that even in that case, in point of fact, the creditor was heard against the will. It certainly did appear to me that this was a novel application, and against the understood rule and practice of the Court; and no case has been cited in which a decision was given in favour of the creditor.

Whatever were the circumstances in the case of *Burroughs v. Griffiths*, both Sir Wm. Wynne and Sir John Nicholl were strongly of opinion that a creditor had no such right. They adopted the rule without any doubt as to its propriety. In *Elme v. Da Costa* (1 Phill. 173) it was contended by Sir Wm. Scott and Dr. Nicholl that a creditor, when in possession of an administration, might contradict a will, and *Mrs. March's case* was referred to. Dr. Harris and Dr. Swabey on the other side denied that a creditor [848] had any right to oppose a will. Sir Wm. Wynne expressed himself to this effect: "The right of a creditor is only this, he cannot be paid his debt till a representation of the deceased is made; he can call on all who have a right to administer; before an administration is granted, if a will be produced, the creditor has no right to contradict or deny it; for if there is a will, or a next of kin claims the administration,

then a person offers to make himself a representative, and the creditor gets all that he has a right to." This appears to me to be a very strong expression that a creditor has no right to oppose a will, and that all that he has a right to is that there should be a representation; although this does not expressly determine the point, it is so strong a declaration that the Court would be inclined to adhere to it; and in *Dabbs v. Chisman* (1 Phill. 155) Sir John Nicholl expresses his opinion equally strongly, "A creditor cannot deny an interest or oppose a will." These two cases, then, the one in 1791 and the other in 1810, affirm the rule, and the expressions are so strong that, unless there be something to contradict them or to shew that the rule is wrong in principle, the Court would be bound to adopt it.

What, then, was the case referred to of *Burroughs v. Griffiths*? The case is reported very shortly, and as it is not exactly stated how the question arose, I have had the proceedings in the case looked up; it seems that it was a proceeding to this effect—"a business of proving in solemn form the last will of Mr. James Strangeways, by Samuel Burroughs, [849] the sole executor against Thomas Griffiths, a pretended creditor, and claiming an interest." It certainly does appear in that case that affidavits were exhibited by the creditor against the will, and by the executor in support of it, and *prima facie* it would seem that the creditor had been allowed to impugn the will, but in giving judgment Sir Geo. Lee says that he heard the counsel for Griffiths as *amicus curiæ*, and not as counsel for a person who had a right to appear, and that the creditor had no right to oppose the will. Now, I cannot think that this case was decided by Sir George Lee without deliberation. It was said that, as Sir George Lee had erroneously held that a creditor had no right under an administration bond, he might upon that ground have held in this case that the creditor had no right to oppose a will; but still Sir Wm. Wynne and Sir John Nicholl adopted the rule, well knowing that a creditor had a right in an administration bond, and expressly declared that a creditor could not contest a will.

Another case was mentioned in the argument, that of *Newman v. Bourne* (cited 1 Phill. 178), which was referred to by Sir Wm. Wynne in *Elme v. Da Costa*, and he said that in that case a creditor having an administration decreed, though not under seal, was allowed to oppose a nuncupative will; unfortunately the proceedings in that case cannot be found.

These cases then appear to me to establish the rule of practice as contended for by the counsel for Menzies, and to be precedents which the Court must adhere to, unless the principle on which they [850] are founded be shewn to be unsound. Now, some cases (a) were cited in which a creditor has been allowed to contest the right to administration against the next of kin; but in those cases it appeared that the next of kin had no interest in the property, and they do not affect the question before the Court.

I apprehend that a creditor, except by the practice of the Court, has no right to the administration of the estate of a party deceased; he has no right by the statute: he is the appointee of the Court, and I do not know, if circumstances shewed that the creditor was not a proper person, that the Court might not appoint another person.

The rule contended for in this case is founded in reason and sound sense. Sir George Lee says, "If a creditor was admitted to dispute the validity of a will, it would create infinite trouble, expense, and delay to executors," and I think much inconvenience; if a creditor has a right to oppose a will, he has an equal right to call in a probate, and put the executor upon proof of the will in solemn form; and if one creditor has this right, every creditor has it; and if a creditor has a right to oppose a will, an executor has a right to oppose the interest of a creditor; and the Court would be called upon to determine questions out of its jurisdiction, whether a debt was barred by the Statute of Limitations; whether the instrument under which the creditor claimed was duly stamped, and various other points. I am therefore clearly of opinion that the rule which has been acted upon so long ought not to be disturbed.

[851] I do not think that because a creditor has a right to sue upon an administration bond, he has a right to oppose a will. No case has occurred, in modern times, in which such a claim has been allowed. That a creditor who has obtained a grant

(a) *Furlonger v. Cox*, 3 Phill. 381. *Bridges v. The Duke of Newcastle*, *ibid.* *West v. Wilby*, 3 Phill. 374.

of administration may contest a will, without costs, does not affect the question; he is then the appointee of the Court, and defends that character, and does not appear simply as a creditor.

It was stated that, but for the conduct of Mr. Menzies, Mr. Millar would have been in possession of a grant of administration, and that Menzies ought not by his own wrong to be put in a better situation; if Millar had been the party seeking to oppose this will, there would have been some force in the observation, but he does not appear before the Court.

Upon the whole I am of opinion that this petition ought to be rejected, and without entering into the particulars set forth in the petition, this being a question merely as to the right of a creditor to oppose a will, that Messrs. Pulbrook and Ker ought to be condemned in the costs occasioned to Mr. Menzies.

The Court is not at present in a position to grant probate to Mr. Menzies, there being still an administration outstanding in Scotland, where it would seem the deceased was domiciled, and Mr. Millar being in possession of that administration, has a right here to oppose Mr. Menzies having probate of this will. At present I shall content myself with rejecting this petition with costs.

[852] IN THE GOODS OF ANN SOWERBY, Deceased. Prerogative Court, July 8th, 1841.—Administration of the effects of a former wife refused to the representative of a second wife who had taken out administration to her husband, the next of kin of the husband not having been cited.

[S. C. 1 Notes of Cases, 107.]

Ann Sowerby died on the 17th of August, 1806, leaving her husband, Robert Sowerby, surviving. She left property, 1000l. South Sea stock, standing in her name. Robert Sowerby married again, and died in May, 1830, intestate, leaving his second wife surviving, who was entitled by the custom of London to three-fourths of his property; she took out letters of administration to Robert Sowerby, but died in 1838, leaving the 1000l. South Sea stock still standing in the name of the first wife. The executor and residuary legatee of the second wife now prayed administration to the effects of Ann Sowerby, the first wife, without citing the husband's next of kin.

Nicholl. In all cases not within the statute it is the course of office that the administration should follow the interest; the only excepted case was that of a wife's next of kin, but that is now altered (see *Fielder v. Hanger*, 3 Hagg. Ecc. 769). The second wife in this case was entitled to three-fourths of her husband's property; her representative has, therefore, a much larger interest than the husband's next of kin, who are twenty-four in number; it would lead to much inconvenience if they are to be cited; besides, if a decree be taken out, it ought only to be to shew cause, as the party now applying is entitled to the grant. In *Lovegrove v. Lewis* (2 Hagg. Ecc. App. 154) there was no [853] citation, nor in *Rees v. Cart* (2 Hagg. Ecc. App. 161), where a caveat had been entered against the grant.

Sir Herbert Jenner. The widow of Robert Sowerby took out administration to her husband, who died intestate; she was then entitled to represent the first wife, Ann Sowerby; her executor can only be entitled to represent the first wife through Robert Sowerby; there must be a representation to Robert Sowerby.

According to the practice of the Court the representative of the second wife is not entitled to represent the first wife without citing the husband's next of kin, or their renouncing.

My opinion is that there should be a representative of the husband in the first instance, and then his representative would be entitled to take administration to the first wife. There must be a decree against the husband's next of kin; my impression is that they are entitled in the first instance.

IN THE GOODS OF JOSEPH WILSON, Deceased. Prerogative Court, August 3rd, 1841.—Motion to supply a legacy omitted by mistake rejected, the will being perfect and having a clause revoking all former wills.

[S. C. 1 Notes of Cases, 128.]

Addams prayed probate of two papers of the 21st of January and 5th of February last, as together containing the will of the deceased, under the circumstances stated by the Court.

[854] Sir Herbert Jenner. The testator, Joseph Wilson, died on the 5th of

February, in the present year: on the 20th of January he gave instructions for a will, and that will was executed; he discovered afterwards that a legacy had been omitted, whereupon he directed a codicil to be prepared, but a new will was made, which the testator executed. A codicil was afterwards prepared, which the deceased attempted to execute, but failed to do so through weakness. Then a new will was prepared, but unfortunately the will of the 20th of January was taken as a draught instead of the second will. It would be extremely difficult for the Court to supply from one paper that which has been revoked by a subsequent paper, for the last will revokes all former wills. Under the present statute the Court cannot supply this omission; I think the Court has no power to do this. I must reject the motion.

WALKER against WALKER. Prerogative Court, August 3rd, 1841.—Marriage and the birth of a child an absolute revocation of a will prior to Jan. 1838.

[S. C. 1 Notes of Cases, 131.]

The testator died on the 3rd of April, 1841. He made a will on the 6th of September, 1834. In July, 1837, he married his present widow, by whom he had one child; he also left three children, who were minors, by a former wife.

The Queen's advocate moved for administration to the deceased as dead intestate to be granted to the widow. He submitted that the will was ab-[855]-solutely revoked by the marriage and birth of a child. It was so held by the Judicial Committee in the case of *Israell v. Rodon*.(a)

Sir Herbert Jenner. Upon a service of a decree upon the minors in the presence of their guardian the administration may pass.

COLLIER against RIVAZ. Prerogative Court, August 3rd, 1841.—Testator died domiciled in Belgium; he left certain testamentary papers executed not according to the forms required of Belgian subjects, but the law of Belgium, under the particular circumstances of the case, determining the validity of the testamentary instruments according to the laws of testator's own country. The Court pronounced in favour of the papers, they being valid instruments by the law of this country, in which the deceased was previously domiciled.

[See 1 Notes of Cases, 369. Referred to, *Maltass v. Maltass*, 1844, 1 Rob. 72. Questioned, *Bremer v. Freeman*, 1857, 10 Moore, P. C. 374. Referred to, *Hodgson v. De Beauchesne*, 1858, 12 Moore, P. C. 328; *Crookenden v. Fuller*, 1859, 1 Sw. & Tr. 455.]

Philip Ryan, the deceased in this case, formerly of Warren Street, Fitzroy Square, but lately of the city of Brussels, died in Brussels, 1829; he left a will and six codicils; four of those codicils were not executed according to the forms required by the law of Belgium, in which country, it was contended, the deceased died domiciled, and those codicils were opposed on that ground. The circumstances of the case are stated in the judgment of the Court.

The Queen's advocate and Nicholl argued in support of the codicils, and Addams and Harding contra.

Judgment—Sir Herbert Jenner. This is a question with respect to certain testamentary papers of Mr. Philip Ryan, who died at Brussels in 1829. He left behind him two nieces, Mary Ryan and Mrs. Langebear, a widow, who would have been entitled to his personal estate in [856] case he had died intestate. He left property to the amount of about 20,000l. In September, 1824, he executed a will, of which he appointed Mr. V. F. Rivaz, Mary Ryan, and A. H. Rivaz, executors, and his niece, Mary Ryan, residuary legatee; he also left behind him six codicils, four of which are opposed, upon the ground that they are not executed according to the forms of the law of Belgium, in which country it was contended that the deceased was domiciled at the time of his death.

The first question then is, whether or not Mr. Ryan, the testator, was domiciled in Belgium; it is admitted that if he had not his domicile in that country, the codicils in question are entitled to probate according to the law of England; on the other hand, it is said that, whether the testator had his domicile in Belgium or not, these codicils are entitled to probate, as executed according to the law applicable to the

(a) 2 Moore, P. C. C. 43, and see *Fox v. Marston*, 1 Curt. 494.

circumstances of this particular case in Belgium, although they are not executed according to the forms required from Belgian subjects generally.

Now the history of the deceased is briefly as follows:—He was born at Clonmell in Ireland; in 1762 he entered into the British Navy, in which he continued to serve until 1780. In 1776 he married at Rochester, and his wife died about 1802. The deceased was engaged in business as a dealer in foreign cambrics, and, in consequence of that business, was frequently in the habit of resorting to different places on the Continent for the purposes of that trade, but his principal residence was in this country, where he had a house in Warren [857] Street, Fitzroy Square, which he sold in 1802. There could then be no doubt that up to this time he had abandoned his original Irish domicile, and had acquired one in England. In 1802 he went to Brussels for the purpose of residing there, as is stated by him in a codicil before the Court, dated the 24th of September, 1825; in 1803, the war between England and France being renewed, the deceased was detained as a prisoner; in 1814 he came to England, and remained here for a few months; he afterwards returned to Brussels, and continued to reside there until his death, with occasional excursions on matters of business or pleasure. It also appears that in early life he had adopted his niece, Mary Ryan, and she went to live with him at Brussels, and continued to reside with him until his death.

I cannot think it necessary to go at any length into the facts of the case, because they are all admitted; there is no dispute as to them; the only question is as to the result of them. Now, I cannot but think that all the facts, with respect to the abandonment of the old domicile and the acquisition of a new one, indicate not only an intention to reside at Brussels, and make that place his home, but that the fact and intention concur together, which is all that is necessary to constitute a domicile. Length of time will not alone do it, intention alone will not do, but the two taken together do constitute a change of domicile. No particular time is required, but when the two circumstances of actual residence and intentional residence concur, there it is, that a change of domicile is effected. In this [858] case I can have no doubt, from the facts, that this was the deceased's selected place of domicile; though from 1803 to 1814 it was a forced residence, yet from that time, 1814, he became habituated to the manners of Brussels and the inhabitants of Brussels, and preferred to make his continental residence in that place to a return to his original domicile. I am, therefore, of opinion, under the whole circumstances of the case, that the testator must be considered to have been domiciled at Brussels at the time of his death.

The question, however, remains to be determined whether these codicils which are opposed are executed in such a form as would entitle them to the sanction of the Court which has to pronounce on the validity of testamentary dispositions in Belgium, in the circumstances under which they have been executed. Because it does not follow that, Mr. Ryan being a domiciled subject of Belgium, he is therefore necessarily subject to all the forms which the law of Belgium requires from its own native born subjects. I apprehend there can be no doubt that every nation has a right to say under what circumstances it will permit a disposition, or contracts of whatever nature they may be, to be entered into by persons who are not native born, but who have become subjects from continued residence; that is, foreigners who come to reside under certain circumstances without obtaining from certain authorities those full rights which are necessary to constitute an actual Belgian subject. Every nation has a right to say how far the general law shall apply to its own born subjects and the subject of another [859] country; and the Court, sitting here to determine it, must consider itself sitting in Belgium under the particular circumstances of the case.

Now three witnesses have been examined with respect to the law of Belgium, as applying as well to the acquiring of a domicile in Belgium as to the law with respect to the execution of testamentary instruments.

With respect to domicile acquired, it is quite clear, according to the evidence of these persons, that no domicile according to the law of Belgium can be acquired unless the authority of the ruling powers is obtained to authorize the persons who apply for that authority to continue in that country; that unless that authority is obtained he is liable to be removed at any time; that having obtained that authority he then becomes to all intents and purposes a subject of Belgium, and has a right to remain there and enjoy the privileges of a natural born subject. But it may be a different question whether a person who has not obtained that authority, a mere resident there, is to be considered as a foreigner simply having a residence and not a domicile. I

think it is very doubtful whether the Dutch and Belgian lawyers understand the same thing—from the evidence given with respect to domicile—whether they do not consider that a person to become domiciled must have denization—that which is equivalent to our naturalisation—and they do not mean simply domicile for the purpose of succession or anything of that description, but they consider that a person in order to become domiciled must place himself by the authority of the government in the same situation as a Belgian sub-[860]-ject, and have the rights and privileges of that country. But I think it is not necessary to inquire into this, because I think we have the conclusive evidence of two witnesses as to that which is necessary to give validity to the testamentary dispositions of persons who reside there, but have not acquired all the rights of Belgian subjects.

The first of these witnesses is Dr. Schooneveld. He describes himself as a doctor of laws and advocate at the High Court of the Netherlands, residing at The Hague. He is qualified to depose to what is required to give validity to testamentary dispositions executed by persons in the situation in which Mr. Ryan appears to have been. He states that “the law which was in force in Belgium and Holland from the year 1815 till the Revolution in 1830 was the French Code Napoleon. That according to that code foreigners who obtained from the King the authority to establish their domicile in the Netherlands could and did enjoy all civil rights so long as they continued to reside there; that therefore on the contrary foreigners not admitted by the aforesaid authority of the King could not acquire a domicile for the exercise or enjoyment of the full civil rights.” He deposes also “that such a foreigner, when in addition thereto he has not made his positive declaration at the municipality of the place at which he took up his abode that he was willing and desirous to fix his residence in such place, and to transfer his domicile thereto, he is considered to have only a residence but not a domicile there.” The declaration being, he means to make a particular place his residence. It is not necessary, in order to give him authority [861] to reside in Belgium or in Holland, that he should give any declaration before the magistrates; that only goes to the particular place which he means to make his domicile. He goes on to depose “that the Code Napoleon, in its dispositions respecting domicile, has reference only to natural born subjects, and not to foreigners, the latter being commonly considered to have a residence only, and whose successions must consequently be governed by the laws of their own country.” Then if this is the law of Belgium; if the succession with regard to such persons who came to reside in Belgium as Mr. Ryan did is governed by the laws of their own country; then the law of his own country being followed by Mr. Ryan, these codicils are entitled to probate.

Dr. Schooneveld also deposes “that the mere fact of residence would not render such a person’s succession subject to the law of Holland, and which law was in force in Belgium during the period of its union with that country.” Another gentleman has been examined, who deposes pretty much to the same effect; he says “that as long as Belgium was united with Holland, that is to say, from 1815 till the year 1830, the French Code Napoleon was the common law in force in the United Kingdom. That according to that law a foreigner who had obtained the authority of the King to establish his domicile in the kingdom enjoyed all the civil rights so long as he continued to reside in it. That by such law in force during that period foreigners who have not obtained the authority of the King as above mentioned,” which is the case with Mr. Ryan, “were unable, that is, incompetent, to exercise the [862] full civil rights, particularly if they had not expressly declared at the municipality of the place where they had decided to reside that they had fixed their residence in such place with the intention of transferring their domicile, and of establishing themselves there; but such persons continued to be foreigners although they lived there several years, and even to their deaths they were considered to have only a residence. That the disposals of the code in force at the above-mentioned period respecting domicile refer to the domicile of natives and not to foreigners, who by merely residing in the United Kingdom of the Netherlands”—that is, who reside in the Netherlands without having obtained royal authority so to do—“did not lose their domicile of origin, and their successions consequently were not subject to the law of that country.” This witness, as the former, makes his deposition from his opinion and construction of the law as acquired by a practical knowledge thereof in his capacity of an advocate.

Then, according to the opinion of these gentlemen, well skilled in the practical

application of the Code Napoleon and its dispositions, and which was the law in force in Belgium up to the year 1830, when the separation of the two countries took place, and consequently at the time at which these testamentary documents of Mr. Ryan were executed, they do not consider that Mr. Ryan, as a foreigner, was bound by the requisites of the law of Belgium as to the form and execution of a will, as would necessarily be the case with a free, natural born, subject of Belgium; but the successions of persons who, however long they might have been resident, [863] not having obtained the royal authority to reside there, being considered as mere foreigners, would be governed by the laws of their own country, and would be upheld by the Courts of Belgium, if those Courts were called on to decide. The Court sitting here decides from the evidence of persons skilled in that law, and decides as it would if sitting in Belgium.

Therefore I am of opinion that, notwithstanding the domicile of Mr. Ryan must be considered to have been in Belgium, and that he had in point of law abandoned his original domicile, and had acquired animo et facto a domicile in a foreign country, yet that foreign country in which he was so domiciled would uphold his testamentary disposition, if executed according to the forms required by his own country. I am therefore of opinion that I am bound to decree probate of the will and all the codicils. And I decree the costs of all parties to be paid out of the estate.

IN THE GOODS OF MARY HARRISON, Deceased. Prerogative Court, Nov. 6th, 1841.

—Motion: Will Act.—Probate refused of a paper produced by the deceased to three witnesses who subscribed their names thereto, two of the witnesses not seeing the signature to the paper nor knowing that it was signed; the third witness deposing that she saw the signature of the deceased.

[S. C. 1 Notes of Cases, 168; 5 Jur. 1017.]

Mary Harrison, late of Jermyrn Street, Saint James's, spinster, a milliner and dressmaker, died on the 28th of September, 1841. In the morning of the 22nd or 23rd of that month she went into a room where Mary Panniers, Mary Godwin, and Janet J. Kay, persons in her employ, were at work, with a paper in her hand, and obtained their signa- [864] -tures as witnesses thereto, but did not state to them that such paper was her will, nor did she sign it in their presence, or acknowledge the signature thereto, if even there was any. Shortly after the paper had been thus witnessed the deceased on the same day, with another paper in her hand, again came into the room where the same three persons were still at work, and going first to Mary Panniers, desired her to write her name at the bottom of the paper, stating, at the same time, that she required her to sign her name to that paper, in consequence of having written her name crooked to the former one. The deceased then took the said paper to Mary Godwin and Janet J. Kay, and desired them to sign their names to it, which they accordingly did. The deceased then left the room, and took the paper away with her. When the deceased presented the last paper to the witnesses for their signatures she placed it on the table, folded up so as to present to their view the bottom part thereof, and neither of them recollected to have seen any of the writing except Mary Godwin, who stated that she observed the deceased's signature immediately above that of Mary Panniers. The paper was in the deceased's handwriting.

Jenner prayed probate upon an affidavit of the above circumstances from the three witnesses.

Sir Herbert Jenner. Under the circumstances stated, it is quite clear that the signature to this paper was not made in the presence of the witnesses; the question then is, was it acknowledged in their presence; it appears [865] to me that it was not. Suppose Mary Godwin saw the name, the other witnesses depose that they did not see it; can this then be a sufficient acknowledgment of the signature to two witnesses present at the same time? I am of opinion that it cannot: the Court cannot on motion decree probate of this paper. I therefore reject the motion.

IN THE GOODS OF G. L. OLDING, Deceased. Prerogative Court, Nov. 6th, 1841.

—Motion for probate of a will, signed by the testator after the witnesses had subscribed their names, rejected.

[S. C. 1 Notes of Cases, 169; 5 Jur. 1017. Followed, *In the Goods of Byrd*, 1842, 3 Curt. 117.]

Haggard prayed probate of the will of the deceased, under the following circum-

stances:—On the 18th of September, 1841, the two attesting witnesses being both present, the deceased took up the will (which had been previously written by his wife from his own dictation), and read the same all over aloud, in the hearing of those present, and, having so done, requested the witnesses to attest the same, telling them that they had better sign their names at full length. They thereupon subscribed their names to the will in the presence of the deceased, after which he signed his name at the foot or end thereof, in their presence.

Sir Herbert Jenner. Is the paper a will before it is signed by the testator? A party signs his name after the attestation of the witnesses, although in their presence: my present impression is that this is not a compliance with the statute.

I shall reject the motion for probate without giving any opinion.

[866] *MACKENZIE against YEO*. Prerogative Court, Nov. 16th, 1841.—Motion that certain writings should be produced which were referred to by a witness in his deposition, such witness being the solicitor of the party in the cause opposing a codicil, resisted on the ground of privilege; held—First, that information collected by the solicitor from a subscribed witness to the codicil is not privileged: semble it would be otherwise if collected by the client and communicated to the solicitor.—Second, that letters written to the principal solicitor by another solicitor, also employed by the client to collect evidence in the matter, and with directions to communicate it to the principal solicitor, are privileged.—Third, that letters written by the testator to his solicitor with regard to a bond executed by testator in favour of the party propounding the codicil are not privileged communications as between the solicitor and the executor opposing the codicil, by whom he was also employed as his solicitor in this matter.

[S. C. 1 Notes of Cases, 516; 5 Jur. 1041.]

This was a cause of proving a codicil to the will of G. A. Barbor, Esq., deceased. At the commencement of the argument,

The Queen's advocate and Addams prayed the Court to direct certain writings referred to in his deposition by Mr. Thomas Hooper Law, the solicitor of Dr. Yeo, party in the cause, to be produced. This application was opposed by Haggard and Jenner for Dr. Yeo.

Sir Herbert Jenner. In this case a question has been raised by the counsel for Mrs. Mackenzie, who is a legatee in 5000*l.* by the codicil the subject of the suit, and it is said that I ought to direct certain paper writings referred to in the depositions of the solicitor of Dr. Yeo, the other party in the cause, to be produced. I am prayed to suspend the proceedings in the cause until the order prayed shall have been complied with. This motion was resisted on behalf of Dr. Yeo, and the point has been argued by counsel on both sides, and the Court has now to give its decision upon it.

The papers referred to may be classed under three heads:

First. Two letters in the handwriting of the testator in the cause directed to Mr. Hooper Law, [867] the witness, and they refer to a bond to a person now Mrs. Mackenzie.

Secondly. Two letters received from a Mr. Turner, a solicitor in Exeter, by Mr. Law, and

Thirdly. A memorandum in writing taken by Mr. Law of a communication of a witness who is one of the subscribing witnesses to this codicil.

These papers, thus classed, are said to be open to one common objection against their production, for it is said that they are all of them confidential communications between Dr. Yeo and his solicitor, Mr. Law, and as such privileged communications, which Mr. Law ought not to be called upon to disclose, which he is bound not to disclose, and which in point of fact the Court ought not to suffer to be produced, had Mr. Law been inclined to do so. That is the first and principal ground of objection taken to the prayer of Mrs. Mackenzie's proctor.

As a general principle, a solicitor ought not to disclose what has been confidentially communicated to him as solicitor. In Mr. Phillipp's book on Evidence the rule is thus stated: "Confidential communications between attorney and client are not to be revealed at any period of time—not in an action between third persons, nor after the proceedings to which they referred are at an end, nor after the dismissal of the attorney. The privilege of not being examined to such points as have been communi-

ated to the attorney while engaged in his professional capacity, is the privilege of the client, not of the attorney, and it never ceases." (a)

Now this being the general position, which seems [868] not to be denied, the only question which arises is whether, the circumstance being attended to, these are communications of such a nature as bring them within the privilege. Particular communications are under no circumstances to be divulged, but a solicitor is bound to disclose some facts come to his knowledge collaterally.

The rule has been acted upon with some qualification; a solicitor cannot refuse to answer questions which have come to his knowledge collaterally and not confidentially, or from other quarters. So, if he has made himself a party to the transaction, or if he has made himself a witness to a deed which any other person might equally well have witnessed, the witnessing the execution of a deed being no part of the duty of a solicitor.

Now it is impossible to lay down any general rule as to the extent of the privilege. The cases have turned on very nice distinctions. Lord Cottenham, in the case of *Desborough v. Rawlins* (3 Myl. & Cr. 515, 519), says, "I do not think that it is necessary that I should now lay down any rule as to the length to which the privilege should extend. It would not be easy to do so consistently with the cases, but I am to consider whether the defendant clearly brings himself within the privilege; for a defendant who relies upon the privilege is undoubtedly bound to bring himself clearly and distinctly within it." That was a case where a bill had been filed by the insurers of a life against the insured, and to which the solicitor of the insured was made a defendant, and it stated that on a particular day the insured [869] had been informed that the life in question was bad, and that the solicitor was present at the communication. The Lord Chancellor was of opinion that the solicitor was, in that case, bound to divulge what had taken place. His Lordship being of opinion that the communication was not privileged, and that divulging it was not a breach of professional confidence. The same observations were made by Lord Chancellor Brougham in the case of *Greenough v. Gaskell* (1 Myl. & Keen, 98). The general result of that case is, that a solicitor cannot be compelled, at the instance of a third party, to disclose matters which have come to his knowledge in the conduct of professional business for a client, even though such business has no reference to legal proceedings either existing or in contemplation. Lord Brougham says, "No authority sanctions the violation of professional confidence which would be involved in compelling counsel or attorneys to disclose matters committed to them in their professional capacity, and which, but for their employment as professional men, they would not have become possessed of." In that case the question was whether the privilege extended to communications made before legal proceedings were actually commenced; the Lord Chancellor considers that question, and states the result: "As regards them, the counsel and attorney, it does not appear that the protection is qualified by any reference to proceedings pending or in contemplation. If, touching matters that come within the ordinary scope of professional employments, they receive a communication in their [870] professional capacity, either from a client or on his own account, and for his benefit in the transaction of his business, or, which amounts to the same thing, if they commit to paper, in the course of their employment on his behalf, matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information or produce the papers in any Court of law or equity, either as a party or as witness. If this protection were confined to cases where proceedings had commenced, the rule would exclude the most confidential, and it may be the most important, of all communications—those made with a view of being prepared either for instituting or defending a suit up to the instant of the process of the Court issued."

An attorney is not to disclose what has come to his knowledge solely in his professional capacity immediately from his client, or immediately from his connection with his client. I take that to be the result of all the cases.

Where an attorney directly or immediately derives information from his client, that is a privileged communication, and the object of the rule being to conceal secret communications, the privilege applies; but to bring his case within the rule, the

matters communicated must have come directly or immediately from the client, for if the facts come collaterally from another person, the attorney will be bound to answer.

It remains to be considered whether the circumstances of this case bring it within the rule. Look-[871]-ing at these several papers, I propose to invert their order, and to consider the first class the last. Now the first class I shall consider is the paper or the memorandum of the communication from the witness Lake; Mr. Law, acting as solicitor of Dr. Yeo, makes inquiries, and takes down the result of the communication between himself and the witness, who is one of the subscribing witnesses to the codicil. This communication took place before actual proceedings had commenced. It is a communication made under the circumstances stated in answer to the twenty-eighth interrogatory addressed to the witness Law, who has been examined on the allegation given in by Dr. Yeo, and who appears to have been the confidential solicitor of the testator in the cause, and of Dr. Yeo, the party in the cause.

(The learned Judge here read the twenty-eighth interrogatory (a) and the answer of the witness to [872] it, and continued.) The witness then objects to the production of this paper; he was at this time acting as the solicitor of Dr. Yeo, as he states, and that he went to one of the subscribing witnesses previous to the commencement of the proceedings, but relating to the investigation in the cause, but he declines to set forth what passed on that examination, or to deliver up the paper or memorandum; and the question is whether, under the circumstances, this is a privileged communication which he is not at liberty to divulge, because it would be a breach of professional confidence?

I have great difficulty in holding this to be a professional communication. It is true Law was acting as solicitor of Dr. Yeo, and he asks a witness what passed on a certain occasion, but that is no communication between Dr. Yeo and Law. If Dr. Yeo had himself asked the witness a question, and then communicated the answer to Law, that would be a privileged communication; but, as held by Lord Cottenham, in *Desborough v. Rawlins*, it is not enough that it comes to the knowledge of Law in a conversation between himself and the witness; it is no breach of confidence as between the witness and Law. The information is for a collateral point, and I think it is not a privileged communication, but that Law might be called upon to divulge it. There is no confidence between him and his client in this matter.

[873] This paper has been annexed to Law's deposition, and has been brought in subject to any observations that may be made upon it; but I think there is a still more serious objection which may be made to its production, namely, that if produced, the parties could make no use of it. It is clear, on all the authorities, that the testimony of a witness may be impeached, by shewing that he has made statements out of Court different to what he has deposed on the trial, yet on all points it is clear that this declaration could not be attended to in evidence—it is no evidence at all.

(a) Twenty-eighth interrogatory.

What interviews, and when and where, have you had with George Lake, one of the subscribed witnesses to the codicil in question in this cause? What was the purport of your interview or interviews with him? What transpired between you and him on the occasion or occasions of such interview or interviews? Set forth the same most specifically, and if possible, verbatim. Did you take down any examination of the said George Lake in writing? If yea, obtain the same and annex it to your deposition, &c.

The answer of the witness:

I have had only one interview with George Lake; the object was to inquire of him all that he knew respecting the codicil. It was on the 17th of December, at Exeter. I have a memorandum of what passed on that occasion, and from that better than from recollection I could state what passed between George Lake and myself; but I doubt if it would be right in me either to give up the document or state its contents, since it belongs to my client. I acted as his solicitor on that occasion.

The witness was then told that the production of the paper was called for on the part of the ministrant by her proctor. "That I do not consider to be enough; if called for on the authority of the Court, I should consider myself bound to comply. Being now told by the examiner that I ought not to withhold the paper, I give it up, subject to any order of the Court respecting it, and that he takes upon himself the responsibility of requiring its production."

If Law had been called on to depose that the witness Lake had made statements out of Court contrary to his deposition in Court, this paper might be material; but I am of opinion that, further than this, if this paper was disclosed in evidence, it would form no part of the testimony of Lake.

I am asked to stop the hearing of this cause until this paper is produced. The Court would not be inclined to do so, especially as the parties have all the benefit they could have from the production of it. Law has been examined, and has been called on to state all that passed between him and the witness Lake; he has set forth no contradictory evidence to Lake's testimony, and the parties have the benefit of the presumption that what Lake has stated is conformable to the evidence he has given. With respect to that paper I am of opinion that it is not to be opened for the further examination of Law.

The next class of papers are two letters written to Law, and they are referred to in the sixty-third interrogatory. (The Court read the interrogatory [874] and the answer.(a)¹) Therefore this witness states that Turner made inquiries, but he declines to give up the letters received from Turner, inasmuch as they are confidential communications which he is privileged not to part with, but to withhold.

These letters are very differently circumstanced, and I think they do come within the principle of privileged communications. Dr. Yeo employs Law generally; he also employs Turner, with direction to communicate with Law. Turner does inquire, and does communicate with Law; therefore I think these are privileged communications from the client to Law, acting in a professional capacity, through [875] the medium of Turner, who was also acting in a professional capacity. The Court cannot conceive a case where stronger circumstances could be brought forward against the production.

These are communications from Dr. Yeo to one solicitor through another solicitor, whom he also employed. The witness is not bound to produce letters or to divulge the contents of them, being communications made by a certain person professionally employed to another person also professionally employed. I am of opinion they come within the privilege, and that the parties are not at liberty to have the letters brought in.

The remaining papers are two notes written by the deceased in the cause to Mr. Law, as to the preparation of a bond. (The Court read the fifteenth interrogatory and the answer.(a)²)

(a)¹ Sixty-third interrogatory.

Let William Law and Thomas Hooper Law be asked, upon your oath, Have you not, or to your knowledge and belief has not the producent, employed a Mr. Turner, an attorney at Exeter, to examine some person or persons at that city touching some pretended or alleged declaration or declarations of George Lake, one of the subscribed witnesses to the codicil in question in this cause? Has not the said Mr. Turner had an interview with a person named James Gilbard on such subject? Also with a person named William Cornish, and also with a person named Evans? or with all, some or one of such persons, and whom? Have you not received some letter or letters, or some statement or statements in writing, from the said Mr. Turner in respect thereto? If yea, obtain and annex the same to your deposition.

Answer of Mr. Thomas Hooper Law.

"Mr. Charles Henry Turner of Exeter, attorney at law, was, I believe, consulted by the producent, and employed by him to make some inquiries in Exeter touching the boy George Lake, and to communicate with me, if he saw occasion so to do, the object being only an investigation of the circumstances of the case, and to ascertain, if possible, the truth of it. I received some letters, three or four as I recollect, from Mr. Turner on the subject, but I cannot consent to give them up: I have no right to part with them. I do not remember the name of Gilbard; those of Clappitt, Cornish, and Evans were I think mentioned in the letters of Mr. Turner. I submit that what I have done in my professional character as solicitor of the producent is not a proper subject of inquiry."

(a)² The fifteenth interrogatory (so much as related to this point was as follows):—

"Was not the testator much attached to the ministrant? Did he not so express himself to you? Was he not most reluctant to part with her? Did the testator ever write to you on the subject of his intimacy, connection with, or attachment, to the ministrant? If yea, produce the letters to the examiner to be annexed to your

[876] Now this can hardly be considered a confidential communication between Dr. Yeo and Law; it might have been so as between the deceased and Law, but as between Dr. Yeo and Law it was no confidential communication; I should consider these notes as papers not privileged to be withheld, but in point of fact my decision is not called for, because Law has been called on to state what passed on the instructions for the preparation of the bond, and what passed after the preparation; and he has been cross-examined, and has very properly been called on to communicate what passed on the subject. I think the privilege of the client would be held to have been waived, even if this had been a privileged communication. A witness may be cross-examined as to all facts on which he has been examined; but the answer to this is, that Law has not these notes in his possession, which is a sufficient answer; he has stated what the contents of these letters are.

Under these circumstances I think the answer is sufficient, and that I cannot compel Law to go to persons in whose possession these letters are, if they are in existence.

I reject the prayer of Mrs. Mackenzie's proctor, and direct the cause to proceed.

[877] VARTY AND MOPSEY *against* NUNN. Consistory Court of London, Nov. 18th, 1841.—An allegation rejected, pleading in objection to a church-rate that the rate should have been made by certain trustees under a local act, 30 Geo. 3, c. 71 and not by the churchwardens of the parish (St. John's, Hackney); that the rate ought to have extended over the whole ancient parish of Hackney, and not to be confined to the distinct parish of St. John, Hackney (construction of Church Building Acts); that the churchwardens were not duly elected, no notice having been given in the original parish.—Where occupiers are assessed to the church-rate, it is unimportant by whom the payment is made.—An averment of inequality in a church-rate must be plain and clear. A slight inequality will not vitiate a church-rate.

[S. C. 1 Notes of Cases, 191; 5 Jur. 1138: affirmed 1843, 3 Curt. 352.]

On the admission of an allegation.

This was a question as to the admission of an allegation by way of defence to a libel in a suit for subtraction of church-rate, brought by the churchwardens of the parish of St. John, Hackney, against William Nunn; the amount sued for was three shillings and four-pence.

The allegation which now stood for admission pleaded:

First. That in or about the year 1763 it was considered expedient to enlarge the then existing churchyard of the ancient parish of St. John, Hackney; that accordingly a piece of copyhold land was purchased with certain monies, forming part of a fund known in the said parishes as the "unappropriated fund," and which was created by means of fines imposed on persons in lieu of their serving certain offices in the said parish. That the said piece of land was subsequently duly consecrated by the Bishop of London, and thereupon became the usual burial place of the said parish, the old burial ground being afterwards but seldom resorted to; that both before and subsequently to the consecration of the said additional burial [878] ground the churchwardens of the said parish were accustomed to receive certain dues and duties at funerals or interments of the dead, for the use of the ground in the church and churchyard of the said ancient parish of St. John, and for tolling a funeral bell in the said church. And this, &c. &c.

deposition, and at the same time solemnly swear that the letters you have produced are the whole you ever received on that subject, or that you can now obtain."

The answer of the witness (to that part of the interrogatory):

"He expressed himself in favourable terms of her; I do not think that he was reluctant to part with her. I do not think that latterly he had been much with her. The only letters or notes that I ever received from him having any reference whatever to her were the two notes already alluded to, and they are not in my possession now. They were merely to apprise me that he was coming to me on the business of making a settlement on Miss Melton. The first was dated on the Sunday, mentioning that he would call the next day. The second was written at my office, as I suppose, and left for me, because of my not having received the other. I was from home when he called."

Second. That the present parish church of the said ancient parish of St. John at Hackney was erected under the provisions of a certain act of Parliament, passed in the thirtieth year of the reign of George III., entitled, "An Act for taking down the Church and Tower belonging to the parish of St. John at Hackney, in the county of Middlesex, and for building another Church and Tower for the use of the said parish, and for making an additional Cemetery or Churchyard;" and that in order to build and complete the said parish church, and to provide the said additional burial ground, the said ancient parish of St. John at Hackney was assessed to the amount of 25,000*l.*, or thereabouts, and the said sum was raised by means of certain annuities granted and rates raised under the provisions of the said act, and of two other acts, passed in the 35th and 43rd years of the reign of Geo. III. respectively, as in and by the said three several acts of Parliament, to which the party proponent craves leave to refer, doth more fully appear, and the party proponent doth expressly allege the said acts to be public acts. And this, &c.

Third. That the said rates still continue to be raised under the provisions of the aforesaid acts of Parliament, several of the said annuities being still unexpired, and that the said rates being raised [879] throughout the whole of the said ancient parish of St. John at the present time, amount annually to the sum of 700*l.*, or thereabouts. That by the aforesaid act of the 30th Geo. III. it is enacted that during the continuance of the said rates the then new intended church and churchyard, together with all buildings, bells, pews, seats, and all goods, chattels and ornaments thereunto belonging or appertaining, and the roads, avenues, and passages thereto shall vest in the trustees appointed under the said act, and that at and from the ceasing of the said rates, the fee simple of the same shall vest in the vicar and churchwardens of the said parish for the time being, &c.

Fourth. That by the 23rd section of the said act it is recited to the effect following, viz.: "That the churchwardens of the said parish (to wit, of the said ancient parish of St. John at Hackney) had received certain accustomed dues and duties at funerals or interments of the dead, for the use of the ground in the then existing church or churchyard, and for tolling a funeral bell in the said church, the same being the dues and duties hereinbefore mentioned," and it is thereby enacted, "That the said churchwardens shall continue to demand, take, and receive such and the same dues and duties at funerals or interments of the dead in the said new church and churchyard, and for tolling a funeral bell in the said new church, which dues and duties, when received, shall be applied by the said churchwardens in aid of the church-rate of the said parish," &c.

Fifth. That on or about the 25th of July, 1840, a certain meeting was held in the vestry-[880]-room of the parish church of Hackney, with the privity and sanction of the said William Varty and Robert Mopsey, styling themselves the churchwardens of the said parish, when a committee consisting of eight persons was appointed to inquire into the nature and extent of the above mentioned dues and duties; that the said persons met together frequently to ascertain the same, and that such inquiry was conducted with the assistance and co-operation of the said Varty and Mopsey; that the result of such inquiry was published in a printed report circulated through the said parish, with the concurrence of the said meeting, styling themselves the vestry of the said parish, &c.

Sixth. That in part supply of proof, &c., annexed one of the said printed circulars.

Seventh. That the said dues and duties mentioned in the said act of Parliament, or contemplated thereby, or dues and duties similar thereunto have been from time to time raised and collected since the passing of the said act, and that a large annual amount hath from time to time been realized, to wit, in respect of the use of the said burial ground, to the annual amount of *l.*, or thereabouts, and in respect of tolling the bell, to the annual amount of 75*l.*, or thereabouts, but that the said dues and duties arising from the use of the said burial ground are not applied in aid of the church-rate of the said parish as directed by the said act of Parliament, &c.

Eighth. That under the provisions of the acts 58th and 59th Geo. III. and certain other acts, usually designated as the Church Building Acts, two new parish churches were built within the [881] limits of the said ancient parish of St. John's at Hackney and that under the provisions of the said acts, and by an instrument under the seal of his Majesty's commissioners for building new churches, duly enrolled in the High Court of Chancery, and entered in the registry of this Court, and bearing date 6th

August, 1824, the same having been made in pursuance of an Order in Council, bearing date the 10th of March in the same year, the said ancient parish of St. John, Hackney, was divided into three separate and distinct parishes for ecclesiastical purposes, to be called severally the rectory of Hackney, the rectory of South Hackney, and the rectory of West Hackney; that notwithstanding the aforesaid divisions of the said ancient parish, the same, according to the provisions of the said acts of Parliament, is but one parish, in respect of "any poor or other parochial rates to be raised in the said parish, or to the maintenance or relief of poor persons, or to any title or claim to such relief or to any powers relating to such rates, or holding vestries, or appointments or powers of parish officers, or any such relief or claim thereto, or to any act or acts of Parliament, or law or custom relating thereto, save and except as to church-rates in so far as the same are regulated by the provisions of the said acts;" that since the division of the said ancient parish of St. John the parishioners of the said three parishes, viz., Hackney, South Hackney, and West Hackney, have severally from time to time elected their own churchwardens; that the churchwardens of the said ancient parish of St. John are, in virtue of their appointment, [882] and under the provisions of a public act of Parliament, 4 Geo. 3, and entitled, "An Act for maintaining, regulating, and employing the poor within the parish of St. John at Hackney, in the county of Middlesex, and for lighting the said parish and establishing a regular nightly watch therein," appointed trustees for the purpose of carrying into effect the provisions of the said act, and, as such, are empowered to make certain rates for the lighting and watching the whole of the said ancient parish of St. John; that by the said act, 30 Geo. 3, the said churchwardens are also, in virtue of their office, appointed trustees of the funds to be raised under the said act for building the then intended new church of St. John, and as such are authorized to make and levy certain rates throughout the whole ancient parish of St. John, in order to raise the funds necessary for carrying into effect the provisions of the said act; that by another public act, 50 Geo. 3, entitled, "An act to alter and amend the powers of so much of an act passed in the fourth year of his present Majesty as relates to the maintaining, regulating, and employing the poor within the parish of St. John at Hackney, in the county of Middlesex," the said churchwardens are also appointed trustees of the poor throughout the whole of the said ancient parish of St. John, and as such are authorized by means of rates to levy any sum or sums necessary for the maintenance and relief of the poor throughout the said ancient parish; that notwithstanding the premises, the said trusts have been executed solely by the churchwardens for the modern parish of Hackney, distinctively so called, and that previously to the pretended election and appointment [883] of the said W. Varty and R. Mopsey to be churchwardens, and previously to the holding of the pretended vestry meeting for making the rate libellate in this cause, no notice whatever of such intended election or of such intended vestry meeting was given to the parishioners of South and West Hackney, by affixing the same upon the doors of the churches or chapels within the said two parishes or otherwise, and that none of the parishioners in the said two parishes did in fact attend or vote on such occasions, nor were offered the opportunity of attending and voting, &c.

Ninth. That at the pretended vestry meeting held on the 23rd of July, 1840, at which the pretended rate was made, the said W. V. and R. M., calling themselves the churchwardens of the said parish of Hackney, laid before the said meeting a certain statement of account purporting to be an estimate of the money necessary to be raised for the current expenses of the churchwardens of the parish of Hackney for the then ensuing year. That the said estimate was signed by the said W. V. and R. M. in their assumed character of churchwardens, and the party proponent, &c. doth annex a certain paper, &c., and doth allege it to be a true copy of the said estimate. That the said estimate is excessive, that no credit is therein given for certain monies which are directed under the aforesaid acts of Parliament, or some of them, to be collected and applied in aid of the church-rate, and that it contains certain charges which under the said acts ought not to be included in the said rate, &c.

Tenth. That under the provisions of a certain act of Parliament passed in the 50 Geo. 3, and [884] pleaded in the seventh article of this allegation, the trustees of the poor for the ancient parish of St. John at Hackney are authorized in certain cases, if they think proper, to compound with the landlords or owners of houses, tenements, and hereditaments, for the payment of the poor rates "at such reduced yearly rentals

as the said trustees or any seven or more of them shall think reasonable, so that such houses, tenements, and hereditaments be not rated at less than one-half, nor more than two-thirds, of the rack rent at which the same shall be let, or the annual value of the premises respectively." That by the said act the trustees are also empowered, if they think proper, to agree and compound the said poor-rate with the landlords or owners of all houses, tenements, and hereditaments, the yearly rent of which does not exceed the sum of 20l. at any reduced sum which may be mutually agreed between them. That many landlords and owners of houses in the said parish have, under the provisions of the said act, compounded with the said trustees of the poor in the manner as aforesaid, and that there are in the parish of Hackney alone nearly one thousand houses rated to the poor-rate under such composition. That in assessing the church-rate libellate in this cause all the houses in the said parish were rated upon the principle of the poor-rate under the said act, and that the said W. V. and R. M., or one of them, have or has admitted or declared to that or the like effect, &c.

Eleventh. That although the names of the tenants of the said compounded houses are inserted in the church-rate book, and a certain assessment affixed to each of them, yet that it is not such [885] tenants but their landlords who are applied to for payment of the said rate. That although the said assessment in the church-rate book is in itself below the real, actual, and proper value of such houses, and below their estimated rental in the poor-rate book, yet that in fact the landlords of the said houses, or most or many of them, do not pay the church-rates according to such assessment, but according to the reduced compounded assessment as contained in the said poor-rate book, under the aforesaid act of Parliament. That sixteen houses belonging to J. B., a parishioner, of the actual yearly rental of 120l. or 140l., or thereabouts, and estimated in the poor-rate book at the rental of 104l., are assessed in the church-rate book at 100l., and are charged in the rate at twopence in the pound at the sum of 16s. 8d.; but that although such sum is entered in the said church-rate book as having been paid in respect of the said houses, yet that the said J. B. did not actually pay more than 7s. 2d., being the amount due from him for the said houses upon the compounded poor-rate assessment, made under the said act of Parliament, &c.

Twelfth. That seven houses situate, &c., belonging to J. P., are estimated in the poor-rate book at 44l., but are assessed to the church-rate at 28l. only. That three houses, &c., belonging to J. R., of the estimated rental in the poor-rate book of 21l., are assessed to the church-rate at 12l. only. That eight houses, &c., belonging to J. C., estimated in the poor book at 42l., are assessed to the church-rate at 24l. That six houses, &c., belonging to W. L., estimated in the poor book at 70l., are assessed to the church-rate at 36l. only. That fourteen [886] houses, &c., belonging to S. F., estimated in the poor book at 91l., are assessed to the church-rate at 47l. only. That, in like manner, seven houses belonging to S. B. are estimated in the poor book at 34l., but assessed to the church-rate at 18l. That five houses belonging to J. S., and estimated in the poor book at 48l., are assessed to the church-rate at 30l. only. That nine belonging to W. S., estimated in the poor book at 63l., are assessed to the church-rate at 40l. That fifteen belonging to T. D. are estimated in the poor book at 100l., but are assessed to the church-rate at 75l. That three houses, &c., belonging to T. L. B., are estimated in the poor book at 24l., but assessed to the church-rate at 13l. only. And in supply of proof the party proponent craves leave to refer to the original poor-rate book, and to the original rate book, &c., to be produced in this suit. And the party proponent does expressly allege and propound that the estimated rentals of the said several houses as contained in the said poor-rate book, and much more as assessed to the said church-rate, are much below the actual rentals of the same, &c.

This allegation was opposed by Addams.

The Queen's advocate and Bayford argued in support of it.

[887] Nov. 29th.—*Judgment*—*Dr. Lushington*. Before I proceed to consider the main questions which have been raised in this case I think it right, to prevent all possible misunderstanding, to advert to a matter which was discussed at some length at the Bar—I allude to the smallness of the amount sought to be recovered by the present proceedings; now I wish to state in the clearest and most distinct terms that this circumstance does not, and cannot in the slightest degree, affect the consideration or decision of the case; I, in the discharge of my duty, am bound to bestow the same labour and care in ascertaining what the law is, whether the rate sued for is three

shillings and fourpence, or five hundred times that amount, and having to the best of my power ascertained the law, to pronounce my decision for or against the rate, according to my conviction of what the law is.

This suit is brought by persons who represent themselves to be the churchwardens of St. John's, Hackney, and the libel pleads, in the common form, the necessity for a church-rate, and the making of it; assuming the facts stated therein to be true, the rate would be a legal rate, and the defendant bound to pay the sum assessed. But the defendant has offered this defensive allegation, which purports in substance to controvert some of the most material facts alleged in the libel; I say in substance, because it does not do so in form, and I am certainly of opinion that the question of law might have been more conveniently raised by pleading the facts in a somewhat different shape. [888] The allegation also purports to state other matters, besides contradicting the libel, which it is contended would be a bar even if the facts pleaded in the libel were true; the plea is therefore twofold—in part denying the averments in the libel, and, in other parts, even admitting them to be true, avoiding them.

I must then, according to the well-known rule, assume the specific facts stated in this allegation to be true, and then determine whether, if proved as laid, they would form a good defence to the suit.

The first objection to which I shall direct my attention is that, by virtue of the Local Act of the 30 Geo. 3, c. 71, the rate ought to be made by the trustees, and, therefore, laid on the whole of the ancient parish, and not on any particular part of it. To understand and decide this point, we must look at the facts and consider the law as it stood prior to 1790, the date of the local act. Prior to 1790 the whole of Hackney formed one parish, in which stood the ancient parish church; the parishioners of the whole parish were bound to repair that church, that is the body of it, and this obligation was imposed, not by the ecclesiastical law, but by custom; by the common law of England recognised by various statutes. It is not the ecclesiastical law which imposes such burthen, for by the ancient ecclesiastical law the expense arising from such burthen was to be defrayed out of ecclesiastical profits; neither could the ecclesiastical law alone have produced any such effect, because that law, unless recognised by the common law, or enacted as law by statute, was and is wholly inoperative in [889] this country. This obligation to repair as imposed by the common law is recognised by all the common law authorities, by Lord Coke, and, indeed, before him, down to and including Lord Chief Justice Tindal and the Judges of the Court of Exchequer Chamber in *Veley and Joslin v. Burder* (12 Add. & Ell. 265); the obligation is further recognised by various statutes from the time of Edward the First down to the present day. In the statute *circumspecte agatis*, the statute *ne rector prosternat arbores*, and all the acts of Parliament of modern times touching the collection of rates before magistrates. I speak of the legal obligation to repair and not of the mode by which such obligation should be fulfilled or enforced. This, then, being a common law obligation, can only be altered by an act of Parliament, and the first question I have to solve is, what is the effect of the local act of the 30 Geo. 3?

The title of the act, and especially the nineteenth section, prove that the new church was to be substituted for the old, as the parish church, and, consequently, so becoming the parish church, stood in the same legal position as to repairs and otherwise as the ancient parish church had done, save so far as any alteration might have been effected by the statute. The very title of the act shews what the intent and meaning was; it is "an act for taking down the church and the tower belonging to the parish of St. John, at Hackney, in the county of Middlesex, and for building another church and tower, for the use of the said parish, and for making an additional cemetery or churchyard," and the nineteenth section of the act states that after the [890] church is completely finished and consecrated, it shall for ever be called and known by the name of the parish church and churchyard of St. John's, Hackney; and further, that it shall be used for all the same purposes as the ancient parish church had been accustomed to be used for." There cannot, therefore, be a doubt but that the new church is simply substituted for the old church, and, as I have already said, except as altered by the act, it stood in precisely the same legal position.

Now it is not contended that there is any express enactment in this statute whereby the rates for repairs or expenses legally incidental to the office of churchwarden were to be made by the trustees. Repairs are not mentioned, so far as I am aware, throughout the statute. Then if there be no direct alteration of the law, such

alteration can only be effected by necessary implication. Does it follow as a plain inference from other parts of the statute? So far as I understand the argument, this conclusion is to be drawn from the twenty-first section, which vests the new church in the trustees during the continuance of the rates to be levied by virtue of the act. The rates imposed by the act for defraying the expenses of building the church are essentially different from ordinary church-rates in very many particulars, which it is not necessary to specify, but I do not perceive upon what sound principle of law or reason it can be contended that the vesting the church in the trustees for a certain term can alter the common law as to the burthen of repairs or the mode of rating, whereby the monies are to be raised; why should the trustees have the burthen cast upon them any more than upon the incumbent before the passing of this act, [891] or after the rates were paid and the church vested in him and the churchwardens? It cannot be on account of any profits, benefits, or emoluments, for those were in the incumbent before, and yet he was not liable, and, moreover, there are none such vested in the trustees.

If I understand the argument correctly it is this, that the custom of the parish repairing the nave existed only in relief of the incumbent, and not in former times in relief of the church funds, when they were not appropriated wholly to the incumbent but paid according to ancient divisions. This circumstance appears to me rather a fit subject for antiquarian research than legal investigation, for even if the fact were true that the custom of the parish repairing arose only where the repairs would otherwise have fallen solely on the incumbent, who also received the whole emoluments, and for his relief, it would not follow that the mere vesting of the freehold in the trustees with none of the profits would render them liable and exonerate the parish, or give them the power to make a rate for such purposes. I think it unnecessary to follow this point further; it does not come within the principle of cessante ratione cessat lex, nor has any authority been cited to prove what would have been in the first instance indispensable, namely, that the sole reason of the custom was the relief of the incumbent. So far then as I have hitherto examined the act of the 30 Geo. 3, there is no ground for holding that the ordinary liability was taken away either by express words or necessary implication; there are, however, some other parts of the act which I think it my duty to notice.

[892] The 23rd section enacts, "That certain accustomed dues for burials shall be received at the new church and be applied by the churchwardens in aid of the church-rate." What rate?—the trustees' rate or the church-rate made in the ordinary form? In order to sift this question I must refer to the subsequent sections; by the 24th, the pew-rents; by the 27th, the fees for burials are to be applied, first, to the trustees' rates; secondly, to the church-rate of the parish. Here then the statute makes an obvious distinction as to the three different species of emolument, giving the first instantly to the church-rate; the two remaining only where the rates imposed by the act are at an end, clearly therefore contemplating two contemporary rates, and consequently repelling all inference that common church-rates were to cease at all for any period; it is true that at the commencement of the 29th section words are used which apparently contemplate the application of the first set of burial fees to the purposes of the act, but a mere statement of an inducement cannot affect the clear terms of the other sections. I am of opinion, therefore, that this act has not repealed ordinary church-rates during the existence of the trustees' rates, and that, therefore, the objection that the trustees ought to have made the rate for repairs and expenses incidental to divine service falls to the ground.

The next objection is, that the rate, though made by the churchwardens, ought to have extended over the whole parish, as it stood when the new church was erected; no doubt such was the law and the practice when this new church was first consecrated, but in virtue of the Church Building Acts, the 58 [893] & 59 Geo. 3, the original parish has been divided into three separate parishes, and if there be any alteration of the limits over which the church-rate originally extended, it must be by virtue of the provisions of those acts. It has been no easy task to discover the true meaning of the Local Act, but that act is light itself compared with the obscurity of the church building statutes, to which I must now apply myself.

At the period of making the rate in dispute Dr. Watson, the incumbent, at the time of the division, was dead; consequently without adverting to any previous resignations, the division into distinct parishes had completely taken effect by the

16th section of the statute 58 Geo. 3. Does the act then provide that the church-rate of such distinct parish shall be levied on the divided parish only, or does it not? if it does not, the old common law remains unaltered.

First, then, the 16th section declares that the parish may be divided into two or more distinct parishes for all ecclesiastical purposes whatever; the true question is, whether by those words a necessary implication was raised that the old common law was altered and the rate confined to the curtailed parish; certainly it is most inconvenient that so important a matter should be left to interpretation and construction without any express enactment, but so it is, and I must now see whether the true meaning of this section is helped out by any of the subsequent enactments. The enactments which in any degree affect the question are the 31st, the 70th, and the 71st sections of the 58 Geo. 3, and the 20th section of the 3 Geo. 4. It was naturally to be ex-[894]-pected that the 31st section would be followed up by some distinct enactment: no such thing is to be found. Looking at all these enactments, I confess I feel very great difficulty and embarrassment. Had the case stood upon the 16th section, the path would have been more easy, but the 31st created the great obscurity. I am compelled to say that the 70th and 71st sections rather assume that it had been enacted that separate and distinct parishes should each have their own rates than that the statute actually does so; on the whole, however, nothing doubting the intention of the legislature, but hesitating greatly as to the expression of that intention, I think that from the time of the division being complete under the 16th section, the rates must be made for each separate division, or otherwise this consequence would follow, that a district parish would be exempt from the repairs of the mother church at the end of twenty years, a separate parish never; such a consequence as this appears to me to be repugnant to all the principles on which the Church Building Acts are founded and inconsistent with some of their plainest provisions; for this reason I hold myself justified, not in raising up an enactment which does not exist at all, but in giving doubtful enactments such a construction as shall not manifestly violate other clearly expressed intentions of the legislature.

Having thus declared my opinion that the rate ought not to be made by the trustees, and that it ought not to extend over the whole original parish, the question which immediately follows is as to whether the churchwardens were duly appointed, and are the proper persons to sue.

[895] Now, several of the articles go to shew that churchwardens elected by the inhabitants of one division cannot act as trustees, or discharge divers duties under the Local Act of 30 Geo. 3. This may or may not be the case, and on such questions I give no opinion, for it does not belong to me to decide them: the sole question for me to determine is whether they are legal churchwardens of the division of St. John, and entitled to sue in this cause.

On a question so important as this it might reasonably have been expected there should have been some legislative declaration, but I am aware of none, and the intent of the legislature is again to be painfully collected by inference only from the effect of other enactments; now the 73rd section gives the power to appoint churchwardens to the new churches; and the 71st section directs that districts, though liable for twenty years to the mother church, shall, at the end of that time, make their rates, as if a separate parish, and that must mean by the churchwardens chosen by the inhabitants of the division assessed.

The statute 1 & 2 Wm. 4, c. 38, ss. 23 and 25, throw some light on the meaning of the words separate and distinct parish, but then the words are altered to spiritual purposes.

It is admitted by the highest Courts that in construing acts of Parliament in cases of difficulty, that construction ought to be taken which prevents consequences which the legislature could not have intended. The Parliament could hardly have intended such an anomaly as that churchwardens [896] should be chosen by the inhabitants of a district under the 73rd section, and also of a distinct parish under the 1 & 2 Wm. 4, and yet not so chosen by the inhabitants in any divided parish under the Church Building Acts; I think, therefore, that I must adopt the interpretation which would avoid such a discrepancy, and hold that by virtue of the 16th section of 58 Geo. 3, and also the 73rd, the churchwardens for the purposes of rates and repairs are properly elected by the inhabitants of the curtailed parish; I say for rates and repairs only, and give no opinion as to the rest. I hold these churchwardens to be duly elected as to this suit.

If I am correct in this position, I apprehend that the objection on the score of want of notice under the Vestry Acts falls to the ground, for if the electors are the inhabitants of St. John's, Hackney, only, I do not find it alleged, nor do I believe it was argued, that proper notice was not given.

I now proceed to a class of objections of a different character. The objections I am now about to consider are in effect denials of the facts pleaded in the libel.

First. That the churchwardens either had or might have had funds in their hands applicable to church repairs, and therefore that this rate was not necessary, as alleged in the libel. I hold there to be a wide distinction in law between the actual possession of funds and a power of acquiring them. I hold that if I found the churchwardens in actual possession of funds clearly applicable to church-rate, and sufficient, if so applied, to render a rate unnecessary, I should be bound to pronounce against [897] the validity of a rate made under those circumstances, for it is absolutely essential to the validity of a rate that it should be necessary, but I do not find it so pleaded; therefore I dismiss from my mind every consideration of the case on the ground of possession of funds, though I must observe that the question I am about to discuss is not very explicitly raised by the facts contained in the allegation; still, as the objection has been much pressed in argument, I will consider what is the law where it is pleaded that the churchwardens might, if they had done their duty, have had funds, though in fact they have not. I am of opinion that the course to be pursued by the Court would entirely depend on the circumstances of each particular case. If they had a rate uncollected, a case put in argument, such uncollected rate being sufficient, I should certainly refuse to recognise the validity of a new rate; but if the supposed fund consisted of monies belonging to an estate given for the benefit of the church, or in aid of church-rate, I should say that I have no jurisdiction over the churchwardens in their character of trustees, and that all such questions are within the cognizance of other tribunals, which alone could afford a remedy. So I should say also in any cases of doubt or difficulty, for the church must not fall down, or necessities for divine service be wanting, till difficult questions of law of this kind are decided.

Then as to the alleged fund; it certainly is my opinion that if there were any ancient and accustomed dues, as mentioned in the Local Act, such dues are, by the 23rd section of the Local Act, to be applied in aid of this church-rate, but I have no [898] jurisdiction to determine, if the custom were denied, whether there are any such dues, nor what they are, nor could I enforce the payment: all these are matters for Courts of Common Law to determine. Tables of fees confirmed by the ordinary will not constitute legal fees; they may be convenient as a guide to parishes with regard to the amount of monies which the ordinary thinks it proper should be taken for matters not of right with relation to burial or otherwise, but legal fees can exist only by immemorial usage, or be created by the authority of acts of Parliament; then how can I hold that the possibility of the churchwardens receiving some fees, I know not what, will prevent the necessity of a church-rate, and invalidate it? I have not even the jurisdiction to compel the churchwardens to act in this matter, for how can I compel them to adopt measures which would involve them in litigation in other Courts? I cannot pronounce a rate excessive on this ground.

I have had quite enough to do in disposing of the questions necessary to be considered in this case, without going out of my way to hunt for others, and therefore I conclude that the averment that the estimate is excessive referred only to the facts before pleaded, and not to any of the items themselves, and I am entitled so to do both from the shape of the allegation, and because also no objection to any particular item was taken by the counsel.

The last class of objections is to the rate itself. It is first said that the rate is illegal, because, though the occupiers are assessed, the landlords of a large class are the persons universally called upon [899] to pay, and this case is compared to a church-rate, apparently prospective, but really retrospective, but the cases are wholly different; the rate ought to be laid on every occupier, and he is legally liable, and it is not of the slightest importance to whom the churchwardens apply for payment. In *Thompson and Sandford v. Cooper* (3 Phill. 640) Sir William Wynne held that the landlords might be rated; I mention that case, because, till reversed, it would be binding on me, not that I concur in the doctrine laid down, which, if followed out, would take from all church-rates all certainty and precision, and without special custom being

pleaded, sanction different modes of rating throughout the whole kingdom ; I cannot, therefore, sustain this objection.

Then does the allegation state sufficient facts to shew that the rate has been unequally assessed? If there be a clear inequality, no doubt it would vitiate the rate; if the inequality were slight, it would not, for it is impossible to rate all properties with absolute precision, and there will be difference of opinion as to annual value: what such an allegation ought to state amongst other things is this, that various properties, specifying them, are not rated according to the same principle of valuation with other properties assessed in the same rate: these articles do no such thing, there is no such distinct averment to be found. There is an averment that, however rated in the church-rate books, the persons refused to pay according to the principle of the poor-rate—a fact which could not [900] invalidate the rate, if true; there is an averment that, as to some of the houses, they are estimated at one sum in the poor-rates and rated at another in the church-rates, but they are not rated in the poor-rate according to the gross estimated value, but on different principles; how am I to conclude that the gross estimated sum in the poor-rate is the proper valuation for the church-rate and so adopted in other cases? it is not so pleaded, it is not so argued; but it is pleaded that it is too low. These articles raise nothing but issues, which may be wholly irrelevant to the question, and which would decide nothing as to the inequality of rating. I presume, from the heading of the rate-book, that the poor-rate was made in pursuance of the 6 & 7 Wm. IV. c. 96, and the Local Act; that act of Wm. IV. requires the rating to be upon the net annual value, and not on the estimated value, and yet the estimated value is referred to in these articles, and then it is pleaded that the estimated value is below the actual rental; suppose it is so, unless the rest of the parish were rated on a higher scale, which is not pleaded, the rate would not be unequal. No explanation of all these matters has been offered by counsel, scarcely an argument even to prove the rate unequal. The case of *Chesterton v. Farlar* (1 Curt. 345, 367, 371; and 2 Moore's P. C. Cases, 330) was cited, but that was a totally different case; in that case I did not reject the articles explanatory of the mode of making the church-rate because they were inadmissible, but because the plaintiffs had pleaded and admitted that the rate was retrospective; consequently in my opinion could not [901] substantiate the rate and succeed in the cause; in fact, they had pleaded themselves out of Court: it appeared to me, therefore, according to my conception of the practice in these Courts, and strictly conformable with justice, that plaintiffs who on their own shewing, by their pleading, could not possibly recover, should not be permitted to go into issues on minor points, which, however decided, could never affect the ultimate decision of the case; in giving my opinion on that case I did say that all property ought to be rated, and so in strictness it ought, though the occupiers of property may, under certain circumstances, be excused from payment; were it otherwise, a rich man occupying a cottage might be excused, and all cottage property exempted for the benefit of the landlord.

On the whole, I am satisfied that these articles do not raise in any issuable shape the question of inequality of rate; inequality is a legal defence, but the averment must be plain, clear, and capable of being tried; these articles do not do so, and I must reject them.

I believe I have considered every point of law which can possibly arise from these facts, and I am of opinion that, if the articles as laid were all proved, they would furnish no legal defence to the action, and therefore I reject the allegation.

[902] STILL AND BUNN *against* PALFREY. Arches Court, Dec. 11th, 1841.—Suit for church-rate. Objection: First, that the proceeding was for six rates at the same time, overruled. Second, that the rates were made by persons delegated by the parishioners in vestry, but not made in vestry, overruled. Third, that the minister's salary was included in the rate, such salary amounting to one-third of the whole rate, sustained.

[S. C. 1 Notes of Cases, 220; 5 Jur. 1162.]

This was a question as to the admissibility of a libel in a suit of subtraction of church-rate, brought in this Court by letters of request from the commissary of Canterbury, by Messrs. Still and Bunn, the churchwardens of the parish of St. Mary the Virgin, Dover, against Daniel Palfrey, a parishioner; the circumstances of the case are fully set forth in the judgment of the Court.

The libel was opposed by Phillimore and Harding, and supported by Burnaby and Nicholl.

Sir Herbert Jenner. This is a cause of subtraction of church-rate; and the question before the Court is whether or not the libel given in is admissible. The libel is for the recovery of no fewer than six rates, four of them more particularly called church-rates, the other two in point of fact are rates made for repayment of money for the purchase of a cemetery by the parish, and the rates for this latter purpose are not opposed.

The whole libel is opposed, together with the additional articles, which were brought in for the purpose of giving more information to the Court than was originally contained in the libel.

[903] The circumstances of this parish of St. Mary, Dover, are peculiar, and the course of proceeding in the parish for making the rates is also peculiar, and although it appears that the rates have been made in this manner for a very long period, their validity has never before been called in question; still, when parties are called on to pay the rates, they are at liberty to take any objection, and have their objection considered by the Court, and the weight given to it which it merits.

The case comes here by letters of request, and the parties to the suit are the churchwardens of the parish, who sue in their official capacity; they describe themselves as the successors of Saunders and Hall, who were the successors in office of T. H. E. and K. H., the successors of T. S. and T. W. respectively, churchwardens at the times when the several rates were made. The other party is described as a parishioner of this parish. The consequence of including all these rates in one proceeding is that it has given rise to proceedings which, if the rates can be maintained, may be attended with considerable expense. The libel consists of thirty-five articles and exhibits, additional articles have been given in with ten exhibits. If there is a valid objection, the suit ought to be stopped in limine, before any great expense is incurred.

The objections to the libel are three in number:

First. That some of the rates are of long standing, and that with respect to them the suit, if at all, ought to have been brought long ago.

Second. That the rates were not made in vestry.

[904] Third. That some of the purposes for which they were made are not the subjects of church-rate.

With regard to the first objection. This circumstance was very properly brought to the notice of the Court, as introductory not only of great inconvenience to the party proceeded against, but also to the parishioners called on to pay the rate. It may turn out that the rate is illegal, and then the parties who have paid will have paid money in their own wrong. Still, notwithstanding this, the Court is not at liberty to say that it will not entertain the suit for these rates, but it must be understood by churchwardens that the Court will not be inclined to give them assistance, if they do not take the earliest opportunity of recovering rates when parties give notice that they will not pay them. In this case there is some excuse: many causes have been pending here and elsewhere which may have deterred parties from bringing forward questions so early as they otherwise might have done. Whatever the reasons were, the delay is not attributable to these churchwardens, but to their predecessors.

The second head of objection is to the manner in which the rate has been made. It is said that the mode of making the rate is not legal, that it was not made in vestry, but by a certain number of the parishioners appointed in vestry to audit the accounts of the churchwardens and to make a rate. This objection applies to the whole four rates in principle, for although the sums differ in amount, I apprehend that they were all made in the same manner; therefore this objection may be considered as applying to the whole libel.

[905] The mode of proceeding appears to have been this; the first article of the libel pleads the making the rate in 1837, and the proceeding seems to have been in this shape: certain repairs are stated to be necessary, and the churchwardens wanting funds to do the repairs, due notice is given, calling the parishioners to meet to appoint persons to audit the churchwarden's accounts, and to make a church-rate. A meeting is held; at that meeting twelve parishioners are nominated and appointed, and they, or any five of them, are authorized to audit the accounts; and also, according

to the ancient usage and constant practice of the parish, to make a church-rate. According to this statement, the parishioners were duly assembled for these purposes, and those persons, being twelve in number, were specially appointed to make a church-rate, on the Thursday next following, according to the ancient usage and practice in this parish. It seems that on that day the parishioners so nominated met in vestry; there were present five of them, and the churchwardens, whose accounts were to be audited, attended, and in their presence a rate was made, or an assessment for the repair of the church; that the churchwardens were present at such meeting and were consenting to such rate.

The other articles plead in the usual form the making of the rate, the demand made on the parishioner, his refusal to pay, and the summons before magistrates; that Mr. Palfrey at this time occupied premises rated at the sum of 14s. 6d., the sum sued for; and annexed is a copy of the original rate so made. The same course of proceeding was adopted on the other occasions, in 1838, 1839, [906] 1840; as to two of these rates, it is objected that they were for two of the years then at an end. The amount required for these repairs were greater in some years and less in others. And also a greater or less number of parishioners were nominated to make the rate. Also on one occasion in 1840 it is pleaded that Mr. Palfrey, then one of the auditors, gave notice of a motion, to be brought forward at the vestry, to rescind the resolution of the vestry, insomuch at least as it empowered the churchwardens to make a rate, and to order that no church-rate be allowed until it had received the sanction of the parishioners in vestry assembled; that motion was, however, negatived, and an amendment carried that the ancient and constant practice of the parish be adhered to. This was accordingly done, and the rate made; in point of fact, it was made by the resolution to adhere to the practice of many years.

Now, the motion made by Mr. Palfrey was not improper, nor was it in itself unreasonable. The practice in this parish was contrary to what is customary in most parishes, and it would have been perhaps the most desirable course that after the accounts of the churchwardens had been audited, the parishioners should have passed the accounts, and should have themselves made the rate. Still the question has been raised, and must be considered, whether the custom is such as to render the rate invalid.

Now it was objected that this was a rate not made in vestry, and that no rate can be good and valid unless made by the parishioners in vestry assembled, unless made by a select vestry, or by prescription from [907] time immemorial. It is certainly not alleged that there has been an immemorial custom in this parish; and it was argued that if immemorial custom be not pleaded it is of no avail to allege constant and ancient usage. I do not entirely agree with this argument, although no immemorial custom is set up as to the mode of making the rate, yet the rate is made, as it is said, according to what has been for many years the ancient practice; the parishioners were not taken by surprise, no novel mode was adopted, the ancient and constant practice was adhered to, and it may be considered not an inconvenient mode. The burthen is cast by law on the parishioners of repairing the parish church and providing those things which are necessary for divine worship; this practice may be considered as a bye-law made *pro re ratâ*, that no fixed number but a certain number of the parishioners should be selected to make the rate as being an arrangement most convenient to the time and employment of the others, and this may be considered as in the nature of a bye-law. As it is stated by Lord Chief Justice Tindal, in *The Braintree case* (12 Add. & Ell. 265), a parish is a corporation aggregate, as far as regards the making of rates for the repair of the church, and "the power of making bye-laws is incident to corporations aggregate," and he says that "Lord Coke lays it expressly down that the inhabitants of a town may, without custom, make ordinances or bye-laws for the reparation of the church, or highways, or any such thing, which is for the general good of the public; and in such cases the greater part shall [908] bind the whole without any custom." I do not, therefore, see anything improper in the mode adopted. If these persons had taken upon themselves to assemble and make a rate, without the authority imparted to them by a majority of the parishioners, the case would fall within the principle acted on in *The Braintree case*, where a rate was made by a portion of the parishioners not authorized to do so, and no notice having been given to the parish. This difference essentially distinguishes this case from a case where churchwardens had taken upon themselves to make a rate of their own

authority, that here certain persons were appointed for the special purpose by the whole body of the parishioners, notice having been duly given. Where a notice is duly given, the whole body are present or consenting to what is done by those present. Here notice was duly given for the purpose for which the parishioners were to assemble, namely, to appoint persons to make a church-rate; the parishioners were not taken by surprise, it was simply following the previous course adopted for many years. If the whole case rested on these two objections, the Court would be bound to admit the libel, and if it was proved to pronounce for the validity of the rate. But there is another objection, with respect to which I have great difficulty: it is this, that a considerable part of this rate is to be applied to the payment of the minister's stipend. The heading of the rate is that it is "for and towards the necessary repairs of the church and payment of the stipend, maintenance, or salary of the minister, &c.," and the question is whether the providing for the salary of the minister is a legal subject of church-rate.

[909] Additional articles were given in, and they state that for many years the minister's salary has been paid out of the church-rate. That in 1817 Mr. Maule, who had previously been the assistant minister, was elected minister by the inhabitants of this parish, to whom the patronage belongs, at an annual stipend of 200l. in addition to surplice fees; that this stipend has ever since been paid him out of the church-rate. The stipend to the other ministers varied, but was paid in the same manner, and the sums for that purpose were allowed in the churchwardens' accounts. It is not a usual mode of providing for the payment of the minister of a church to make his stipend an item in a church-rate.

The circumstances of this parish are peculiar; the additional articles plead "that the church of St. Mary the Virgin, in Dover, is a very ancient edifice, of Saxon origin, belonging to and in the patronage of the inhabitants of the parish, in whom (in vestry assembled) the election of the minister is vested; that the duty of providing and paying a stipend to a minister for performing the spiritual duties of the parish hath at all times been incident to the possession and patronage of the church; that there are no tithes or glebe, and the minister, besides Easter offerings, and fees for occasional duty (which together are of small amount), receives a yearly stipend from the inhabitants, the amount whereof is agreed upon at the time of his appointment." And a variety of exhibits were annexed to shew the mode in which the stipend had been paid out of the church-rates. The question is, the objection being now taken, whether the rate for such purpose can be maintained. The true character of this pre-[910]-ferment is not very accurately defined; I can form no notion how the parishioners became possessed of the patronage, or when for the first time it was given to them, whether the right of patronage came to them on the dissolution of the monasteries, or when it was: all that the Court can collect is, that it is neither a rectory nor a vicarage; there is no endowment, no tithes; the minister is not instituted or inducted; and whether he is licensed by the bishop is not set forth, though I presume that it must be so, as the churchwardens come in the usual course to the Commissary Court to confirm the rate.

Now the libel pleads that the minister's stipend is always collected with the rate for their repair of the church; I apprehend, however, that there were two rates originally—one for the minister—one for the church. The first of the exhibits, dated 1611, states, "The accounts of Thomas Obree and Richard Dawkes, churchwardens, were audited, as was the book for the minister's wages," so that it would seem the accounts were kept separate; it is clear that separate books were kept, one for the minister's wages, the other for the general appropriation to repairs of the church; in subsequent years, however, the plan of collecting separately was abandoned, and one sum collected, from which the minister's stipend was paid; this has been the course since 1817. The amount of 200l. out of 600l. is very considerable, it is one-third of the whole sum. The repair of the fabric of the church, and the providing necessities for divine worship, are the purposes to which church-rates are more immediately applicable; but it may be said that [911] this parish is very differently situated from others, as it undoubtedly is. The parishioners are bound to provide a minister; whether the parish receives the tithes or not, they are the patrons, and, as such, are bound to provide a minister, and are bound to pay him; and it may be said that it can make little difference whether the rate is collected by the churchwardens as a church-rate or a separate rate: it would so seem at first sight, and Mr. Palfrey could

receive no prejudice by being assessed in one form or the other. I should be very much inclined to adopt this view of the case, if there were not this distinction, that if this is not a legal charge in a church-rate, this Court has no power to enforce the payment of the minister's stipend as part of a church-rate. It is a different thing for the Court to entertain a suit for ecclesiastical dues to the minister *eo nomine*, and to enforce payment of such dues as part of a church-rate. Cases were cited to shew that ecclesiastical dues could be enforced in the Ecclesiastical Court. In *Gilby v. Williams* (Cro. Jac. 666), where it was pleaded that for twenty years dues had been paid, a prohibition to the Ecclesiastical Court was denied.

In *Gooch v. The Bishop of London* (2 Stra. 879) a prohibition was denied to the Ecclesiastical Court, and on this ground, that it was not necessary for the bishop to claim, by immemorial custom or prescription, but *ex antiquo*, and that in such a case the Ecclesiastical Court might proceed.

These cases are very strong to shew that ecclesiastical dues may be sued for in a Spiritual Court, [912] but they do not shew that they may be sued for under the name of subtraction of church-rate; no case has been cited where such a charge has been enforced as part of a church-rate. I am not prepared to say that it is a purpose for which a church-rate can be made; I cannot say that if all the facts stated in the libel were proved that I could enforce this rate. It may involve this parish in considerable expense. The parishioners cannot escape from the duty of providing a minister. They may be subject to an action of *assumpsit*, or other means for compelling them to find sufficient funds from some source or other for paying his stipend to the minister.

I am, therefore, of opinion that I cannot enforce this payment in a suit of this description: as to what the powers of the Court may be in a suit of a different description I give no opinion. I reject all the articles of the libel which refer to this part of the case: the libel must be reformed.

The libel was subsequently brought in and admitted as reformed. The defendant paid the cemetery-rates, and the proctor for the churchwardens declared he proceeded no further.

The Court being of opinion that both parties were in error, condemned the churchwardens in the costs which related to the church-rates, and the defendant in the costs occasioned by his refusal to pay the cemetery-rates.

[913] IN THE GOODS OF LIEUT. GEN. THORNTON, Deceased. Prerogative Court, Dec. 6th, 1841.—Probate allowed of a copy of a duly executed codicil which had been burnt by mistake.

[S. C. 1 Notes of Cases, 216.]

The testator left a will and a codicil dated 13th of October, 1838; and on the 25th of October, 1841, a further codicil was drawn up for execution, but, there not being space left sufficient for the names of the witnesses and the testator's seal, a fresh copy of the codicil was made, which was executed by the testator, and duly attested by two witnesses. This latter executed codicil was then, as it was supposed, enclosed in an envelope; and the first prepared copy burnt.

Upon the death of the testator, upon opening the envelope, it was discovered that the codicil was not there, and upon search being made the executed codicil could not be found, but the first copy was discovered, which it was supposed had been burnt. Upon an affidavit from T. R. Thornton, Esq., the executor and residuary legatee, and his son, of the above facts, and that they had no doubt that the executed codicil had been burnt by mistake instead of the first copy, and which Mr. Thornton, the son, deposed was a correct copy of the executed codicil.

Robinson prayed probate of the will and first codicil, and of the copy of the codicil of the 25th of October.

[914] Sir Herbert Jenner. There is full proof of the execution of the codicil of the 25th of October, 1841; and as far as possible of the fact of the wrong paper being burnt: it is fortunate that the copy has been found, otherwise the Court might have had great difficulty.

Let probate pass of the will and codicil, and of the copy of the last codicil as prayed.

FIFE against **BLUNT**. Arches Court, Dec. 11th, 1841.—Motion to enforce payment of costs in a suit for subtraction of tithes, notwithstanding an appeal, under stat. 32 Hen. 8, c. 7, rejected, the proceeding in the cause being under the stat 2 & 3 Edw. 6, c. 13.

[S. C. 1 Notes of Cases, 173.]

This was a cause of subtraction of tithes, brought originally in the Commissary Court of Surrey by the Rev. Henry Blunt, rector of Streatham, against Mr. Henry Fife. It was appealed to this Court, upon the rejection of an allegation in the Court below, on behalf of Mr. Fife. This Court affirmed the sentence of the Court below, and retained the cause.

The Court at the hearing of the cause (11th of November) pronounced in favour of the party suing for the tithes, and condemned Mr. Fife in costs. On the 1st of December (the fourth session of Michaelmas Term) the costs were taxed, and on that day Mr. Fife alleged that he had in due time and place appealed, and he was assigned to prose-[915]-cute his appeal by the first session of the next term.

Addams now (11th of December) prayed that the Court would, notwithstanding the appeal, direct a monition to issue against Mr. Fife for the payment of costs, as it was authorized to do under the stat. 32 Hen. 8, c. 7, (a) the appeal he submitted was merely to cause delay.

Sir Herbert Jenner. I agree with the counsel that, looking at the circumstances of the case, the appeal is made merely for delay; and the Court would feel inclined to direct the costs to be paid under the statute of Henry VIII., but unfortunately the proceeding in this case was not under that statute, but under the statute 2 & 3 Edw. 6, c. 13; I therefore do not feel that I am authorized to enforce the costs under the former statute.

[916] **IN THE GOODS OF LOGAN MITCHELL**, Deceased. Prerogative Court, Dec. 6th, 1841.—A legatee at the request of the testator, signed her name to the will, the testator subsequently duly executed the will in the presence of two witnesses, who attested it; motion to strike out the name of the legatee rejected.

The deceased died on the 16th of November, 1841. Shortly previous to his death, a servant in his house having destroyed herself, he sent for a niece to come to his house; he soon after made his will, and requested his niece to put her name to it, which she did. She then said to the deceased that she feared she should get into a scrape by signing the will, upon which the deceased sent for two friends, to whom he acknowledged his signature to his will, and they subscribed their names in his presence; there were some alterations in the will in the deceased's handwriting, and there was no doubt that they were on the paper before the execution.

Haggard prayed probate of the will with the alterations, and that the Court would direct the name of the niece to be struck out, as she might otherwise be considered as an attesting witness, and deprived of the legacy to which she was entitled under the will.

Sir Herbert Jenner. There can be no doubt that the second execution of the will was a valid execution; from the affidavit it is clear that the alterations were made before the will was executed.

The Court is prayed to strike out the name of the niece, who upon the face of the instrument [917] would seem to be an attesting witness; the Court cannot do that.

The proper time to take the objection would be upon a suit being brought for the legacy.

Probate granted of the paper as it stands.

(a) The 3rd section of the act is as follows:—

"And in case that any of the parties for any cause or matter concerning that suit do appeal from the sentence, order and definitive judgment of the said ordinary, or other competent judge, as is aforesaid, then the same judge by virtue of this act forthwith upon such appellations made, shall adjudge to the other party the reasonable costs of his suit thereinbefore expended; and shall compel the same party appellant to satisfy and pay the same costs so adjudged by compulsory process, and censures of the said laws ecclesiastical, taking surety of the other party to whom such costs shall be adjudged and paid, to restore the same costs to the party appellant, if after the principal cause of that suit of appeal shall be adjudged against the same party to whom the same costs shall be yielded," &c.

WELLESLEY against VERE AND KNOX. Prerogative Court, Dec. 16th, 1841.—Motion at the hearing of a cause with respect to the validity of a will dated 1822, to import into the cause the proceedings and evidence in a former suit in this Court, respecting the capacity of the deceased in 1835, rejected.

[S. C. 1 Notes of Cases, 240.]

This was a cause of proving the will of Edward Hope, Esq., deceased, promoted by the Reverend Henry Wellesley, the universal legatee named therein, against J. J. Hope Vere, Esq., the brother, and the Hon. Jane Knox, the sister of the deceased, his next of kin. The testator died on the 4th of November, 1836, a bachelor, leaving property of the value of about 12,000l. The paper was dated August 13th, 1822, and was to the following effect:—"In the name of God, Amen. I, Edward Hope, do leave and bequeath every thing I possess under the sun to Henry Wellesley, a younger son of the Marquess of Wellesley, who is the brother to the Duke of Wellington." The paper was in the deceased's handwriting, but was not signed at the end, nor attested. A will of the deceased, dated July 27th, 1835, leaving the property to Mr. Wellesley, with the exception of 3000l. to Louisa Goddard, the deceased's servant, was pronounced against in a suit in this Court, on the ground of insanity, and the sentence in that case was affirmed on appeal by the Judicial Committee of the Privy [918] Council. Two witnesses were examined in support of the will now before the Court, and the cause stood for hearing; no plea had been given in opposition to the will.

Haggard and Harding now prayed the Court to import into this suit the proceedings and evidence in the former cause; it was a suit between the parties now before the Court upon the same question, the testamentary capacity of the deceased, and the circumstances and facts proved in that case would shew the real state of the deceased.

Burnaby and Addams opposed the application.

Sir Herbert Jenner. It appears that the proceedings in this cause have taken their regular course; the will was declared to be opposed by the proctor of Mr. Hope Vere, an allegation was then given in on the part of Mr. Wellesley propounding the will, upon that allegation two witnesses have been examined; publication passed of that evidence, no allegation being given by Mr. Hope Vere against the will; the cause was set down regularly for hearing, and the prayer of Mr. Wellesley's proctor is, that the Court would pronounce in favour of the will, and decree administration to his party; and a prayer from Mr. Hope Vere's proctor is before the Court, that I would pronounce that the proctor of Mr. Wellesley has failed in proof of his case, and that the deceased is dead intestate. So the cause stood up to this time, and now for the first time, at this late period of the cause, the Court is prayed to [919] rescind the conclusion of the cause, in order to admit the evidence in the former cause between Mr. Wellesley, one of the parties, and Mr. Hope Vere, in which a will of 1835 was pronounced against, and the sentence of the Court was affirmed by the Judicial Committee of the Privy Council. Now, although that suit was between the parties now before the Court, it related to a different period of time, and if I were to accede to this application the whole case must be re-opened. The application is quite a novel one, and if it could be entertained, it certainly ought to have been made at an earlier period. I must reject the application.

The cause was then argued on its merits, and the Court pronounced in favour of the will.

SCURRAH against SCURRAH. Prerogative Court, Dec. 16th, 1841.—An application to compel an administratrix to exhibit an inventory and account after a lapse of eighteen years rejected, and the party making the application, under the circumstances, condemned in costs.

[S. C. 1 Notes of Cases, 248.]

In this case a decree was taken out at the suit of R. W. Scurrah, a brother and one of the next of kin of Richard Edward Scurrah, deceased, calling upon his mother, Sarah Scurrah, the mother and administratrix of the deceased, to exhibit an inventory and account of her administration. The deceased died on the 6th of August, 1823, a bachelor, intestate, leaving his mother, who took out letters of administration shortly after the death of the deceased, and his brother and two sisters, the parties entitled

in distribution. No proceeding was taken to call for an inventory [920] and account until a decree was taken out by the brother in August, 1841.

The administratrix appeared to the decree, and a petition was entered into on her behalf, praying that she might not be assigned to bring in the inventory and account. It was alleged that the affairs of the deceased were much embarrassed; that the debts exceeded the assets; that being unacquainted with business, her son (the party now proceeding) assisted her in the management of the deceased's affairs; that he made an account for her of all that had been received and paid relative to the deceased's estate, by which it appeared that she had disbursed 41l. more than she had received; and it was submitted that by reason of the premises and of her great age, being in her eightieth year, she ought not to be called on for a further account.

On the other side it was denied that the estate was much involved, or that the debts of the deceased exceeded his assets, or that the party proceeding had assisted the administratrix in the management of the affairs, &c.

Haggard for the party cited, submitted that the proceeding was a vexatious one, and that the administratrix ought to be dismissed with her costs. He cited *Bowles v. Harvey* (4 Hagg. Ecc. 241).

Jenner contra. The time that has elapsed and the age of the administratrix are not a bar to this application. It was stated that the estate was in-[921]-solvent; the assets, however, were sworn under 300l., but they are now stated to be 614l.

The case of *Bowles v. Harvey* is not similar to this; in that case it was said by the Court that it was impossible to make out an inventory as all the papers were lost. In *Higgins v. Higgins* (4 Hagg. Ecc. 242), after a long delay, although a full inventory was dispensed with, a declaration instead of an inventory was produced.

Here no information is given; we should be satisfied with a declaration.

Sir Herbert Jenner. In this case the Court is asked to assign Mrs. Scurrah, the administratrix, to exhibit an inventory and account of the estate and effects of her son, who died in August, 1823, intestate. He left his mother, a brother, and two sisters who were entitled in distribution to his property. The effects of the deceased were sworn under 300l. The administration was taken very soon after the death of the deceased, and this application is now made for the first time in 1841, that is, eighteen years after the death of the party.

The Court, under these circumstances, expects some ground to be stated for the application now made. I admit the right of the parties to call for an inventory and account, and that the party called upon cannot allege time as a bar to exhibiting it, but the Court has a discretion, which it exercises, of considering whether, under the particular circumstances of each case, it will assign a party to [922] exhibit an inventory and account after a lapse of time; but it must be clearly understood that the Court does not consider time alone a bar to exhibiting an inventory and account.

What, then, are the circumstances of this case? administration was taken out immediately after the death of the deceased in 1823. It appears that the son assisted in making out the account of the property of the deceased from the books and the dictation of the administratrix, the account consisting of a statement of one side of debts due from the deceased, on the other of debts due to him in his trade; this was made out in 1825, two years after administration was taken out. The property was sworn under 300l., but it turns out that when the account was made out by the son (the party now applying to the Court) either from his mother's dictation or assistance, that 604l. had been received, so far as could be made out, and payments made to the amount of 653l., shewing a balance in favour of the administratrix, and which balance has been increased to 41l. by a further payment of 2l., so that at that time it did not appear that there were any assets to be divided; but this is not conclusive. It may be that other sums were paid or received; still the Court expects some good ground to be shewn for exercising its power of compelling the exhibiting of an inventory and account after a lapse of eighteen years. The administratrix is in her eightieth year; she swears that at the time of the death of the deceased his affairs were very much involved, that his debts exceeded his assets, that she availed herself of the assistance of her son, the party in the cause, to arrange her accounts, and remunerated him [923] out of her own money; the account is in the son's handwriting. There is a positive averment in the affidavit of the administratrix that no other money has ever been received to which the deceased was entitled; a positive averment of no assets received on her behalf.

What is the statement made by her son, the party before the Court. That he does not know, but does not believe, that the affairs of the deceased were much or at all involved, or that the debts exceeded the assets. The account is not conclusive, but it bears strong marks that the debts exceeded the assets; the mother's affidavit states that the account as made out was all that the deceased was entitled to. The son goes on to swear "that he hath made several applications for payment of his share of the deceased's assets;" not one application only, and that he was then satisfied, but "that on several occasions she informed him that she was entitled to the whole." He made other applications and received the same answer; he is not satisfied, he makes others, and yet he ventures to swear that he was ignorant that he was entitled to any of the property of the deceased. It exceeds my belief that there was such *crassa ignorantia*; if there was, he must take the consequences of it. The Court will not, at this length of time after the death of the deceased, the administratrix being in her eightieth year, call upon her to give this account. There is no averment that assets have come to her hands, no reason to believe the estate is not fully administered. There is no ground for the application, and I dismiss the party, and condemn the other party in costs.

REPORTS of CASES ARGUED and DETERMINED
in the ECCLESIASTICAL COURTS at DOCTORS' COMMONS. By W. C. CURTEIS, LL.D.,
Advocate. Vol. III. Containing Cases from
Hilary Term, 1842, to Trinity Term, 1844, inclusive. London, 1844.

[1] REPORTS OF CASES ARGUED AND DETERMINED IN THE ECCLESIASTICAL
COURTS AT DOCTORS' COMMONS.

HARRISON *against* SPARROW, FALSELY CALLED HARRISON. Arches Court, Hilary Term, Jan. 11th, 1842.—An appearance under protest to an inhibition, on the ground that the appellant, being in contempt in the Court below, had no right to appeal, overruled; the contempt having been waived in the Court below. Query, whether a party in contempt has a right to appeal.

[S. C. 1 Notes of Cases, 294 : affirmed 1842, 4 Moore, P. C. 96 ;
13 E. R. 238 (with note).]

Protest.

This was originally a cause of nullity of marriage by reason of impotence, brought by the alleged wife against her husband, in the Consistory Court of London, where a sentence was pronounced on the 22nd of July, 1841, declaring the marriage null and void ; from that sentence the proctor of the husband appealed to this Court, and he extracted the usual inhibition and citation, which having been duly served, an appearance was given by the proc-[2]-tor of the respondent under protest ; and an act on petition was entered into.

In support of the protest it was alleged that, in the first instance, this was a cause of nullity of marriage by reason of impotence, brought by Jane Sparrow, spinster, falsely called Harrison, and the wife of Fiske Goodeve Fiske Harrison, against the said F. G. F. Harrison, in the Consistorial Court of London : that the citation issued in the said cause was returned, and an appearance given thereto, and a libel prayed, on the extra Court day after Trinity Term, 5th of August, 1840 : that the libel was brought in on the first session of Michaelmas Term (1840), and was admitted as reformed on the bye day after that term (its admission as brought in having been opposed by counsel on behalf of the defendant), when the fact of marriage pleaded in the libel was confessed, but otherwise a negative issue was given to the libel : that on the second session of Hilary Term (1841) the said F. G. F. Harrison appeared personally, and gave in his answers to the libel : that on the third session of the said term a monition was decreed against the said F. G. F. Harrison, to undergo (as usual in such suits) an inspection of his person before certain inspectors then appointed, in the presence of the proctor of the said F. G. F. Harrison, who then undertook for, or declared, his said party's willingness to undergo such inspection : that on the faith of such undertaking an appointment, whereof the said F. G. F. Harrison had due notice, was made with the inspectors, but that the said F. G. F. Harrison, notwithstanding the premises, declined attending, and refused to attend such, or any other [3] appointment for the inspection of his person : that a monition issued thereupon, calling upon him to undergo such inspection of his person, that the said monition was returned on the bye day after the said Hilary Term, with a special certificate thereon, to the effect that the said F. G. F. Harrison had purposely absented himself, to avoid the service of the said monition, that a further monition thereafter issued, and was duly served and returned, and at length, to wit, on the third session of Easter Term (1841) the

said F. G. F. H. still not appearing to any or either of such processes, or at all appearing, either himself or by his proctor, was, by the Right Honourable the Judge of the said Consistory Court, duly pronounced in contempt: that on the second session of Trinity Term the person of the said Jane Sparrow was decreed to be inspected by inspectors then appointed, at her proctor's petition, as also a decree to see proceedings to be served on the said F. G. F. Harrison, that such decree to see proceedings issued accordingly, and was returned into Court on the third session of the said term, in the presence of the proctor of the said F. G. F. Harrison, who then alleged that his said party acknowledged or had admitted his receipt of a copy thereof: that the person of the said Jane Sparrow was afterwards inspected by inspectors appointed as aforesaid, and that their report in writing, touching or concerning the virginity of the said Jane Sparrow, was by them delivered, closely sealed up, to the registrar of the said Court. That on the fourth session of the said term publication was decreed in the cause, and all facts were assigned to be propounded on the bye day. That on the bye day the [4] cause was assigned to be concluded. That on the first extra Court day after the same (15th of July, 1841) the cause was concluded, and was assigned for informations and sentence on the next Court day, and that on the next Court day (22nd of July, 1841) the said cause was heard, after hearing whereof the Right Honourable the Judge was pleased to pronounce, by his interlocutory decree, having the force and effect of a definitive sentence in writing, the sentence of nullity of marriage prayed on behalf of the said Jane Sparrow, and to condemn the said F. G. F. Harrison in costs.

That all and singular the proceedings aforesaid had and done from and after the third session of Easter Term (1841) were so had and done, and that the sentence of nullity pronounced in the said cause was so pronounced in pain of the said F. G. F. Harrison and his proctor thrice called and not appearing: wherefore it was prayed that the inhibition might be relaxed, and the said F. G. F. Harrison condemned in costs.

On behalf of Mr. Harrison, in support of the appeal, his proctor alleged that his party was not, by reason of his having been so pronounced in contempt, as alleged on behalf of the other party, barred or prevented from prosecuting any appeal to this Court, and that the inhibition ought not of right to be relaxed: that after his said party had been so pronounced in contempt by the said Judge of the Consistory Court, to wit, on the 7th day of May last, being the third session of Easter Term, 1841, and on the same day the said Judge had decreed such his contempt to be signified pursuant to the stat. 53 Geo. 3, c. 127, a significavit duly [5] issued accordingly, pursuant to the said statute, under the seal of the said Court, on the 15th of the same month, and that thereupon afterwards a writ de contumace capiendo issued, pursuant to the said statute, from the Court of Chancery, directed to the sheriff of Essex, commanding him to attach the said F. G. F. Harrison. That by reason of the premises, all and every the proceedings alleged to have been done in the said cause, subsequent to the said Judge of the Court directing the contempt of the said F. G. F. Harrison to be so signified as aforesaid, were and are absolutely null and void; and, lastly, he alleged that his said party was ready and willing to obey all lawful commands of this Court, and, particularly, to undergo an inspection of his person by any inspectors this Court might think fit.

In reply to this the proctor of Jane Sparrow alleged that, when the Judge of the Consistory Court, to wit, on the second session of Trinity Term, 1841, decreed to proceed in the said nullity cause in pain of the said F. G. F. Harrison, and also a decree against him to see proceedings therein; as pre-alleged, he was fully aware that the writ de contumace capiendo had issued (though it had not been served), and was pleased so to decree, upon mature deliberation, and notwithstanding its issue. That from his so decreeing to proceed, no appeal either then was, or has since been, entered or asserted, by or on behalf of the said F. G. F. Harrison. That the said Judge decreed to proceed in the said nullity cause as aforesaid, upon the proctor of the said Jane Sparrow engaging that all proceedings on the writ de contumace capiendo should [6] be, as the same were, stayed forthwith, and which were agreed to be stayed, at the instance and request of the proctor of the said F. G. F. Harrison; and at his request also the decree to see proceedings was neither served nor attempted to be served upon the said F. G. F. Harrison personally, but that when the same was returned into Court it was returned in the presence of his proctor, who then and

there admitted that his client had acknowledged to him the receipt of a copy of the said decree.

Wherefore, &c.

Addams in support of the protest. A party in contempt can do no act: this is the known and established law of the Court.

“Quia non auditur verus contumax.”

Maranta, De Contumacia, part 6, sec. 19.

Many other authorities might be cited to the same effect, if it were necessary.

I can find no case where a party has appealed who was in contempt.

Contumacy is of two kinds, actual and presumed. The one where the party before the Court refuses some order, the other where the party refuses or declines to appear.

In this case the party is in actual contempt—is verus contumax.

The case of *Herbert v. Herbert* (2 Phill. 430; 2 Hagg. Con. 263) is stronger than the present. There the party who was in contempt merely for non-appearance attempted to [7] appeal from an order of the Judge of the Consistory Court. Yet, in the Arches, an inhibition was refused. It is said that the contumacy of the party having been signified, and a writ de contumace capiendo issued, it was not competent to the Court below to take any further step; but the significavit was waived, and proceedings upon the writ de contumace capiendo were stayed.

Curtis on the same side. The inhibition is in the usual form, and the appeal purports to be from the sentence of the Judge pronouncing the marriage void; but, upon looking at the act on petition, it would seem that the appeal is really intended to be, from the Judge having proceeded in the cause after the 7th of May, 1841, the third session of Easter Term, when he decreed the contempt of the party to be signified; but there was no appeal from that act, and the sentence was not pronounced until the 22nd of July: if the party had appealed from the contumacy, it ought to have been set forth in the inhibition, as was done when the party, according to the ancient practice, had been excommunicated. Oughton, tit. 303. The party, however, remains in contempt, and the sentence is pronounced in pain of his contumacy, which is tantamount to suffering judgment at law to go by default, and which is stated by Mr. Justice Blackstone to be a confession of the law and facts. Book 3, p. 396, he says, speaking of judgments, “Thirdly, where both the fact and the law arising thereon are admitted by the defendant; which is the case of judgment by confession or default.” To such a party, therefore, it is not competent to appeal—he [8] is verus contumax, and can do no act. If such a course be warranted by the practice of the Court, the counsel for Mr. Harrison may produce cases where a similar proceeding has been allowed; it is incumbent upon them to produce such authorities; but they cannot do so.

It is contended that, because the Judge in the Court below signified the contempt of the party, that therefore all further proceedings are void; this cannot be so—the cases of *Rea v. Rea* and *Fitzgerald v. Fitzgerald* are direct authorities to the contrary.

Easter Term, 1st Session, May 3rd, 1800.—In *Rea v. Rea* (Consistory), which is not reported, the following minutes appear:—

“The Judge, at petition of Bicknell, concluded the principal cause, and assigned the same for sentence and information the next Court. Bicknell returned excommunication duly published, alleged the party to have been excommunicated forty days; the Judge decreed him to be signified to his Majesty; the rest of the assignation continued to next Court. On the following Court day,

“The Judge pronounced for the divorce,” although the party’s excommunication had been signified.

In *Fitzgerald v. Fitzgerald* (2 Lee’s Cases, 263, 264) the husband had been excommunicated for not paying costs. Upon his affidavit, stating his inability to pay more than a certain sum, Sir George Lee suspended the excommunication, and allowed him to bring in an allegation.

Sir George Lee says “that as his contempts did [9] appear from his affidavit to arise from inability to pay the money, the effect of those decrees against him ought to be suspended till he was able to obey them; and as he was ready with an allegation, which his counsel had signed, it would be unjust to hear this cause ex parte, and deprive him of a possibility of making his defence;” clearly, therefore, shewing that

if the party had remained obstinately in contempt, the Judge would not have allowed him to be heard.

The Queen's advocate contrà. Contumacy is substituted for excommunication; that was the major excommunication. Ought. tit. 11.

By stat. 53 Geo. 3, c. 127, all disability is removed except imprisonment under the writ de contumace capiendo; here that writ has issued against the party in contempt, therefore no disability can now attach to him, and he has a right to appeal.

Even in majori excommunicatione, according to the old practice, an appeal was allowed.

There is no decided case in these Courts in which it has been held that a party in contempt cannot do any act; but in the Court of Chancery the practice is not so. *Wilson v. Bates* (3 M. & Cr. 197).

But it was said that the contempt was waived; if so, the appeal is regular.

Harding on the same side. Contempt does not bar an appeal. The process now in use is substituted in the place of excommu-[10]-nication, and it was competent to a person excommunicated to appeal.

Judgment by default at law is not analogous. The practice of the Court of Chancery is more consistent with that of this Court—and there a party in contempt may appear and do an act: in *Wilson v. Bates* the plaintiff was in custody for contempt, yet he compelled the defendant to give in his answer. But has not the party here waived the contempt?

Another question arises, whether all the proceedings, after the significavit issued, are not null and void?

Court. They were grievances from which you have not appealed.

Harding. Then *Herbert v. Herbert* is not in point, for in the judgment in that case Sir John Nicholl says he shall not decide whether a party in contempt can appear before purging his contempt; and in *Fitzgerald v. Fitzgerald* the party purged his contempt.

We do not deny that, when parties are in contempt, the Court allows the cause to proceed in pœnam; but it is another question if, not content with that, the party allows the contempt to be signified, and the writ de contumace capiendo issues.

[11] Jan. 29th —*Judgment*—*Sir Herbert Jenner Fust*.(a) This is an appeal from the Consistory Court of London; in that Court a suit of nullity of marriage, by reason of impotence, was brought by the alleged wife against the husband; the Judge of that Court was of opinion that the wife had sufficiently proved the libel, and he pronounced the marriage null and void; from that sentence an appeal was asserted, and the usual inhibition issued, which was served, and an appearance has been given to it, under protest, and an act on petition has been entered into. This is not a very convenient mode of bringing the case before the Court, but there are precedents for such a course, although not agreeing precisely with the present case: the difficulty the Court has is to ascertain the state of facts as they existed in the Court below: there is no process before the Court, and I can only see what is stated in the act on petition.

The cases in which a somewhat similar course has been adopted are those of *Herbert v. Herbert* (2 Phill. 430; 2 Hagg. Con. 263); *Chichester v. Donegal* (1 Add. 5), and *Greg v. Greg* (2 Add. 276); these cases are not precisely the same as the present, but sufficiently analogous to shew that this is not an improper proceeding.

In *Herbert v. Herbert* an objection was taken to the issuing of the inhibition, a caveat was entered [12] against the inhibition: it was contended that the inhibition ought not to issue, that there was no ground alleged for the inhibition, that there was no appealable grievance; and the Court being of opinion that there was not an appealable grievance, the inhibition did not issue.

In *Chichester v. Donegal*, the objection was taken after the inhibition had issued; in that case an appearance had been given in the Consistory Court under protest to a decree to see proceedings; the Court overruled the protest and pronounced for its jurisdiction; from that order the party appealed to this Court, an inhibition was extracted and returned, and the libel of appeal was brought in, which was opposed,

(a) On the 14th of January Sir Herbert Jenner, by license and authority of her Majesty, assumed the name of Fust, in addition to, and after that of, Jenner, in compliance with a proviso contained in the will of his kinsman, Sir John Fust. *London Gazette*, Jan. 18th, 1842.

on the ground that it did not on the face of it disclose an appealable grievance, but my learned predecessor was of opinion that the objection was taken too late, that it ought to have been taken by an appearance under protest to the inhibition. The appeal was afterwards proceeded with regularly, but the Court was finally of opinion that there was no appealable grievance.

In *Greg v. Greg*, a suit for restitution of conjugal rights, one party appealed to the Court of Arches, and an appearance was given under protest to the inhibition, but the Court, on the ground that appealable matter appeared on the face of the inhibition, overruled the protest, and directed an absolute appearance to be given.

In *Ray v. Sherwood* (a) an appearance was [13] given to the inhibition under protest, and the Court held that on the face of the inhibition there was no grievance from which the party could appeal, and relaxed the inhibition.

These cases shew that where, on the face of the inhibition itself, it appears that there is not appealable matter, the objection should be taken in the first instance; the Court can then relax the inhibition: where there is no question of fact, but merely of law, this is a convenient practice; but where the question is one both of law and fact, the Court cannot dispose of it without having the process before it.

This is a question both of law and fact, and no objection arises upon the inhibition, for that states that the appeal is from a final interlocutory sentence; then, upon the face of the inhibition, there is no doubt that the party had a right to appeal; but it is said that the party was in contempt in the Court below, and that a party in contempt has no right to appeal.

The question, then, is, Was the party in contempt? and, if so, had he a right to appeal or not?

I must, then, look at the proceedings in the [14] Court below: it appears that a citation issued and was returned, an appearance given and a libel prayed, that the libel was admitted and an issue given; that on the second session of Hilary Term a monition issued, calling upon Mr. Harrison to undergo an examination of his person; that, no appearance being given to that monition, the party was pronounced in contempt; it further appears the party was not only pronounced in contempt, but his contempt was signified, and a writ de contumace capiendo issued, and was placed in the hands of the sheriff; so that it was not only a process putting the husband in contempt for the purpose of proceeding with the cause, but in order to punish him by imprisonment. Nothing then occurred until the second session of Trinity Term: on that day an order was made for the inspection of the lady's person, and a decree to see proceedings was taken out against Mr. Harrison; that decree was not served on the party, but was returned on the third session of that term, when the proctor of Mr. Harrison alleged that his party acknowledged to have received a copy of the said decree. The party then was before the Court by his proctor, his appearance is recorded, and no objection is made, nor anything urged in regard to the contempt; it appears to me that from this time the proceeding was not in penam, properly so called. I am of opinion that what took place after the proctor for Mr. Harrison appeared and acknowledged the receipt of the decree to see proceedings, and his appearance being entered, was a waiver of the contempt of the party; so that the proceedings from that time were with the party before the Court, [15] and the contempt being waived, the party is entitled to prosecute his appeal.

It is, then, unnecessary to determine whether it is competent to a party in con-

(a) *Ray v. Sherwood and Ray* was a suit of nullity of marriage by reason of incest, brought by Ray, the father, against Sherwood and Ray (the daughter). The libel in the Consistory having been rejected, Mr. Sherwood was served with two inhibitions in the Arches Court, one at the instance of Ray the plaintiff, in the Court below, and the other of Ray the defendant; to these inhibitions Mr. Sherwood appeared under protest, and the protest with regard to the inhibition on behalf of the daughter was sustained, and the inhibition relaxed, on the ground that, being a defendant in the Court below, she had no grievance to complain of, and that on the face of the inhibition there appeared to be no appealable grievance: with regard to the inhibition on behalf of Ray, the father, the protest was overruled, and an absolute appearance directed to be given. This point is not reported, although some reference is made to it in the judgment. Vol. i. p. 213.

tempt to appeal or not there is no decision to that extent ; in *Herbert v Herbert* Sir John Nicholl did not decide the point.

I am of opinion that the party was not in contempt in the Court below when the sentence was pronounced, and that he is not precluded from prosecuting the appeal to this Court ; I therefore overrule the protest, and assign the party to appear absolutely.

This decision was affirmed on appeal by the Judicial Committee of the Privy Council on the 22nd of June ; and the principal cause, being retained there in order to prevent delay, was assigned for sentence forthwith, upon the evidence taken in the Consistory Court, and on the 9th of July the sentence of that Court annulling the marriage was affirmed : an allegation tendered in the Privy Council on behalf of Mr. Harrison, and an offer to undergo an inspection of his person having been rejected, as coming too late.

The cause in the Consistory Court was heard in camera, but from its importance it is here inserted.

[16] SPARROW, FALSELY CALLED HARRISON *against* HARRISON. Consistory Court of London, July 22nd, 1841.—Sentence of nullity of marriage by reason of the impotency of the husband pronounced, without the inspection of his person.

The citation called upon Mr. Harrison to appear and “to answer to Jane Sparrow, spinster, falsely, as alleged, called Harrison, and pretended to be the wife of the said F. G. F. Harrison, in a certain cause of nullity of marriage, by reason of impotency of him the said F. G. F. Harrison.”

The libel which was admitted after opposition pleaded—

First, second, and third. The fact of marriage at the chapel of the British Ambassador at Paris on the 28th of March, 1826, and the handwriting of the parties of their names to the entry of the marriage.

Fourth. That at the time of the aforesaid pretended marriage the said F. G. Harrison was a major, of the age of about forty years, but that the said Jane Sparrow, otherwise Harrison, was a minor only just turned of seventeen years of age.

Fifth. That the said pretended marriage was never consummated, as hereinafter more particularly pleaded ; but that the said F. G. Harrison and the said Jane Sparrow, otherwise Harrison, nevertheless, from and after the time thereof, lived and cohabited together, except as to sexual intercourse, as husband and wife, in manner as and at the several places also hereinafter more particularly pleaded ; that they also, ever since their said marriage in fact, save as hereinafter mentioned, have acknowledged each other as and for husband and wife respectively, and that they were and are commonly accounted, reputed, and taken as and for such [17] respectively by and amongst their relations, friends and acquaintances.

Sixth. That on the night following the said pretended marriage the said F. G. Harrison desired the said Jane Sparrow, otherwise Harrison, to sleep with her sister Augusta Sparrow, spinster (who had accompanied them to France as aforesaid), as she had been thencefore accustomed to do ; and which she did accordingly : that she also, still by the desire of the said F. G. Harrison, continued generally to sleep as before with her said sister during the rest of their stay in France, and until their return to this country, their journey to which, from Paris, commenced about a week after the said pretended marriage had been there celebrated, or rather profaned, as aforesaid : that at Abbeville, however, on their said journey the said F. G. Harrison came one morning into the bed-room and bed of the said Jane Sparrow, otherwise Harrison (her said sister having on that night occupied a separate bed-room and bed), and there lay with her for some time naked and alone, to wit, in the said bed.

Seventh. That on their return to this country, at or about the time in the next preceding article pleaded, the said F. G. Harrison and the said Jane Sparrow, otherwise Harrison, took up their residence at the Bath Hotel, in Arlington Street, London, where they continued to reside for about three months : that during such whole time (with the exception of certain nights, on which the said F. G. Harrison slept out of the said hotel, though where, in particular, on such nights, is unknown to the said Jane Sparrow, otherwise Harrison) the said F. G. Harrison and the said Jane Sparrow, otherwise Harrison, slept every night naked and alone in one and the same bed-room, in which were two beds however, and which beds, for the most part, were occupied by the said F. G. Harrison and the said Jane Sparrow, otherwise Harrison, separately : that the said parties, nevertheless, passed whole nights, or parts of whole nights,

during such period, naked and alone in one and the same bed, to wit, that of the said Jane Sparrow, otherwise Harrison, who never refused or declined, but on the contrary rather at all times invited the said F. G. Harrison's access to her bed, as well during the period articulate, as during the whole period of their cohabiting with each other (howsoever) hereinafter pleaded.

Eighth. That in the autumn of the said year, 1826, the said F. G. Harrison and the said Jane Sparrow, otherwise Harrison, [18] went on a visit to the grandmother, since deceased, of the said Jane Sparrow, otherwise Harrison, at Lakenham House, near Norwich, where they continued for about six weeks, during which whole time they occupied one and the same bed-room, and during about the first half of which they lay every night naked and alone in one and the same bed: that from Lakenham (after a short visit paid to an aunt of the said Jane Sparrow, otherwise Harrison, resident at Tostock in the county of Suffolk, and where the said Jane Sparrow, otherwise Harrison, by desire of the said F. G. Harrison, slept with her sister, the aforesaid Augusta Sparrow, who had accompanied them there) the said parties returned to the Bath Hotel aforesaid, and at which hotel, as during their former stay thereat, they again occupied a double-bedded room: that from the said Bath Hotel the said F. G. Harrison and Jane Sparrow, otherwise Harrison, went to lodgings in South Audley Street, and from such to other lodgings in Dover Street, and from such last-mentioned lodgings to the Waterloo Hotel, in Jermyn Street, London, respectively, where they continued to live and reside until the summer of the year 1827: that in the summer of 1827, the said parties again went abroad, viz. via Dover and Calais, to Paris, where they resided for about three months. That after such time, to wit, in the autumn of 1827, they made several tours together in France, still, however, from time to time returning to and making Paris their principal place of residence until the spring of 1828, when they went to Switzerland together. That during all such time the said F. G. Harrison absented himself from the bed, and mostly from the bed-room, of the said Jane Sparrow, otherwise Harrison, and constantly slept in a separate bed, and mostly in a separate bed-room, from that of the said Jane Sparrow, otherwise Harrison, during all such time.

Ninth. That the said parties, after staying for some time first in Switzerland as aforesaid, and afterwards at Boulogne and Calais respectively, returned together to this country, to wit, in or about the month of August, 1829, and again took up their residence at the Waterloo Hotel, in Jermyn Street, London, aforesaid: that from the said hotel, to wit, in or about the month of September, 1829, the said Jane Sparrow, otherwise Harrison, went on visits successively to her father, at Gosfield, in the county of Essex; to her aforesaid grandmother at Lakenham House, near Norwich aforesaid, and to J. H. Harrison, the father of the said F. G. Harrison, at Copford, also in Essex, and that [19] during her stay at such last-mentioned place, where, on her arrival, she was met by the said F. G. Harrison, and which lasted for about six weeks, the said F. G. Harrison slept every night naked and alone in one and the same bed with the said Jane Sparrow, otherwise Harrison. That the said F. G. Harrison, and the said Jane Sparrow, otherwise Harrison, returned together in the month of December in the said year, 1829, to the said Waterloo Hotel.

Tenth. That the said F. G. Harrison and the said Jane Sparrow, otherwise Harrison, went together from the said Waterloo Hotel to lodgings in Dover Street, and afterwards, to wit, in or about the month of July, 1830, to other lodgings in Grosvenor Street, where they continued for about a year and a quarter: that during the whole of such their residence at the said Waterloo Hotel, and at each of their said lodgings successively, the said F. G. Harrison wholly absented himself from the bed of the said Jane Sparrow, otherwise Harrison, and that he, the said F. G. Harrison, slept but one night in the said house even in Grosvenor Street (and then only in consequence of having been detained there by the extreme severity of the weather) during the whole time aforesaid that they occupied lodgings therein, though where he slept, out of such house at such time, is unknown to the party proponent, and to his party, the said Jane Sparrow, otherwise Harrison: that the aforesaid Augusta Sparrow, spinster, was principally resident with the said Jane Sparrow, otherwise Harrison, during that period; and that on the one night on which the said F. G. Harrison slept in the house during that period as aforesaid he slept there in the bed usually occupied by the said Augusta Sparrow, spinster, who resigned it for his accommodation, and slept with her sister, the said Jane Sparrow, otherwise Harrison, on that night.

Eleventh. That in or about the month of November, 1831, the said F. G. Harrison and the said Jane Sparrow, otherwise Harrison, left Grosvenor Street aforesaid and went to Brighton, accompanied by the said Augusta Sparrow, where, at the end of about six weeks, the said Augusta Sparrow (who in the mean time had constantly slept with her said sister, the said Jane Sparrow, otherwise Harrison, the said F. G. Harrison occupying a separate bed-room) caught the small-pox, of which disease she the said Augusta Sparrow soon after died there. That the said F. G. Harrison and the said Jane Sparrow, otherwise Harrison, returned [20] to London upon that event, and from such time lived together successively at the aforesaid Waterloo Hotel, London, at Hampstead in the county of Middlesex, and at lodgings in Baker Street, London, and then again at the said Waterloo Hotel until the month of February, 1833; but that during no part of such time did or would the said F. G. Harrison lie in the same bed, or save only occasionally, such occasions being rare, occupy the same bed-room with the said Jane Sparrow, otherwise Harrison.

Twelfth. That in the month of February, 1833, the said F. G. Harrison and the said Jane Sparrow, otherwise Harrison, went to Cheltenham together, and took up their residence there at the Plough Hotel, where, however, they had still separate bed-rooms, though the said F. G. Harrison used to visit the said Jane Sparrow, otherwise Harrison, in her said separate bed-room every morning, and from his regular habit of so doing passed at the said hotel as, or was taken for, her medical attendant: That from the said hotel the said parties went into lodgings, and afterwards, successively, into two cottages, all situate in or near the said town of Cheltenham, in all of which, however, as well as in the other places aforesaid, the said F. G. Harrison still absented himself from the bed of the said Jane Sparrow, otherwise Harrison; and that whilst resident at the last of such cottages, to wit, in or about the month of June, 1833, the said F. G. Harrison left altogether, and finally ceased to cohabit in any sort with, the said Jane Sparrow, otherwise Harrison, who hath since that time seen him, the said F. G. Harrison, but on two occasions only, and both times in the presence of a third person.

Thirteenth. That during all and singular the nights and parts of nights that the said F. G. Harrison and the said Jane Sparrow, otherwise Harrison, lay naked and alone in one and the same bed-room and bed, as pleaded in the sixth, seventh, eighth, ninth, and eleventh articles of this libel, the said Jane Sparrow, otherwise Harrison, was apt and fit for coition, and was desirous of the conjugal embraces of him the said F. G. Harrison, and willing to be carnally known, in order to become a mother by him, and gave herself up to him without any reserve for that purpose accordingly: also that during the whole thereof, save as hereinafter excepted, the said F. G. Harrison was of sound and perfect bodily health; but that, notwithstanding the premises, he, the said F. G. Harrison, neither ever did nor was ever able to consummate his aforesaid pretended marriage with the said Jane Sparrow, other-[21]-wise Harrison, who is still a virgin, and has never been carnally known by man, as will appear on due inspection of her person (if necessary) to competent judges (physicians and surgeons or others).

Fourteenth. That the said F. G. Harrison's parts of generation and sexual or seminal organs were and are not such, or in the same state, as are the same parts and organs in men capable of having connexion with and of the carnal knowledge of woman; and the party proponent expressly alleges and propounds that it will appear to competent judges (physicians and surgeons or others), on a due examination of his the said F. G. Harrison's person, that such was and is the fact, and that he the said F. G. Harrison, as well at the time of his aforesaid pretended marriage with the said Jane Sparrow, otherwise Harrison, as before and ever since the same, hath been and now is naturally impotent or incapable of knowing any woman carnally; and that it will also further appear to such competent judges, on such due examination, that the said F. G. Harrison's natural impotency aforesaid was and is irremedial, and not to be removed or relieved by art.

Fifteenth. That on the occasion of an interview, which the said F. G. Harrison had with the said Jane Sparrow, otherwise Harrison, at the aforesaid Waterloo Hotel, in the month of May last, to wit, of May in the present year, 1840, he the said F. G. Harrison admitted to the said Jane Sparrow, otherwise Harrison (in the presence and hearing of a third person present during and throughout their said interview), that their said pretended marriage was a nullity, and that he knew it to be in her

power to procure a legal sentence declaring it so to be, as he had taken several opinions on the subject, which went to that effect: that it was a delicate business (he added) for her to move in, but that she, as the injured party, must be the plaintiff, in any suit, to obtain such a sentence; and that knowing, as he did, the sufferer which she had been in consequence of their said marriage, he could not blame her for being the plaintiff in any suit which afforded her the means of releasing herself from it; or he, the said F. G. Harrison, on the said occasion, expressed himself to the very effect, or in words of the identical meaning and import articulate.

Sixteenth. That the said Jane Sparrow, otherwise Harrison, until recently, concealed from her legal and other advisers as well the fact of the non-consummation of her aforesaid pretended marriage with the said F. G. Harrison, as the cause thereof, and [22] the other, or most of the other, facts and circumstances connected therewith, and inferring or tending to evidence the same, hereinbefore pleaded, and that her motive to such concealment was female delicacy, coupled with her ignorance, until recently, of there being facts which upon proof would entitle her to a sentence pronouncing and declaring her said pretended marriage with the said F. G. Harrison null and void in law: that on such better information, recently obtained as aforesaid, she, the said Jane Sparrow, otherwise Harrison, disclosed the said facts to her said legal and other advisers, and that the result of such disclosure has been the institution of this suit on her behalf.

In proof of this libel the answers of Mr. Harrison were taken, and two witnesses were examined, T. W. Cooper, Esq., to prove the first article, he having been present at the marriage; and Marianne Dolphin, who was examined on the first, second, third, fourth, fifth, and fifteenth articles.

The answers of Mr. Harrison were to the following effect:—

The first, second and third articles were in substance admitted.

Fourth. To the fourth he answered: That at the time of the celebration of the marriage he the respondent was a major of the age of thirty-three years, but not of the age of forty-six years as articulate, and that the said Jane Harrison, then Sparrow, was as articulate of the age of seventeen years.

Fifth. To the fifth, respondent says: He admits that the marriage was never consummated (as to sexual intercourse as hereinafter more particularly answered); but that he and his said wife, from and after the time thereof, lived and cohabited together (save and except as to sexual intercourse) as husband and wife, as also hereinafter more particularly answered; and save that the said Jane Harrison, in reference to the proceedings in this cause, and since the same began, hath, as he believes, denied the validity of the aforesaid marriage: the respondent further answers and [23] says that he and the said Jane Harrison, at all times since the said marriage, have respectively acknowledged each other as and for husband and wife; and that they were so commonly accounted reputed, and taken to be, by and amongst their relations, friends, and acquaintance.

The sixth and following articles to the twelfth inclusive were in substance admitted, although not precisely as pleaded.

Thirteenth. Respondent admits: That during all and singular the nights and parts of nights that the respondent and the said Jane Harrison lay naked and alone in one and the same bed-room and bed, as pleaded in the sixth, seventh, eighth, ninth, and eleventh articles of the said libel, the said Jane Harrison was apt and fit for coition; but he disbelieves and denies that she was desirous of the conjugal embraces of the respondent, and willing to be carnally known, in order to become a mother by him; and he also denies that she gave herself up to him without any reserve for that purpose, for he says that, on the contrary, the manner of the said Jane Harrison, on each and every of the said occasions, was extremely repulsive and frigid. And he further answers and says he admits that on the said nights and parts of nights he was of sound and perfect bodily health, and that notwithstanding the same he never did, but he denies that he was unable to, consummate his aforesaid marriage with the said Jane Harrison: the respondent says he knows not, and cannot form a belief or disbelief, whether the said Jane Harrison is or is not still a virgin, and has or has not been carnally known by man; and also that he is unable to answer what the appearances in that respect may indicate, upon due inspection of her person by competent judges, physicians and surgeons, or others.

Fourteenth. He expressly denies that his parts of generation, and sexual or seminal

organs, were or are not such, or in the same state, as are the same parts and organs in men capable of having connection with, and the carnal knowledge of, women : and he expressly denies that it will appear to physicians and surgeons, or others, on a due examination of his, the respondent's, person, or that such was or is the fact, or that he, as well at the time of his aforesaid marriage, or before, or ever since the same, hath been, or now is, naturally impotent or incapable of knowing any woman carnally, or that it will also appear to such competent judges, upon such examination, that he has a natural impotency irremediable, and not to be removed or relieved by art.

[24] Fifteenth. He denies that on the occasion of an interview, which he admits he had with his said wife, at the aforesaid Waterloo Hotel, in May, 1840, he admitted to her (in the presence and hearing of a third person, whom he admits to have been present during their said interview) that their said marriage was a nullity, and that he knew it to be in her power to procure a legal sentence declaring it so to be, as he had taken several opinions on the subject, which went to that effect; for, on the contrary, he says that at such interview he stated or declared to her that he had taken but one professional opinion relative to the said marriage, and that the same was in favour of the validity thereof: but he admits that he then stated or declared that it was a delicate business for her to move in, and that as the complaining party, and so far in a legal sense the injured party, or to that effect, she must be the plaintiff in any suit to obtain such a sentence: but he denies that either on that, or any other occasion, he admitted or declared that he knew her to be a sufferer in consequence of their said marriage, but he admits that he may on such occasion have said that he could not blame her for being the plaintiff in any suit which afforded her the means of releasing herself from it, or to that effect, in the event of her having placed her affections on any other person.

Sixteenth. He knows not, and is unable to form a belief or disbelief, whether the said Jane Harrison did or did not, until recently, conceal from her legal and other advisers as well the fact of the non-consummation of her aforesaid marriage with this respondent as the cause thereof, and any other of the facts and circumstances connected therewith, and inferring or tending to evidence the same howsoever in the said libel pleaded, nor whether or not her motive to any such concealment was female delicacy, coupled with her ignorance that the same would (if proved) entitle her to a sentence pronouncing and declaring the said marriage null and void in law, nor whether or not the proceedings in this cause have resulted from any better information recently obtained and disclosed to her said legal and other advisers.

Marianne Dolphin proved the handwriting of the parties to the entry of the marriage, and deposed farther—

[25] To the fifth article: I cannot depose otherwise than as I know that the parties in this cause did live together as husband and wife, and acknowledge each other as such, and were so reputed to be. I knew them so living together just after the marriage in question, at intervals since, until about eight years ago: since which time they have not lived together at all; nor have they met, as I believe, but in my presence.

To the fifteenth article: I was present at an interview which the parties in this cause had at the Waterloo Hotel, Jermyn Street, in the month of May last year. The object of the meeting had reference to a separate maintenance, which Mr. Harrison had to my knowledge promised to make on his father's death. He had promised, years before, that if she would delay any proceeding against him till his father's death, he then would do everything that could be required, or to that effect. At the time of which I am now deposing his father was dead. In the course of that interview (at the whole of which I was present, though I could not undertake to repeat all that was said) Mr. Harrison stated to her words to this effect: he began by saying that legal arrangements, as to separate maintenance, were very expensive, and that perfect freedom would be more desirable to her, which could be effected by following the example of a lady whom he named, and who had eloped. Mrs. Harrison expressed great indignation at this suggestion; and thereupon he said that he was well aware that her principles were good, and her ideas quite strict as to the marriage vow; but he said that, being left in a cruel position in which she had been for so many years, he could not blame her if she had formed another attachment; which he repeatedly asked her if she had; assuring her if she had so done he would do every thing in his power to free her. She expressed great indignation, which I did also, at the suggestion.

And he said that he only suggested it for the purpose of assuring her that he should not blame her, left in the cruel situation in which she was; but that he had the highest opinion of her principles and conduct. He then said that he knew that children were essential to her happiness; and could she not adopt one: that would be the same thing to him. Then he added that his father ought never to have made him marry; that he was not fit he well knew for the married state, and ought not to have married; it would have been the same with any other woman, and he did not at all blame her. He said that her situation was very cruel, and he would [26] willingly give her perfect freedom from it if he could. He afterwards added, "There is a way, Jane, by which you may obtain freedom;" then she said, "You mean the marriage never having been consummated:" he replied, "You are right, it never has." He said that he had considered the subject much, and had taken several opinions (of what kind I do not know). "In our case," he said, "medical opinions are necessary;" and he added that it was a delicate matter, and she had better consult her own friend, who was her legal adviser; that the highest legal authority, that of an Ecclesiastical Court, I remember, he said was requisite; that it was a very delicate matter for her to enter upon, and she had better put her case into the hands of her friend, her legal adviser. The interview lasted for an hour, or nearly as much, as I recollect. In what he said, respecting another person's child being the same to him as his own, I did not understand him to mean anything more than the adoption, on her part, of a child for her own happiness.

Report of Sir Charles Mansfield Clarke, Bart., Charles Locock, Esquire, and Sir Benjamin Collins Brodie, Bart. the physicians and surgeons appointed to inspect the person of Mrs. Harrison.

"The signs of virginity are in many instances inconclusive. In the present case there are no positive proofs of connection having ever taken place, or the contrary; but there are decidedly no physical impediments to sexual intercourse.

"CHARLES M. CLARKE, M.D.

"CHARLES LOCOCK, M.D.

"BENJAMIN C. BRODIE."

"London, 23rd June, 1841.

Upon this evidence the cause came on for hearing.

Addams and Curteis for the alleged wife submitted that there was sufficient proof of the non-consummation of the marriage and of the inability of Mr. Harrison, and referred to the cases of *Mor-[27]-ris v. Morris* (not reported), *Greenstreet v. Cumyns* (2 Hagg. Con. 332; S. C. 2 Phill. 10), *Pollard v. Wybourne* (1 Hagg. Ecc. 725).

No counsel or proctor appeared for Mr. Harrison.

Judgment—*Dr. Lushington*. In cases of this description the Court has generally considerable difficulty, and I have felt that this case is not without some embarrassment.

The certificate does not much assist the case; it affords no proof whether there has been connexion or not; but it is not wholly unimportant; it states that there is no impediment on the part of the lady; but the true question is whether there has been a triennial cohabitation and no sexual intercourse? I think there has been sufficient cohabitation to satisfy the expression triennial cohabitation within the meaning of the law.

If that be so, the question is, am I or am I not to believe the answers of Mr. Harrison? I see no reason whatever for disbelieving his answers, and they are supported by the evidence of Mrs. Dolphin.

I have examined the case very carefully, and am satisfied that there is no collusion; and if there be no collusion, taking the evidence to be true, I think I am justified, upon the whole, in pronouncing the libel proved, and in declaring the marriage null and void.

The Court pronounced the marriage null and void, and condemned Mr. Harrison in the costs.

[28] IN THE GOODS OF THE REV. WILLIAM SOUTHEAD, Deceased. Prerogative Court, Jan. 15th, 1842.—Administration with will annexed de bonis non granted to the executors of a sister, the administratrix, deceased, for the use and benefit of the surviving sister, the sole next of kin, during her imbecility, without citing her next of kin.

[S. C. 1 Notes of Cases, 274.]
Motion.

William Southmead died on the 25th of December, 1832, a bachelor, without a parent, leaving a brother, since deceased, and two sisters, Judith and Charlotte Southmead, his only next of kin. He left a will dated 24th of July, 1792, by which he gave the residue of his property to his mother, and appointed her sole executrix; she died in the lifetime of the testator. In February, 1833, administration with the will annexed was granted to Judith Southmead, who died in August, 1841, leaving part of the goods of the deceased unadministered; she left a will, and appointed executors. Charlotte Southmead, the surviving sister, and the only next of kin of the deceased, labouring under imbecility of mind, and being wholly incapable to take the administration or to renounce,

Addams prayed administration with the will annexed of the unadministered effects of William Southmead, deceased, to be granted to the executors of Judith Southmead for the use and benefit [29] of Charlotte Southmead, during her incapacity, without citing her next of kin, who were thirty in number and resident in various places, some in America.

Sir Herbert Jenner Fust. Under the circumstances of this case the Court may, I think, dispense with the citation and grant the administration as prayed; the grant of this administration being in the discretion of the Court, no party being of right entitled to it; although had one of the next of kin of Charlotte Southmead applied for the administration the Court would have granted it. Every circumstance is as favorable as can be to this grant passing; a considerable part of the property of Judith Southmead is left to her executors for the benefit of this imbecile person during her life at their discretion, and who are entitled to a part of the property of William Southmead, the deceased, in this case.

IN THE GOODS OF WILLIAM CARVER, Deceased. Prerogative Court, Jan. 15th, 1842.—Testator signed his name at the bottom of a printed form, ending on the second side of a sheet of paper, the will itself ending on the first side. Probate allowed to pass of the will as signed at the “foot or end thereof.”

[S. C. 1 Notes of Cases, 276; 6 Jur. 40.]

Motion.

The deceased, late of Charlton, in Kent, left a will dated the 19th of October, 1841, signed by him in the presence of two witnesses who attested it. The will was written on a printed form, and [30] ended on the first sheet of the paper, where there was not room for the testator's signature and that of the witnesses, and the testator, instead of signing his name at the top of the next page, wrote it at the end of the printed form, where the testator's signature was directed to be made by the instructions in the margin of the paper.

Addams submitted that this might be considered a signing at the foot or end of the will, and prayed probate.

Sir Herbert Jenner Fust. The deceased seems to have written this will upon a printed form with great care; the will is divided into paragraphs, and the deceased, looking, it should seem, to the instructions in the margin, signed his name to the last paragraph of the printed form, supposing that to be the proper place; the more correct way would have been to put the signature where the will itself ends; but I am inclined to think that this may be considered a signing at the foot or end of the will, under the statute.

Probate to pass.

[31] IN THE GOODS OF WILLIAM SMITH, Deceased. Prerogative Court, Jan. 15th, 1842.—Motion for probate to the executors of an executor who had proved the will of his testator, but who was not the surviving executor, rejected.

[S. C. 6 Jur. 41.]

Motion.

The testator died on the 17th of June, 1830; he left a will, of which he appointed three executors; he left sons and daughters, one son under age; one of the executors only, Nash, took probate of the will; he died in March, 1841, and left a will and appointed executors, who proved his will at Worcester, the deceased not having left bona notabilia out of that diocese.

Haggard prayed probate to the executors of the executor (Nash) who proved, the

other executors renounced, and a proxy of consent had been executed by the sons who were of age.

Sir Herbert Jenner Fust. The husbands of the daughters are also interested; but how is it possible for the Court to grant probate to the executors of this executor? He was not the surviving executor. These executors can have no claim to this representation. Motion rejected.

[32] THE OFFICE OF THE JUDGE PROMOTED BY SANDERS *against* HEAD. Arches Court, Jan. 29th, 1842.—Church Discipline Act.—The bishop of the diocese having given notice of his intention of issuing a commission for the purpose of making inquiry as to the grounds of certain charges against a clerk in orders, under the 3rd sec. of 3 & 4 Vict. c. 86, without withdrawing such notice, issued letters of request to the Arches Court of Canterbury. Held, that the letters of request were sent to the Arches in the first instance, as required by the 13th section of the statute.

[Affirmed, 1842, 4 Moore, P. C. 186; 13 E. R. 273 (with note). See further, p. 565, post.]

This was a cause of office promoted under the statute 3 & 4 Vict. c. 86, in virtue of letters of request under the hand and seal of the Bishop of Exeter, by Ralph Sanders, of the city of Exeter, against the Rev. Henry Erskine Head, rector of Feniton, in the county of Devon. The Judge having accepted letters of request from the Bishop of Exeter, a citation or decree issued, calling upon Mr. Head to appear in this Court; to this citation or decree an appearance was given on behalf of Mr. Head, under protest. The decree, in which are embodied the letters of request, was as follows:—

Herbert Jenner, Knight, Doctor of Laws, official principal of the Arches Court of Canterbury, lawfully constituted; to all and singular clerks and literate persons whomsoever and wheresoever, in and throughout the whole province of Canterbury, into whose hands these presents shall come, greeting. Whereas we have lately received letters of request from the right reverend father in God, Henry, by divine permission Bishop of Exeter, of the tenor following, to wit:—

“Henry, by divine permission, Bishop of Exeter, to the Right Honourable Sir Herbert Jenner, Knight, Doctor of Laws, official principal of the Arches Court of Canterbury, lawfully constituted, your surrogate, or some other competent judge in this behalf. [33] Whereas by a certain act of Parliament passed in the session of Parliament holden in the third and fourth years of the reign of her present Majesty Queen Victoria, intituled, ‘An Act for better enforcing Church discipline,’ it is enacted ‘that in every case of any clerk in holy orders of the United Church of England and Ireland, who may be charged with any offence against the laws ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against the said laws, it shall be lawful for the bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or, if he shall think fit, of his own mere motion, to issue a commission under his hand and seal to five persons, of whom one shall be his vicar-general, or an archdeacon or rural dean within the diocese, for the purpose of making inquiry as to the grounds of such charge or report.’ And whereas it is in and by the said act also enacted ‘that it shall be lawful for the bishop of any diocese within which any such clerk shall hold any preferment, or if he hold no preferment, then for the bishop of the diocese within which the offence is alleged to have been committed, in any case, if he shall think fit, either in the first instance or after the commissioners shall have reported that there is sufficient *prima facie* ground for instituting proceedings, and before the filing of the articles, but not afterwards, to send the case by letters of request to the Court of Appeal of the province, to be there heard and determined according to the law and practice of such Court.’ And whereas the Rev. Henry Erskine Head, a clerk in holy orders of the said United Church of England and Ireland, and rector of the rectory and parish church of Feniton, in the county of Devon and diocese of Exeter, and province of Canterbury, is charged with having, within our said diocese of Exeter, offended against the laws ecclesiastical, by having written and published, or caused to be published, in a certain newspaper called the *Western Times*, dated ‘Exeter, Saturday, August 21, 1841,’ a letter entitled ‘A View of the Duplicity of the present System of Episcopal Ministration, in a Letter addressed

to the Parishioners of Feniton, Devon, occasioned by the Bishop of Exeter's Circular on Confirmation, by Henry Erskine Head, A.M., Rector of Feniton, Devon,' in which letter it is openly affirmed and maintained that the 'Catechism,' the 'Order of Baptism,' and the 'Order of Confirmation,' in the Book of Common Prayer, contain erroneous and strange doctrine, and [34] wherein are also openly affirmed and maintained other positions in derogation and depraving of the said Book of Common Prayer, contrary to the statutes and to the constitutions and canons ecclesiastical of the realm, and against the peace and unity of the Church. Now, therefore, we the said Bishop of Exeter do hereby request you the said Right Honourable Sir Herbert Jenner, Knight, Doctor of Laws, official principal of the Arches Court of Canterbury, lawfully constituted, your surrogate, or some other competent judge in this behalf, to issue a citation or decree under seal of the said Court, calling upon the said Henry Erskine Head, clerk, to appear at a certain time and place, therein to be specified, then and there to answer to certain articles, heads, positions, or interrogatories touching and concerning his soul's health, and the lawful correction and reformation of his manners and excesses, and more especially for having written and published, or caused to be published, the letter aforesaid, in manner aforesaid, to be administered to him at the voluntary promotion of Ralph Sanders, of the city of Exeter, gentleman, and to hear and determine the said cause according to the law and practice of the said Court. In witness whereof we have hereunto set our hand and seal this ninth day of November, in the year of our Lord one thousand eight hundred and forty-one, and in the eleventh year of our consecration.

"H. EXETER, L.S.

"Signed, sealed, and delivered in the presence of Edwd. Toller, Jun."

And whereas, at the petition of the proctor of the said Ralph Sanders, and in aid of justice, we have accepted of the said letter of request, and decreed to proceed according to the tenor thereof, and in pursuance thereof have decreed the said Reverend Henry Erskine Head, clerk, rector of the rectory and parish church of Feniton, in the county of Devon, diocese of Exeter, and province of Canterbury, to be cited and called into judgment, on the day, at the time and place and to the effect and in manner and form hereunder written (justice so requiring), we do therefore hereby authorize and empower, and strictly enjoin and command you, jointly and severally peremptorily to cite or cause to be cited the said Reverend Henry Erskine Head, clerk, to appear personally or by his proctor duly constituted before us, our surrogate, or some other competent judge in this behalf, in the Common Hall of Doctors' Commons, situate in the parish of St. Benedict, near [35] Paul's Wharf, London, and place of judicature there, on the sixth day after he shall have been served with these presents, if it be a general session, by-day, or additional court day of the said court, otherwise on the general session, by-day, or additional court day of the said court then next following, at the hour of ten o'clock in the forenoon, and there abide during the sitting of the Court, if necessary, then and there to answer to certain articles, heads, positions, or interrogatories touching and concerning his soul's health and the lawful correction and reformation of his manners and excesses, and more especially for having within the said diocese of Exeter offended against the laws ecclesiastical, by having written and published, or caused to be published, in a certain newspaper called the *Western Times*, dated "Exeter, Saturday, August 21, 1841," a letter entitled "A View of the Duplicity of the present System of Episcopal Ministration, in a Letter addressed to the Parishioners of Feniton, Devon, occasioned by the Bishop of Exeter's Circular on Confirmation, by Henry Erskine Head, A.M., Rector of Feniton, Devon;" in which letter it is openly affirmed and maintained that the "Catechism," the "Order of Baptism," and the "Order of Confirmation," in the Book of Common Prayer, contain erroneous and strange doctrine; and wherein are also openly affirmed and maintained other positions in derogation and depraving of the said Book of Common Prayer, contrary to the statutes and to the constitutions and canons ecclesiastical of the realm, and against the peace and unity of the Church, to be administered to him by virtue of our office, at the voluntary promotion of the said Ralph Sanders. And further to do and receive as unto law and justice shall appertain under pain of the law and contempt thereof, at the promotion of the said Ralph Sanders. And what you shall do or cause to be done in the premises you shall duly certify us, our surrogate, or some other competent judge in this behalf, together with these presents. Dated at London, the eleventh day of November, in the year of our Lord one thousand eight hundred and forty-one.

The act on protest on behalf of Mr. Head denied the jurisdiction of the Court, and alleged that by the 23rd section of the stat. 3 & 4 Vict. c. 86, it is enacted "that no criminal suit or proceeding [36] against a clerk in holy orders of the United Church of England and Ireland, for any offence against the laws ecclesiastical, shall be instituted in any Ecclesiastical Court, otherwise than is hereinbefore enacted or provided." That the said citation or decree is a criminal proceeding, instituted against a clerk in holy orders, of the said United Church, for an offence against the laws ecclesiastical. That by the third section of the said statute it is enacted "that in every case of any clerk in holy orders of the United Church of England and Ireland who may be charged with any offence against the laws ecclesiastical, or concerning whom there may exist scandal or evil report, as having offended against the said laws, it shall be lawful for the bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or, if he shall think fit, of his own mere motion, to issue a commission, under his hand and seal, to five persons, of whom one shall be his vicar-general, or an archdeacon or rural dean within the diocese, for the purpose of making inquiry as to the grounds of such charge or report; provided always, that notice of the intention to issue such commission, under the hand of the bishop, containing an intimation of the nature of the offence, together with the names, addition, and residence of the party on whose application or motion such commission shall be about to issue, shall be sent by the bishop to the party accused, fourteen days, at least, before such commission shall issue."

That on the day of October, 1841, the defendant was duly served with a certain notice in [37] writing, under the hand of the Lord Bishop of Exeter, in the words and figures following: that is to say, "To the Rev. Henry Erskine Head, rector of the rectory and parish church of Feniton, in the county of Devon, and diocese of Exeter. Whereas a certain letter, entitled 'A View of the Duplicity of the present system of Episcopal Ministration, in a Letter addressed to the Parishioners of Feniton, Devon, occasioned by the Bishop of Exeter's Circular on Confirmation, by Henry Erskine Head, Rector of Feniton, Devon,' was lately printed and published in a certain newspaper called the *Western Times*, dated 'Exeter, Saturday, August 21st, 1841,' in which letter it is openly affirmed and maintained that the 'Catechism,' the 'Order of Baptism,' and the 'Order of Confirmation,' contained in 'The Book of Common Prayer and Administration of the Sacraments and other Rites and Ceremonies of the United Church of England and Ireland,' contain erroneous and strange doctrine; and wherein are also openly affirmed and maintained other positions in derogation and depraving of the said book, contrary to the statute 2 & 3 Edward 6, chap. 1; 5 & 6 Edward 6, chap. 1; 1 Elizabeth, chap. 2; 13 Elizabeth, chaps. 12 and 13, and 14 Charles 2, chap. 4 (all, some, or one of them), and to the constitutions and canons ecclesiastical treated upon by the Bishop of London, President of the Convocation for the province of Canterbury, and the rest of the bishops and clergy of the said province, and agreed upon by the King's Majesty's license in their synod, begun at London Anno Domini one thousand six hundred and three, and against the peace and unity of the Church. And whereas there was and is a scandal [38] and evil report against you the said Reverend Henry Erskine Head, as the author and publisher of the said letter; and whereas we, Henry, by divine permission, Bishop of Exeter, rightly and duly proceeding under the authority, and in conformity with the provisions of a certain act of Parliament, to wit, the 3 & 4 Victoria, chapter 86, intituled 'An Act for better enforcing Church Discipline,' of our own mere motion think fit and intend to issue a commission under our hand and seal to five persons, of whom one shall be our vicar-general, or an archdeacon or rural dean within our diocese, for the purpose of making inquiry as to the grounds of such report, in order to the institution, if need be, of such further proceedings in pursuance of the said last-mentioned act of Parliament, as the case may require; we do therefore, by these presents, under our hand, give notice of such our intention to you the said Reverend Henry Erskine Head, and we do hereby intimate to you that such our commission as aforesaid, for the purpose aforesaid, will issue accordingly at or after the expiration of fourteen days from the day of your being served with these presents. Given under our hand this eleventh day of October, in the year of our Lord one thousand eight hundred and forty-one."

"HENRY EXETER."

That the said notice was and is a sufficient and subsisting notice, under the said

third section of the said statute, of the intention of the said lord bishop, to do and proceed in all things as is therein set forth and expressed; and that it hath never been in any manner revoked or annulled.

[39] That by the thirteenth section of the said statute it is enacted "that it shall be lawful for the bishop of any diocese within which any such clerk shall hold any preferment, or if he hold no preferment, then for the bishop of the diocese within which the offence is alleged to have been committed, if he shall think fit, either in the first instance or after the commissioners shall have reported that there is sufficient *prima facie* ground for instituting proceedings, and before the filing of the articles, but not afterwards, to send the case by letters of request to the Court of Appeal of the province, to be there heard and determined according to the law and practice of such Court."

That the bishop hath not sent the case by letters of request to this Court, in manner and form as in the said statute is enacted or directed according to the true intent and meaning thereof.

That it doth not appear, either by the said citation or decree, or by the said letters of request, on whose application, or at whose mere motion, this cause or case was in the first instance commenced, or at the first began, or was originally proceeded in, nor by whom nor on whose application or complaint the defendant was in the first instance charged with the said pretended offence, nor at whose request nor on whose mere motion the said letters of request were issued, nor doth it therein or thereby sufficiently appear that the several provisions, enactments, and directions of the said statute have been duly observed or complied with. Wherefore it was submitted that the defendant was not bound to appear in this Court to the said citation or decree.

In reply to this it was submitted that this Court [40] had jurisdiction in the matter stated in the said citation or decree with which the defendant had been served, notwithstanding what was alleged on his behalf, the relevancy of the whole of which was denied.

The Queen's advocate and Harding in support of the protest. If it can be shewn that these proceedings are not in accordance with the provisions of the statute 3 & 4 Vict. c. 86, this protest must be sustained.

The 23rd section of the statute provides "that no criminal suit or proceeding against a clerk in holy orders of the United Church of England and Ireland, for any offence against the laws ecclesiastical, shall be instituted in any Ecclesiastical Court, otherwise than is hereinbefore enacted or provided." And it was held unanimously by the Court of Queen's Bench, in *The Dean of York's case*, that no other proceedings can be taken.

The mode of proceeding against clerks is set forth in the third section, which enacts "that in every case of any clerk in holy orders, who may be charged with any offence, &c., or concerning whom there may exist scandal or evil report, &c., it shall be lawful for the bishop of the diocese, within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or, if he shall think fit, of his own mere motion, to issue a commission, under his hand and seal, to five persons, of whom one shall be his vicar-general, or an archdeacon, or rural dean within the diocese, for the purpose of making inquiry as to the grounds of such charge or report; provided always [41] that notice of the intention to issue such commission, under the hand of the bishop, containing an intimation of the nature of the offence, together with the names, addition, and residence of the party on whose application or motion such commission shall be about to issue, shall be sent by the bishop to the party accused, fourteen days, at least, before such commission shall issue." This is the mode which the bishop has adopted; it appears by the act on petition that Mr. Head was duly served with a notice from the bishop, and from reference to the notice itself it will appear that the offence there set forth is the very same which is charged in this case. This notice is tantamount to a citation in a cause, the service of which has been held to constitute a pendency of suit (*Ray v. Sherwood and Ray*, 1 Curt. 173); the notice is now a subsisting notice, and the cause is now pending; then how can the bishop call upon Mr. Head to appear here, while at the very same time he may be called upon to appear at Exeter? The bishop may go on at any time, and at this very time the bishop may be proceeding at Exeter; and this is a much more fit question to be decided by the bishop himself than by a lay judge.

Then has the bishop at this stage of the proceeding the power of sending the case to this Court? By the 13th section of the act it is enacted "that it shall be lawful for the bishop of any diocese, &c., in any case, if he shall think fit, either in the first instance, or after the commissioners shall have reported that there is sufficient *prima facie* ground for instituting proceedings, and before the filing of the [42] articles, but not afterwards, to send the case by letters of request to the Court of Appeal of the province, to be there heard and determined according to the law and practice of such Court." Can this be said to be in the first instance, while proceedings may be now going on at Exeter? Besides, is this the same case? In this Court it is the office of the Judge promoted by Sanders against Head, while at Exeter it is the bishop himself who is proceeding.

Addams and Robinson *contra*.

Judgment—*Sir Herbert Jenner Fust*. This case comes here by letters of request from the bishop of the diocese of Exeter; the letters of request are set forth in the decree or citation issued in the cause, and the act of Parliament under which the suit is commenced is also stated. It is quite clear that these letters of request must differ from those which the Court has been in the habit of receiving from the chancellors of the different dioceses from whom letters of request used to issue to this Court. In those cases the bishop did not send the letters of request, but the Judge of the Court. There must be some form adapted to what is required by the act of Parliament.

A question has been raised as to the jurisdiction of the Court, and the points on which the jurisdiction is disputed are set forth in the act on petition, and, as I collect them, are as follow:—

"That the cause is not sent in manner and form as by the statute is enacted or directed, according to the true intent and meaning of the statute." [43] That is the first ground taken for the objection. "And that it doth not appear, either in or by the citation or decree, or in or by the letters of request, on whose application or at whose mere motion this cause or case was in the first instance commenced, or at whose mere motion the party was charged with the pretended offence, nor at whose request or mere motion the said letters of request were granted." "Nor does it sufficiently appear that the several provisions, enactments, and directions of the act have been duly observed or complied with."

These are the grounds of objection to the form and manner in which the proceedings were commenced in this suit.

The first question is, what does the statute require with respect to letters of request, as to the form and manner in which they are to be sent? for the forms and requisitions of the act must be complied with; whether minutely, it is not necessary to inquire. Now there is no form or schedule to the act of letters of request; but it is argued that they ought to contain, not only the offence, but also all the particulars which are required in the notice from the bishop of the diocese in which the offence is alleged to have been committed, of his intention to issue a commission, pursuant to the third section of the act. I find no provision or enactment which requires that this must be stated in the letters of request; nothing in the act requires that the letters of request shall contain those particulars, which notice of intention to proceed in another form shall contain. Unless it is shewn to me that great injustice would result to the party in sending letters of request in this form, I cannot un-[44]-derstand why more information should be given than was necessary under the ecclesiastical law as established before the passing of the act. This act orders preliminary notice to be given for certain purposes, but it does not contain any form. It does not appear from the general tenor of the act that it was intended that the letters of request should contain all the particulars which the bishop is bound to give under the third section: there is nothing to be found fault with in these proceedings in that respect. Formerly, every judge of an Ecclesiastical Court, before whom it was intended to institute a suit against a clergyman for an ecclesiastical offence, could only issue letters of request at the request of the promoter of the suit; and it was necessary to be inserted in the letters of request that the cause was sent at the especial request of the party. The thirteenth section of this act provides that it shall be lawful for the bishop of the diocese, within which any clerk shall hold preferment, if he shall think fit, either in the first instance, or after the report, to send the case by letters of request to the Court of Appeal. It is to be the act of the bishop, a matter of discretion to be exercised by him, whether he will entertain the suit himself, or whether he will send

it up to be heard, in the first instance, in the Court in which it would be heard if he committed any error in the proceedings before him. I am of opinion, as far as the letters of request are concerned, that they are in the form and manner required by the act of Parliament.

The letters of request recite the act of Parliament, that (sect. 3) the bishop of the diocese within which the offence is alleged or reported to have [45] been committed, if he shall think fit, of his own mere motion is to issue a commission, that is, the bishop of the diocese within which the offence is alleged to have been committed, not the bishop of the diocese in which the party is preferred, who, as such, has no power to issue any such commission. The bishop of the diocese in which the party is merely preferred cannot issue a commission of inquiry in this form; all that the act requires under such circumstances is that the case should be sent by letters of request to this Court. This Court, according to its law and practice, is to take cognizance of offences committed by clergymen, and no alteration is made in this respect by the statute.

The letters of request also, after setting forth the offence with which the party is charged, go on to request this Court to take cognizance of the case. This Court agreed to proceed, and directed a decree to issue, calling on the party to appear. The decree having issued accordingly, an appearance has been given under protest, and one objection is, that the letters of request are not sent in a duly formal manner; that they do not contain the name of the party on whose application or at whose mere motion this cause or case was in the first instance commenced. It does not seem to me that this is required to be set forth in the letters of request.

It is objected that the bishop has not sent this case to the Court in the form required by the 13th section of the act. In the first place, it is said, in reference to the 23rd section, that all criminal proceedings in any Ecclesiastical Court must be according to the particular enactments of this act. The 13th section directs the time at which the [46] complaint to the bishop is to be sent by letters of request to this Court. But it is said that the notice sent by the bishop to Mr. Head of his intention to proceed under the provisions of the act of Parliament, by issuing a commission of inquiry whether *primâ facie* there was a ground for proceeding, is equivalent to a citation binding the bishop to carry it out to the fullest extent: and that he cannot now send the case here by letters of request; that, in point of fact, the notice, like the citation in *Ray v. Sherwood* (1 Curt. 173-193), was the commencement of a suit. But the case of *Ray v. Sherwood* was a decision only with reference to a particular act of Parliament; that with reference to the term "suit depending" in that act, it was not necessary that there should be a *contestatio litis*, but a suit was considered to be depending by the issuing and service of a citation; that service, and not the return of the citation, was intended with reference to the words used in that act of Parliament. Whatever may be considered the commencement of a suit in this Court, whether there must be a *contestatio litis*, or whether a citation is sufficient—is a notice equivalent to it? stating not that it was intended to proceed at once against the party, but to issue a commission for the purpose of making inquiry whether there was a just ground for proceeding; and giving the party notice provided by the act, in order that he might have an opportunity to defend himself when before the commissioners.

What is the effect of the 4th section? If it was this, that in point of fact there is to be a citation [47] to appear before the commissioners, that would be a commencement of proceedings. But is a notice to appear a notice of an intention to proceed? It is nothing but an intimation to enable the party to defend himself against the charges preliminary to proceedings being commenced. Undoubtedly the phraseology of the act is not such as, unless the act had been passed in a hurry, would have been permitted to remain. It is clear that the same words are used in different senses in different parts of the act: for example, in the section (13) which directs the bishop to send letters of request to this Court, the words "first instance" are used in a different sense from that in which they are used in the 15th section; for the 15th section enacts, "That it shall be lawful for any party who shall think himself aggrieved by the judgment pronounced in the first instance by the bishop, or in the Court of Appeal of the province, to appeal from such judgment, and such appeal shall be to the archbishop, and shall be heard before the judge of the Court of Appeal of the province." Now, there the words "first instance" cannot mean the notice, but the sentence on

the first hearing of the cause. So they are used in the latter part of the same section. "When the cause shall have been heard and determined in the first instance in the Court of the archbishop." By these words the same meaning is not intended to be conveyed in the two sections. What I understand by them is, that at any time before the commissioners have proceeded in the inquiry the bishop may send the case up to be heard elsewhere. It is not necessary for the com-[48]-mission to issue, but the bishop may send the case up before or after the commissioners have inquired. But it is not necessary that I should say what would be my conclusion if the commission had actually issued. What I understand is, that the bishop, before the commission has issued, may send it up, and that that is sending it up to be heard in the first instance.

I consider the notice as a preliminary proceeding, in order to institute further proceedings before the commissioners, which further proceedings are themselves only preliminary proceedings. I think in this case the notice is not to be considered as part of the proceedings, but merely as preliminary.

It is stated in the sixteenth section of the act: "Provided always that the archbishop or bishop who shall have issued the commission hereinbefore mentioned in any such case, or who shall have heard any such case, or shall have sent any such case by letters of request to the Court of Appeal of the province, shall not sit as a member of the Judicial Committee on an appeal in that case." So that any bishop or member of the Privy Council who has issued a commission could not sit; but any bishop who has sent the notice might: there is nothing to prevent him from sitting.

I consider this as only a preliminary step to inform the party that proceedings may be issued against him, but as no part of the proceedings whatever. I think this same interpretation applies with reference to the other sections of the act of Parliament.

As to sending letters of request to this Court, it seems to me that it was intended that the judge [49] sitting here was to say what punishment should be inflicted. I think the act of Parliament constitutes this Court the tribunal to correct any excess of punishment by the bishop. The Legislature thought a Court of Appeal proper to correct any error by an inferior Court, subject, in its turn, to be corrected by its superior Court.

I think there is nothing in the observation, as to the propriety or impropriety of this case being sent here by letters of request. I do not see how the party is prejudiced if there is a valid subsisting notice at this time. I may wish the notice had been withdrawn and revoked before the letters of request were sent; but I can never suppose for one moment that it is the intention of the bishop to proceed when an inquiry is going on in this Court. If this is a valid and subsisting notice, no proceedings can be instituted which would not be prevented by other Courts.

Considering the notice as not a commencement of the proceedings so as to bar the bishop of the right of sending the case to this Court; considering it not necessary that the letters of request should contain the name and description of the person on whose application or at whose mere motion the case was commenced in the first instance; I overrule the protest.

I entertain no difficulty whatever in the case. I assign the party to appear absolutely; but I do not give costs; I reserve them to the final hearing.

This decision was appealed from, but was affirmed by the Judicial Committee of the Privy Council, and the cause remitted to the Arches Court.

[50] *BUBBERS against HARBY AND OTHERS.* IN THE GOODS OF GEORGE KATS, Deceased. Prerogative Court, Hilary Term, Feb. 3rd, 1842.—Motion for administration with will annexed to the attorney of a residuary legatee, a married woman, upon her proxy alone, her husband refusing to join, rejected.

[S. C. 1 Notes of Cases, 306. Followed, *In the Goods of Sutherland*, 1862, 4 Sw. & Tr. 189.]

The deceased died on the 11th of January, 1841, leaving a will dated the 9th of November, 1837. The will not having been proved, the executors were cited to accept or refuse probate, or to shew cause why administration with the will annexed should not be granted to Frances Bubbers (wife of W. Bubbers), one of the residuary legatees.

No appearance being given by the executors,

The Queen's advocate prayed the administration to the attorney of Mrs. Bubbers upon her proxy alone, without her husband joining in the execution of it, he having declined to do so, fearing that he might be involved in proceedings in the Court of Chancery, and in expense. He submitted that a proxy from the husband was not

necessary ; in *Prankard v. Deacle* (1 Hagg. Ecc. 186) it was held that a proxy was not necessary ; in *Suter v. Christie* (2 Add. 150) Sir John Nicholl accepted a proxy without the husband, and in *In the Goods of Hardinge, Deceased* (2 Curt. 640), a married woman's proxy was received.

[51] Sir Herbert Jenner Fust. The cases mentioned do not come up to the present case. In *Prankard v. Deacle* the Court held that a proxy was not absolutely necessary ; that the proceedings would not be necessarily void without a proxy. *Suter v. Christie* comes nearer to the point, but the circumstances of that case do not bear upon the present case. There a married woman had been appointed executrix of a will, and she was permitted to propound that will against the administrator with a former will annexed, her proxy being accepted without her husband joining in it, upon giving security for the costs of the other party ; and it appears that she afterwards took probate of the will. In the present case the husband states his reasons for refusing to join in the proxy, and I do not think that they are ill-founded ; and I do not think that I ought to put him in a situation that may make him liable for costs, beyond the property to which he would be entitled. In the case of *Hardinge* the wife was entitled to the whole of the property, and she released her interest only ; if the husband had any interest, he was only relieved of the responsibility. I do not think that in this case I can accept the proxy without the consent, or rather against the consent, of the husband.

Motion rejected.

[52] *HORTON against WILMOT*. Prerogative Court, Hilary Term, Feb. 3rd, 1842.—The Court having pronounced in favour of a will, and decreed administration, a party appealed ; such appeal being abandoned, and the cause remitted, motion for costs out of the estate, at the instance of the representative of the appellant, rejected.

[S. C. 1 Notes of Cases, 311.]

In this case a will of Sir Robert Wilmot, Bart., deceased, dated May, 1834, had been opposed by Sir Robert Wilmot Horton, as one of the executors of a former will, and the Court, in August, 1840, pronounced for the validity of the will, and decreed administration ; from that decree Sir Robert Wilmot Horton appealed ; he soon afterwards died, and his representative, abandoned the appeal, and the cause was remitted to this Court in the usual way.

Burnaby now prayed the Court on behalf of the representative of Sir R. Wilmot Horton, to decree the costs of the suit to be paid out of the estate of the testator ; he submitted that the Court might make such an order, the cause having been remitted with all its emergencies.

Sir Herbert Jenner Fust. Is there any case where such a thing has been done ?

Burnaby. Many cases might be found : if the Court feels any difficulty, it will perhaps allow the case to stand over.

The Court directed the case to stand over.

[53] Feb. 26th.—The motion was renewed.

Burnaby. This case stood over for the purpose of ascertaining whether a similar case had occurred.

In the case of *Franco v. Alvarenza* (1 Cases temp. Lee, 659, 661), where the cause had been appealed and remitted, Sir George Lee said, "The cause stood in the same light as if there had been no appeal. I could have received the tender originally, and nothing barred me from receiving it now."

Ayliffe and Gail make a distinction between a sentence and a *res adjudicata* ; here there is no *res adjudicata*.

Court. The administration was decreed, and the decree was only suspended by the appeal ; and the party himself is dead : can I now direct the costs to be paid out of the estate ? I could not condemn his representative in costs.

Burnaby. In *Dean v. Davidson* (3 Hagg. Ecc. 554) Sir John Nicholl, after the death of one of the parties, directed his costs to be paid. The costs in this case were not applied for at the time, lest the party's right of appeal should have been perempted.

Sir Herbert Jenner Fust. In the case cited there had been no decision ; here a final decree was made, an appeal was as-[54]-serted and proceeded with to a certain extent, and the cause is now remitted to this Court in the same state in which it was when the decree was made, and no costs were given : no prayer was made for costs,

under an impression that such an application would have preempted the appeal ; but that was clearly a misapprehension, the whole decree would have been one act ; and the Court itself might *ex mero motu* have directed the costs to be paid out of the estate.

The Court has now nothing to do but to carry into effect the former decree. I must reject this motion.

IN THE GOODS OF SUSANNAH HARE, Spinster, Deceased. Prerogative Court, Feb. 19th, 1842.—An affidavit as to the due execution of a will being required from the attesting witnesses ; one of the witnesses deposing that the will was signed in the presence of himself and the other witness, the other witness having no recollection as to the fact, probate allowed.

[S. C. 1 Notes of Cases, 359.]

R. Phillimore prayed probate of the will of the deceased, under the circumstances stated by the Court.

Sir Herbert Jenner Fust. Susannah Hare, the deceased, in this case, died on the 26th of January last ; she left a will in her own handwriting, signed by her, and purporting to be attested by two witnesses ; there being no attestation clause, an affidavit was required from the witnesses as to the due execution of the will under the statute, and one of the witnesses deposed that he saw the deceased sign the will in the presence of himself and the other witness ; the other witness [55] cannot recollect whether the deceased signed her name in his presence or not. It seems to me that there is sufficient to shew that the requisites of the act have been complied with.

Probate to pass.

IN THE GOODS OF RICHARD WIDGER, Deceased. Prerogative Court, Feb. 19th, 1842.—A minor executor elected his step-mother, the widow of the testator, his guardian, for the purpose of taking administration with the will annexed, for his use and benefit. Such administration granted to her, under the circumstances, without citing those having a prior claim.

[S. C. 1 Notes of Cases, 360.]

The testator died on the 7th of September, 1841, leaving a widow, and two sons and two daughters, the children by a former wife ; he executed a will in February, 1837, of which he appointed his second son sole executor, who was a minor, of the age of seventeen years ; the eldest son had gone abroad in 1833, and settled in Valparaizo ; a correspondence had been kept up with him until 1835, since which time nothing had been heard of him ; the two daughters, one of whom was married, had renounced the guardianship of the minor, but the husband of the married daughter had not joined in the proxy, he having embarked on board a ship bound to the East Indies, and his return being uncertain. The executor had elected the widow, his step-mother, as his guardian, for the purpose of taking administration with the will annexed, for his use and benefit, until he should attain the age of twenty-one years : the widow had a life interest under the will, in the dividends of 500*l.*, three and half per cent. annuities.

Jenner, under the above circumstances, prayed [56] the Court to accept the guardian elected by the minor, and to decree administration with the will annexed to her, without citing the husband of the married woman, or the son who was probably dead.

Sir Herbert Jenner Fust. The executor is seventeen years of age ; the wife has the interest for life in 500*l.* stock, and, unless there is a representation, she cannot obtain what was intended for her support. The nearest of kin to the executor are an elder brother, who has not been heard of since 1835, and two sisters, who have renounced the guardianship, but the husband of the married sister has not joined in the proxy, which is usually required ; but he is abroad, and his return is uncertain, and the Court is asked to dispense with the service of a citation in the usual way against him ; I am unwilling at any time to dispense with the forms commonly required by the Court, but here the interests of the absent party will not be affected, and the administration is to be granted for the use and benefit of the minor. I think, under the peculiar circumstances of this case, the Court need not require the husband to be cited. The Court decrees administration to the widow, who has been elected

by the executor as his guardian, for his use and benefit until he attains the age of twenty-one.

[57] IN THE GOODS OF LOUISA ELIZABETH, COUNTESS OF DURHAM, Widow, Deceased. Prerogative Court, Feb. 22nd, 1842.—Probate granted of two instruments, as together containing the will of the deceased, the latter paper being duly executed, and referring to the former (not in the possession of the deceased at the time) so particularly that there could be no mistake as to its identity.

[S. C. 1 Notes of Cases, 365 ; 6 Jur. 176. Applied, *In the Goods of Willesford*, p. 78, post.]

The deceased in this case died at Genoa on the 26th of November, 1841, having executed her will on the 3rd of October, 1840, and thereof appointed her brother, the Hon. Charles Grey, and the Hon. J. G. B. Ponsonby, executors.

In this will the testatrix, after reciting that the late earl, by his will, dated 29th of September, 1837, had devised and bequeathed to her all his real and personal estate, and appointed her sole executrix and residuary legatee, devised and bequeathed all her real and personal estate to her executors, upon trust for her only son, the present earl (aged thirteen), to be conveyed to him when he should attain the age of twenty-one, or, in case of his death under twenty-one, to the eldest of his issue, male, upon attaining twenty-one, or if he should die under twenty-one, without leaving issue, male, living at his decease, then "upon the trusts, intents and purposes expressed and declared in and by a will (afterwards revoked by the said will hereinbefore mentioned) executed by my said late husband, John George, Earl of Durham, bearing date the 12th of April, 1826, by his then name of John George Lambton, or such of the said trusts, intents and purposes, as shall be then existing and capable of taking effect."

The will was executed in duplicate, and after its execution in October, 1841, and previously to [58] leaving this country, the testatrix informed Mr. Stephenson, her confidential adviser, who wrote and attested the will, that she had deposited one part thereof in the strong room at Lambton Castle with the said former will of the late earl, and upon search after her funeral, a packet, tied up, and sealed with her seal, and endorsed with her initials, was there found by Mr. Stephenson, containing one part of the countess's will and one part of the former will of the late earl ; the other part of the will was in the testatrix's own possession, at Genoa, and was brought to this country by Mr. Ponsonby, one of the executors.

Addams prayed probate of the paper executed by the deceased, and of the will of the late earl, of the 12th of April, 1826, as together containing her will.

The question is whether the former will of Lord Durham forms part of the will of Lady Durham ; nothing can be more express than the reference to that instrument ; it is so precise as to exclude all possibility of mistake ; before the Will Act there can be no doubt that both papers would have been entitled to probate, and that act has made no difference. In *Habergham v. Vincent* (2 Ves. jun. 209) it was held, as to real property under the "Statute of Frauds," that if a testator in his will refers to another paper, and so describes it that there can be no doubt of its identity, that such paper is incorporated into the will, and forms part of it. In this case there can be no doubt of the identity of the paper [59] referred to ; in addition to which, the papers are found sealed up together in the same envelope.

The Court. Sir Herbert Jenner Fust. I should like to know whether the trusts could not be carried into effect by the Court of Chancery.

Addams. If the present earl were to die under the age of twenty-one, leaving no male issue, the trusts of the will of the late earl cannot be carried into effect without probate being granted of the two papers, at all events, without expensive proceedings in the Court of Chancery ; on the other hand, by granting probate of both papers, no difficulties can arise.

Sir Herbert Jenner Fust. Much difficulty may arise in case of opposition, where parties may refuse to give up papers referred to ; at the same time, I do not know that I can refuse probate in this case. In *Smart v. Prujeau* (6 Ves. 565) it was held that, in order to incorporate an unattested paper in a will, it must be so identified that there can be no mistake.

Addams. Which is the case here.

Sir Herbert Jenner Fust. There can be no doubt that the revoked will of the late

earl is the identical paper referred to by Lady Durham in her will, and that it was intended by her to form part of her will.

[60] If this be a good disposition of the real estate, I see no reason why it should not be a good disposition of the personal estate also.

Although I allow probate of these papers, similar cases must not pass without notice to the Court.

IN THE GOODS OF THOMAS DICKINS, Deceased. Prerogative Court, March 15th, 1842.—Reference being made in a will to a deed so as to make it part of the will of the testator; probate allowed of the will and a notarial copy of the deed under the circumstances.

[S. C. 1 Notes of Cases, 398. Referred to, *Sheldon v. Sheldon*, 1844, 1 Roberts. 86.]

Thomas Dickins died on the 13th of February last, leaving two sons and two daughters; he made a will on the 20th of August, 1840, and appointed his eldest son executor thereof. The testator left all his estates, real and personal, to his eldest son, upon trust for himself and the other children, in equal shares, the shares of the three younger children to be held by him, his heirs, executors and administrators, upon the same trusts and for the same purposes, &c., as were mentioned in an indenture of settlement, dated the 20th of November, 1830, made between the testator and his said son, or upon so many of the said trusts, intents and purposes as were then subsisting, or capable of taking effect. Upon an affidavit from the executor that the deed referred to in the will was in his possession, and that it related, amongst other things, to freehold and copyhold estates, and that upon sale or mortgage thereof it would be necessary for him to produce the deed, and, therefore, that it was not in his power to leave the same in the registry of the Court,

[61] Haggard prayed probate of the will and settlement, but without leaving the original deed in the registry.

Sir Herbert Jenner Fust. The paper referred to in the will was in existence at the time, and is sufficiently referred to to incorporate it into the will, and the Court, upon the principle upon which it acted in the case of *Lady Durham's Will*, (a) will hold this deed to be part of the testator's will.

The Court is prayed to decree probate without the original settlement, on the ground that it is necessary to be retained in the possession of the trustee to enable him properly to execute his trust; I think, in this case, that if a notarial copy be left in the registry, and a notarial copy form part of the probate, it will be sufficient.

Great difficulties may arise in such cases where the original deeds cannot be got at.

IN THE GOODS OF WILLIAM HOGG, Deceased. Prerogative Court, March 15th, 1842.—Testator died in 1801, leaving bona notabilia. Probate was taken in the Archdeaconry Court of Bucks under 5000l., and the property nearly all administered. Motion for administration, with the will annexed, of the unadministered effects, to be granted by the Prerogative Court, under 100l., rejected—the original grant being void, and the whole effects unadministered.

[S. C. 1 Notes of Cases, 394; 6 Jur. 223.]

Motion.

The deceased died in 1801; he left a will, dated the 3rd of October, 1799; in May, 1801, William [62] Hogg, a son of the deceased, and one of the executors and the residuary legatee, proved the will in the Archdeaconry of Bucks (the personal estate of the deceased being sworn under 5000l.), the testator being entitled to the sum of 850l., secured upon mortgage of property in the Archdeaconry of St. Albans and diocese of London. On the 15th of January, 1828, William Hogg, the executor, died intestate, and the surviving executor died without proving the will. The money secured by the mortgage was paid in 1822, and the mortgage assigned to the parties entitled to the freehold. The whole of the property of the testator had been administered under the probate from the Archdeaconry of Bucks, and the accounts had been settled many years; in order to make a valid assignment of the said mortgage, it was now required that the will should be proved in this Court, for which purpose the will had been transmitted from the registry of the Archdeaconry of Bucks.

Addams prayed administration of the unadministered effects of the deceased to the

(a) See the next preceding case.

representative of William Hogg, the son, who was the residuary legatee in the will, and that the administration might pass under 100l.

Sir Herbert Jenner Fust. The testator died in 1801; he made a will in 1799, and appointed two executors; one of them, a son of the deceased, and the residuary legatee, proved the will in the Archdeaconry of Bucks; it appears that the testator was beneficially entitled to a mortgage in the Archdeaconry of St. [63] Albans, of the value of upwards of 800l.; it is quite clear, therefore, that this grant was void; it appears that all the property has been administered under this void grant; the executor who proved died in 1828, and his co-executor survived, but died without proving the will; the Court is now prayed to grant administration, with the will annexed, to the representative of the residuary legatee (who would be the person entitled to the grant), and that the administrator may swear the property under 100l., but it is impossible to allow this, it being alleged that there were bona notabilia of the value of 850l. The original grant was absolutely void, and the property is unadministered.

Motion rejected.

FINCHAM *against* EDWARDS. Prerogative Court, Feb. 24th, 1842.—To establish the will of a party totally blind, or so nearly so as to be incapable of discerning writing, it must be proved that the will was read over to the deceased in the presence of witnesses, or that he was otherwise acquainted with the contents.

[Affirmed, 1842, 4 Moore, P. C. 198; 13 E. R. 277 (with note).]

Martha Yeomans died on the 19th of June, 1841, a spinster. She left, her surviving, three nephews and a niece, her only next of kin. A will of the deceased, dated the 5th of February, 1841, signed by her, and subscribed by two witnesses, was propounded in a common conditit by Mr. G. Fincham, the sole executor.

The will was as follows:—

"This is the last will and testament of me, Martha Yeomans, of Wells Street, Hackney, in the county of Middlesex, spinster. I give and bequeath unto my niece, Mary Ann Dyer, late Edwards, and to my nephews, John Edwards, Thomas [64] Edwards, and James Edwards, and to each and every of them, the sum of 50l., free of legacy duty. I give unto my kind and faithful servant, Sarah Ball, the sum of 19l. 19s. Also I give to her daughter, Ann Ball, the sum of 19l. 19s. Also I give unto Mary Poole, my servant, if she shall be living with me at my decease, the sum of 5l. Also I give unto Rebecca Arnold, now living with me, 10l. Also I give, as a testimony of regard, unto my friend, George Fincham (of, &c.), the sum of 20l., and I hereby nominate and appoint the said G. Fincham whole and sole executor of this my will. All the rest, residue, and remainder of my estate and effects, whatsoever and wheresoever, I give and bequeath unto my dear friend, Mrs. L. E. Lane, now staying at my house; the same to be for her sole use and benefit, independent of her present or any future husband, and for which her receipt alone shall be a sufficient discharge. And I do hereby revoke all former wills by me heretofore made, and declare this alone to be my last will and testament. In witness whereof I have hereunto set my hand, this 5th day of February, 1841. "M. YEOMANS.

"Signed and declared by the said Martha Yeomans, the testatrix, as and for her last will and testament, in the joint presence of us, who in her presence, at her request, and in the presence of each other, have hereunto subscribed our names as witnesses—Hylton D. Hacon, James Bennet Ashby."

The following other testamentary papers were brought into the registry: a paper dated July 18th, [65] 1835, giving to the nephews and niece, and to certain great-nieces of the deceased, one hundred guineas each, free of legacy duty, and, after certain specific and pecuniary legacies of small amount and value, bequeathing the remainder of her property, wearing apparel, and furniture to Mrs. Lane, whom the deceased thereby constituted her residuary legatee; this was signed by the deceased. A will, dated the 27th of October, 1840, giving one hundred pounds a-piece to her said nephews, niece, and great-nieces, bequeathing pecuniary legacies to her servants, and to Mrs. Arnold, and to Mrs. Lane 100l. for her sole and separate use, and appointing Mr. John de Flewry her sole executor. This paper did not contain any residuary bequest; it had a formal attestation clause; it was signed by the deceased, and subscribed by two witnesses, one of whom was Mr. Blake, a solicitor, who prepared it.

Two other testamentary scripts were brought in.

The one, a draft of a will, prepared for the deceased by Messrs. Jenings and Bolton, whereby she proposed to give 100l. to her nephews and niece, a legacy of 10l. each to two servants, 100l. to Mrs. Arnold. All the residue to Mrs. Lane, for her separate use, and appointing her and Mrs. Arnold executrices. A will in the above terms was duly executed on the 12th of January, 1839, as appeared by an affidavit of Mr. Bolton, but was not produced.

The other, a formal will, prepared for the deceased by Mr. Blake, duly executed, dated the 4th of August, 1835, and to the same purport and effect as the last stated paper, excepting that it did not [66] contain any legacy to Mrs. Arnold, and named Mr. Fincham as the sole executor. This will had been altered so as to form the instructions for the will of 1839.

The will propounded in the cause had been prepared by Mr. Blake from a copy of the will of the 27th of October, 1840, the alterations having been made in pencil; these instructions were not produced.

Mr. H. D. Hacon deposed on the conditit [after stating that he had been requested by message to call on the deceased to see her execute her will]: "I continued to chat with the deceased until Mr. Ashby came in; as soon as he came in the will in question was produced, if it was not already lying on the table, but of which I cannot be certain; the deceased signed her name to it in my presence, and in the presence of Mr. Ashby, saying to us, 'This is my will, and I beg you to witness it,' or she used words to that very effect. I treated the business as a matter of course, and only noticed that the deceased did execute her will by signing it in my presence, and of Mr. Ashby: I did not notice (at least I do not recollect) by whom the will was produced, nor any more of the circumstances attending the execution of the same, beyond the fact of the deceased declaring that the paper which she signed was her will. I did not hear the will read over to the deceased; I did not observe that she read it to herself. She did not declare that she understood the contents of the will; but, as I have before stated, she did declare that the paper which she signed was her will."

On cross-examination,

[67] "The deceased's sight had always been feeble, and it gradually grew worse and worse; I doubt whether the state of her sight at the time of the execution of her will would have enabled her to have read the same, at least without difficulty."

J. B. Ashby deposed: "The deceased's will was executed; I cannot recollect what preliminary conversation, if any, in respect of such execution, took place previous to her signing it; but I perfectly well recollect that I and Mr. Hacon stood by the side of the table at which Miss Yeomans was sitting, and saw her sign it. The deceased was nearly blind, and it was necessary, lest she should sign in the wrong place, to fix her hand at the point where her signature was to be made; and it was so done, I believe, by Mrs. Lane." [After deposing to the fact of execution], "I know nothing of instructions given for the making of such will, nor whether the same was or was not read over to the deceased, nor whether she understood the contents of such will."

On cross-examination,

"The deceased was nearly blind, and I believe the pen she used in signing her name was handed to her, and placed on the spot where she was to sign, by Mrs. Lane; and when that had been done, the deceased's hand and the pen were quitted, and she was left to sign her name by herself, and did then subscribe the will unassisted, and of her own free will and accord."

The will was opposed by Mr. G. Edwards, one of the nephews of the deceased, who gave in an allegation responsive to the conditit.

The third article pleaded affection of the de-[68]-ceased for her said nephews and niece, and testamentary declarations in their favour.

Fourth, undue influence exercised over the deceased by Mrs. Lane, acting in concert with Mr. Fincham.

Fifth, sixth and seventh, declarations of the deceased, inconsistent with an intention of appointing Mr. Fincham her executor, and of bequeathing any part of her property to Mrs. Lane.

Tenth, that from the month of October, 1840, to the time of her decease the deceased rapidly declined in health; that her mental powers became gradually impaired; that she was totally blind; that her memory was nearly gone; and that she had grown quite childish in her manner.

Mr. Blake, the solicitor who prepared the will of the 27th of October, and also the will in question, examined on behalf of the defendants, deposed as follows:—

“The will at issue in this cause was prepared by me; the instructions for it consisted for the most part of alterations, interlined with pencil, in a copy of a previous will (27th of October, 1840) I had prepared for the deceased. These alterations were in the handwriting of Mr. Fincham, the executor, so I learnt from himself. Mr. Fincham, then a stranger to me, called on me, and brought with him a copy of the will of the 27th of October, containing the alterations; he left the copy, and desired me to draw a new will for the deceased, according to the form as altered in pencil. I told him I would look at it; I afterwards returned it to him with a letter, in which I stated that as I had received from the deceased herself, personally, the [69] instructions for the previous will, I must decline preparing the proposed new one, without having a personal interview with the deceased, and receiving instructions from herself. In consequence of a written communication I received from Mrs. Lane I went to Hackney, and had an interview with the deceased. The copy of the previous will containing the alterations in pencil was produced on the occasion, and I read it over to the deceased, with the view of ascertaining her sentiments in respect to the alterations, and obtained her approval of them. In each instance in which a question was raised as to the propriety of such and such bequests in the will the deceased appealed to Mrs. Lane, and inquired of her if it should be so or not, and in each instance it was decided by the opinion Mrs. Lane gave. [The witness stated two instances.] Whether the deceased was wholly incapable of forming a decisive opinion for herself I cannot say; but undoubtedly on every point that was raised she referred to Mrs. Lane for her opinion, and appeared to yield at once to every suggestion made by Mrs. Lane.”

On cross-examination [after stating the fact of going to the deceased's house]. “I ascertained from her that it was her wish to alter her will, and I received instructions from her in what respects she wished alteration. The copy of the former will which Mr. Fincham had before delivered to me, as from the testatrix, with pencilled instructions for such alterations, was then and there produced to me. I deliberately read over such copy to the testatrix, pausing at each bequest, and taking her [70] instructions. I did draw up and prepare a draft will, pursuant to such instructions; I sent it down ready for execution, under cover to Mrs. Lane, with instructions for the testatrix's due execution; I suggested getting a medical man to attest it.”

Mrs. Georgiana Egerton examined on the responsive allegation, deposed on the tenth article, to the following effect:—“Mrs. Yeomans was, as I consider, totally blind. She used certainly herself to say that she could see a little, and talked of sending for her spectacles to see with; but I believe she could not see in the least degree, for I recollect on one occasion her not knowing that there were lighted candles in the room.”

Elizabeth Bayley, on the same article, deposed: “Mrs. Yeomans had been totally blind for a length of time.” On cross-examination—“She could, I think, see a light, but her sight was so imperfect that she could not see to read anything. She was always very near-sighted, and her sight grew worse and worse as she advanced in age; she became more and more so, till at last she became, as I considered, totally blind.”

James de Fleury deposed: “The deceased was all but blind before I last saw her; I do not think she was totally blind, but her sight was so bad that she could not distinguish any one; indeed, she could not see my hand when held out towards her, but groped about for it when she wanted to shake hands with me.” On cross-examination—“I do not think the deceased was actually blind, but she was so much so that she could not recognise any one.”

[71] At the hearing the principal point relied on, in opposition to the will, was that the deceased was blind, and that there was no proof that the will had been read over to her.

It has been considered advisable to report the case on this point only.

Phillimore and Addams in support of the will.

The Queen's advocate and Jenner contra. The will of a blind testator must be read over to him in the presence of witnesses, and the identical will must be read; in Williams on Executors (page 16, 2nd edit.) the rule is thus stated, “He that is blind may make a nuncupative testament by declaring his will before a sufficient

number of witnesses; but he cannot make his testament in writing unless the same be read before witnesses, and in their presence acknowledged by the testator for his last will; and, therefore, if a writing were delivered to the testator, and he, not hearing the same read, acknowledged the same for his will, this would not be sufficient; for it may be that if he should hear the same he would not own it. And it seems best that it be read over to the testator, and approved by him, in the presence of all the subscribing witnesses; and this the civil law did expressly require in the case of a blind man's will. But in England this strictness seems not to be precisely requisite, if there shall be otherwise satisfactory proof before the Court *that the identical will was read over to him, although it was not in their presence.*" (a)

[72] Per Curiam. Must the identical will be read over; may it not be shewn that the testator had knowledge of the contents?

Counsel. It is submitted that would not be sufficient. See *Barton v. Robins* (3 Phill. 455, n.), *Longchamp v. Fish* (2 Bos. & P. N. R. 415).

Judgment—Sir Herbert Jenner Fust. This will is made in favour of a person who is a stranger in blood to the deceased, to the exclusion of three nephews and a niece, for whom the testatrix appears to have felt some interest, though no very great regard; this is proved by former wills; under one they were to take legacies of one hundred pounds each; and from 1835 up to 1840 she did intend that they should each take legacies to that amount. The person to be ultimately benefited is Mrs. Lane, the wife of a gentleman at present in India. It appears that Mrs. Lane had early in life been placed under the tuition and care of this lady; she remained with her many years, and then went to India, where she married; on her return to this country she took up her abode in the neighbourhood where the deceased lived, and was frequently, with her two children, resident in the house of the deceased, who appears to have entertained the greatest [73] regard and affection for her; as is testified by the disposition of her property by the will of 1839, the deceased names her residuary legatee, as she also does in the will now in question. The property is sworn under 1500l., but there are certain legacies given—I assume that Mrs. Lane will eventually receive about 1000l.

It has been said that this is a will of a person blind, or almost blind; and that the will is not proved to have been read over to the deceased, and it has been argued that proof of the mere fact of execution, without proof of knowledge of the contents, which is only to be inferred, as it is contended, by the identical will being read over to the deceased, is insufficient to establish a will in the case of a blind testator, or a person—like this lady—blind for all useful purposes. The result of the evidence on this part of the case I take to be this, that although the deceased was capable of forming a correct opinion as to whether a candle was alight in a room, she was blind to this extent, that at the time when she signed this will she was obliged to have her hand guided and placed in a proper direction.

Certainly, when the Court is asked to grant probate of a will of a party totally or almost blind, it must be shewn, to the satisfaction of the Court, that the contents of the will are conformable to the instructions and intentions of the deceased; undoubtedly in this case the will is not proved to have been read over to the deceased. A reference has been made to Mr. Williams's Treatise (page 16, 2nd edit.), but [74] the case of *Barton v. Robins* (3 Phill. 455, n.) shews that it is not necessary that the actual will should be read over, if there is proof that the party deceased knew the contents of it. That was a strong case; the will gave the property to the drawer of it, an attorney; there was proof that part had been read over to the deceased, but no proof as to the other part. Sir G. Hay said, "My opinion is, the part not read over is void;" so far he confirms the proposition now contended for; but he goes on—"A blind man's will established upon proof that he knew the contents of the will, though not read over before the witnesses"—and at the conclusion he says, "In point of law the writer who is benefited must shew that the contents were known." The result was this,

(a) In the 3rd edition (1841) this passage in italics is thus amended: "If there shall be otherwise satisfactory proof before the Court *of his knowledge of the contents of the identical will;*" and (page 263): "Where the testator is blind, it must be proved *that the contents of the will were known to the deceased;* for his execution or other acknowledgment of the will is not sufficient."

Sir G. Hay pronounced for the part of the will which had been read over, and directed the residue to be expunged.

I am of opinion that the deceased in this case sufficiently knew the contents of this will, and I pronounce for it, but without costs.

Affirmed by the Judicial Committee of the Privy Council.

[75] IN THE GOODS OF WILLIAM HAYNES, Deceased. Prerogative Court, March 15th, 1842.—A testator appointed the Archbishop of Tuam for the time being an executor of his will, the archiepiscopal jurisdiction of Tuam having been abolished by stat. 3 & 4 Wm. 4, c. 37—probate granted to the Bishop of Tuam as executor.

[S. C. 1 Notes of Cases, 402.]

Motion.

The testator died at Mirzapore in the East Indies in December, 1834. He left a will, and appointed two executors in India, who proved the will there; he also appointed the Archbishop of Tuam for the time being an executor in Ireland. In August, 1835, probate was granted by this Court to the Archbishop of Tuam. The executors in India were directed by the will to transmit the deceased's property to the archbishop, for him to dispose of amongst the testator's family, who lived in and near the city of Tuam, in such portions as should appear to the archbishop to be fair and just, and they were required to abide by his decision. The executors in India remitted the proceeds of the principal part of the property of the testator to the archbishop, who distributed the same among the testator's relations, under the direction of the Court of Chancery in Ireland. The archbishop died in March, 1839, and further sums having been since remitted, and more shortly expected, there are no persons authorized to give a proper discharge, or to carry the trusts of the will into effect. The stat. 3 & 4 Wm. 4, c. 37, enacts, "that when the archiepiscopal sees of Tuam and Cashel should become void, the archbishops should cease to have archiepiscopal jurisdiction, which should be transferred [76] to the Archbishop of Armagh, to whose jurisdiction the Bishop of Tuam should be subject. The bishop's residence is at Tuam.

Addams prayed probate to the Bishop of Tuam.

Sir Herbert Jenner Fust. The testator died in 1834; he appointed two executors in India, and the Archbishop of Tuam for the time, to whose discretion everything was entrusted as to the division of the property among the deceased's relations. Probate was granted to the archbishop in 1835, who proceeded to administer the effects of the deceased, under the directions of the Court of Chancery of Ireland. The archbishop died in 1839, and it is requisite that administration should now be granted, and an application is made on behalf of the Bishop of Tuam. By the 3 & 4 Wm. 4, c. 37, the archiepiscopal jurisdiction of Tuam is removed to Armagh, and there is now no Archbishop of Tuam; it is stated that the Bishop of Tuam's residence is at Tuam, and it may be presumed that the testator knew that the residence of his relations was in the diocese of Tuam, and the question is whether administration is to be granted to the Bishop of Tuam. No doubt it was the deceased's intention that the person likely to have a knowledge of the claims of his relations should be his executor, and not the Archbishop of Armagh. I am clearly of opinion that the Bishop of Tuam is the person intended.

[77] IN THE GOODS OF FRANCIS WILLESFORD, Deceased. Prerogative Court, March 15th, 1842.—Probate granted of an unexecuted paper as part of the will of the testator, there being sufficient reference to the paper in the will to identify it as the paper referred to.

[S. C. 1 Notes of Cases, 404. Referred to, *Watson v. Arundell*, 1877, Ir. R. 11 Eq. 60.]

Motion.

The testator died in January last; he left a will with a codicil thereto, of which he appointed his three sons executors. On the first side of the will there was the following clause:—"I also give to my said three sons the several watches, jewels, silver, or such other articles as are enumerated in the paper hereunto annexed, allowing my wife the use of the several silver articles so given by me to my son Harry, during her life," and towards the conclusion of the will he directs the residue of his real and personal estate to be divided between his sons, share and share alike, "but on the

terms and conditions hereinbefore expressed, and that the paper hereunto annexed, as referred to by me, be deemed as a further distribution of my effects." On the death of the deceased the will and codicil were found in a sealed packet, and, attached to the will by a pin, was also found a paper purporting to dispose of plate, jewels, and other things, and which began: "For the Rev. F. F. B. Willesford, in accordance with my will," and ended, "reserving for my wife the use of such silver articles for her life, in accordance with my will," and on the third side of the paper was written: "This is the paper referred to by my will as hereunto annexed. Francis Willesford, 15th June, 1841."

[78] The papers were all in the handwriting of the deceased.

The two subscribed witnesses deposed that they did not recollect to have noticed the paper so as to identify it as being annexed to the will, but that they believed that it was annexed at the time of the execution of the will.

The Queen's advocate moved for probate of the paper as part of the will and codicil.

Sir Herbert Jenner Fust. The question is whether this paper is sufficiently identified, as to enable the Court to grant probate of it as part of the will. It is found pinned to the will, and it is expressly stated by the testator to be the paper referred to in the will. In the case of *Lady Durham's Will* (ante, p. 57) the Court held, as far it could decide on an ex parte motion, that a paper in existence before the date of the will, if referred to, and sufficiently identified as the paper intended by the testator, may form part of the will, although such paper is not attested. In this case the paper is sufficiently identified, and it was in existence when the will was executed; probate may therefore pass of the paper as part of the will and codicil of the deceased.

[79] IN THE GOODS OF RICHARD SIMMONDS, Deceased. Prerogative Court, April 20th, 1842.—The deceased, having signed his will, acknowledged the signature in the presence of one witness, who subscribed his name to the will, and on a subsequent day acknowledged the signature to another witness, who subscribed his name, the former witness being present at the time, but who did not again subscribe his name; motion for probate rejected.

[S. C. 1 Notes of Cases, 409; 6 Jur. 349. Distinguished, *Moore v. King*, p. 250, post.] Motion.

Haggard moved the Court to allow administration with the will annexed of Richard Simmonds, deceased, to pass, there being no executor named therein; the circumstances were almost identical with those of *Ann Allen, Deceased* (vol. 2, p. 331).

Sir Herbert Jenner Fust. The deceased in this case died on the 19th of March last, a widower, with seven children; after his death a will was found which bears date the 9th of January, 1842; there is no executor or residuary legatee named in it, it was signed by the deceased, no witness at that time being present; he afterwards acknowledged his signature to one witness who signed the will as attesting his acknowledgment; some time afterwards (on the 9th of February) he shewed it to another person and acknowledged his signature, the former witness being also present at the time, so that the deceased acknowledged his signature to two witnesses present at the same time; the second witness then attested it, but the first witness did not again attest it. According to the opinion I gave in the case of *Allen*, this is not a compliance with the statute; it [80] appears to me that the intention of the Legislature was, that there shall be a signing or acknowledgment in the presence of two witnesses present at the same time, and that they shall both then attest it.

Motion rejected.

THE DUKE OF DORSET *v.* LORD HAWARDEN. Prerogative Court, April 20th, 1842.

—A testatrix appointed an executor by the description of "Lord Sackville," and "Lord George Sackville." It appeared that there were only two persons to whom the description could apply, viz. "Charles Lord Sackville, Duke of Dorset," and the "Hon. George Germain."—Held, under the circumstances, that the former was the party intended.

[S. C. 1 Notes of Cases, 412; 6 Jur. 350.]

On petition.

In this case the Duke of Dorset claimed to take probate of the will of Charlotte Leighton, deceased, as being one of the two executors named therein.

The testatrix died in September, 1841; by her will, dated the 2nd of April, 1839,

she "gave and bequeathed unto her cousins Lord Hawarden and Sackville, a thousand pounds a piece, provided they consented to take upon themselves the trust of executors to that her last will and testament."

"And she nominated, constituted, and appointed the said Lord Hawarden and Lord George Sackville executors of that her will and testament."

The following are the facts material to be adverted to:—In 1770 the Right Hon. Lord George Sackville, the father of the Duke of Dorset, assumed, by virtue of an act of Parliament, the name of Germain, and continued to be known as Lord George Germain until 1782, when, by letters patent, he was created Viscount Sackville and Baron Bolebrooke. In 1785 he died, leaving two sons, viz., the present Duke of Dorset, and the [81] Hon. George Germain, who died in 1836. The Duke of Dorset was born on the 27th of August, 1767. In 1770 he became the Hon. Charles Germain, and continued to use that name until the death of his father (in 1785), when he succeeded to the title of Viscount Sackville, and was styled Viscount Sackville (or popularly) Lord Sackville, down to 1815, when, upon the death of his cousin, he became Duke of Dorset. From 1775 until 1800 he was upon terms of intimacy with the deceased, who it appeared by affidavits entertained great esteem and regard for him, and always speaking of him as her cousin, and as Lord Sackville. About thirty years before her death the deceased retired from society, her place of abode being concealed from her family, with whom she had ceased to have any intercourse or correspondence from about the year 1800. The Duke of Dorset stated in his affidavit that he believed the deceased was not aware that he had become Duke of Dorset.

It was stated, on behalf of Lord Hawarden, that the testatrix, by the names and titles "Lord Sackville" and "Lord George Sackville" meant and intended the late Honorable George Germain, the brother of the Duke of Dorset, that the deceased was acquainted with him, and had as great a regard and esteem for him as for his brother.

Haggard and Harding contended that the Duke of Dorset was sufficiently identified as the party referred to, that no other person answered the description of "Lord Sackville" so nearly; that the deceased was proved to have known and spoken [82] of him as Lord Sackville, and would more probably make a mistake between the Christian names "George" and "Charles" than between the surnames "Sackville" and "Germain;" they cited *Beaumont v. Fell* (2 P. Wms. 141); *Miller v. Travers* (8 Bingh. 244); *Still v. Hoste* (6 Madd. 192); *Rivers' case* (1 Atk. 410); *Gord v. Needs* (2 Mees. & Wels. 129); *Bradshaw v. Bradshaw* (2 Younge & C. 72); *Wigram on Evidence* (Prop. 7); *Phillipps on Evidence* (Phillipps & Amos, pt. 2, c. 5, s. 1).

Addams and Curteis contra, submitted that the description did not apply to the duke, inasmuch as he never was Lord George Sackville; that by that description the testatrix could not have intended Charles, Duke of Dorset, who had been Duke of Dorset for twenty years before her death; that the probabilities of the case favoured the supposition that the testatrix, upon the accession of Charles, Lord Sackville to the dukedom of Dorset, imagined that the Hon. George Germain had become George, Lord Sackville, or Lord George Sackville, their common friend Mrs. Corbett having stated, in an affidavit, her belief that such was the fact. That at all events the identity was not so clear as to allow the Court to pronounce that by the description "Lord George Sackville" the person meant was Charles, Duke of Dorset. *Doe v. Hiscocks* (5 Mees. & Wels. 363); *Smith v. Galloway* (5 B. & Ad. 43); *Blundell v. Gladstone* (11 Sim. 467).

[83] Sir Herbert Jenner Fust. The facts of this case lie in a narrow compass. The deceased died in September, 1841; she made a will (in her own handwriting), by which she has given a legacy of one thousand pounds to persons described as her cousins, Lord Sackville and Lord Hawarden, on condition that they should act in the trusts of her will, and, in case of their refusal to act, to her other nearest relation, and the will proceeds: "And I nominate the said Lord George Sackville and Lord Hawarden, executors," meaning thereby the same persons to whom she had given 1000l., on condition of acting as executors.

It is averred on behalf of the Duke of Dorset that by the words "Lord Sackville," and "Lord George Sackville," he was meant and intended, and that the appointment of executor applies to him. In his act on petition the circumstances of his descent are stated: "In 1770 his father, formerly Lord George Sackville, took the name of Germain, and was so known until 1782, when he was created Viscount Sackville; he died in 1785, leaving two sons, one of whom (the petitioner) thereupon became

Viscount Sackville; the other son died three years before the will in question was made. The party in the cause was known as Viscount Sackville until 1815, in which year he became Duke of Dorset, but he still retains his former title of Viscount Sackville, as the older in the peerage. Between him and the deceased an acquaintance commenced at an early period, and continued until 1800; they were in the habit of meeting each other at Mr. Corbett's, at Sundorn, near Shrewsbury, at a time when he was [84] known as Lord Viscount Sackville; he had borne the surname of Germain from 1770 until his father's death in 1785, but his Christian name is Charles. The deceased, in the latter part of her life, lived in great seclusion, and there seems to have been no intercourse between the Duke of Dorset or Mr. George Germain and the deceased after 1800; it appears, therefore, a priori, unlikely that she should have appointed either of those persons executor of her will.

The question is, who is meant by Lord George Sackville? being evidently the same person named as Lord Sackville in the preceding part of the will. Now it is admitted there are only two persons whom the deceased could have meant—the Duke of Dorset, or his brother Mr. George Germain; the question is, to which of the two does the description most nearly apply? The first point is whether parol evidence is admissible; and, if so, secondly, whether the Duke of Dorset is the party meant. It would be useless to go through the authorities bearing on the first point; the general rule is this: “*ambiguitas verborum latens verificatione suppletur*”; here there is that latent ambiguity; on the face of the will there is no ambiguity—there is a person referred to by name in the will, one of two persons must be the party meant. How far does the Duke of Dorset answer the description? He was known to the deceased as Lord Sackville; he answers the description so far, but his name is Charles, and in the clause appointing the executor the party is named “George.” I think it probable he was not addressed by his Christian name at the time of the intercourse between him and the deceased. The [85] other person never bore the name of “Sackville,” but was always called Mr. George Germain. I think it much more probable that the deceased should have confounded the Christian names of Charles and George than the surnames of Germain and Sackville; or that she should have supposed that the Hon. George Germain had succeeded to the title of Lord George Sackville. The Hon. George Germain only answers the description in one respect, he bore neither the title nor name of Sackville, but his name was George.

When it is ascertained that one of two persons can alone be meant, the Court has only to consider which of the two was the person whom the testatrix meant to appoint. On the whole, looking at all the circumstances, I am of opinion that the Duke of Dorset was the person intended, although I confess that I cannot satisfactorily account for the erroneous description.

By decreeing probate to the Duke of Dorset the other party can still contest the claim to the legacy in a Court of Equity; whereas if I decide the other way, the duke cannot claim the legacy as executor.

[86] *DILLON against DILLON.* Consistory Court of London, April 22nd, 1842.—On debating the admission of a defensive allegation in a suit for divorce by reason of adultery. Held—That a charge of cruelty is not rendered admissible by an averment that it was designedly committed with the view of inducing the adultery, and thereby enabling the husband to obtain a separation from his wife.—That declarations of the husband, expressive of a desire to get rid of his wife, are admissible, as tending to elucidate his conduct in reference to the facts of the case.—That it is competent to a party charged with adultery, first, to deny such charge specifically; secondly, to plead condonation.—A husband receiving information, impugning his wife's fidelity, sufficient to induce him to investigate her conduct, is bound, pending the inquiry, to abstain from cohabitation, although not bound to remove her from his house.—A departure from established forms of pleading, although in a particular not strictly essential to the proof in the cause, is calculated to excite the vigilance of the Court.—A party marrying a young person whom he had previously seduced is bound to exercise more than ordinary marital care over her conduct and deportment.—Where a single act of adultery is pleaded, unaccompanied with circumstances leading up to the probability of its commission, the Court will view the case with jealousy, and examine the evidence with great vigilance.—Evidence in proof and in disproof

of adultery being equally balanced, the Court examined the following incidents of the case:—First, the fact of the wife having, previous to the marriage, been seduced by the husband.—Second, the fact of warnings, direct and indirect, given to the husband, calculated to excite his vigilance for his wife's honour, and no steps taken by him in consequence thereof. The absence of due precaution may amount to criminal negligence.—Third, the fact of cohabitation continued after *probabilis scientia* of the alleged adultery.—Fourth, the citation in the cause served on the wife whilst in company with her husband.—Fifth, two interviews, of some duration, between the husband and wife, after the commencement of the proceedings, their object and effect being unexplained. Semble, that, on the part of the wife, the fact of such interviews should, immediately on their occurrence, have been brought to the notice of the Court.—Sixth, the absence of an action at law, and of any attempt to discover the *particeps criminis*, and no evidence accounting for the omission, although in cases of separation, by reason of adultery, proceedings at law are, generally speaking, unnecessary, they are of great importance when the proof in this Court depends on identity.—In weighing the testimony of witnesses naturally biassed, the rule is to give credit to their statements of facts, and to view their deductions from facts with suspicion.—Observations in testing evidence in a case of disputed identity.

[S. C. 1 Notes of Cases, 415; 6 Jur. 422. Referred to, *Lemprière v. Lemprière*, 1868, L. R. 1 P. & D. 571; *Otway v. Otway*, 13 P. D. 149; *Hodgson v. Hodgson*, [1905] P. 242.]

This was a cause of divorce by reason of adultery, promoted by the Rev. R. C. Dillon, D.D., against Frances Charlotte Dillon, his wife.

The libel pleaded, in the first, second and third articles, the marriage of the parties of the 26th of November, 1839, and their cohabitation together as husband and wife.

Fourth. That on Tuesday, the 29th day of December, 1840, the said F. C. Dillon went to Gravesend, that her ostensible purpose in so going was to pay a visit of several days to her mother, then resident at or near Gravesend, and for which she had solicited and obtained her husband's permission, who accompanied her to Blackwall on that day, where she embarked on board a steam-packet, as for the purpose of proceeding therein to her mother's house, at or near Gravesend.

Fifth. That at some time previous to the premises in the next preceding article pleaded, but when, more particularly, is unknown to the party proponent, the said F. C. Dillon formed a lewd and adulterous intercourse with some man whose name is unknown to the party proponent. That on the arrival of the steam-packet at Gravesend, on the [87] afternoon of Tuesday, the 29th of December (1840), the said F. C. Dillon was there met and joined by the said man, and shortly after proceeded in company with him, by an omnibus, or some other public conveyance, to an inn, called or known as the "Sir John Falstaff," at Gadshill, near Rochester; that the said two persons had tea, and spent the evening together in a private room in the said inn, and in which they had bespoke a bedroom with a single bed in it, for their common occupation, upon their arrival, saying that they intended to pass the night there. That the said F. C. Dillon retired to bed between ten and eleven o'clock at night, and was soon after followed by the said man, when and where they committed adultery. That they breakfasted together on the morning of the following day, Wednesday, the 30th of December, and then left the said inn together, in an omnibus or other conveyance, for Gravesend, at which place the said F. C. Dillon had stated to the chambermaid of the inn, whilst assisting to undress her the night before, that she had a mother living, whom she was going to visit.

Sixth. Pleaded the identity of the said F. C. Dillon, and that the man was not Dr. Dillon.

Seventh. That such the adulterous conduct of his said wife was unknown to the said R. C. Dillon until on or about the 10th day of May last (1841), when he immediately separated himself from his said wife, whom he took to, and left with, her mother, then resident at Paddington. That the said R. C. Dillon hath never since lived or cohabited with his said wife.

Eighth. That shortly prior to the said 10th of [88] May the said R. C. Dillon having been told (but which in the first instance he disbelieved) that his wife had passed the night of the 29th of December preceding with a strange man, at the aforesaid inn, the "Sir John Falstaff," himself applied to the landlord of the said inn, and

ascertained from him that a female answering the description of the said F. C. Dillon (which was remarkable, inasmuch as she had lost an eye) slept with a man at the said inn a night or two preceding New-Year's day in that year; that the said R. C. Dillon then, for the purpose of complete identification, promised to be with his wife at an exhibition called the "Polytechnicon" the morning of the said 10th of May, and requested the said landlord also to be there, in order to see if he recognised in the said F. C. Dillon the female who had so slept with a man at his said inn; that the said R. C. Dillon accordingly, on that day, took his wife to the said exhibition; that Mr. Wilson attended, and recognised Mrs. Dillon as the female who had slept at his inn, and accordingly addressed her; that Mrs. Dillon signified to him not to notice her, and shortly afterwards, on Dr. Dillon retiring a few paces out of hearing, said, "Say it was not me."

The libel was admitted, without opposition.

A defensive allegation was afterwards given in on behalf of Mrs. Dillon, the fourth article of which counterpleaded the fifth article of the libel, by stating that Mrs. Dillon, on the arrival of the steam-packet at Gravesend, on the afternoon of Tuesday, the 29th of December, 1840, immediately proceeded, in pursuance of a previous engagement, to her mother's house, and arrived there [89] between five and six o'clock, and remained there the whole of that evening and night.

The sixth pleaded that on the night of the 9th of May, 1841, after the time when the circumstances pleaded in the eighth article of the libel are admitted to have been known to Dr. Dillon, he and Mrs. Dillon slept and passed the night in one and the same bed.

The eighth pleaded that the affections of Dr. Dillon having become alienated from his wife, he had long before, as subsequent to the 10th of May, 1841, by conduct, language, and behaviour, frequently evinced and declared that he was anxious to get rid of his wife, and also frequently declared that he would get rid of her; and, among other things, in proof that his affections were so alienated, and in furtherance of such desire to get rid of his wife. [The article went on to allege acts of cruelty committed.] This part was ordered to be struck out.

The ninth pleaded that in the latter end of May Dr. Dillon visited Emily Dicks, who had lived as servant to Mrs. Drury, the mother of Mrs. Dillon, and inquired of her on what day in the month of December, 1839, Mrs. Dillon had arrived at the house of her mother; that Emily Dicks answered, Tuesday, the 29th, and, in answer to a further question, stated she was positive that it was the 29th, and not Wednesday, the 30th. That Dr. Dillon endeavoured to induce Emily Dicks to declare that Mrs. Dillon arrived on the morning of Wednesday, the 30th.

The tenth and eleventh articles pleaded two visits of Dr. Dillon to Mrs. Dillon, the one on the [90] 30th of May, and the other the 4th of July, 1841, and great cordiality between them on both occasions.

The admission of this allegation was opposed by Addams for Dr. Dillon.

Nicholl argued in support of it.

July 22nd, 1841.—*Judgment*.—*Dr. Lushington*. The parties in this suit are the Rev. Dr. Dillon, and Charlotte Frances, his wife, and, according to the copy of the entry in the register annexed to the libel, they were married on the 26th of November, 1839, Mrs. Dillon being at that time a minor and a spinster. It is not pleaded that there was any courtship between the parties previous to the marriage, and it may not be necessary to plead this, but when long established forms are departed from, the vigilance of the Court is usually excited. There is also an absence in the pleadings of circumstances leading up to adultery, or to the probability of adultery one single act of adultery is alone charged; indeed, the circumstances connected with the case are all marked with considerable singularity.

[The Court read the seventh and eighth articles of the libel.]

[91] Now although Dr. Dillon pleads that he did not believe the information that his wife had slept on the night of the 29th of December with a strange man at the inn at Gadshill, he acts as if he did credit it, and he continues to cohabit with her on the very night of the day on which he receives the information. Now I have always understood the legal principle to be this, that when a husband has received information respecting his wife's guilt, and can place such reliance on the truth of it as to act on it, although he is not bound to remove his wife out of his house, he ought to cease marital cohabitation with her.

Having recapitulated the leading features of the case I now come to the present plea, the defensive allegation given in by Mrs. Dillon. It has been said in argument that this allegation is merely brought in for the sake of delay, and for creating additional expense to Dr. Dillon; that if the defence is genuine the libel cannot be proved. I am not at liberty to look at the case in this view; according to the first principles of justice, a party charged with a particular offence has a right specifically to counterplead the acts charged against him. It may be that the party may be unable to adduce the requisite evidence to support a counterplea, but I see no impossibility at present of doing so; I recollect a case perfectly well where a lady was accused of adultery, the circumstances were stated with great minuteness, she was even charged with having given birth to a child, the fruit of that adultery, all the facts pleaded were apparently fully proved, but the evidence failed on the point of [92] identity; indeed the diversity was clearly established.

This disposes of the first five articles of the allegation; I now come to the sixth, which pleads that on the 9th of May, 1841, after the circumstances stated in the eighth article of the libel were known to Dr. Dillon, and he had taken measures founded on them, he passed the night in the same bed with his wife. This, it is said, is pleading condonation, which proceeds on an avowal of adultery, and is inconsistent with a denial of adultery, but according to the rules of pleading in this class of cases, I apprehend you may plead double—you may first deny the adultery in toto, and you may further plead that if the adultery shall be proved to have been committed, it has been condoned.

I now come to the eighth article when I first read this article of the allegation I found that it contained matter of serious difficulty I have searched for cases in order if possible to discover whether acts of cruelty, coupled with such declarations as are pleaded in this article, had ever been admitted or rejected, and, if the latter, what were the reasons why they had been rejected.

[The Court read the article.]

The argument adduced in order to sustain the article, is that it may prove two things; first, that Dr. Dillon places little reliance on the information he had received; secondly, that he was ready to listen to any charges against his wife, with a disposition to give them credence.

Now, on referring to the cases, I find it laid down in several of them that cruelty cannot be [93] pleaded in bar to adultery. I myself so held in *Harris v. Harris* (2 Hagg. Ecc. 411), and on referring to my own note of the judgment I find that I relied upon the doctrine of Lord Stowell, in *Chambers v. Chambers* (1 Hagg. Con. 452), where he expressly lays it down as the general doctrine, "That a wife cannot plead cruelty as a bar to divorce for her violation of the marriage bed;" the reason he assigns for this is that compensation can only arise where both parties are in eodem delicto, and that in the cases of cruelty and adultery the delictum is not of the same kind. I candidly say I entertain doubts whether the reason given is the most satisfactory that could be adduced, because, if this effect arises out of the difference in the nature of the two offences, it follows, *è converso*, that where the wife has brought a suit on account of cruelty, the husband cannot plead her adultery in bar—a proposition which I am not aware has ever been laid down in these Courts. Perhaps the more correct, because the more satisfactory, reason may be that if the husband has been guilty of cruelty before the wife is charged with having committed adultery, she might have had redress by proceeding for a separation before the time when the adultery was committed. No cruelty can, as Lord Stowell has said, justify the violation of the marriage bed. Moreover, a wife might, after committing adultery, endeavour to provoke her husband to cruelty, in order to raise a defence to any suit that might be brought against her. I have stated my reasons in support of the doctrine, to shew that I am not disposed, even if I was at liberty [94] to do so, to depart from the doctrine as laid down by my predecessor; with regard then to this case, all that I have to consider is, whether the doctrine just laid down is applicable to the circumstances of it, which are very peculiar.

Now the way to consider the question is to try what will be the legal effect of the cruelty, if proved; the counsel for Mrs. Dillon has disclaimed any suggestion that it could bar the sentence for divorce, if the adultery shall be proved; then the only effect of it will be to throw some degree of suspicion on the husband's case as to whether he actually believed the charge made against his wife. If adultery is charged

against a wife, if counter adultery cannot be proved, nothing can bar a sentence for separation but connivance on the part of the husband ; cruelty will not be a bar, neither will malicious desertion ; although such conduct may have a tendency to cause the wife to commit adultery, it is clearly established that it is no defence to the husband's suit ; although I have some doubt as to the propriety of the doctrine on this point, I have felt myself compelled to act on it, indeed, I did act on it in a recent case of *Morgan v. Morgan* (2 Curt. 686).

Is the doctrine thus established affected by pleading that the cruelty was committed with the ulterior design of getting rid of the wife by driving her to the commission of adultery—is it connivance ? I think it is not. There may by possibility be cases where cruelty on the part of the husband may directly lead up to the wife's adultery ; I say nothing upon such a case.

[95] I must reject that part of the article which pleads the acts of cruelty ; with regard to the other part, which pleads the declaration of the husband as to a desire to get rid of his wife, I think it is admissible ; it may tend to shew whether the husband actually believed the truth of the charge of adultery ; it may be very necessary to sift the conduct of the husband on this part of the case.

It is somewhat extraordinary that Dr. Dillon should have taken the conduct of the case into his own hands, and that after the commencement of the suit he should have sought and had an interview with one of the persons who in all probability will be a material witness in the suit.

The other articles plead interviews and amicable intercourse between Dr. and Mrs. Dillon subsequent to the commencement of these proceedings ; these facts are clearly admissible ; if they shall be proved, it may be very doubtful how far Dr. Dillon will be entitled to relief in this Court, for it will be inconsistent with a belief in the adultery of his wife that, although not cohabiting with her, he should have these interviews.

The allegation must be reformed in the particulars specified.

The allegation was afterwards admitted as reformed, and witnesses having been examined in support of it, the cause came on for hearing, and was argued by Addams for the husband.

Haggard contra.

[96] April 22nd, 1842.—*Judgment*—*Dr. Lushington*. This is a suit brought by the Rev. Dr. Dillon against Frances Charlotte Dillon, his wife, for a separation by reason of her adultery, and certainly, since the time I have sat in this chair, I have never met with a case where the evidence required a more careful and painful investigation.

On the part of the wife the adultery is denied ; and, further, it has been argued on her behalf that Dr. Dillon's conduct, as well on the discovery of the alleged adultery as during the progress of the suit, has been such as to bar him of his remedy in this Court, even were the charge of adultery sufficiently established : to these points my attention must be directed.

The parties were married at the latter end of November, 1839, and it has been truly observed by the counsel of Dr. Dillon that the marriage did not take place under happy circumstances, since it has been proved by Mr. Wingate, a witness examined on behalf of Dr. Dillon himself, that Dr. [97] Dillon had previously seduced his present wife, then a young woman under twenty years of age. At the time of adverting to this circumstance the counsel of Dr. Dillon observed, and observed truly, that however reprehensible, in this particular, the conduct of Dr. Dillon might be, the Court ought not, on that account, to visit him with punishment in this suit ; certainly not, and I wholly disclaim any intention of doing so ; the marriage, under these circumstances, was commendable ; it was making all the reparation in his power for all that had occurred previous to the marriage ; and such circumstances never can operate as a justification for a wife's misconduct, nor excuse infidelity after the marriage, nor form a bar to the husband's redress : still, in cases like this, facts which have occurred prior to the marriage are not without their legitimate bearing, for a husband contracting marriage under such circumstances is bound to exercise more than ordinary care that his wife does not deviate into that path of error into which he was the first to lead her. It would, however, be too much to say that because the marriage was contracted under such circumstances, the husband intended, a priori, to break the tie between him and his wife, by conniving at her adultery.

The cohabitation after the marriage was not of long continuance, for the citation

in this cause was taken out on the 10th of May, 1841. There is not much evidence to shew on what terms the parties lived during the cohabitation, but apparently they were not those of happiness, for it is in evidence that Dr. Dillon frequently complained of his wife absenting herself from home.

[98] I now proceed to the charge of adultery: it is contained in the fourth and fifth articles of the libel, and it is necessary to advert to them with some particularity; in substance they plead, first, "that on Tuesday the 29th of December, 1840, F. C. Dillon went to Gravesend, for the ostensible purpose of paying a visit to her mother, for which she had solicited and obtained her husband's permission, who accompanied her as far as Blackwall. That at some time previous F. C. Dillon had formed an adulterous intercourse with some person whose name is unknown. That on her arrival at Gravesend the said F. C. Dillon was joined by this person, and proceeded in company with him, in an omnibus or other public conveyance, to an inn at Gadshill, called the 'Sir John Falstaff,'" and it is then alleged that the parties spent the evening there together, and committed adultery; that the next morning they left the inn for Gravesend, to which place, it is pleaded, the said F. C. Dillon stated that she was about to proceed to visit her mother.

Now the first observation that arises on this part of the case is the total absence of circumstances leading up to and making the adultery probable; and the total silence as to why no such evidence is produced. It is true that in almost all cases adultery is clandestine, but it is equally true, in the great majority of cases, where the parties are cohabiting together, that after the discovery of the fact of adultery, evidence is produced to shew that it is probable; but in the present case, there is no evidence of any previous circumstances, and if any have since come to light, they are neither pleaded [99] nor proved. This is a species of evidence the Court always looks for; indeed requires, wherever the circumstances allow of its production, as was frequently observed by Lord Stowell. On the present occasion all such evidence is wanting: it is only on the cross-examination of Mr. Wingate that it accidentally comes out that he was told by Dr. Dillon, as a fact, that Mrs. Dillon was in the habit of absenting herself from home—under what circumstances, what means the husband adopted to check such habit—bound as he was to exercise great care over his wife; with respect to all these facts, important as they are, the Court is left entirely in the dark; that such evidence might have been given I must assume, if the case stated by Dr. Dillon be true, and the Court being purposely kept in the dark on this point, is bound to take especial care not to travel out of the light.

Now, with regard to the adultery on the 29th of December, 1840, although it is not proved by any evidence that Mrs. Dillon met any person that day at Gravesend, it is agreed that she did go to Gravesend, and without Dr. Dillon; so far she is shewn to have been in the vicinity of Gadshill; this is certainly not an unimportant fact; its bearing will have to be considered hereafter; if the three witnesses examined on this point be not grossly perjured, some man, and some woman answering the description of Mrs. Dillon, slept at their house on the 29th of December; which fact brings this part of the case to a question of identity. As to the particular day—a very important point in the case—I should place but slight reliance on the memory of the witnesses, unless it were that particular facts [100] are stated enabling them to fix the time: it certainly does appear to me that the fact of a ball being to take place the next day at their house reasonably tended to enable the witnesses to fix the time, and I do not think the accuracy of the maid-servant is impugned by her saying that it was two nights before Christmas day, instead of New Year's day; it is a very natural mistake, and not such a discrepancy as would cause any doubt as to the accuracy with which the witness had fixed the day.

Then with regard to the identity of the person, and the power of witnesses to speak to the identity of an individual, I think these witnesses, having had such means and opportunity in this case of seeing the lady, and in all probability having had their attention particularly called to her, and especially to Mr. Wilson, who attended in person upon the parties at tea, and again in the morning at breakfast, would be enabled to speak to the identity of her person with reasonable certainty; and I say reasonable certainty, because I think that, as a general observation, an inn-keeper may not be the best witness to speak to the identity of a guest whom he sees but once; an inn-keeper must be in the habit of seeing a great number of strangers, and unless there be some circumstances attracting his attention, he is not likely to take very accurate

notice of his guests. But these observations do not apply on the present occasion, where it is stated by the witnesses that there was the peculiar fact attracting their notice, namely, that the lady had lost an eye, or, at least, that one eye was visibly affected, and also the fact of the [101] gentleman coming again to their inn, and speaking of bringing the lady there again. The maid-servant Goff had still more ample opportunity of ascertaining the identity; she waited on the parties, and assisted the lady to dress; and she states that, on seeing Mrs. Dillon in the steam-boat, when going to London, on the 11th of May, she immediately recognised her.

It is unnecessary to travel through the evidence as to the adultery, for, unless these witnesses be grossly perjured, these two persons did sleep together in the same bed at this inn on the night in question. In the libel it is stated that the lady, whoever it was, who slept there, told the chambermaid, who was assisting her to undress, that she had a mother living in Gravesend, whom she was going to visit; that is true as pleaded, but the evidence of the witness goes further—that she stated, not only that she had a mother living at Gravesend, whom she was going to visit, but whom she had not seen for eight or nine years. It has been contended that this addition to the statement, as pleaded, is as inconsistent with the fact of the informant being Mrs. Dillon, as, if it stood alone, it would be consistent with that fact. It is, I think, scarcely fair to plead part of a conversation, leaving out that which has much operation the other way.

Now, as I have said, the charge of adultery is limited to one occasion, and there are no corroborating circumstances, yet there can be but little doubt that the proof—which both by law and justice is thrown upon the accuser—is *prima facie* borne out by the evidence; there is enough *prima facie* evidence both of adultery and of identity, [102] unless there be other circumstances to be taken into consideration. However, before the Court can arrive at the conclusion that these facts are proved, and before it can pronounce Dr. Dillon entitled to the divorce he seeks, not only must the evidence to establish the alibi be carefully weighed, but many other important circumstances must be investigated and considered.

Now the evidence to establish the alibi consists of the testimony of four persons—Mrs. Drury, the mother of Mrs. Dillon, Janet Rumball, her daughter, Emily Dicks, and Elizabeth Lloyd. They have been examined to prove that Mrs. Dillon, on the very night in question, slept at Gravesend, and was at Gravesend during the whole night, and consequently could not have been at the “Sir John Falstaff.” The connection of two of these witnesses with the party accused would induce the Court to watch their testimony with caution; but neither on principle nor authority are they, on that account alone, to be denied credence; they are capable witnesses, and nothing could be more absurd than that Mrs. Drury, the mother, is to be examined, and *a priori* not credited; in my judgment, as was often stated by Sir John Nicholl, the proper course is this—when you examine the testimony of witnesses nearly connected with the parties, and there is nothing very peculiar tending to destroy their credit, when they depose to mere facts, their testimony is to be believed; when they depose as to matter of opinion, it is to be received with suspicion. Now, if Mrs. Drury, Janet Rumball, and Emily Dicks are to be believed, it is manifestly impossible that Mrs. Dil-[103]-lon could have been at the “Sir John Falstaff” on the night in question. Elizabeth Lloyd cannot establish the fact with the same certainty; she only says she was at Gravesend at six o’clock in the afternoon of that day, therefore it is possible that Mrs. Dillon might have reached the “Sir John Falstaff” between seven and eight o’clock, which may be taken to be the time when it is said by the Wilsons and by Goff that she did arrive there; but the evidence of Elizabeth Lloyd is of considerable importance, inasmuch as it tends to corroborate Mrs. Drury, her daughter, and maid-servant, as to Mrs. Dillon having actually been at Gravesend on the day in question.

Such being the contradictory state of the evidence, the credit of the witnesses is one of the most important questions the Court has to determine—as to these four witnesses, the tone of their evidence, and the probability of the facts which enable them to fix the precise night when Mrs. Dillon slept at Gravesend, are the circumstances which must guide the judgment of the Court. The admitted fact of Mrs. Dillon going, with the consent of Dr. Dillon, to Gravesend, takes away all the improbability of her being at Gravesend on that day, exactly as it adds to the probability of her being on that day at the “Sir John Falstaff;” it is consistent with either alternative of guilt or innocence; it has, however, this additional bearing, that it is

in unison with the evidence of Mrs. Drury, who states that she had written to, and expected, her daughter during that week. I am of opinion, upon a careful consideration of the evidence of Mrs. Drury, that I should not be justified [104] in saying that it is marked with circumstances of gross or palpable inconsistency; moreover, she is confirmed in all her reasons for being certain of the day by her daughter, by Elizabeth Lloyd, and by Emily Dicks. I do not think that, properly speaking, they are at all to be considered as witnesses exposed to suspicion.

Elizabeth Lloyd, as far as appears to me, is as credible a witness as any one who has been examined in the cause; she does not attempt to go beyond facts in her own knowledge; she states that she was engaged to go to Mrs. Drury's house on that day for the purpose of making up a dress; she does not attempt to carry down the presence of Mrs. Dillon at Gravesend later than six o'clock; if she were a forward witness, or produced for the purpose of her establishing an alibi, she would have gone further, but she confines her evidence to facts in her own knowledge, and states her reasons for remembering the precise time; the circumstance of Thursday being New Year's day is common to both sides as a mark whereby to fix the day. What was the circumstance which occurred to Lloyd on that day? not simply that in consequence of the arrival of Mrs. Dillon she was disappointed at sleeping at the house, but that she had to go, at six o'clock on a night in December, to the village of Northfleet, to sleep with her sister: I think that was a circumstance fairly calculated to make an impression on the memory of the witness.

In proceeding to try the evidence of Emily Dicks, I shall first observe that there is nothing in her evidence to induce me to say that she is a less credible witness than Frances Goff; they are both [105] in the same situation of life, and she is not now living in the service of Mrs. Drury, but of another person, and is in no way under the control of Mrs. Drury; her reason for fixing the day is not, apparently, so cogent as that which exists on the mind of Lloyd, but still there is no improbability in her statement, and no appearance of falsehood; the circumstance of having been promised a holiday on that day, and losing it, is a circumstance by no means likely to escape the memory of a person in her situation in life; her statement is consistent with itself, and it is scarcely possible, had it been otherwise, that she should not have betrayed herself, considering that she has been most closely cross-examined.

The statements of both witnesses are consistent, and could not have been concocted by such persons: they never could have met the cross-examination, such as that addressed to them.

There is one fact deposed to by Dicks which is of a very startling description; I refer to her evidence on the ninth article; she states that, subsequently to the 10th of May, Dr. Dillon questioned her as to Mrs. Dillon coming to her mistress's house, and endeavoured to persuade her that it was on a Wednesday, and that she mentioned this to her mistress. I thought it my duty to look at the answers of Dr. Dillon, and I find he denies that he ever had any conversation with the witness. On her sole testimony I will to attribute to Dr. Dillon an attempt to tamper with this witness, but, though I do not impute this to him, it would be wholly unjustifiable to impute to this witness that the whole is untrue: a principle very analogous to [106] this is acted upon by the Court of Chancery, where the facts stated by one witness only are denied by the answer of a party; although I do not think that the principle could always be carried out in these Courts. On the one hand, then, I decline imputing to Dr. Dillon any culpability; on the other, I do not fix on Emily Dicks the charge of falsehood.

Now this is the evidence of these seven witnesses as to the great point in dispute, namely, where Mrs. Dillon slept on the night of the 29th of December, and I am compelled to say that, upon the examination of this evidence, on whichever side the truth may be, I find myself placed in this painful predicament, there is not sufficient to enable me to say that either party has been guilty of wilful perjury; and if either party has been guilty of mistake, it is equally difficult to account for it. In such a case it behoves the Court to advert to the other facts with great caution.

To proceed, then, to the other parts of the case—the conduct of Dr. Dillon before and after the discovery of the alleged adultery, and what took place as regards the witnesses, as regards his wife, and as regards the unknown adulterer; and here again the same observations apply as to the credit of the witnesses.

First, then, as to the evidence of the manner in which the alleged adultery first

came to Dr. Dillon's knowledge; this is given by Mrs. Wilson in answer to the seventh and eighth interrogatories, and the truth of this statement cannot be denied without impugning the veracity of one of the most important witnesses examined on behalf of Dr. Dillon—the witness [107] says “that Dr. Dillon called upon her, that her husband was the only person present on the occasion, that Dr. Dillon stated that he had been repeatedly written to about his wife to watch her movements, that he paid no attention to the letters he received about her, till he received one from a friend of the gentleman who had been with her at our house, and who had quarrelled with the said gentleman, stating that his wife and the said gentleman had slept at our house on the said 29th day of December;” she goes on to say, in answer to the eighth interrogatory, that “she does not know who the man was, and that Dr. Dillon said he did not know the man himself, but had been told that he was the son of a solicitor living at No. 3, somewhere in Lincoln's Inn.” Now what does Dr. Dillon do upon this discovery?—that which it is not prudent in any case, and particularly not in one like this—he undertakes the investigation in person, and going down to the inn sees the two principal witnesses. He goes down again on some day before the 10th of May, and on Mrs. Wilson saying that something was the matter with the lady's eye, Dr. Dillon said, “It is my wife,” and seemed much affected. Pursuant to an arrangement then made, Mr. Wilson proceeds to town on the 10th of May, and meets Dr. Dillon and his wife at the Polytechnic Institution, and then this conversation occurs, which is somewhat singular, the previous facts being borne in mind, and the meeting having been arranged for the express purpose of identifying Mrs. Dillon. Mr. Wilson states that, having observed Dr. Dillon sit down with his wife in a less frequented part of the room, and having immediately recognised her, I went up and said ‘Good morning, Ma'am, I hope you are better, Mrs. Wilson and myself thought we should have had the pleasure of seeing you at Gadshill again before this; your good gentleman was at our house a short time since, and said he should bring you down again as he thought it benefited your health.’” Now this appears to me to be a most singular mode of addressing her! and it seems that this unknown gentleman had been to the house subsequently, and, as is pretty clear from the evidence, had stated his intention of re-visiting the inn. The witness goes on, “Dr. Dillon and his wife then stood up, and he questioned her about what I had said to her, addressing her by her Christian name, which I do not now remember, ‘My dear,’ says he, ‘what does this mean? Your good gentleman, what does this mean?’” why, Dr. Dillon was perfectly cognizant of this before; I cannot help saying that here is a strong appearance of an arrangement for the purpose of proving identity. [The witness proceeds.] “Addressing me, he (Dr. Dillon) said, ‘I am this lady's good gentleman.’” Why, Mr. Wilson knew that—it was a very gratuitous piece of information? “I am her husband, was it I who was with her at your house? I told him no, and he proceeded to question me further as to his wife, and as he was so doing Mrs. Dillon squeezed my arm. I continued however. He appeared very much cut up, and, putting his hand to his forehead, he turned round.” If Dr. Dillon had believed this witness he was before this time convinced of all that had occurred, and, if so, it is somewhat singular that he should have conducted himself in such a manner. The reason why [109] I advert to this is on account of the difficulty in which the Court is placed when an individual conducts his own case; the Court has a right to expect that some person whose integrity and impartiality could be relied on should be employed to conduct the case, and to sift the witnesses, and not the party in the cause. I must not, however, although very much struck with the details of this meeting, take a one-sided view of this evidence, it is distinctly sworn to by Mr. Wilson, and I know no reason why he should not be entitled to credit that Mrs. Dillon by signs urged him to keep silence, which in effect was admitting her identity, for if she was entirely innocent she would at once have denied all this. It is a very strong circumstance; but it is deposed to by one witness only. But what occurred subsequently? On this same 10th of May Mr. Wilson comes to Doctors' Commons, and is examined by the clerk of Dr. Dillon's proctor. Was this in pursuance of a previous arrangement or not? If in pursuance of a previous arrangement, it is very difficult to account for, and not at all consistent with the surprise exhibited by Dr. Dillon. Is it probable that if an arrangement had been made that Wilson should come here to be examined on that day, that Dr. Dillon should so express himself, after all that he knew, and after he had spoken to a proctor on the subject? On the same 10th of May Dr. Dillon takes his wife to her mother, then

residing near Bayswater, and on the same day Mrs. Dillon goes to Gravesend to see Emily Dicks; on the 11th she comes back, and Mrs. Wilson and Frances Goff also come to town by the same steam vessel, and on board of her they see and recognise [110] Mrs. Dillon; on that very day, the 11th, she is joined by Dr. Dillon on her return from Gravesend, and near her mother's house, in the presence of Dr. Dillon, Mrs. Dillon is served with the citation in the cause; and then what takes place? Why, that which I should think is quite unprecedented in these Courts, Mrs. Dillon walks away and joins her husband! Before commenting more particularly upon this I will follow the evidence; after the citation is served, while the cause is going on, Dr. Dillon had two interviews with his wife, the one on the 30th May, and the other on the 4th of July; they took place in the evening, and lasted for no inconsiderable space of time—from three to four hours; they walked arm in arm together, and shook hands at parting.

Having stated the evidence, I must now consider its weight and bearing; this is no ordinary case; there are many points deserving the greatest consideration; my judgment must be founded on no one isolated fact, but upon a view of all the facts and circumstances. This is, I repeat, no ordinary case for many reasons, and especially for this, that Dr. Dillon had previously to the marriage seduced his wife: I think it never can or ought to be maintained that a husband who seeks to be divorced from his wife, which wife he had first seduced, is not to expect his whole conduct to be examined into with more vigilant scrutiny and more rigid investigation than where no such connection has existed: if he has paved the way to her first fall, he ought to take care that he does not smooth the path to a second. Dr. Dillon has furnished no evidence as to the terms of their [111] matrimonial cohabitation: I place no great reliance on the evidence of the two servants who were at the house where he resided, with respect to his frequent declaration that he wished to get rid of his wife; but his own witness—and it is fair to judge him by his own witness—deposes that Dr. Dillon and his wife did not live on happy terms, nor were there circumstances wanting to excite his vigilance. Wingate deposes that early in 1841 Dr. Dillon declared it was impossible they could live together much longer, and that he stated as a reason for this, among other facts, her violence of temper and her constantly absenting herself from home. Now this fact, considering the connection before marriage, the terms they were on, and the disparity of years between them, ought to have excited Dr. Dillon's attention, and to have led to some steps for the preservation of her honour and his own; nothing, however, appears to have been done, and nothing having been done, I think in a case like this I do not express myself too strongly in saying that the absence of due precaution amounts to criminal negligence, and although the absence of all precaution might not alone determine the judgment of the Court, yet, combined with other circumstances, it is an important ingredient in the case.

Now, what is the next step? Dr. Dillon, according to his own account, as deposed to by his own witness, had been repeatedly written to to watch his wife's movements, but had paid no attention to these letters; what is to be said as to this conduct? There is no evidence that he ever complained to her of her conduct; it is not even alleged that he did any one thing before or when [112] these letters were written: he did nothing to prevent the consequences likely to result: he receives warnings of the danger, and totally disregards them: again, what does he do after he had had the two interviews with Mr. and Mrs. Wilson? He continues to cohabit with his wife. Is this justifiable or not, is it sanctioned by the principles laid down by these Courts? What does Oughton (*Ordo. Judiciarum*, tit. 214) say when speaking of the causes which prevent separation, although adultery has been committed—that if the party proceeding shall have had “*notitiam saltem probabilem criminis commissi*,” and shall continue cohabitation, that is condonation; and he then proceeds to say what this *probabilis scientia* is, if the witnesses had signified to the party that they could depose to the adultery “*ex propriis eorum visu et scientiâ*.” In this case the husband had received a letter informing him of the adultery, he had heard from the witnesses all which they have since deposed to, he had heard Mrs. Wilson speak of the mark in the eye, and the means of identification, he had declared it must be his wife, and according to the witnesses he was much affected, and yet he continued the cohabitation.

In excuse of Dr. Dillon's conduct the case of *Elwes v. Elwes* (1 Hagg. Con. 292) has been cited, or rather a dictum of Lord Stowell's in that case, for there condonation was not pleaded, nor was the *probabilis scientia* proved; on the contrary, it was rather disproved. To that dictum of Lord Stowell's I am [113] disposed to pay the greatest

deference; he says, "A husband has suspicions—he has some intimations—he has enough to convince his own mind, but not to instruct a legal case. In that distressing interval his conduct is nice, and it is difficult to refrain from cohabitation, as the means of discovery would be frustrated; and if he continues cohabitation, it then becomes liable to that species of imputation which has passed to the disadvantage of this gentleman." These observations appear to me to apply to a case wholly different from this—to a case where there is no direct evidence of the fact, although there are circumstances rendering the fact probable. In *Timmings v. Timmings* (3 Hagg. Ecc. 84), a case greatly different from this in its circumstances—as indeed all cases of this description must necessarily differ—Lord Stowell expressed himself very strongly as to the necessity of the husband proving (although condonation was not pleaded) that he had not slept with his wife after his knowledge of her adultery. (He says) "It has been said there is no condonation of this fact in proof, nor anything to shew that he slept with her on the night of the 12th; and that if condonation is relied upon, it should be put in plea, for that it is not incumbent upon the complaining party to prove there was no condonation."

"To this" (he says) "as a general doctrine I assent; but I think in this case, where it is alleged in the libel that she did not leave his house till the 13th, it is necessary the complainant should shew that they did not cohabit on the 12th by sleeping [114] together: he has taken an onus upon him, which, in ordinary cases, does not lie on the complaining party;" now in the present case condonation is expressly pleaded, and it is true that in this case on the 9th of May Wilson had not had a personal interview with Dr. Dillon, yet all the other circumstances being well known, I cannot but think that it is very difficult to escape from one or other of these conclusions; first, that Dr. Dillon did not give credit to the story, or secondly, that he was very reckless whether he continued cohabitation with her or not after the adultery was known to him—the latter, perhaps, is the most probable. I have thought it my duty not to leave this point unnoticed. The principle laid down by Oughton is never to be lost sight of; at the same time, acting on what was said by Lord Stowell in *Elwes v. Elwes*, I am not disposed in the present case to hold that, if these were the only circumstances unfavourable to his claim, such circumstances standing alone would bar the husband of his divorce.

I have already adverted to the fact of Dr. Dillon being present when the citation was served upon his wife, which appears to me to have been a very unbecoming proceeding; then with regard to the two interviews with the wife during the pendency of the suit, I have great doubts whether the Court, had these facts been brought to its notice at the time, would have allowed the case to proceed; moreover, all explanation as to these visits has been refused. I looked at the answers of Dr. Dillon to see if he has given any explanation, but I find that he has refused to give any answer with regard to these interviews. In such a case no facts ought [115] to be kept from the knowledge of the Court. In former times great doubt was entertained whether, in cases of this nature, even the solicitor of the party could refuse to disclose confidential communications.

There still remains a further point of no small importance; there has been no action at common law: not only is the alleged adulterer undiscovered, but there is no evidence to shew that any attempt has been made to discover him, or to account for the extraordinary darkness of the case in this particular. It was indeed said in argument that the poverty of the husband would not allow of the expense of such proceedings; I cannot allow such an excuse. Look to the facts of the case; here are letters giving important information, and those letters are withheld from the Court, and, if the story be true, they were written by one who must have known all the facts; they state the party to be the son of a solicitor, the number of his residence is disclosed, and the vicinity of the house; he was a person who evidently well knew the inn at Gadshill, and was there after the particular occurrence in this cause: surely this individual could have been traced. Lord Stowell, in the case of *Timmings v. Timmings* (3 Hagg. Ecc. 84), commented strongly on withholding evidence of this kind; the present case is one where it is of paramount importance, with reference to the bona fides of the whole case, considering that identity is the great point in dispute, and looking to the absence of a vivâ voce examination, which, in such a case as the present, is almost [116] indispensable to the discovery of the truth. In ordinary cases proceedings at common law are unnecessary—indeed they are often of no advantage; but that is not so in this

case, where the identity of the alleged adulteress as the wife is at issue, in such a case a vivâ voce examination becomes of paramount importance; it is quite manifest that in a case of contradictory evidence, the confronting the witnesses and the opportunity of cross-examination tend to throw more light on the real facts than can possibly be done by written examinations.

Taking, then, the whole of the circumstances into consideration; here is a charge of adultery on one single occasion, preceded by no one fact of improper freedom, or even of acquaintance tending to make it probable, proved by three witnesses, whose veracity there is no ground to deny, but whose testimony is corroborated by no other circumstances sufficient to establish adultery, and opposed by the testimony of four other witnesses to whom, in equal justice, veracity is to be conceded. As far as concerns the wife, in effect, this is not a civil but a criminal proceeding, and, if there be any doubt, she is entitled to the benefit of it; the evidence perhaps may preponderate in favor of the husband, but I cannot say that it is free from reasonable doubt. I do not, however, refuse to grant the divorce on this ground alone, but looking at all the circumstances before marriage, the neglect of repeated warnings to the husband after the marriage, indirect from the absence of the wife from home, direct from letters written to the husband, to the continued and unjustifiable cohabitation after the alleged discovery of the adultery, to the reck-[117]-lessness shewn by the husband of his own honor in this continued cohabitation, and in his interviews during the suit, to the suppression of evidence, and the absence of all information why there has been no discovery of the alleged adulterer, or the reason of it satisfactorily accounted for, and to the want of proceedings at common law, I think, in pronouncing for a divorce, I should do an act not warranted by the legal considerations applicable to the case, and set an evil example of granting relief, in a case of great doubt, to one whose conduct towards his wife tends strongly to shew that he has no just claim to relief. I dismiss Mrs. Dillon.

IN THE GOODS OF JAMES BYRD, Deceased. Prerogative Court, May 27th, 1842.

Motion for probate of a will signed by the deceased after the witnesses had subscribed their names, the witnesses having, subsequently to the signing by the deceased, placed seals opposite to their names, rejected.

[S. C. 1 Notes of Cases, 490. Discussed, *Charlton v. Hindmarsh*, 1859, 1 Sw. & Tr. 440.]

James Byrd died in February last; on the 18th of that month, intending to execute his will, two persons in his presence as witnesses subscribed their names to the will, and the deceased then placed his signature to the will, and declared it to be his will; one of the witnesses then suggested that there should be seals; upon which seals were placed by [118] the witnesses opposite to their names, and afterwards the deceased placed a seal opposite to his name.

Burnaby prayed probate, submitting that there was a distinction between this case and that of *Olding, Deceased* (2 Curt. 865), in which the deceased signed his name after the witnesses, there being the further act of sealing by the witnesses, which might be considered a re-attesting, after the deceased had signed the will in their presence.

Sir Herbert Jenner Fust. There appears to me to be no real distinction between the two cases. My opinion is that the witnesses should subscribe the will after the testator has signed it. I must reject the motion; the parties, if they please, may propound the paper.

IN THE GOODS OF EDWARD COLMAN, Deceased. Prerogative Court, May 27th, 1842.—Motion for probate of a will signed by the deceased in the presence of two witnesses, but subscribed by them in an adjoining room, communicating with folding doors, but in such a situation that the deceased could not see them, rejected.

[S. C. 1 Notes of Cases, 489. Applied, *Norton v. Bazett*, 1856, 1 Deane, 264.]

Edward Colman died at Naples on the 2nd of April, 1842. On the 25th of March, the deceased being ill in bed, two persons were called into his bed-room for the purpose of seeing him sign his will, and to attest its execution; the deceased then signed the will in the presence of those two persons, but, being apparently exhausted by the effort, the witnesses retired into an adjoining room, which communicated with the bed-room by folding doors, [119] each of the width of about eighteen inches, and

which were open at the time, being tied back by strings, and the witnesses there subscribed their names to the will on a table, which was so situated that it was impossible for the deceased to have seen them.

Addams prayed probate.

Sir Herbert Jenner Fust. I know of no case which would authorize the Court to hold that this will was attested and subscribed by the witnesses in the presence of the deceased; had the deceased been in such a situation that he might have seen the witnesses subscribe their names, it might have been held to have been done constructively in his presence, as in the case where a lady sat in her carriage whilst the will was attested in a solicitor's office, in which she might have seen the witnesses (*Casson v. Dade*, 1 Br. C. C. 98) sign their names. Here it was impossible for the deceased to see the witnesses. I reject the motion.

RENDALL against RENDALL. Prerogative Court, May 27th, 1842.—Motion, after publication of the evidence, to rescind the conclusion of a cause, for the purpose of releasing and re-examining the solicitor who drew the will propounded, and who, upon his cross-examination as a witness in support of the will, had admitted that he retained the proctor in the cause, and was responsible to him for the costs, grounded on an affidavit of the witness—that he had not seen the depositions—rejected.

[S. C. 1 Notes of Cases, 491.]

This was a business of proving the last will and testament of Simon Rendall, deceased. The solicitor [120] who drew the will, having been examined as a witness in support of the will, admitted, on cross-examination, that he had retained the proctor in the cause and was responsible to him for the costs; publication of the evidence had passed.

Addams and Bayford prayed the Court to rescind the conclusion of the cause, and to permit the witness to bring in a release and be re-examined, upon his affidavit that he had not seen any portion of the evidence; they submitted that the application so supported was in effect the same as if made before publication, and was therefore distinguishable from the case of *Godrich v. Jones* (1 Curt. 630).

The Queen's advocate and Jenner contra.

Sir Herbert Jenner Fust. The Court gave notice in a late case (*Godrich v. Jones*, 1 Curt. 630) that, under circumstances like the present, it would not permit a witness to be re-examined. Publication of the evidence has passed, and the proctor has seen the depositions of the witnesses, and he must have been aware of the rule of the Court, and of the incompetency of the witness; I do not think that the circumstances of the case are such as should induce the Court to depart from the rule laid down; it appears that the proctor, upon reading the depositions, discovered that the witness, Mr. Mogg, had admitted his responsibility for the costs, upon which he wrote to Mr. Mogg, desiring him not to look at the depositions; I daresay Mr. Mogg could swear that he has not read any part of the depositions, and that he gave his evidence without reference to [121] his responsibility; I have no doubt he did depose without reference to his responsibility, and probably many witnesses, whose testimony has been excepted to on the ground of interest, gave their evidence without reference to their responsibility; but the Court cannot act upon such a supposition.

I see no ground for departing from the rule laid down.

SOAR against DOLMAN. IN THE GOODS OF CHARLES NICHOLAS RIPPIN, Deceased. Prerogative Court, June 6th, 1842.—A testator executed his will, containing a legacy therein of fifty pounds to S. S. Subsequently to the execution he erased the word fifty, and substituted the word thirty. The alteration not being attested, probate granted with the original word fifty inserted.

[S. C. 1 Notes of Cases, 513; 6 Jur. 512.]

Motion.

In this case probate of the will of C. N. Rippin had passed on motion (see 2 Curt. 333), with a legacy to Sarah Soar in blank—the legacy had been originally fifty pounds, which the testator had altered into thirty, and the alteration not having been attested, the Court, considering that parol evidence could not be admitted, to shew what the original word was, directed probate to pass in blank. It having since been

held, by the Judicial Committee of the Privy Council, in the case of *Brooke v. Kent*,^(a) that where a testator, intending to revoke a legacy, by substituting a different [122] sum to that originally given, and such substituted sum is not effectually given, the original legacy is not revoked, and that evidence is admissible to shew what was the original legacy; a decree was now taken out on behalf of Sarah Soar, the legatee, calling upon the executors to bring in the probate, and shew cause why the original sum should not be inserted—the executors by proxy authorized a proctor to appear for them, and consent to the legacy being inserted.

Haggard prayed the Court to direct the word “fifty” to be inserted in the probate.

Sir Herbert Jenner Fust. When this case came before the Court on a former occasion the Court was of opinion that as the original word was entirely erased, evidence aliunde was not admissible to shew what the word was. The Judicial Committee of the Privy Council, having subsequently held, in the case of *Brooke v. Kent*, that in such a case evidence may be admitted aliunde, and the Court has now no difficulty in directing the word fifty to be inserted in the probate. There can be no doubt that the sum was originally fifty; and although it would have been more satisfactory if the case had been brought before the Court by allegation, still, as the sum is so small, and the executors are consenting, it is unnecessary to put the parties to the expense of propounding the will.

Let probate pass with the word “fifty” inserted. I should have considerable difficulty in directing the will itself to be altered.

[123] IN THE GOODS OF PRISCILLA DEICHMAN, Widow, Deceased. Prerogative Court, June 6th, 1842.—A testatrix appointed A. and B. executors of her will, and “in case of the death of either of them, empowered the survivor to appoint another, so that there should continue to be two executors.” Upon the death of A., B. appointed C. executor, to act with him; C. did not take probate during the lifetime of B.—Held, that probate might pass to C., and that he might appoint another executor to act with him.

[S. C. 1 Notes of Cases, 514.]

Motion.

Priscilla Deichman, widow, died on the 4th of June, 1826; she left a will, of which John Puckett and John Inman, the two executors, took probate shortly after the death of the testatrix. John Inman, the survivor, died on the 13th of January last, intestate, leaving part of the effects of the deceased unadministered.

The deceased by her will directed, “Also should one executor die, the survivor to choose another to the best of his judgment, and so to continue to the true intent and meaning of two executors,” and by indenture dated the 7th of January, 1834, John Inman, the surviving executor, after reciting that the said John Puckett had departed this life, “did nominate, substitute, constitute, and appoint John George Puckett to be an executor of the said will, in the room, place, and stead of the said John Puckett, deceased, to act in conjunction with the said John Inman.” John George Puckett, however, never applied for probate in the lifetime of John Inman, and it being doubtful whether he could now take probate, he having been appointed to act in conjunction with John Inman,

Addams prayed administration with will annexed to Priscilla Marshall, the surviving residuary legatee for life named in the will; she [124] did not, however, oppose probate passing to J. G. Puckett.

Sir Herbert Jenner Fust. The object of the deceased was, that there should be two executors of her will, and it appears to me that this party may have the probate.

The testatrix died in June, 1826; she appointed two executors, who are now dead; the survivor died in January last, intestate, but in his lifetime appointed J. G. Puckett to act as executor with him under a power given by the will; the party appointed did not take probate, he now applies for probate, and there appears to me in principle to be no difference between this appointment and that of two executors by a testator,

(a) See *In the Goods of Brooke, Deceased*, 2 Curt. 344 (b). The allegation propounding the will was admitted by the Judicial Committee on the 1st of July, 1841, reversing the decision of the Prerogative Court.

and where one does not prove in the lifetime of the other. There was a case somewhat similar at the Rolls, in 1825 (*Frances Ashton, Deceased*), in which it was said that the party appointed was not an executor, but a trustee only, but there is a material distinction between that case and the present; there the deceased had appointed five trustees for certain purposes, and gave a power to appoint others, that there should be always five executors; the object then was that there should be always five trustees, and the Master of the Rolls thought the deceased meant to continue the trustees perpetually, and not the executors—that the word executors had been used by mistake: here there are no trustees except as executors; I think that Mr. Puckett may take probate and appoint another to act with him.

[125] MACKENZIE *against* YEO. Prerogative Court, June 6th, 1842.—The evidence of one witness, although *omni exceptione major*, is not sufficient to support a testamentary paper purporting to be duly executed and attested, where there are no adminicular circumstances tending to confirm it, and where the probabilities of the case incline against the *factum* of such an instrument.—A paper of a testamentary nature was produced by a sole legatee named in it; it purported to be signed by the testator and to be attested by two witnesses, one of whom had, subsequently to the date of the paper in question, married the legatee. The evidence of the other witness, whose credit and testimony were unimpeached, entirely supported the *factum* of the paper: Held, that his sole testimony could not sustain the paper, there being no circumstances leading up to the probability of the transaction, and there being, on the contrary, various facts and circumstances from which the Court drew a conclusion unfavourable to its legal validity.

[S. C. 1 Notes of Cases, 516.]

George Acland Barbor, Esq., of Fremington, in the county of Devon, died on the 7th of July, 1839, a bachelor, being seised of real estate of about 4000*l.* per annum, incumbered in his lifetime by a jointure and by mortgages, and further by annuities and legacies bequeathed by his will, in the whole to the extent of 1900*l.* per annum; he was possessed of personal property of about 4000*l.* He left a will, which had been prepared for him by his confidential solicitor, dated the 15th of October, 1830, and duly executed and attested. On the 27th of August, 1839, probate of this will was granted to Dr. W. A. Yeo, the sole executor named therein. In the month of December, 1839, the executor was formally required to take probate of a paper, of the existence of which he had been informed on the 26th of November, 1839; it was dated the 6th of July, 1838, and purported to be a codicil to the will of the testator, and to be executed by him, and attested by two witnesses. By this paper a legacy of 5000*l.* was given to a Miss Ann Melton. The paper was entirely in the handwriting of the legatee, with the exception of the signatures of the testator and of the witnesses, and of the two first words of the paper, which were alleged to be in the handwriting of the testator. The executor having refused to take probate of this [126] paper, it was propounded on behalf of the legatee, who had then lately intermarried with Mr. Thomas D. Mackenzie, one of the attesting witnesses to the paper.

The first plea was a common *condidit* given in by Mrs. Mackenzie; it pleaded the signature "G. A. Barbor," and the two first words of the paper propounded to be of the proper handwriting of the testator.

The answers of the executor having been taken, a responsive allegation was given in, pleading, in the

First article, the amount of the property of the deceased.

Second. The notoriety of his death, and actual knowledge of the fact by Mr. and Mrs. Mackenzie in July, 1839.

Third. The employment of Mr. W. Law, and subsequently of Mr. T. H. Law, as the confidential solicitors of the deceased, the ignorance of the deceased of legal business and phraseology.

Fourth. The will of the deceased.

Fifth. The existence of an illicit connection between the deceased and a Miss S., and the birth of a child; the great affection of the deceased for Miss S. and this child, and the settlement of 200*l.* per annum on the former secured by a bond.

Seventh. An illicit connection between the deceased and Mrs. Mackenzie, then Ann Melton, which commenced in 1834.

Eighth. That such connection entirely ceased on the 22nd of June, 1838.

Ninth. That during the period of such last-mentioned connection T. D. Mackenzie was constantly in the company of Ann Melton.

[127] Tenth. That in May, 1838, T. D. Mackenzie wrote two letters to the deceased on the subject of this connection.

Eleventh. That during the absence of Mr. Barbor from Fremington T. D. Mackenzie stated publicly the fact of such connection, and uttered violent threats against Mr. Barbor on account of it.

Thirteenth. Directions by Mr. Barbor to T. H. Law to prepare a bond, securing an annuity of 60l. to Ann Melton.

Fourteenth. That Mr. Barbor subsequently directed the bond to be increased, by making the annuity 100l., stating, however, to T. H. Law that Ann Melton had promised only to take 80l. per annum.

Fifteenth. Repeated declarations by the deceased that he should do nothing more for Ann Melton.

Seventeenth. That the deceased never mentioned to his confidential advisers or intimate friends that he had executed such a paper as the codicil propounded.

Eighteenth. The marriage of Ann Melton with T. D. Mackenzie in August, 1838, and advances of money made to her by the deceased. An application made by Mr. and Mrs. Mackenzie to T. H. Law for payment of the first half-yearly amount of the annuity, and a statement by the deceased to T. H. Law that he had already paid it by such advances, and a refusal by Mr. and Mrs. Mackenzie, communicated to T. H. Law, through Mr. Gribble, a solicitor, to allow the sums advanced to be considered as payments of what was due on the bond.

[128] Nineteenth. An interview between the deceased and Mr. T. H. Law, as his solicitor, with Mr. Gribble, on the subject of the advances and payment of the annuity, and a statement on that occasion that the advances had been made in respect of the annuity, and that the annuity was to be 80l., not 100l.

Twentieth. A demand made by Mr. Gribble for the payment of the whole of the first half-year's annuity without any deduction whatever, and a refusal to allow the advances to be taken as payments. Great displeasure evinced by the deceased at the conduct of the Mackenzies, and the following letter, by his desire, written by T. H. Law to Mr. Gribble.

"12th January, 1839.

"Dear Sir,—You will no doubt recollect the statement of Mr. Barbor, made to you on the subject of the Mackenzie's annuity; namely, that it should be nominally 100l., but in reality that only 80l. should be paid or demanded, and that he had paid 60l. on account of the first year's annuity. I have therefore to request that you will inform me, whether your client really means to require that the annuity shall be paid at the rate of 100l., and to deny that the 60l. have been paid on account.

(Signed) "T. H. LAW."

(Addressed) "W. Gribble, Esq."

That on the same day Mr. Gribble, junr., called, and stated that the 100l. per annum would be demanded, and that no part of the 60l. would be allowed as payment on account; and that [129] thereupon T. H. Law paid 50l. for the first half-year of the annuity.

Twenty-second. Extreme anger of the deceased on account of the enforcement of this demand, and repeated declarations to the effect that the conduct of Mr. and Mrs. Mackenzie had been fraudulent and dishonest.

Twenty-sixth. A visit by Gribble to T. H. Law, in the latter part of August, 1839, an inquiry whether Mrs. Mackenzie's name was mentioned in the will of the deceased, and no mention made by Gribble of this codicil at that interview.

Twenty-eighth. An application, on the 25th of November, 1839, by Gribble to T. H. Law, to shew him the will of the deceased, and an inquiry whether there was any codicil to it, and the then communication of the fact of the paper bequeathing the 5000l. to Mrs. Mackenzie.

Twenty-ninth. A formal letter, written by Gribble to Law on the 9th of December, 1839, by the desire of the latter, announcing the existence of the codicil, and requiring the executor to take probate of it.

The concluding articles related to the handwriting of the deceased, and exhibited several genuine signatures of his.

An allegation in reply pleaded—

Third article. That Mr. and Mrs. Mackenzie did not hear of the death of Mr. Barbor

until the 27th of July, 1839; and pleading a letter of the 2nd of August, written by Mrs. Mackenzie to Mr. Gribble, communicating to him the fact of her having this codicil in her possession, and requesting his advice in the matter.

[130] Fifth. Mr. Gribble's answer to this letter.

Twelfth. Pleaded the handwriting of Mr. Mackenzie as the witness to the asserted codicil.

The Queen's advocate and Addams in support of the paper.

Haggard and Jenner contra.

Judgment—Sir Herbert Jenner Fust. Mr. G. A. Barbor died on the 7th of July, 1839; he was unmarried; his father was dead; his nearest relation was Dr. Yeo, for whom he appears to have entertained considerable regard and affection. The personal property of the deceased is about 4000l., and he also appears to have been possessed of real property of about 4000l. per annum, but this must be considered as incumbent to nearly one-half of its annual value. The deceased made a will in 1830; by it he has given a considerable amount in legacies to various persons, all charged on his real estate; amongst others is an annuity or rent-charge of 300l. to a Miss S., in addition to an annuity of 200l. previously secured to her by a bond; he has also given to his (natural) child 3000l. for her sole and separate use; and has bequeathed other legacies, and, amongst others, 3000l. to his executor; he has charged all these incumbrances and his debts on his real estate, and has devised the residue of his real estate to his cousin, Dr. Yeo, his heirs and assigns; but, in case he shall depart this life without issue, then to his (Dr. Yeo's) brother, his heirs and assigns; and he gives his personal estate to Dr. Yeo absolutely, and [131] appoints him sole executor. This will was executed by the deceased on the 15th of October, 1830, in the presence of Mr. Law, his confidential solicitor, and of two other witnesses, and probate of it was granted to Dr. Yeo, as the sole executor, six weeks after the death of Mr. Barbor, and this probate has remained unquestioned, in any way, until the month of December, 1839, when an asserted codicil was produced, and the executor called on to take probate of it; the deceased having, as I have before stated, died on the 7th of July, 1839. This codicil purports to have been executed by the deceased on the 6th of July, 1838, just one year before his death; it is as follows:—

"This is to certify that I, George Acland Barbor, of Fremington, in the county of Devon, Esq., do give and bequeath to Ann Melton, of Barnstable, in the County of Devon, spinster, the sum of five thousand pounds, of good and lawful money of Great Britain, in consideration of injuries and sufferings sustained by her, through certain false and calumnious reports caused by me. The same to be paid to the said Ann Melton, within six months after my death, should she survive me; but should the said Ann Melton die before me, then this shall be of none effect. And I fully authorize and command my heirs, executors, and administrators, each and every of them, to receive and view this in every respect as a codicil to my last will and testament, and discharge it accordingly."

(Signed) "G. A. BARBOR."

(Attestation) "Signed by the said George Acland Barbor, this 6th day of July, 1838, in the presence of T. D. Mackenzie, George Lake."

[132] The body of this paper is in the handwriting of Ann Melton, with the exception of the two first words, which are pleaded to be in the handwriting of the deceased; the signature is also pleaded to be that of Mr. Barbor, and being so signed, in the presence of two witnesses, it would be entitled to probate. Assuming all this to be so. It has happened that one of the two attesting witnesses has since become, and is now, the husband of Ann Melton, and consequently, as this sum is not given to her for her separate use, this person has the presumptive interest in it in himself, and if this paper shall prove to be a good and valid codicil, T. D. Mackenzie will be entitled to this sum of 5000l. I mention this circumstance, because an objection (see *Mackenzie v. Yeo*, 2 Curt. 509) on the ground of interest has, in a former stage of this cause, been taken to the evidence of T. D. Mackenzie, and his deposition has been rejected; he is not now a competent witness to prove the execution of this paper, however competent he may have been at the time of its execution; this circumstance, however, would not, standing alone, have the effect of preventing this paper operating as a valid codicil. The Court directed Mr. Mackenzie's deposition to be sealed up, and accordingly it has been sealed up and has not been seen. The examiner was bound to take the examination of this person; indeed I think that, in the first instance, his examination was properly taken, although it has since, as properly, been rejected as evidence in the

cause. It therefore now turns out that there is only one witness to prove the execution of this [133] codicil; there were four persons present at its execution, namely, the deceased Mr. Barbor, Ann Melton, the legatee, T. D. Mackenzie, now her husband, and G. Lake, the other attesting witness; there is no other person who can be produced as a witness to prove the execution of this paper; true it is that in a subsequent allegation given in by Mr. and Mrs. Mackenzie the handwriting of Mr. Mackenzie has been pleaded and witnesses have been examined to prove it. The names of two persons are subscribed as witnesses to the instrument, but, independent of Lake, no person can be examined as to its execution, and, under these circumstances, its validity depends on the sole testimony of Lake, who is described as a witness *omni suspicione major*. Although, perhaps, not necessary, yet, no doubt being advised to do so, the parties have pleaded the handwriting of the deceased, and have supported this plea by the testimony of several witnesses.

I have already stated that probate of the will of the deceased was extracted by Dr. Yeo in August, 1839, and this codicil was not produced either to Dr. Yeo or to his legal adviser until November, 1839—three months after the probate had been obtained; however, this circumstance is not to be viewed to the full extent of a keeping back, a non-asserting of this paper, for although it was not produced, it does appear that, on the 2nd of August, 1839, Mrs. Mackenzie, then Miss Melton, wrote a letter to Mr. Gribble, her solicitor, in which she requests him to inquire whether any mention had been made of a codicil to the will of Mr. Barbor, which was in her possession at that time; this letter produces an [134] answer from Mr. Gribble, bearing the post-mark of the 3rd of August, 1839; therefore there can be no doubt of this, that Mrs. Mackenzie did communicate to Mr. Gribble the fact that she had such a paper in her possession, and directed him to make an assertion of that codicil; and it further appears that the knowledge of Mr. Barbor's death did not reach her until about that time. This fact does away with any prejudice which would otherwise arise from Mrs. Mackenzie not having previously mentioned this codicil; still, however, Dr. Yeo, up to the end of November, had no knowledge that such a paper was in existence; that appears on the evidence and letter of Mr. Gribble, who, it seems, thought it prudent to keep back the codicil, in order, first, to make inquiry whether any mention had been made of this codicil in the will of the testator, of the date of which he was ignorant at the time. After the lapse of a fortnight, about the 17th or 20th of August, Gribble saw T. H. Law, and inquired of him, not whether there was any mention of this codicil in the will, but whether any mention was made of Mrs. Mackenzie's name in the will. Under these circumstances I think the responsive plea of Dr. Yeo is quite justifiable: until the latter end of November he did not even know of the existence of this codicil, for although it is true that, on the 23rd of November, 1839, a letter, containing a copy of the codicil, was sent by Mrs. Mackenzie to Mr. Gribble, it was not until two days after that letter that any mention of this codicil was made by Gribble to T. H. Law. The evidence proves this: Gribble says "he asked [135] Law what was the date of the will of Mr. Barbor;" Law replied, "It was made about eight years before;" Gribble told him "there was a codicil, and that Mrs. Mackenzie had it;" whereupon Law requested that any communication on the subject should be made in writing.

T. H. Law, in his deposition, says, "On the 25th of November, 1839, Gribble called on me; he asked 'if there was any codicil to Mr. Barbor's will;' I told him 'I never knew or heard of any codicil;' he told me 'there was a codicil;' I expressed my surprise, and said 'that as the matter had assumed a serious aspect, the communication of such fact should be made in writing.'" The truth is, that at this interview no communication was made of the contents of the codicil; it was only by means of an application made by Law through his town-agent that the contents of this codicil became known to him, the agent having procured the information through his proctor. Unquestionably, a codicil of this description must have made a considerable impression on the minds of Dr. Yeo and of Mr. T. H. Law, the fact of the testator giving so large a sum as 5000*l.* to this lady, and that, too, at so late a period of his life, must have excited great astonishment.

The witnesses to the codicil were found to be Mr. Mackenzie, the present husband of the party benefited, and G. Lake, who, on inquiry being made for him, is found to be residing at Exeter. Application is made to Lake, who gave information to the effect stated in his deposition—to which the Court will presently refer.

[136] Now it has been admitted that Dr. Yeo was justified in making these inquiries of Lake in the first instance, but it is said that he ought to have been satisfied with the result of them, and perhaps, if that had been the whole of the case, he would have been; but I cannot say that the mode in which Dr. Yeo and Mr. Law acquired their knowledge and information, as to the existence of this codicil, were of such a nature as bound them to assume that it was a genuine document: I see no fault to find with them, or with their legal advisers, in coming to a determination that the codicil should be opposed, and the circumstances of the case be investigated.

It has been said, as a reason why Mr. Gribble did not previously mention the existence of the codicil to Mr. Law, that Gribble considered Law had given him evasive answers to his inquiries respecting the will of the testator: it seems Gribble asked to see the will; Law declined to shew it, saying "that it was in process of being proved, and he might see it at Doctors' Commons." I see nothing objectionable in this answer, or anything inconsistent with Mr. Law's professional conduct; even if it be an excuse for Gribble not having then disclosed the fact of the codicil to Law. Gribble, however, takes no further notice of this remark; surely, after being told that the will was at Doctors' Commons, this was the time to bring forward the codicil. I see nothing in all this which is evasive on the part of Law, and the rather so, as the main inquiry was whether he knew of any codicil to the will. It has been said in argument that the codicil [137] was not brought forward until the date of the will was known, as the party interested under it did not know the date of the will, which might have been of a later date than the codicil, and might have revoked it.

Having made these preliminary observations, I will now proceed to the circumstances of this case, in relation to Mr. Barbor and Mrs. Mackenzie.

Mr. Barbor was, as I have before stated, a person of considerable landed property, and I assume that this will come to Dr. Yeo comparatively unincumbered; he was addicted to field sports, averse to business of all descriptions, took no part in the county business, expressed the greatest horror of the law, and was entirely unacquainted with legal forms and proceedings. He had formerly employed as his confidential solicitor Mr. W. Law, a solicitor at Barnstable, and, it seems, placed great confidence in him; and when that gentleman retired from business he still continued to consult him, though not professionally; he gave his professional business to Mr. T. H. Law, a nephew of his former solicitor, who had succeeded his uncle in his business; and the fact is deposed to that he never transacted any legal business without the advice and sanction of either the uncle or the nephew. In the year 1825 Mr. Barbor formed an illicit connection with a Miss S., by whom he had two children; one of them died before 1830, the other is still alive; Miss S. has an annuity of 300*l.* by the will; Mr. Barbor had previously, by bond, settled on her an annuity of 200*l.*; he gave 3000*l.* to the child. Miss S. did not continue entirely to [138] cohabit with Mr. Barbor; she resided abroad, and was occasionally joined there by him, and then they cohabited together; indeed, at the time of his death, he was travelling with her; a relation of his own and of Dr. Yeo's was also travelling with them, and he proves that at the time of his death Mr. Barbor's affection for Miss S. continued unabated.

In the year 1834 the deceased formed a connection with Miss Melton (the party in the cause), whose character, previous to this, the Court has no reason to assume to have been anything else than unimpeachable, at all events, it was not such as to cause any observation in Barnstable; she kept a respectable day-school, though, of course, when once her connection with Mr. Barbor became known, her scholars were withdrawn. There is nothing in the evidence to lead the Court to the conclusion that she lived otherwise than respectably until the time when her connection with Mr. Barbor commenced; I am bound to assume that there was nothing in the conduct of these two parties towards each other which could make the connection known in Barnstable previous to the time, when by some means or other it did become known. It appears that Mr. Barbor visited Miss Melton at the house of some persons named Beaseley, where she then resided, and T. D. Mackenzie boarded in the same house, whether for a long or short time before the connection between the parties was known does not appear; but if Mr. Barbor's visits were of frequent occurrence, it must have become known to Mackenzie, more particularly as at this time he appears to have been paying his addresses to the [139] lady. In May, 1838, Mr. Barbor was absent from home, and during that time it did become known in Barnstable that an improper intimacy had subsisted between him and Miss Melton; and it appears that T. D.

Mackenzie, on the occasion, exhibited the greatest indignation, and threatened to destroy himself, Mr. Barbor, and Miss Melton. What was the object of Mackenzie in doing this, whether he really was as indignant as he expressed himself to be, I have no means of knowing: certain it is that, whatever was the previous degree of notoriety on this subject, Mackenzie left it in no doubt; he declared his indignation publicly; he said that his whole happiness was destroyed, and that all intimacy between himself and Miss Melton must be broken off; still, it seems, he endeavoured to procure her some compensation. The Court does not stop to inquire what was the income derived by this lady from her school; most certainly she lost her scholars from the time the connection with Mr. Barbor was known.

Now the account of the manner in which the application for compensation to Miss Melton was made to Mr. Barbor is deposed to by T. H. Law, and I consider that I do no injustice to the parties in giving perfect credit to his testimony; and I say so for this reason—T. H. Law swears in his deposition that he wrote a certain letter (12th January, 1839) to Mr. Gribble, and Gribble, in allusion to this circumstance, says he never received this letter, but that “such is his belief in the veracity of T. H. Law, that if he says such a letter was written he (Gribble) cannot doubt but that it was so written.” So that the veracity of T. H. Law stands corroborated by the solicitor and witness of the opposite parties. I see no reason to doubt the testimony of T. H. Law; true it is, in his cross-examination, one or two of the interrogatories are not quite fully answered, but yet I see no reluctance—no shrinking from giving testimony. Now, his account of the transaction as to the bond given to Miss Melton is this: that in June, 1838, Mr. Barbor returned from the Continent to Barnstable, and, on his arrival, found several letters addressed to him from T. D. Mackenzie, couched in language of great violence, the effect of which letters Mr. Barbor at once communicated to the deponent Law. Now I dwell on these minute particulars, because the real question in this case is the probability of the provision of 5000*l.*, and in all these sort of cases—where it is not a trial of sanity or insanity—but whether a particular act is really and truly the act of a party deceased, every—even isolated—fact is of importance. *Primâ facie*, the onus probandi is on the party setting up the instrument; it does not, in the first instance, lie on the other side to negative it. Then I come to consider what is the amount of proof required from the party, whether the onus is satisfied by the examination of the attesting witnesses, and whether, their testimony being in favour of the due execution of the instrument, the other side is then to be called on to shew—(I allude to cases where the general credit of the witnesses stands unimpeached)—that by reference to the general circumstances of the case, credit—by this I mean credit in a legal sense—cannot be given to the testimony of the witnesses. Now *primâ facie*, in this case, the factum of the instrument is established; then what are the circumstances [141] to shew that credit cannot be given to the testimony of the witnesses? *Imprimis*, what is the quantum of probability and improbability of the gift? It was but natural that some provision should be made for Miss Melton, and there was nothing actually improper in Mackenzie endeavouring to obtain it for her—provided he had no other motive in so doing. Law states: “In June, 1838, Mr. Barbor had a communication with deponent on the subject of this connection: and on the 26th of that month he called, by request, on Mr. Barbor, who, at this interview, shewed him a letter which he had received from Mackenzie. The result of this was, a bond was drawn up, securing 60*l.* per annum to Miss Melton; this was afterwards altered to 80*l.*, and subsequently to 100*l.*, and both these alterations were made without the advice and sanction of Law, who was told by Mr. Barbor that, although the bond was nominally given for 100*l.*, Miss Melton had promised him not to take more than 80*l.* per annum.” Now this has an appearance of an attempt by Mackenzie and Miss Melton to drive a hard bargain with Mr. Barbor. The consideration of the bond has been much dwelt upon in argument; it has been remarked that by its provisions Miss Melton was bound to continue her residence within a certain distance of Barnstable, by which was meant to be inferred that Mr. Barbor’s affection for her continued unabated; but there is not a tittle of evidence to shew that he continued the connection after Mackenzie’s letters; moreover, there is no evidence that Mr. Barbor intended, or was required, to do anything ultra the bond for Miss Melton; on the other hand, there is evidence [142] that he said to Mr. Russell “that his connection with her was over.” I look then to the conduct, coupled with the declarations of Mr. Barbor, on the days of the

29th of June and the 4th of July, 1838; on this last day—two days before the codicil—he went to Mr. W. Law, who was then at Instow, in Devonshire; on this occasion he said “both Miss Melton and Mackenzie had behaved very ill; that they had got too much out of him, and Mackenzie had written several threatening letters to him;” and, in Law’s opinion, “nothing could be more improbable than that the deceased should have made or contemplated the making such a provision for Miss Melton.” So far then it does not appear at all probable that the deceased would make any further provision for her. On the 15th of November, 1838, it seems an application was made respecting the payment of the first instalment of the bond, and made by Mr. Gribble, who called on Law to inquire how the annuity was to be paid; it being the intention of Miss Melton to leave Barnstable; Law thereupon communicates with Mr. Barbor on the subject, and Mr. Barbor stated that nothing was due on the bond, as Miss Melton had had 60l. on account, and also that the annual sum to be paid on the bond was to be 80l. and not 100l. This Law communicated to Gribble, who, on a subsequent day, answers that his clients did not admit that anything had been paid on account of the annuity, which also could not be taken at a less sum than the bond stated. In consequence of this, T. H. Law and Mr. Barbor go together to Gribble, and Mr. Barbor’s version of the story is given, [143] whereupon Gribble said he would speak to his client about it. In his deposition in chief Gribble says, “The object of the visit and the purport of what passed on the occasion, according to the best of my recollection, were to assert that certain sums of money which Mr. Barbor had advanced to Mrs. Mackenzie since the date of the bond, had been paid in liquidation of the growing half-yearly annuity.” He says further, “What had previously passed to lead to this visit I cannot say; I have an impression that either by personal communication with myself, or through my son, I had been informed by Mr. T. H. Law that Mr. Barbor would so call, or I could not have replied to Mr. Barbor, as I did, that Miss Melton considered the sums of money as presents to her and not payments. I do not recollect that anything was said about the amount of the annuity; something might pass on the subject, I have no recollection of it. Mr. Barbor and Mr. Law remained with me but the shortest possible space of time, scarcely three minutes. It was not Mr. Barbor himself but Mr. Law who asserted that of which I have deposed. Mr. Barbor assented to what Mr. Law said for him, he scarcely spoke five words himself. I told them that Mrs. Mackenzie denied what they asserted, but that I would communicate to her what had passed.” Now Law, in his deposition, says, “The subject of the annuity was mentioned. I accompanied Mr. Barbor to Mr. Gribble’s office on the 7th of December; we went there and had a conference with him. I stated to Mr. Gribble that I had brought Mr. Barbor to him that he might hear from his own lips the statement he had to make, which was that he had [144] paid to Mrs. Mackenzie several sums on account of the first year’s annuity, and amounting to 60l., and further, that Mrs. Mackenzie did engage, when the bond was given to her for 100l. a-year, never to claim more than 80l., the 100l. mentioned in it having been inserted merely to shew to her friends, or to that effect. Mr. Barbor then, in my presence, either repeated what I said, or assented to it. Mr. Gribble listened to the statement and said he would see his clients upon it.” Gribble says he does not recollect whether the subject of the amount of the annuity was mentioned or not; Law says that it was, and Law is confirmed by Gribble as to the greater portion of his statement, and he is not contradicted as to the rest; moreover, Gribble admitting that this conversation took place in the presence of Mr. Barbor, goes far to confirm Law, because, unless Mr. Barbor had really made such statements to Law, he never would have taken him to be present at the interview between himself and Gribble. On the 11th of January, 1839, Mr. Gribble, jun., demanded payment of the first half-year’s annuity; Law says in his deposition, “I declined to pay him until I had seen Mr. Barbor. I did see him, he was very angry indeed at the conduct of the Mackenzies; we discussed the matter with a view to the means in his power of defeating the fraud, as he insisted that it was; he was as angry as a man could well be; he declared it to be a gross cheat, and it was a matter of discussion between us whether the bond itself could be got rid of altogether; at length it was determined that I should make one effort more by letter, and if that failed, I was to pay the money.” Then he states that he [145] wrote the letter of the 12th of January to Mr. Gribble, that he received no written reply, that in the course of the day young Mr. Gribble called, and stated that the full annuity was insisted on; and, in the end, Law gave a check for 50l.,

which was honoured, the money was paid, and so the matter ended. Is this true, or is it not? What does Mr. Gribble, jun., say on the subject? It is sufficient to state that his evidence offers no contradiction whatever to the testimony of Law.

So far then there is no one circumstance of probability leading up to the making of this codicil, and there is no evidence (save that of Lake) to shew that, subsequent to this, Mr. Barbor had any one interview with Mr. or Mrs. Mackenzie.

I now come to the factum of the codicil: The question is this, Is the handwriting of Mr. Barbor so substantiated that the sole testimony of Lake is sufficient to sustain this paper? It has been already seen that the testimony of Mackenzie is excluded by reason of his interest in the event; it has been urged, in proof of the bona fides of the parties setting up this paper, that he has been produced in order that he might be cross-examined; I do not view the question in that light; he has chosen to put himself in such a situation that he cannot be examined, and the opposite party has a right to insist on his not being examined.

Now let me consider the language of the codicil itself. It has been said, it is such as any individual devoid of legal knowledge might pick up; the expression "false and calumnious charges," is singular, it is just possible, but is it probable that Mr. Barbor dictated these words, or that this paper [146] was written without any alteration; then what is the consideration stated?—these charges; is it true that they were false and calumnious? is it not notorious that Mr. Barbor had been connected with Miss Melton? However, to recur to the factum of the paper, I will now consider the evidence of G. Lake, the only witness: he says, "I knew Mr. Barbor by sight, almost as long as I can remember anything. I never spoke to him, unless on the only time I ever was in company with him, which was when he signed the codicil, and I do not know that I spoke to him then; at the time of which I am about to depose I was in the service of Messrs. Cook, druggists, in Barnstable. I had frequently seen my fellow witness, Mr. Mackenzie, there at that time; I knew Miss Melton, now Mrs. Mackenzie, by sight but no more. One Friday, it was market day, in the summer, two years ago come next June or July, I was going up the High Street early in the afternoon, I think; I remember I had not been to dinner. Mr. Mackenzie tapped on the window to me as I was passing on the opposite side of the street, he was in Miss Melton's front room up one pair; I stopped, he beckoned me, I went to the door, he came down to me, opened the door and asked me to walk up stairs, that he wanted me for something; I followed him up into the room, Miss Melton was sitting at a table, writing, Mr. Barbor was standing behind her looking over her shoulder; she was not copying any other paper, it appeared to me that he was telling her what to say, but I did not hear him say anything to her distinctly."

Now I confess that I cannot imagine how Mr. [147] Barbor should be able to dictate a paper in these terms. To give validity to such a paper the evidence must be that of most unimpeached witnesses, but it consists only of the sole testimony of the one witness, Lake. There is no general reflection on the conduct of Lake; he was a boy living in Barnstable, and no particular intimacy that I can discover on the evidence subsisted between him and Mackenzie, or between him and Miss Melton.

Lake continues—"Mackenzie said to him (Mr. Barbor) here is a young man I know something about, have you any objection to his being a witness to this? Mr. Barbor said, 'No, not in the least.' Miss Melton was writing all the time this passed, Mr. Barbor still being behind her looking over her; he seemed to be telling her what to write. I heard nothing more till the paper was finished by her, that was not more than two or three minutes; I was not there altogether more than about five minutes I should say. The paper was then read over aloud by Miss Melton, I did not hear any one tell her to read it, she read it of her own will, as I believe; she was sitting while she wrote, and standing while she read, the paper which was bequeathing 5000*l.* to her; the paper was afterwards read over by Mr. Barbor, not so loud or distinctly as by her. I heard some words, but not all. Without making any observation as to its contents not a word was said about them." Now if the witness was not there altogether more than about five minutes, there could not be much time for making observations on the paper. "Mr. Barbor took the pen and wrote his name; he did that as he stood, I did not see him sit the while I stood there; Mackenzie signed his [148] name to it, then I signed mine; one or both of them, I think both, said to me, 'Now, young man,' and so stepping forward I wrote my name under that of Mr. Mackenzie; when I had so done, Mr. Barbor gave me half a sovereign, and bade me say nothing about it. His

words I think were, 'Young man, I hope you will keep this to yourself and say nothing about it to any one, as I do not wish it to be known.'

Undoubtedly this witness proves sufficient to shew that the act of Parliament (1 Vict. c. 26, s. 9) has been complied with. Lake goes on to identify the paper as the one so signed, and he says, "There is one change in it; it was a whole sheet then, it is only a half one now." It has been urged in argument that this fact is very strong in confirmation of Lake's evidence, inasmuch as it has been proved in the cause that the codicil was written on the other half sheet of paper on which the bond was written; I lay no stress on this; if the evidence of Lake is not sufficient without being corroborated by this fact, I do not think this will confirm it. It is said, indeed it is proved, that in 1832 Lake left Barnstable and went to live in Exeter. In 1839 Mr. and Mrs. Mackenzie came to Exeter to reside, but Lake says "they never had any conversation about the codicil until about three months before his examination." In his cross-examination Lake says, "Mackenzie called on me, he told me I should be required as a witness. Mr. T. H. Law next called on me, it might be about a fortnight after Mackenzie had been with me; he asked me if I knew him, I said 'Yes,' and I told him who he was; he asked me if I knew Mr. Barbor of Fre-[149]-mington, I said, 'Yes, I did;' he asked me if I ever was in company with him, I told him 'Yes, once,' and on my telling him where, he said, 'Oh! then you are the young man I want, can I take down your evidence.' He asked me if I knew Mackenzie, and had I seen him lately, I told him 'Yes;' he asked me the nature of the business on which I was in company with Mr. Barbor, I told him it was about bequeathing a sum of 5000l. to Miss Melton; he asked me what day it was, I told him 'Friday;' he then asked me what had passed, and I told him; I gave him an account of it just the same as now. He asked me if I could recollect anything about the room, what kind of a room it was, what the furniture was. I could not tell that, for I had been there but a short time, and paid no attention. When I had answered all his questions, and which he wrote down, as I imagine, but he did not read it to me, he thanked me and went away."

This is the amount of what passed between Law and this witness. I have already stated (see 2 Curt. 873) that I must suppose Lake to have told Law to the same effect as what he has deposed he did tell him, but still this cannot corroborate Lake's evidence, certainly it does not invalidate it; all that can be said is, it is consistent with his deposition, but it cannot strengthen it.

The result at which I arrive is, that the circumstances of this case are not such as to enable me to rely on the sole statement of Lake as sufficient to support this codicil; but I deny the necessity of coming to a conclusion that a person of unim-[150]-peachable character has been guilty of perjury; it is the duty of the Court to weigh the whole of the evidence, and then to determine whether it is such as to satisfy the mind of the Court that this was the act of the testator, Mr. Barbor. Here are parties setting up an instrument, and it is the duty of the Court; the Court is bound to sift the evidence, and then to say whether or not it is sufficient to support such a document as this. The Court is not bound to pronounce that a party has been guilty of perjury, but, giving credit to his testimony, is to say whether it can give such effect to it, as to pronounce this paper to have been the act of the testator.

The only remaining question is, regarding the handwriting of the testator. The great bulk of the interrogatories apply to this part of the case; a great number of witnesses depose to the signature not being of his handwriting, and as great a number that it is. Evidence of this nature is always unsatisfactory, it never leads to a sound conclusion; I cannot try this question on evidence of handwriting.

[The Court then went very minutely through the evidence as to the handwriting, and observed at the conclusion that no one witness gave positive evidence either way.]

Is not then the evidence of this single witness Lake, even admitting him to be a witness *omni suspicione major*, so affected by the whole transaction, and by the great improbabilities of the case, that the Court cannot pronounce for this paper, on his sole testimony. The parties propounding the codicil labour under the disadvantage [151] of having only one attesting witness whom they can produce. I am bound to say that, in my judgment, there is not sufficient probability, and there are not sufficient circumstances to support the testimony of Lake, and as I have said the evidence to support this paper as a codicil consists in his sole testimony, I cannot place that reliance on his evidence as to enable me to pronounce a firm and clear opinion that this was the act of the testator; that is the utmost extent to which the Court can be called on to pro-

nounce its opinion. I pronounce against this paper as a codicil to the will of Mr. Barbor.

The paper has been propounded by Mr. Mackenzie, the party to be benefited by it, who was present when it was made and attested it, and who afterwards married the party then intended to be benefited; under these circumstances I think the parties propounding it must do so at their own expense.

I pronounce against the validity of the codicil, and I condemn the parties propounding it in the costs of the suit.

GOVE *against* GAWEN. Prerogative Court, June 23rd, 1842.—A paper admitted to probate on the testimony of one of the two attesting witnesses, although the other witness deposed that it was not signed by the testator in his presence: the circumstances of the case inclining to favour the supposition of a due execution, *e.g. a formal attestation clause; and the first witness having, in an affidavit sworn a few days after the will was made, deposed to the due execution, the second witness not having been examined until two years and a half afterwards.

[S. C. 1 Notes of Cases, 536.]

Henry Prescott, late of Greenwich, died on the 14th of July, 1839, a widower. He died possessed of stock in the funds to the amount of 6000l. He [152] left an only daughter, who had since his death intermarried with Alexander Gove. The deceased made a will bearing date the 7th of July, 1839, signed by him, and subscribed by two witnesses; the purport of it was to give to trustees 3600l., new three-and-half per cents., upon trust to pay the dividends to his daughter, for her separate use during life, and at her decease, in case she should leave any children or a child surviving, to divide the principal money equally between such children or child, and the child or children of his cousin James Gawen, and of his sister Jane Prescott, and of his niece Jane Gawen, as should be then living. But in case his daughter should not leave any children or a child, then he directed his trustees to pay the said dividends to his said sister for her separate use during life, and at her decease, or in case of her decease in the lifetime of his daughter, to divide the principal equally between the children or a child of the said James Gawen, Jane Prescott, and Jane Gawen. And he gave the further sum of 2200l., three-and-half reduced bank annuities to his trustees, upon similar trusts, as declared concerning the sum of 3600l. (with the exception that the life interests given therein to his sister and daughter were transposed). The testator appointed his said cousin, James Gawen the elder, James Gawen the younger, and James Terry his executors. The attestation clause was as follows:—"Signed, sealed, published, and declared by the said Henry Prescott, the testator, as and for his last will and testament in the presence of us, who in his presence of us, (a) who in his presence, [153] at his request, and in the presence of each other, have hereunto subscribed our names as witnesses.

"GEORGE STANLEY. RICHARD CATTARNS."

On the 29th of July, 1839, this will was proved in the Prerogative Court of Canterbury by the three executors. In consequence of there being certain alterations or obliterations on the face of the will, Mr. Cattarns, on the 29th of July, made an explanatory affidavit by which he deposed (among other things), "That the said alterations were made in the said will, prior to the execution thereof by the said Henry Prescott, who, on the 7th day of July, 1839, duly executed his said will, by signing his name at the foot or end thereof, in the presence of this deponent, and of George Stanley, the other subscribed witness thereto, both of whom were present at the same time, and this deponent and the said George Stanley, thereupon attested and subscribed the said will in the presence of the said testator."

In Michaelmas Term, 1841, a decree issued, at the promotion of Mr. and Mrs. Gove, calling on the executors to bring in the probate of this will, and to shew cause why it should not be declared null and void, and administration to the effects of the deceased, as dead intestate, granted to Mrs. Gove, as his daughter and only child. The probate having been brought in, the will was propounded in a condidit. Mrs. Gove gave in her answers; the attesting witnesses were examined and cross-examined, and the cause assigned for sentence.

Mr. Cattarns deposed to the following purport:—[154] "I had been instructed by

(a) So in the original will.

the deceased to prepare his will. On Sunday morning, the 7th of July, I was sent for to attend the deceased; I went, taking with me the will. Upon going into the deceased's bed-room I found his sister there; the deceased begged her to leave the room, which she did. I sat down by the bed-side, and read the contents of the will over; I said, 'We shall want a light to seal with, and also another witness:' the deceased called his sister to fetch a light, and she was then informed, either by me or by the deceased, that a second witness was wanted. Whilst she was gone for a witness I affixed a seal to the will; in a few minutes she returned, bringing with her a person. I then, as I now best recollect and believe, gave the will, which I had read over, into the deceased's own hands, and in the presence and hearing of my fellow subscribing witness I dictated, and the deceased, after my dictation, deliberately repeated these words: 'This is my will, it is as I wish it, and I wish you to witness it;' and the will being then placed before the deceased, he, in my presence, and in the presence of G. Stanley, signed his name at the foot of each sheet of the will, and upon completing his signature on the last sheet thereof he, by my direction, touched with his finger the seal affixed thereon, and declared such to be his act and deed. The will was then attested by myself and by Stanley, by our signing our respective names to each sheet thereof, and our initials against certain alterations in the will, in the presence of the deceased and of each other. Neither of us had quitted the room from the time of Stanley first entering the same until after the [155] will had been executed and attested. The alterations in the will were made in the presence of the deceased, previous to the execution by him of the will."

George Stanley (the other subscribed witness) deposed, "I was acquainted with the deceased for upwards of twenty years. On Sunday, the 7th of July, 1839, I was going towards the house of the deceased, I saw his sister stop a Mr. Fisher; she said, seeing me, 'Never mind, here is Mr. Stanley, my brother would rather have him;'. I went with her into the deceased's bed-room, I found him with Mr. Cattarns; the latter said, 'Have you any objection to sign Mr. Prescott's will?' I replied, 'No;'. he said, 'I suppose you don't wish to hear it read?' I replied, 'If Mr. Prescott is satisfied, I am.' At this time the will was lying on a small table in the room: Mr. Cattarns asked me to sign the will, and I signed my name to it, I believe four times. I had not at such time seen the deceased sign the will, but at the time of my signing I am sure that I saw Mr. Prescott's handwriting to the will: I saw his name written close to the place where I signed; not more than one minute passed between the time of my entering the room and the time of Mr. Cattarns asking me to sign. The will had not, at least while I was in the room, been in the hands of Mr. Prescott before I signed, but it was lying on a small table. Besides signing my name four times, as I believe, I set my initials in the margin. After I had signed, I turned about, and went to the bed-side, and spoke to the deceased; during this time Mr. Cattarns was behind me where the will was. I did not see him sign the [156] will, though he may have done so. Mr. Prescott did not in the joint presence of me, and of Mr. Cattarns, declare the paper which I signed to be his will. I am again referred to the signatures, 'Henry Prescott,' which are subscribed at the foot of each sheet of the will; I saw such signature already subscribed to the will when I signed the same, but I did not see the deceased write such signatures."

Addams and Deane in opposition to the will. The sole question is, Has this paper been sufficiently executed, so as to become a will under the provisions of the 1 Vict. c. 26? The onus of proving that it has is on the parties propounding it, and they must stand or fall by their plea; they plead actual signing by the deceased in the presence of two witnesses, and so exclude the possibility of proving that there was an acknowledgment of a signature. It is true that Mr. Cattarns affirms positively that this paper was signed by the deceased in the presence of himself and Stanley, but Stanley is equally positive that it was not signed in his presence. *Chambers and Yatman v. The Queen's Proctor* (2 Curt. 415, 434) will be relied on; true, in that case, the Court said affirmative evidence would prevail over negative, but here the evidence of Stanley is as much affirmative that a particular fact did not and could not have happened, as is the evidence of Mr. Cattarns affirmative that it did. There is another circumstance in this case: Mr. Cattarns is a biassed witness, he prepared the will, and [157] undertook the business of seeing it legally completed, his professional reputation is at stake in supporting the factum of the will. On the contrary, Stanley is perfectly unbiassed.

The Queen's advocate and Jenner in support of the will.

Judgment—Sir Herbert Jenner Pust. I should consider it most unfortunate if this was a case in which I was compelled to determine between the credit of two witnesses, one of whom must be absolutely perjured; I do not think I am under the necessity of coming to so painful a conclusion. The witness Stanley has deposed to a fact that happened two years and a half before the time of his examination, and, if the Court shall be of opinion that the facts deposed to by him are not substantiated, it is not a necessary inference that it considers him not worthy of credit, or that he has come forward to depose corruptly; but, on the contrary, if the Court shall hold that what Mr. Cattarns says is not true, he must be grossly perjured.

The will in question was executed on the 7th of July, 1839, probate of it was granted at the latter end of the month, when the executors were sworn to the due execution of the will. On that occasion Mr. Cattarns made an affidavit that the will was signed by the testator, in the presence of himself and of Stanley, both of whom were present at the same time, and subscribed the will in the presence of the testator. Stanley made no affidavit on that [158] occasion; two years and a half elapse between the time of the execution of the will and of his examination in the cause; it is very possible Stanley may have forgotten the circumstances; he may have heard remarks made in conversation as to the nature of the will, and may have had an idea so impressed on his mind as to lead him to the belief that the will was not actually signed in his presence; but there is no absolute necessity for saying that he is perjured.

It has been urged that Mr. Cattarns has a strong bias to sustain his own act, inasmuch as, being the solicitor called in to draw and advise as to the execution of the will, he must consider his professional reputation at stake if he has not conducted the transaction in a legal manner, so as to sustain his act. If this is to throw suspicion on his testimony, it is a circumstance which will go to the credit of every solicitor, who is called on to give evidence in this Court with respect to a testamentary business transacted by him; for no solicitor can give evidence on such a point, without feeling that, to some extent at least, his professional character is at stake. Am I to presume that Mr. Cattarns has misrepresented the facts in order to substantiate this will, and that, after making the affidavit of the 29th of July, to which I have before alluded, Mr. Cattarns could, in the short interval of the few days which elapsed between the date of the will and the affidavit, have forgotten the circumstances attending the execution of it. The question is not one of credit between two witnesses, both similarly circumstanced as regards the facts of a case, but between two witnesses, one of whom [159] cannot by possibility be mistaken, since he made an affidavit a few days after the particular transaction, and the other, who speaks from recollection, two years and a half afterwards; moreover, there is the evidence of the attestation clause, signed by Stanley, vouching that he had witnessed the signing of the will by the testator, by the fact of subscribing his name to the clause, and to the three sheets of the will; I have his act against his deposition. Now, I should not be inclined to place much reliance on this circumstance, were it not that I am called on to come to a conclusion between two directly opposite statements; I must therefore look to all the circumstances, and, when I do so, I think they enable me to come to a safe conclusion. It must be evident that it is a matter of most serious consideration, if the rights of parties are to depend on the recollection of witnesses at any distant period of time. Both witnesses are positive in their different statements; Stanley may be, Mr. Cattarns cannot be, mistaken. Some criticisms have been made on the language of the will; this Court has nothing to do with such questions; the validity of the will, as regards the probate, does not depend on whether Mr. Cattarns is a good and careful conveyancer, but whether he knew how a will ought to be executed. He took instructions for the will; he drew a draft will; he had it engrossed; he attended on the 6th of July, 1839, for the purpose of its being executed, but found the deceased asleep; he is sent for on the following day; he attends, he reads over the will, certain conversation takes place, an alteration is made, which is attested by the initials of the witnesses [160] being placed opposite it, and with this alteration the will is approved of by the deceased: a light is brought, a seal affixed; another witness is sent for, and Stanley is met with; he is asked to attest, and, according to his evidence, he does so; the whole story shews the will was prepared with the utmost deliberation.

Under these circumstances, I think, without reflecting the least on Mr. Stanley,

that I am bound to give credit to Mr. Cattarns. I confirm the will, and direct the probate to be re-delivered out.

ILOTT against GENGÉ. Prerogative Court, July 19th, 1842.—A. B. (deceased) requested two persons, present at the same time, “to sign a paper for him,” which they did in his presence; the paper was so folded that the witnesses did not see any writing whatever on it; A. B. did not state what was the nature of the paper in question. On the death of A. B. it was found to be his intended will.—Held that it was not entitled to probate, the provisions of the 9th section of the 1 Vict. c. 26 not having been complied with.

[S. C. 1 Notes of Cases, 572: affirmed 1843, 4 Moore, P. C. 265; 13 E. R. 304 (with note). See also *Blake v. Knight*, p. 563, post; *Hudson v. Parker*, 1844, 1 Rob. 34; *Daintree and Butcher v. Fasulo*, 1888, 13 P. D. 102.]

The Rev. H. Masterman, the vicar of Milton Abbas, in the county of Dorset, died on the 8th of December, 1841. On his death, a testamentary paper was found, dated the 8th of September, 1841; it was in the handwriting of the deceased, signed by him, and the names of three witnesses appeared subscribed to it. The attestation clause was as follows:—“Signed, sealed, and delivered in the presence of us, this 8th day of September, 1841, Samuel Hopkins—Henry Eaton—John Chaffey.” This clause not shewing that the 9th section of the 1 Vict. c. 26 had been sufficiently complied with, the subscribing witnesses were applied to, to make an affidavit in the form required by the Prerogative [161] Court; they declined to do so, whereupon the paper was propounded by Mr. Ilott, an executor named therein, and was opposed by Mrs. Genge, whose interest (as the lawful second cousin of the deceased) in his effects, in case he had died intestate, was admitted.

The allegation given in by Mr. Ilott pleaded, in the first article, that this paper was written by the deceased with his own hand, that it was subscribed by the deceased, in the presence of two witnesses present at the same time. It then went on to plead “that on the 8th of September the deceased, at about four o’clock in the afternoon, called on S. Hopkins, the parish clerk of Milton Abbas, who was in his shop with H. Eaton, and said, I want you two to come to my house to sign a paper for me; that Hopkins said we will come; that the deceased went back to his house; that Hopkins and Eaton shortly afterwards went to the testator’s house, and found him in his study standing at a writing desk placed on a small table near the wall; that his back was turned to them as they entered; that on their entering he turned round and said, ‘Mr. Hopkins, I want you to sign this paper for me.’ That he then turned round again to his writing desk, and, still standing up, did something with the paper, and, as appeared to Hopkins and Eaton, from his attitude and manner, he was writing upon it. That after a short interval, during which the deceased was so employed, he moved the paper from the desk and put it on the table on which the desk was standing, and said, pointing with his fingers to the bottom thereof, ‘Sign your names there.’ That Hopkins then took the pen which was in the [162] ink-bottle, and which apparently the deceased had been just using, and signed his name in the testator’s presence, and in the presence of Eaton, and Eaton also signed his name in the presence of Hopkins and of the deceased, but that the upper part of the paper was so folded or turned down as to conceal the writing on the concluding part thereof, so that Hopkins and Eaton could not see whether or no there was any signature or seal to it. That the deceased, on the same afternoon, called on J. Chaffey, and requested him to put his name to the paper, under those of Hopkins and Eaton, which he accordingly did; that the paper was again so folded or turned down as to conceal the writing on the concluding part thereof, but neither Hopkins nor Eaton were present when Chaffey signed.”

The second article pleaded the handwriting of the deceased to the paper.

The subscribing witnesses having been examined, it appeared by their evidence that the deceased did not sign the paper in their presence, and that they never saw his name or seal to the paper.

The case came on for hearing.

Haggard and R. Phillimore, in support of the will, argued that this was a will which the Court would be anxious to support. That in *White v. Trustees of the British Museum* (6 Bing. 310) and *Doe dem. Jackson v. Jackson* (coram Parke, B., North Circuit, 16th March, 1842) the question whether the signature of a testator to a will was

made before the witnesses subscribed, was left as a fact to a jury, and a jury will presume the fact to be one way or the other on the reasonable probabilities of a case. That [163] in a Court of probate the judge will, in favour of a testamentary disposition, make the same presumption of fact as a jury would make; that it would be most anomalous and inconvenient if, in the case of a will respecting real estate, a jury should presume it to have been signed by the deviser in the presence of witnesses, or to have been signed by him before the witnesses subscribed, and a Court of probate not make the same presumption in the case of the same will as respected the personalty. That in this case the reasonable probabilities were that the testator signed whilst the witnesses were present. They cited *Farebrother v. Simmons* (5 B. & Ald. 333), *Wallis v. Wallis* (4 Burn. Eccl. Law, 114) *Trimmer v. Jackson* (ib. 117), *Jarman on Wills* (c. 8, p. 140), *Williams's Executors* (vol. 1, p. 65).

Addams and Curteis contra, contended that to hold this will to be sufficiently executed would be to repeal the 9th section of the 1 Vict. c. 26, which was expressly designed to prevent any paper operating as a will where the witnesses did not actually see the signature of the testator. That the signature under the present act must be made in their presence or the signature—not the will—must be acknowledged in their presence. That the Court could not presume this will to have been signed in the presence of the witnesses, when they, the witnesses, deposed that in their belief it was not signed in their presence. That presumptions of fact can only be made in the absence of evidence; and that to presume the fact of signature in the presence of [164] the witnesses in this case would be to do so in the teeth of the evidence.

In reply, *Starkie on Evidence* (p. 1685) and *Peate v. Ongley* (Com. 196) were referred to.

Judgment—*Sir Herbert Jenner Fust*. The Rev. H. Masterman died on the 8th of December, 1841; he left a will, all in his own handwriting, dated the 8th of September, 1841, signed by the deceased, and with an attestation clause, "Signed, sealed, and delivered in the presence of" (three persons), Samuel Hopkins, Henry Eaton, and John Chaffey. The signature of the deceased, and the date of the year in which the execution took place, appear to have been inserted after the body of the will was written: the purport of the will is to give legacies to friends and servants. [The Court stated the contents of the will, and proceeded.]

Now this is a will which the Court would be disposed to support if, under the circumstances, it can do so; there can be no doubt of the intention of the deceased that it should operate as a disposition of his property.

The will is propounded by Mr. Ilott, the executor, who is a legatee in a sum of 400l., and is opposed by Mrs. Margaret Genge, a second cousin of the deceased. The question is whether it is executed pursuant to the provisions of the 9th section of the 1 Vict. c. 26, inasmuch as the attesting witnesses did not see the testator write his name, so as to be [165] able to swear that he did so in their presence; whether there is sufficient evidence to satisfy the Court of the fact that the signature was on the paper at the time the witnesses attested it; or whether there is sufficient evidence to satisfy the other alternative of the statute, namely, of the acknowledgment of the signature in the presence of the witnesses. Although in the allegation nothing is suggested as to acknowledgment of the signature, but the case is rested on actual signature, yet if, from the evidence of the witnesses, it should appear that the signature was acknowledged, the Court would not deprive the party of the benefit of that fact, particularly, as this circumstance has been called to the attention of the other party, as appears from the interrogatories addressed to the witnesses; therefore I think both points do arise on the present occasion.

The evidence produced by no means comes up to the plea, and as this is the first case which has been argued before this Court as to the validity of a paper executed under circumstances such as exist in this case, I think it right to refer particularly to the evidence and to the facts of the case.

The first witness is Samuel Hopkins; he says, "I and Eaton were called on by the deceased, who said, 'I want you two to sign a paper for me,' I said, we will come immediately, he left directly, Eaton and I followed in a few minutes, perhaps five. We went to the vicarage, we were told Mr. Masterman was in his study, the study door was open, and we went in, the room is small; the deceased was standing at a table on which was a little desk, his back was to us, directly opposite to [166] the door at which we entered. He was doing something to a paper" (no doubt it was

this very paper) "for I could see a portion of it, I think he was folding it." "It was at that table and desk that he did all his writings; then he used to be sitting, for it was high enough for that, and no more, but at the time of which I am speaking he stood leaning forward; I am sure he was doing something to the paper, folding it, I think, I could not swear that he was not writing, but I think if he was writing when we went in I should have seen and remembered his putting his pen into the little glass inkstand in which it was when I saw it, as I shall depose, and where it always was, at the right hand corner of the little desk. He was standing, as I have said, but he often stood to write so much as his name: his chair was close by. He stood for, perhaps, as much as a minute, and then, turning round, he said (seeing us both), addressing me, 'Well, Hopkins, you are come;' he had the paper in his hand, the one I signed, and he then said that he wished me or us ('you, he said') to do a little job for him, or to that effect. I stepped forward, and the deceased, holding the paper down on the desk with one hand, told me to sign my name 'there' or 'here,' pointing with the other hand where. I saw no writing at all upon it; it was folded in such a manner that whatever was upon it was covered by the folding of it down. The place where he told me to sign was up as close to the fold as it well could be. The deceased took the glass inkstand or flat bottle with the pen in it out of the desk and put it on the table by the side of the desk, and then, as he pointed, I wrote my name, [167] 'Samuel Hopkins,' nothing more. Mr. Masterman had blotting paper, and made use of it at times, but I saw none used then." This, I suppose, to be in answer to a question addressed to him by the examiner, for the purpose of bringing out any fact, because, as he had not been there two minutes before he signed his name, if the deceased had signed during that time there must have been some ingenuity used to conceal from him the whole of the paper, particularly as the attestation clause was there before he signed. He goes on, "Not another word was said about what we had been doing, of that I am quite sure; I was not present when any other person signed that paper, and I saw no more of it, and never heard the deceased name it, except as I have said."

Then he goes on to depose to the complete capacity of the deceased, and that this is the paper which he witnessed. That he had not signed any paper for Mr. Masterman for some time before, and never signed any afterwards, and that he never witnessed any such as he describes. Then he says, "I cannot myself fold the paper now produced to me as it was folded when I signed; I signed as I have said, but it was folded or covered by some other paper, so that no part was to be seen by me, but just that lower part on which the names of myself and the other two witnesses now appear."

It is quite clear, according to this witness, that he did not see the subscription of the testator, if then signed to the paper according to the examination in chief of this witness, there was no possibility of seeing any writing; he says the deceased did not sign the will in his presence, and the impression on [168] the mind of the witness is, that he did not sign in his presence, for on the second interrogatory he says: "I cannot positively swear that Mr. Masterman did or did not sign his name in my presence, on the occasion in question; I have deposed to the best of my recollection and belief to what passed, and to all that passed on that occasion; I am sure that he did not shew his signature to me; if it was there I did not see it. He did not acknowledge it by any words spoken in my hearing, and my belief is, that he did not sign his name in my presence. I cannot at all say whether the name of the deceased had or had not been signed by him before he desired me and my son-in-law to witness it as we did. Mr. Masterman has frequently asked me to sign papers for him. I did not know what the paper was (which I so signed as I have deposed), when I signed it."

To the third interrogatory he says—

"I cannot swear that the deceased did write anything at all in my presence, on the occasion deposed of between the time when I so went to him in his study, and of my subscribing my name as I have deposed. If he did write anything, I do not know why it might not have been as well filling up the date as signing his name."

The witness Henry Eaton, the son-in-law, deposes much to the same effect. He says: "Mr. Masterman had his back to us as we entered. The desk stood on a table up against the wall: I had often seen him writing at that desk, in that place. He commonly sat to write. He was a tall man, and had to stoop if he stood to do anything at that desk. When I went into the room I saw nothing [169] but his

back; I could not tell what was before him on the desk; if anything; apparently to me, he was leaning over the desk, doing something to, or else looking at, what was on it, and, that it was a paper that was on it, was shewn immediately from what followed. We had but just entered the room, when Mr. Masterman turning half round, said, 'Mr. Hopkins, I want you and Henry (meaning the deponent) to sign this paper for me.' Mr. Masterman then stood a little aside, to allow us, one at a time, to come to the table, and holding a folded paper—so covered that there was no telling whether there was anything on it or not, or what was on it, I should say, for doubtless there was something on it, or he would not be hiding it as he did—he pointed to Hopkins where he should write his name, which he did, and then the same with me. It was close under where the upper part of the paper was folded down upon it, that we had to sign our names as we did, Mr. Masterman never said what it was we were signing. I suppose that we were with him for about a quarter of an hour; I should think that from the time we entered the room until the business we were come upon was finished by my signing my name, as I have said, would not be more than five minutes, six at furthest; I should say apparently, he was getting of the paper ready for us to sign when we went in."

"No one else was present when we signed. The first that I saw of the pen, as I recollect, was as Mr. Masterman turned aside to make way for Hopkins; the pen was then standing in the glass in the inkstand; I saw Hopkins take it out from it to write his name; when he had done so, he made [170] way for me, and I took his place. Whether Mr. Masterman took up the paper, which we had signed in our presence, or let it remain, I am not able to say; I have seen blotting paper in the desk and on it before now, but I saw none and none was used that day. When we first went into the study (which is a very small room) I stood rather behind Hopkins, and could not see quite so well as he; I should rather say Mr. Masterman did not than that he did write on the paper while we were with him; I doubt if there was altogether time for him to have written and folded the paper too; I do not call to mind anything else having passed; Mr. Masterman certainly did not tell us what paper it was which we were signing." Then further on he says—"How the paper was folded on that occasion I cannot now say, or how Mr. Masterman contrived it, but he did by some means cover it all up, except just the space left for us to sign as we did."

Upon interrogatories, this witness deposes very much to the effect I have already stated, with regard to the first witness. These are, in effect, the only two witnesses, for the third witness was alone at the time of his attestation of the will, and his attestation, therefore, would not be sufficient to comply with the requisites of the act of Parliament.

What is the result? The witnesses are called in to attest a paper; the testator is a tall man, standing at a table, which caused him to stoop; he was doing something with the paper; the impression made on the mind of the one witness is, that he was folding the paper; of the other, that he was getting it ready for them to sign; neither witness can take upon himself to swear that he saw the deceased [171] write anything on the paper, or that he had a pen in his hand, or put a pen back into the inkstand; they will not undertake to swear that he did write anything in their presence, or that the impression on their minds is that he did so; their impression is rather that he did not than that he did.

This is the whole proof of the fact of execution; but it has been contended that, with reference to cases under the Statute of Frauds, something is to be inferred from the attestation clause, which purports that the paper was "signed, sealed, and delivered, in the presence of the witnesses;" and perhaps something might have turned on that, if the deceased himself had considered the instrument complete. The evidence is, that the deceased requested the witnesses merely to sign their names, and that they did not see the attestation clause, and the deceased himself afterwards went to Chaffey, and requested him to sign the paper, and he could see nothing; that detracts from any inference being drawn from the attestation clause in favour of the will.

Then what is the effect which this evidence ought to have on the mind of the Court? It is said that the Court may presume that the paper was signed while the witnesses were in the room; but the Court cannot presume this, while the impression on the minds of the witnesses is that it was not signed in their presence. Although the circumstances of the case do not preclude the possibility of the paper having been then signed by the deceased in the presence of the witnesses, the proof of the affirmative

lies on those who propound the paper, and I cannot presume, in the absence of all evidence—[172] notwithstanding I have a strong inclination to carry into effect the clear intentions of the deceased—that the instrument was signed in the presence of the witnesses.

This brings me then to the second point, whether the signature was acknowledged in the presence of the witnesses; I have already stated that, notwithstanding the form of the plea, the Court would be inclined to give the party the benefit of any proof which may arise from the circumstances of the case. It is not contended that there was any express acknowledgment of a signature, that the deceased said, "This is my signature, and I request you to attest it"—the case must, therefore, rest on what may be considered a virtual acknowledgment of a signature: it is not necessary that a testator should state to the witnesses that it is his signature; the production of a will by a testator, it having his name upon it, and a request to the witnesses to attest it, would be a sufficient acknowledgment of the signature under the present statute.

This was the point most strongly pressed in the argument, and it was contended that, with reference to cases under the Statute of Frauds, what was done in this case was sufficient to constitute an acknowledgment of the signature: before I refer to the cases cited it will be necessary to consider the wording of the two statutes—the Statute of Frauds, and the statute 1 Vict. c. 26. By the Statute of Frauds (29 Car. 2, c. 3), "All devises and bequests of any lands or tenements shall be in writing, and signed by the party so devising the same, or by some other person in his presence, or by his express direction, and shall be attested and subscribed in [173] the presence of the said devisor by three or more credible witnesses." Under this form of words it was held not necessary that the witnesses should see the testator actually sign; he need not acknowledge his signature to all the witnesses at the same time, the acknowledgment might be made to each witness separately: a simultaneous presence of the witnesses was not required. *Grayson v. Atkinson* (2 Ves. sen. 454), *Jones v. Lake* (2 Atk. 176), *Stonehouse v. Evelyn* (3 P. Wms. 254), *Ellis v. Smith* (1 Ves. jun. 11), *Wright v. Wright* (5 Moore & P. 316). These cases determine that point, that an acknowledgment in the presence of each witness separately is sufficient.

In other cases it has been held that a request to witnesses to subscribe their names as witnesses, without stating what the instrument was, was a sufficient acknowledgment under the Statute of Frauds. *The Trustees of the British Museum v. White* (3 Moore & P. 689; 6 Bingham, 310), *Wright v. Wright* (5 Moore & P. 316), *Johnson v. Johnson* (1 Cr. & Mees. 140), *Jarman on Wills* (vol. 1, pp. 71, 73).

How does the law now stand? the 9th section of the statute 1 Victoria, c. 26, enacts that "no will shall be valid unless it be in writing, and executed in manner hereinafter mentioned; (that is to say) it shall be signed at the foot or end thereof, by the testator, or by some other person in his presence, and by his direction;" it was held, under the Statute of Frauds, that a signature at the commencement was sufficient: now, it must be signed at the [174] foot or end thereof: this paper is signed at the foot or end by the testator, there is no doubt of that. The section goes on, "And such signature shall be made or acknowledged by the testator, in the presence of two or more witnesses, present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary." Here it is enacted, not that the will shall be signed, but "that the signature shall be made or acknowledged;" some doubt was raised soon after the passing of the act whether an acknowledgment was not confined to cases where the signature was made by "some other person" for the testator, but the Court was of opinion that the acknowledgment extended to the signature, whether made by the testator himself or by another for him.(a)

The question, then, in this case is whether there was an acknowledgment of the signature by the testator to two witnesses present at the same time. If there was such an acknowledgment, the statute has been complied with, for, undoubtedly, the two witnesses were present at the time of the acknowledgment, if any took place, and they subscribed the will in the presence of the testator. The first observation that arises on this is, that the wording of the present statute varies materially from the corresponding section in the Statute of Frauds; there nothing was said as to acknowledgment of the signature by the testator; a will, therefore, might be signed by the

(a) *In the Goods of Cornelius Regan*, 1 Curt. 908.

testator, or by some other person in his (the devisor's, not the witness's) presence, [175] and if attested and subscribed by three witnesses, in the presence of the devisor, would be good; it is quite clear that the Legislature, in the recent statute, intended something further; under the Statute of Frauds it was sufficient if the paper was acknowledged to be a will, but it is now enacted, in express terms, that the signature shall be acknowledged; it would seem to require that the witnesses should see the signature; that they should know that the paper was signed at the time, a fact which could only be known by seeing the testator sign, or hearing him say that he had signed, and "that was his signature:" it might be a question whether a declaration by the deceased that he had signed the paper would be sufficient for the purpose, but that point does not arise here. How is it possible that a signature should be acknowledged (for it is not the will, but the signature, which is to be acknowledged), unless the signature is exhibited to the witnesses? The statute requires that the signature should be attested, not, as Mr. Jarman says, the will. Now the construction which I should be inclined to put upon this clause is, that the production of the will with the signature to it, and requesting the witnesses to attest, and their attesting and subscribing the will, would be sufficient.

Now, what were the cases referred to? the most important was that of *White v. The Trustees of the British Museum* (6 Bingham, 310). In that case a special verdict found that the will in question had been signed by the testator before he produced it to the witnesses; it is quite evident that on the facts so [176] found the Lord Chief Justice delivered the opinion of the Court.

In that case, then, it appears that the deceased had signed his name to the paper before he produced it to either of the witnesses, that he produced it to two witnesses who did not see the signature of the deceased, and he afterwards produced it to a third witness.

[The Court read the statement of the case as reported in 6 Bingham.]

Serjeant Wilde, in arguing the case on the one side, says: "It is not required by the statute that the witnesses should see the devisor sign; or that he should sign in their presence: nor that all the witnesses should subscribe in the presence of each other: nor that they should know the instrument they have subscribed to be a will."

I refer to this on account of an observation of Lord Chief Justice Tindal which here occurs: his Lordship says, "If the will be not actually signed by the devisor in the presence of the witnesses, must it not be acknowledged as such to them?"

Then Serjeant Wilde answers: "The devisors desiring the witnesses to subscribe the instrument under the usual formulary of attestation is a sufficient acknowledgment of his having signed it himself, and intending the instrument should be effective." Be it remembered that it had been found that this will was actually signed at this time. "There is no other object for which he can be conceived to have required their subscription. Consistently, therefore, with the decisions before referred to, the word 'attested,' as employed in the statute in conjunction 'with subscribed,' can only mean that the witnesses [177] should so subscribe as to be able at a future time to testify, by a reference to their subscription, the identity of the document subscribed. The object of the statute is to prevent a false document from being substituted for that placed in their hands by the devisor. The safety of the devisor, and of the parties claiming under the devise, is sufficiently answered if at any time the witnesses can testify that the document produced with their subscription is the same as that which the devisor has recognised by placing it in their hands, for the purpose of obtaining their subscription."

Chief Justice Tindal said, "The question is whether, in the execution of this will, the several requisites contained in the Statute of Frauds have been duly observed? By the 29 Car. 2, c. 3, s. 5, it is enacted 'that all devises and bequests of any lands or tenements shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of non-effect.' And as the special verdict finds that the whole of the paper writing is in the handwriting of W. White, and that he signed it before it was signed by the witnesses, the jurors do find in terms that there is a devise in writing, and that it is signed by the party who makes the devise.

"Again, it is found expressly that the names of the three persons were signed by them upon the paper writing, in the presence of the said W. White; that is, in the

language of the statute, the writing was subscribed in the presence of the deviser, so [178] that the inquiry is simplified, and reduced to this single question, whether the devise was attested by them within the meaning of the statute?"

The Chief Justice founds his judgment on the special verdict, and he says—having all these facts before him, all found by the special case—"It has been held in so many cases that it must now be taken to be settled law that it is unnecessary for the testator actually to sign the will in the presence of the three witnesses who subscribe the same; but that any acknowledgment before the witnesses that it is his signature, or any declaration before them that it is his will, is equivalent to an actual signature in their presence, and makes the attestation and subscription of the witnesses complete. The case of *Ellis v. Smith*, which was decided by Lord Chancellor Hardwicke, assisted by the Master of the Rolls, Sir J. Strange, Lord Chief Justice Willes, and Lord Chief Baron Parker, all persons of high and eminent authority, is express to the latter point. The objection, therefore, to the execution of the present will, does not rest upon the fact that it was not signed by W. White in their presence; but that with respect to two of the witnesses, Hounslow and Bristow, there was no acknowledgment of his signature, nor any declaration that it was his will; but that they signed their names in entire ignorance of the nature of the instrument, or of the object for which their names were written. And it is argued that if such subscription of their names satisfies the intention of the statute, the word attested will have no force whatever, and may be considered as if it had never been inserted.

"The question, however, appears to us to be, [179] whether 'upon this special verdict the finding of the jury establishes, although not an acknowledgment in words, yet an acknowledgment in fact, by the deviser to the subscribing witnesses, that this instrument was his will? For if, by what the deviser has done, he must, in common understanding and reasonable construction, be taken to have acknowledged the instrument to be his will, we think the attestation of the will must be considered as complete, and that this case falls within the principle and authority of that of *Ellis v. Smith*.

"In the execution of wills, as well as that of deeds, the maxim will hold good, 'non quod dictum sed quod factum est, inspicitur.'

"Now, in the first place, there is no doubt upon the identity of the instrument. The paper in question is the very paper writing which was produced by the testator to the three witnesses. The great object of the direction of the statute, that witnesses shall subscribe in the presence of the deviser, was to prevent the possibility of the witnesses returning to his hands any other instrument than the very instrument which he delivered to them to attest. This object has been attained in the present case, and the identity of the instrument is beyond dispute.

"In the next place, it appears from the special verdict that the deviser was conscious himself that this instrument was his will. For the verdict finds that he was of sound and disposing mind, both at the time he signed it himself, and also at the time when the witnesses subscribed their names.

"But further, it appears from the inspection of the instrument set out in the special verdict that [180] the signature of the three names could not possibly enure to charge themselves, or any other person, and could not have been done for any other purpose whatever than simply to make them witnesses to the will. And, lastly, it appears from the same inspection that, immediately above the names of the witnesses, there was written, in the handwriting of the testator, these words, 'in the presence of us as witnesses thereto,' which do amount to a clear and unequivocal indication of the testator's intention that they should be witnesses to his will.

"When, therefore, we find the testator knew this instrument to be his will—that he produced it to the three persons and asked them to sign the same; that he intended them to sign it as witnesses; that they subscribed their names in his presence, and returned the same identical instrument to him—we think the testator did acknowledge in fact, though not in words, to the three witnesses, that the will was his. For whatever might have been the doubt upon the true construction of the statute, if the case were *res integra*, yet as the law is now fully settled, that the testator need not sign his name in the presence of the witnesses, but that a bare acknowledgment of his handwriting is a sufficient signature to make their attestation and subscription good within the statute, though such acknowledgment conveys no intimation whatever, or means of knowledge, either of the nature of the instrument, or the object of the sign.

ing, we think the facts of the present case place the testator and the witnesses in the same situation as they stood where such oral acknowledgment of signature has been made, and [181] we do therefore, upon the principle of those decisions, hold the execution of the will in question to be good within the statute."

In point of fact, this is the case to which it is alone necessary to advert; this is a determination that where a testator had written a will himself, and signed it, and produces that will, so signed (for that is a point never to be lost sight of) to witnesses, and desires them to sign their names, that amounts to an acknowledgment that the paper signed by them is his will, and the instrument is complete for its purpose; it is acknowledged by the testator to be his will.

But under the present statute the testator must acknowledge his signature, not his will merely, and there is no proof in this case to satisfy my mind that the will was signed before it was produced to the witnesses. It is not sufficient, in my opinion, merely to produce the paper to the witnesses, where it does not appear that the signature of the testator was affixed to it at the time, and this it is which distinguishes this case from those under the Statute of Frauds, as in all those cases, with the exception perhaps of *Peate v. Ongley*, the will was proved to have been signed before it was produced to the witnesses.

But a case has been referred to which occurred on the Northern Circuit, before Mr. Baron Parke, on the 16th of March, 1842, and which applies very materially to this case; it is *Doe dem. Jackson v. Jackson*. It turned on the execution of a will; the paper was signed when it was produced to both witnesses, and both the witnesses subscribed the will in the presence of the deceased; the question [182] was whether the deceased had acknowledged his signature to two witnesses present at the same time.

The facts of the case are these: The testator called one of his confidential clerks into a counting-house; he produced a paper, and told him it was his will (this witness was the only witness examined at the trial); this paper was read over by the clerk in the presence of the testator; he knew what the will was, and that it was signed by the testator, who inquired of him who was likely to attest it as a second witness; he named another person, a second clerk; the testator was unwilling that the second clerk should know the nature of the paper, and, on his being called in, he placed his arm on the instrument so that the second witness could not see the signature or know the contents of the paper; both witnesses attested in the presence of the testator; both witnesses were present at the same time, but when the will was produced to the second to sign he did not know whether it was signed by the testator or not, by reason of the testator placing his arms on it. The first witness knew it was a will and signed by the testator; both subscribed it in the presence of the deceased; the question was whether this was a valid execution of the will; the observations of Baron Parke are these: I think Mr. Baron Parke rather expected the verdict would be against the will. He left it to the jury to say whether it was the intention of the testator to acknowledge his signature to the second witness; he says, "This is a dry question of fact which you have to decide; reference has been made to a case of *White v. Trustees of the British Museum*; one question is whether the testator meant the second [183] witness to see his signature, or to witness it as a complete instrument; you have heard that he put his hand over the paper and covered the instrument; the question is whether he meant to acknowledge his signature: if he put blotting paper over his signature, that would rebut the presumption that he meant to acknowledge it. Under the act of Parliament it is necessary, in order to make a valid will, that it be 'signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction: and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator.' All these circumstances must concur to make a valid will of real and personal property; it must be signed at the end (that was done so in this case); the signature must be made in the presence of two witnesses (that is not done in this case), or the signature must be acknowledged by the testator in the presence of two witnesses present at the same time. I must leave it to you to say whether that has been done in this case. It has been held in the Common Pleas that it is not necessary there should be a verbal acknowledgment; if he meant to acknowledge it, it would do equally well, but there must be some acknowledgment: I leave it to you to say whether that has been done in this case; you will remember it is for the lessor of the plaintiff to prove that it has

been done so to your satisfaction." "I think," he says, "that by sending for Rowley, he meant him to attest a complete instrument; whether that was done or not is for you to say. It appears [184] from the first witness that, on being called into the counting-house, he found the testator engaged in writing; so far as this witness is concerned, he not only shews him his signature, but gets him to read the will. It is also quite clear that he did not want Rowley (the second witness) to know that the paper he was called in to witness was a will. It is for the lessor of the plaintiff to shew that the signature was exposed; if it was, without the testator's saying anything, or if blotting paper were put over the signature, that would, I think, exclude any presumption that he intended to acknowledge his signature before the witnesses." This shews the inclination of Mr. Baron Parke's mind as to what amounts to acknowledgment.

The jury returned a verdict in favour of the will.(a)

If that case had been decided by a Court of law it would have an important bearing on this case. In this case it has not been proved that the will was signed by the testator before the witnesses attested it: in that case it certainly was quite clear that it was signed at the time; the circumstances are very different; and I think Mr. Baron Parke expected that the jury would have found a special verdict, and left it to the Court to establish whether it was a will or not; it is evident Mr. Baron Parke had a strong doubt whether this was a sufficient execution. With reference then to the express direction in the statute, that where the will is not signed in the presence of the witnesses the signature (not the will) shall be acknowledged, I am of opinion, under [185] the circumstances of this case, that the signature was not acknowledged, either expressly (certainly not expressly) or virtually in the presence of two witnesses present at the same time; I therefore pronounce against the validity of the will, and decree administration.

CLOWES *against* JONES, FALSELY CALLING HERSELF CLOWES. Arches Court, Nov. 2nd, 1842.—A libel in a suit promoted by the husband against the wife, for nullity of marriage by reason of fraud in obtaining the license, rejected, there being no error de personâ, although in the license the wife was wrongly named.—A libel by a husband, in a suit of nullity of marriage, having been rejected: Held, that it was competent to the wife, in that suit, without taking out a cross-citation, to sue the husband for restitution of conjugal rights.

[S. C. 2 Notes of Cases, 1; 7 Jur. 449.]

This was a question as to the admissibility of the libel in a suit of nullity of marriage, promoted, in virtue of letters of request from the commissary of the Bishop of Winchester, by E. Clowes against Harriet Jones, spinster, falsely calling herself Clowes.

The libel pleaded—

First. That the said H. Jones, falsely calling herself Clowes, is the natural and lawful daughter of D. Jones and Ann, his wife, respectively deceased, and was born on the 7th of May, 1824. That although the said H. Jones was baptized by the name of Harriot, yet she always was called and known as Harriet.

Third. That in the month of November, 1840, the said H. Jones left the residence of her mother, and went to reside in George Street, Adelphi, when, without any legal authority, she, for the first time, dropped and discontinued the use of her [186] true surname of "Jones," and used and passed by the surname of "Harwood."

Fourth. That about the 28th of November, 1840, the party proceeding in the cause first became acquainted with the said H. Jones whilst she was residing in George Street, Adelphi, and passing by the surname of "Harwood." That in February, 1841, she, the said H. Jones, resided with the party proceeding as his mistress, first at , and afterwards at . That whilst so residing she at first used the assumed surname of "Harwood," but afterwards assumed the surname of "Bailey."

Fifth. That in the month of February, 1840, the said H. Jones, in order to deceive the party proceeding, and to induce him to marry her, falsely and fraudulently represented to the party proceeding that her real, true, and only legal names were not "H. Harwood," but "E. H. G. Terry;" and also, for the purposes aforesaid,

(a) A rule for a new trial in this case was made absolute by the Court of Queen's Bench on Saturday, May 6th, 1843.

falsely and fraudulently represented to him that she was the lawful daughter of Admiral Terry, and belonged to a highly respectable family of that name resident at Brighton; that she was niece to Lady S——, and sister of Mrs. Colonel C——, resident at Brighton; and she frequently represented to the party proponent, that she had received letters from such relatives, and shewed to him forged or fictitious letters fraudulently prepared and procured by her for that purpose. That whilst the parties lived together, and on the 20th of March, 1841, the said Harriet Jones falsely and fraudulently informed the party proceeding that she was enceinte, and also falsely and fraudulently represented that she had been, on the 13th day of June, during the temporary ab-[187]-sence of the party proceeding, prematurely confined. That in consequence of the aforesaid false and fraudulent representations the party proceeding did, in the latter part of the year 1841, pay his addresses or courtship to her in the way of marriage; and that on the 11th of December, 1841, a pretended marriage was, in fact, had and solemnized between the parties by virtue of a pretended license, obtained in the names of Edward Clowes and Emily Harriet Geraldine Terry.

Seventh. That the said Harriet Jones never at any time used, passed, or was known either by the Christian names of Emily, Harriet, Geraldine, or by the surname of Terry, save only when she falsely and fraudulently represented those names to be her only real, true, and legal names, and on the occasion of the said pretended marriage.

The admission of this libel was opposed by Addams and Jenner. Admitting that dicta are to be found in the reported decisions of this Court, to the effect that there may be such imposition and deception practised by a woman to delude a man into marriage, as would support the admission of a libel in a cause of nullity of marriage, still each case, as it arises, must be considered with reference to its own particular circumstances. This is a case *primæ impressionis*. What is the deception said to have been practised on the party proceeding in this case?—that the other party—his own kept mistress, with whom he had been cohabiting for months, deceived him as to her real name; that there is error nominis in the license, which was, be it re-[188]-membered, procured by himself on his own oath as to the truth of its contents.

Per Curiam. The ground of nullity set forth in the citation is fraud in procuring the license, not imposition practised on the party in inducing the marriage.

[Argument resumed.] The identity of the parties actually married with that of the parties named in the license stands confessed in the libel, and, therefore, *Sullivan v. Sullivan* (2 Hagg. Con. 238) is in point, *Hawke v. Corri* (2 Hagg. Con. 280).

The Queen's advocate and Harding in support of the libel. This is the very case of fraud in procuring a license which is contemplated in *Cope v. Burt* (1 Hagg. Con. 434) as sufficient to invalidate a marriage; the name of "Terry" was here assumed by the party for the express purpose of inducing the marriage. Even if no imposition in this respect was practised on the husband, the ordinary has been imposed upon. Lord Stowell, in *Cope v. Burt*, says, "There was no imposition on the ordinary, or on the minister, or on either of the parties," *Rex v. Burton on Trent* (3 M. & S. 537); *Ewing v. Wheatley* (2 Hagg. Con. 275). The ordinary may refuse to grant a license, just as banns may be publicly forbidden; if it is essential that the true names of parties should be given in the publication of banns, is it not equally necessary that the or-[189]-dinary should know the real names of the parties to whom he grants a license or dispensation?

Per Curiam. According to the present Marriage Act, to render a marriage null and void by reason of fraud, both parties must be cognizant of the fraud; does not the 22nd section of the Act equally apply to marriages by license?

[Argument resumed.] It must be admitted that this is the real difficulty in the case. Here the party seeking to avoid the marriage is the party on whom the fraud has been practised. Licenses are *strictissimi juris*. Sanchez, b. 8, div. 21, p. 37.

Addams. The word license in the passage just referred to applies to a totally different kind of licenses, not to marriage licenses.

Sir Herbert Jenner Fust. The parties in this case were married on the 11th of December, 1841. The marriage was had in pursuance of a license, procured by the party who now prays that the marriage may be declared null and void. In the affidavit to lead the license he made oath, "That he believed that there is no impediment of kindred or alliance, nor of any other lawful cause, nor any suit commenced in any Ecclesiastical Court to bar or hinder the solemnization of the said matrimony

according to the tenor of the license; and that the said Emily Harriet Geraldine Terry has no parent living, or testamentary or other guardian whose consent is required." The license issued accordingly, and, by virtue of it, the marriage was solemnized. It is therefore clear, [190] both from the affidavit to lead the license, and from the facts set forth in the libel, that it was the intention of Mr. Clowes to contract a marriage with a person answering to that name; and it is also clear that he did marry the person whom by that description he did intend to marry. There is no error de corpore; if anything, it is error nominis. There is no averment in the libel that this marriage is invalid by reason of want of consent, of affinity, or other legal cause; what then is the ground on which the Court is asked to declare this marriage to be null and void?—fraud; Of what description?—in obtaining the license; In what respect?—that one of the parties is therein designated by a name she was not entitled to bear. It, however, appears that, previous to and at the time of the marriage, the party was well known to Mr. Clowes—she was living with him as his mistress. The particular circumstances of this case may be different from those of former cases of this nature, but the same principle must govern in all: I take it to be this: where there has been no error as to the person, and no fraud practised in obtaining the license, that is, such fraud as if known would have prevented the granting of the license, the marriage cannot be voided; this I consider as the result of the decisions in *Cope v. Burt* and *Cockburn v. Garnault* (cited 1 Hagg. Con. 435). What then are the circumstances which are to distinguish this case from that of *Cope v. Burt*? In this, as in that case, the party had previously to the marriage borne the name by which she was married; she had not assumed it for the purpose of procuring the marriage. In *Cope v. Burt* the real name and [191] description of the party was "Sarah Burt, spinster;" in the affidavit to lead the license she was designated as "Elizabeth Melville, widow;" here then was not only a complete substitution of one name for another, but a false description of state and condition; for what particular purpose she had assumed the latter name and description was not shewn, but as Mr. Cope did not suppose that he was marrying Sarah Burt when he married Elizabeth Melville, the marriage was held not to be invalid. Now, in point of fact, the only fraud that can be relied on in this case consists in the substitution of the name of "Terry" for that of "Jones." I can find no fraud in the mode of obtaining the license; I admit there might be a fraud in this respect, to wit, were a person of bad character to assume the name of a person of good character, in order to procure or contrive a marriage. The authorities referred to, with the exception of *Cope v. Burt* and *Cockburn v. Garnault*, do not seem to have any direct bearing on this case. A case has been cited from a Court of law (*Rex v. Burton on Trent*, 3 M. & S. 537), in which the learned Judges determined that where a name is expressly assumed for the purpose of marriage, it would invalidate the marriage, in other words, it would not be a valid marriage in regard to the decision of a question of parochial settlement. What I want to discover in this case is, what was the particular fraud practised in obtaining the license? There may have been fraud in procuring the marriage, but where is the fraud in obtaining the license? There is no impediment to [192] the marriage in point of consanguinity; I really cannot understand, when it is said this is a void marriage, what is there to render it void? What is there to vitiate the license? there is no substitution of one person for another; both parties were able and willing, and meant to contract this marriage; the whole of the contents of the libel shew that neither of the two persons was deceived by the substitution of one name for another. There was no error de personâ, although there may have been error nominis.

But in point of fact, in all these cases the distinction has been established between a marriage by banns and a marriage by license. The publication of banns is a notice to all the world that the two parties intend to contract a marriage, and the words of the Act of Parliament are direct, "That the true Christian and surname of the parties must be used," and, therefore, if the banns are published in the false names of both parties, the marriage is invalid. A license is a dispensation from the necessity of publication of banns, and is granted on such terms and conditions as the ordinary is willing to accept; in this case the terms are contained in the affidavit to lead the license, and on the oath of the party the license was granted and the parties married; a marriage so solemnized is not to be set aside on slight grounds.

The present Marriage Act is the 6th Geo. 4, c. 76; it was passed to amend a former Act, by which great injury was found to be done to innocent parties; for

a marriage might be set aside in consequence of a fraud committed by one of the contracting parties. Under the present Act both [193] parties must be cognizant of the fraud; it has been so decided in a Court of law (a) in *Dormer v. Williams* (1 Curt. 870). The Judge of the Consistory Court held that, in order to render a marriage by license void, both parties must knowingly and willingly acquiesce in the fraud. With regard to banns, the words are, "If any persons shall knowingly and wilfully intermarry," and it has been decided that the word "persons" is to be taken in the plural sense, and I see no reason why the same construction should not apply in the case of a license.

I see no circumstances to distinguish this case from *Cope v. Burt* and *Cockburn v. Garnault*. I am of opinion that the circumstances stated in the libel are not sufficient to render this marriage null and void; if all the facts alleged were fully proved, the marriage would still remain good and valid. I therefore reject this libel.

The Judge rejected the libel, and assigned to hear on taxation of costs on the second session. The assignation was continued to the first session.

On the fourth session the proctor for Mrs. Clowes prayed leave to bring in a libel—on the bye-day this prayer was repeated. The proctor for Mr. Clowes objected thereto, and prayed to be heard in opposition, and he further prayed that the proctor for Mrs. Clowes might bring in his bill of costs; he subsequently withdrew his prayer, and declined to appear further in the cause. The Judge gave leave to bring in the [194] libel, and assigned to hear on admission thereof on the first session of the next term.

On the first session of Hilary Term the costs were paid to the proctor for the wife, who acknowledged the receipt thereof in Court.

On the same day the admission of the asserted libel was moved by Addams and Jenner; they contended that it was competent to the wife to engraft a suit for restitution of conjugal rights on a suit of nullity of marriage. The factum of marriage had been admitted, and although the husband disputed its validity, the Court, by rejecting his plea, completely affirmed that marriage. They referred to *Wescombe v. Dods* (1 Lee, 59), *Best v. Best* (1 Add. 411), *Hawke v. Corri* (2 Hagg. Con. 280), *D'Aguilar v. D'Aguilar* (1 Hagg. Ecc. 785).

No counsel or proctor appeared for the husband.

Jan. 20th, 1843.—*Judgment*—*Sir Herbert Jenner Fust*. This was originally a suit of nullity of marriage, by reason of fraud practised in obtaining the license. It was promoted by Mr. E. Clowes against Harriet Jones, spinster, a minor, falsely calling herself Clowes. In that suit, which came to this Court by letters of request from the commissary of Winchester, a citation issued, an appearance was given by the party cited by her guardian, a libel was given in, stating the circumstances under which the marriage was celebrated, and the grounds of fraud in obtaining the marriage licence, on [195] which it was contended that the marriage was rendered null and void. The admissibility of the libel was debated, and the Court was of opinion that the libel was not admissible, inasmuch as that, if all the facts stated in it were substantiated at the hearing, the Court would not be enabled to pronounce for the nullity of the marriage; the Court therefore rejected the libel, and condemned Mr. Clowes in the costs. Those costs were not taxed or paid on the bye-day in the last term, on which day the proctor on behalf of Mrs. Clowes asserted an allegation, as in the cause, for obtaining a restitution of conjugal rights. The proctor for Mr. Clowes at first prayed to be heard on his petition against this allegation being brought in, but afterwards he retracted his prayer and declined to appear; an allegation was given in, and the Court heard counsel in support of it, but no party being before the Court to oppose it, the Court was bound to look into the plea, coming, as the cause did, by letters of request, from another Court, and to consider whether, in a suit of nullity of marriage, it could receive a libel for the restitution of conjugal rights. The Court has not been able to find any case precisely in point, except the case cited by counsel, *Wescombe v. Dods* (1 Lee, 59), a suit of jactitation of marriage, in which the party cited alleged herself to be the wife of the party citing her; on the statement of that case it appears that the wife pleaded a marriage, and obtained a sentence in favour of the marriage. In *Hawke v. Corri* (2 Hagg. Con. 280) Lord Stowell stated (p. 285) that in a suit of jactita-[196]-tion of marriage the accused might plead that a marriage had actually

(a) See *Re v. Inhts. of Wroston*, 4 B. & Adol. 646.

passed, and in such a way as to give that party a right to claim the benefit of it, and if the accused obtained a sentence the Court would enjoin the accuser to return to matrimonial cohabitation; on consideration I see no reason why, in a cause of nullity of marriage, the same principle should not be applied, and if in *Wescombe v. Dods* I had found that the husband had been ordered to take his wife home, and to treat her with conjugal affection, that would have been a direct admission of the principle; but it does not appear that Sir G. Lee did make such an order, his own report does not so state. In certain cases it is competent to one party to obtain a sentence of divorce where the suit has been commenced by the other party for the restitution of conjugal rights; but in those cases there is always a sentence in favour of the marriage. There are many cases in which this Court, in a suit for restitution of conjugal rights, has received a plea of cruelty or adultery, and a divorce has been pronounced for in that suit, although originally commenced for restitution of conjugal rights, and that too in causes coming to this Court by letters of request. If, therefore, an allegation, such as this, would have been received in the Court below, it is competent to this Court to receive such allegation; and then supposing the husband's libel had been admitted, the wife might have pleaded a valid marriage. Now comes the question whether, if she had proved a valid marriage, she could have obtained a decree for the restitution of conjugal rights. It was for some time considered that, in cases of this descrip-[197]-tion, there should be a cross-citation, and I find the history of the practice of this Court in this respect given by Dr. Swabey in the case of *Best v. Best* (1 Add. 411). It appears that Dr. Paul, Dr. Penfold and Dr. Jenner stated in Court as their decided opinions that no sentence of divorce could pass where the original suit was for restitution of conjugal rights, for the reason that there could be no sentence for divorce without a cross-citation. Sir G. Lee, however, was of opinion that a cross-citation was not necessary; and he mentioned the case of *Savile v. Savile* before the Delegates. Some doubts were still felt on the point, as appears by a case (*Matthew v. Matthew*, 1 Add. 415) before Dr. Bettsworth in 1769: but, since the case of *Best v. Best*, no doubt has been entertained that a party may plead, in bar of restitution of conjugal rights, either cruelty or adultery without a cross-citation. Still, those cases do not go the full length of this case, where the Court is asked to receive a libel for restitution of conjugal rights in a suit of nullity of marriage in which the original libel has not been admitted. In *D'Aguilar v. D'Aguilar* (1 Hagg. Ecc. 784) Lord Stowell thought he might be under the necessity of pronouncing a wife under an obligation to return to her husband: that was a proceeding by the wife against her husband for a divorce by reason both of cruelty and adultery: Lord Stowell held both grounds fully proved; but in the course of his judgment he said, "I think this lady was in that state of oppression which fully justified the steps she took in withdrawing from her husband. That is the point I [198] have to determine: for, if she was not justified, I must pronounce her under the obligation to return." So that, in his opinion, if the wife had failed in obtaining a separation he must, in the same suit, have admonished her to return to cohabitation. It struck me, at the time this case was cited in argument, that it was not consistent with the doctrine of Lord Stowell in other cases, and on looking into the case of *Evans v. Evans* (1 Hagg. Con. 120) I find him saying, "It is a mistake to say, as has been said on this occasion, that in the present suit I can issue a monition to either party to return. This suit can lead to no such sentence." This seems inconsistent with the dictum in *D'Aguilar v. D'Aguilar*. The Court in its search into the cases has found several which have a bearing on this point. In *Barrett v. Barrett* (1 Hagg. Ecc. 22) it was held that in a suit where the citation was for divorce by reason of cruelty only, a wife was at liberty to plead acts of adultery subsequent to the citation. The Court has also looked at some old cases; in *Moore v. Moore* (1722, a note by Dr. Andrews) there was a suit by the wife against the husband for a separation by reason of cruelty. Sentence was given in the Court at York against the wife, pronouncing that the cruelty was not proved; an appeal went to the Delegates, they affirmed the sentence. The husband prayed the Court at York for a monition to compel the wife to return to cohabitation, and a monition issued; she refused to return, and was, therefore, excommunicated. In the course of the subsequent proceedings the wife appeared, and alleged that the [199] husband was a Roman Catholic convict and not entitled to be heard. He replied that she being excommunicate could not be heard to make the objection; she was purged, and her objection was renewed. It was contended that a Roman Catholic convict could not

be heard. The Delegates held that although he could not originate he might defend a suit; and they also held that this was not an original suit, that the return to cohabitation was the effect of the first sentence, and the wife was ordered to return to the husband. This shews that in a suit for a separation by reason of cruelty, if the party proceeding, either husband or wife, fails, the Court, as a consequence, may order that party to return to cohabitation. There is another case, *Smith v. Smith* (Easter Term, 1718). That was a suit of jactitation by the husband against the wife. The wife proved the marriage and obtained a sentence in favour of the marriage. A monition was prayed by the wife to order the husband to take her home; it was objected that sentence having been given in the cause the Judges were functi officio. The Court came to no determination in that case. This case seems to affirm the principal question that if the Judges were not functi officio, they might have decreed the party to return to cohabitation. There is one other case, although perhaps not precisely in point, *Borton v. Borton*, in the notes of Sir E. Simpson and of Dr. Andrews. It was a suit for a separation by reason of cruelty, brought by the wife against the husband; the wife failed, but the husband was ordered to take her home and to treat her kindly. This case seems to affirm the same position, for the wife failed to establish the [200] cruelty, and the husband was ordered to take her home.

There is, however, a distinction between these cases and the present. In this case issue is joined on the fact of the marriage; in other cases both parties agree in affirming the marriage, but join issue on other facts; in the present case the husband denies the marriage; the question is whether this is so material a distinction as to lead the Court to a different determination from those other cases. I am of opinion that it is not a material distinction; if the libel of the husband had been admitted in this case, the wife might have pleaded a valid marriage, and might have obtained a sentence in favour of it; then, according to the other cases, a monition might have issued to the husband to return to cohabitation. It does not appear to me that there is any material distinction between the cases, for in both views the husband is before the Court in a matrimonial cause.

I am, therefore, of opinion that under these circumstances the libel now offered is proper to be admitted. It is alleged that the costs of the former libel have been taxed and paid; that removed a difficulty which the Court felt on a former day.

[The party having been thrice called and not appearing, the Court admitted the libel.]

[201] OFFICE OF THE JUDGE PROMOTED BY STEWARD *against* BATEMAN. Arches Court, Nov. 11th, 1842.—The Dean of the Arches declined to accept letters of request presented jointly by the Archdeacon and Chancellor of Norwich.

[Referred to, *Sheppard v. Bennett*, 1869, L. R. 2 Adm. & Ecc. 342; *Fagg v. Lee*, 1873, L. R. 4 Adm. & Ecc. 140.]

The Queen's advocate (with whom were Phillimore and Addams) moved the Court (ex parte) to receive joint letters of request signed by the archdeacon of Norwich and by the chancellor of the diocese, in an intended proceeding for promoting the office of the Judge against a certain party for wilfully and pertinaciously refusing to join or concur in making, or obstructing the making of, a church-rate. The cases cited were *Pelling v. Whiston* (1 Comyn, 200), *Butler v. Dolben* (2 Lee, 265), *Sullivan v. Sullivan* (2 Add. 299), *Hodges v. Hodges* (unreported on this point, see 3 Hagg. Ecc. 118).

Judgment—*Sir Herbert Jenner Fust*. The question raised before me is one in which the Court would be very anxious to hear all that could be said on both sides of the case. It is admitted that the question is novel and unusual, some cases there have been which in some degree approach this, but otherwise vary from it: one or two of them have been mentioned where letters of request sent by two jurisdictions have been accepted, but it does not appear that the present case can be governed by any of these precedents.

The present proceeding, as stated by the Queen's advocate, is a motion to the Court to accept letters [202] of request jointly and severally signed by the archdeacon of Norwich, and by the chancellor of the bishop of the diocese of Norwich, and for permission to issue out a decree or citation, conformable to the letters of request, under the seal of this Court, directed to a party named therein. The object is to compel that party to answer to certain articles, and, in particular, "For having wilfully

and contumaciously refused to make or join, or concur in the making of, a sufficient levy, rate, or assessment for providing funds, in order to defray the expense of the necessary repairs of the parish church;" therefore, it is a case which will be pressed in a criminal form, and the party will be entitled to take every objection to the form and nature of the proceedings—they being, as I have said, of a novel kind.

This form of proceeding is the only course which, according to the Queen's advocate, is left open to enforce that which undoubtedly it is the duty of the Court to enforce in a proper case—namely, the necessary repairs of a parish church. I am not inclined to shrink from enforcing what is the law of this country, when it is made out that I have authority to enforce it in the mode requested; this Court can have no objection to have this or a like case brought before it; my doubt arises wholly with reference to the form of the proceeding being a criminal proceeding, and it must be understood that the Court does not throw out any doubt as to the propriety of the proceedings, but only as to their form.

The letters of request thus signed begin with stating a special custom by which the parishioners [203] are bound to repair this church, being the church of the parish of St. George of Colegate, situate and being within the city, archdeaconry, and diocese of Norwich, the chancellor inclusive: so that in the very outset these letters state that which it is not properly the jurisdiction of this Court to decide on, namely, the validity or invalidity of a custom; however, this Court is at liberty to proceed in the matter until its jurisdiction is denied, and this is therefore no reason why, in the first instance, the Court should refuse to enforce the repairs of this church. It is stated that the parish church is in urgent need of substantial repairs, and that the parishioners are bound to repair it. The letters of request go on to recite, "Whereas the injunctions, to the churchwardens and parishioners to repair the said church, of us the undersigned archdeacon of the said archdeaconry of Norwich, particularly at a visitation held on the 14th of July, 1840, not having been complied with, we, the said archdeacon, to whom belongs the visitation of the said church and the special duty of enforcing, if necessary, the repairs of the same," as if there were something in the jurisdiction of the archdeacon of this diocese, not belonging to other archdeacons. "Rightly and duly proceeding in the premises, in the month of April, 1841, caused the said churchwardens and certain principal parishioners of the said parish, wit, John Bateman"—this is the party against whom these proceedings are intended to be taken, and then follow the names of six other parishioners, against whom I understand similar citations are also to be sued out by letters of request; so that there will be seven or eight suits [204] going on at the same time—"to be cited to appear before us at a given time and place, to wit, in our Archdeaconry Court, situate or held in the parish church of St. Michael, in the city of Norwich"—thereby shewing that there is an Archdeaconry Court in Norwich—"then and there to answer as to the state of the said parish church in respect of its want of repairs, and to shew cause, if they had or knew any, why a monition should not issue against them, monishing them to do effectually all such repairs to the said church as it stood in need of:" so that the archdeacon at the visitation issues an injunction on the churchwardens and parishioners to repair the church, that injunction is not complied with, and then he directs a citation to issue, calling on them to shew cause why a monition for such purpose should not issue against them. The letters go on to recite, "That at the return of the citation the churchwardens and principal inhabitants of the parish, the said John Bateman being one of them, personally appeared to such citation, and, no cause having been shewn to the contrary, a monition was decreed, and afterwards issued, and was duly served, admonishing the said several parties specially, and all other the parishioners in general to do the necessary repairs to their said parish church, and further monishing the churchwardens to call a vestry meeting of the parishioners of the said parish, in order to the making of a sufficient levy, rate, or assessment for providing the necessary funds; and, lastly, monishing the said principal parishioners, and among them the said John Bateman specially, to be present at or to attend the vestry so to be holden, and [205] then and there to make, or join or concur in the making of such sufficient levy, rate, or assessment for the purposes aforesaid. That a vestry meeting was called, and duly holden on the 24th day of June, 1841, and was attended by divers of the parishioners of the parish, and among them by the said John Bateman, when and where a levy, rate, or assessment of one shilling and three-pence in the pound was proposed, which would have

raised a sum barely sufficient to defray the requisite costs or charges of doing such repairs to the said parish church, as it was then admitted on all hands to stand in need of. That, notwithstanding the premises, the said John Bateman, with other parishioners of the said parish, then and there assembled, without any just cause or pretence for so doing, but wilfully and contumaciously obstructed or refused to make or join or concur in the making of the rate so proposed, by reason whereof the necessary repairs neither were nor could be done to the said parish church, pursuant to the tenor of the monition aforesaid, and by further consequence of which the said parish church still remains and is unrepaired, and going to decay ;" and then letters of request are prayed to this Court in the form I have before adverted to.

It is impossible not to see that a serious question may arise ; it may be the duty of the Court to proceed against persons contumaciously refusing to repair their parish church, and the Court can have no disinclination to do so ; what the Court is now asked to do and to enforce is as little liable to objection as possible ; the Court has no doubt as to accepting the letters of request ; the only question [206] is, Can the Court properly receive them in their present form ?

The main point is one of great importance as to the jurisdiction of the Court ; in the case of *Butler v. Dolben* (2 Lee, see pp. 265-312) a motion of a somewhat similar nature was directed by Sir G. Lee to be made in open Court ; it was a question of presenting joint letters of request ; certainly not a very usual course, but still cases have occurred where they have been accepted and acted upon, however they were all cases relating to marriages. *Sullivan v. Sullivan* (2 Add. 299) was a marriage case, as was also *Hodges v. Hodges*. The case cited from Sir G. Lee's notes was a marriage case ; in that case, the first of the kind of which I am aware, a woman named Dolben had contracted a marriage with a ward of the Court of Chancery ; after the marriage the parties had gone abroad, and subsequently returned to this country. The Lord Chancellor was applied to for the purpose of proceedings being had against her for having married a ward of Chancery without the proper consent of that Court ; the father of the minor was anxious to proceed against the woman, to obtain a separation by reason of her adultery. Joint letters of request were sent to the Court of Arches by the commissary of Bucks and the chancellor of the diocese of London, there being a doubt as to which of the two jurisdictions, under the statute of citations, she was subject. The personal residence of the woman was in the Fleet, her last known place of residence was in Bucks. The question in this Court was whether her residence in the Fleet, [207] being by compulsion, did constitute a residence in the parish in which the Fleet prison is situate, that is—whether under the statute of citations she should be considered as resident in that parish. If she was to be so considered, no doubt London was the proper diocese. Sir G. Lee was of opinion that he might accept the joint letters of request. An appearance was given for the lady under protest, and in a subsequent state of the proceedings it was held that although her residence in the Fleet was a compulsory residence, that was the proper jurisdiction in which she should be cited. Now in this case there were two separate and distinct jurisdictions, in no way dependent on one another ; the chancellor of London could have no jurisdiction in the diocese of Bucks, and the commissary of Bucks could have no jurisdiction in the diocese of London ; from which ever jurisdiction the party cited was subject to an appeal lay to the Court of Arches ; there could be no intermediate appeal from the one jurisdiction to the other ; there was no appeal per sultum from either jurisdiction, the appeal was to this Court instantur ; moreover, the case was a civil proceeding, here it is criminal. According to the general law, the archdeacon has not a jurisdiction entirely independent of the chancellor of the diocese, but an appeal lies from the archdeacon to the chancellor of the diocese, and from him to the Arches Court of Canterbury ; this is undoubtedly a very material distinction between the two cases, and the proceedings in this case being criminal must necessarily be very strictly conducted.

If these two jurisdictions are independent, the [208] tacking the name of the one judge in the letters of request may be mere surplusage, and I might be willing to proceed, but it does not appear on the face of these proceedings that the archdeacon of Norwich has a separate jurisdiction, therefore it is not competent for him to sign letters of request to this Court ; his is not an exempt jurisdiction. The chancellor of Norwich no doubt has jurisdiction, and if he was alone proceeding in this case I should have no doubt whatever, but it is a mere bare possibility whether the arch-

deacon has an exempt jurisdiction. Why are there joint letters of request if the one jurisdiction is liable to be controlled by the other, namely, the archdeacon by the bishop?

I do not agree with the Queen's advocate in saying that even if the archdeacon has no separate jurisdiction, and although the proceedings were commenced in his Court, there could still be joint letters of request signed by the archdeacon and the chancellor of the diocese together to this Court, passing over the intermediate right of appeal. A delegated power is given to the chancellor, and it cannot be delegated to this Court.

Unless some very special ground be shewn why this case should proceed in this form, I am unwilling that it should so proceed, because, no doubt, the object is meritorious, namely, to compel repair of this parish church; it may defeat the very object by loading the case at its outset with this preliminary objection.

It has been said that there is no other mode of proceeding; my object is not to withhold the jurisdiction of this Court, but to guard against any question [209] arising in respect to the proper form of exercising it. I have heard nothing to shew that the appellate jurisdiction from the Archdeaconry Court is not in the bishop.

The Court declined to accept the letters of request.

(See next case.)

THE OFFICE OF THE JUDGE PROMOTED BY STEWARD *against* FRANCIS. Arches Court, Feb. 8th, 1843.—A citation in a cause of office must describe sufficiently the offence charged against the party, so as to shew that it is a matter of ecclesiastical cognizance, but it need not minutely specify all the particulars of the offence which are to be charged in the articles.

[S. C. 2 Notes of Cases, 131; 7 Jur. 449.]

In consequence of the rejection of the joint letters of request (see last case), letters of request were presented from the chancellor of the diocese of Norwich in consimili casu; the party named in such letters as the person to be cited being Mr. John Francis. The letters were accepted, and in conformity with them a citation issued. Mr. Francis appeared under protest, which was extended in due form.

Burnaby and Harding in support of the protest. The citation is insufficient, it does not state an offence of ecclesiastical cognizance; neither does it sufficiently inform the party what is the nature of the charge which he is to be called on to answer, Oughton (tit. xx. De Crim.), Gail (Obs. 51st). The terms "wilfully obstructed" are too vague to support a criminal charge; is it meant that in consequence of the obstruction no vestry was holden, that one person controlled the whole vestry? There is no state-[210]-ment in the citation that the church was out of repair, that a vestry meeting was ever convened, or that any rate was ever proposed, or that Mr. Francis was assessable to such rate; if not, he was a mere intruder or trespasser. The Court is not at liberty to indulge in conjectures on these points, *Cooper v. Wickham* (2 Curt. 303-312). A proceeding by articles is not the proper course in a case of this nature, it should be by monition, followed up, in case of contumacy, by excommunication, *Veley v. Burder* (12 Ad. & Ell. 314), *Fielding v. Standen* (2 Curt. 663). "Si aliqui, qui tenentur ad reparationem, contribuere, dum possunt, nolunt, vel nimis remissi sunt, tales, monitione præmissa potest ad hujusmodi reparationem compellere" (Lyndwood, lib. 1, tit. 10, p. 53). The citation states that the party has been contumacious, but it does not state that there has been any monition to found the contumacy, and, according to this last passage, a monition must precede excommunication.

The Queen's advocate, Phillimore, and Addams contra. The mode of compelling an individual parishioner to contribute to the repairs of the church is not by excommunication, if the passage cited from Lyndwood be correct, for the words apply to the whole parish, they are in the plural, and excommunication is not inflicted on a whole body of parishioners. Individual parishioners may be proceeded against for not joining in making a rate, Fitzherbert's Reg. Bre. (tit. Cons. 44 a). In this case there is a precise averment that repairs of the church are [211] necessary; in *Cooper v. Wickham* (4 Hagg. Ecc. 77) there was no such statement; moreover, non constabat, in that case that the church had not been repaired between a vestry meeting and the issuing citation. *Greenwood v. Greaves* (2 Curt. 303) is a direct authority for this proceeding. See also *Millar v. Palmer* (1 Curt. 540).

Sir Herbert Jenner Fust. This case comes before the Court by letters of request from the chancellor of the diocese of Norwich. It is a cause of office promoted by Mr. Steward of the city of Norwich against Mr. Francis, calling upon him to answer to certain articles to be administered to him. The letters of request were accepted by the Court, and, in conformity with them, a citation issued, embodying in it the cause of the proceeding; the citation called upon the party to answer to certain articles "touching and concerning his soul's health, and the lawful correction and reformation of his manners and excesses, particularly in respect of his having wilfully and contumaciously obstructed, or at least refused to make, or join or concur in the making of, a sufficient levy, rate or assessment for providing funds in order to defray the expense of the necessary repairs of the parish church (including the chancel, which by the custom of Norwich the parishioners are bound to repair) of the said parish of St. George of Colegate, within the said city and diocese of Norwich."

To this citation an appearance was given under protest, and the protest is set forth in very few words in an act on petition; it is alleged, "That [212] Mr. Francis is wrongfully and unlawfully cited in the manner and form, and to the effect aforesaid, by reason that it doth not appear by the said citation that the said John Francis hath been guilty of or is charged with any ecclesiastical offence cognizable by this or any other Ecclesiastical Court"—"that by the said citation it does not appear that the said parish church of St. George, Colegate, ever was or now is in want of any repairs whatever; or that any vestry for making any rate to defray the expense of any such repairs had been duly or at all called or held; or that the said John Francis was ever present at any vestry in the said parish when such rate or any rate for the repair of the said church was proposed or considered; or that he ever took any part whatever in the proceedings of any such vestry:"—"that it is not competent for any person to promote the office of the Judge, or otherwise to proceed criminally against any one or more individual parishioners or inhabitants of a parish for or in respect of the acts, matters, or things charged or alleged against the said John Francis in the said citation, and that he, the said John Francis, is not bound to appear in the said cause or business to the said citation;" and it concludes with a prayer that the Judge will pronounce for the protest and dismiss Mr. Francis from this suit, and condemn the said Edward Steward in costs.

To this it is replied on behalf of the promoter that, "denying it to be true as alleged that it does not appear, and on the contrary alleging that it does appear by the citation issued, served and returned in this cause, that the said John Francis is charged with an ecclesiastical offence cognizable by [213] this Court," and denying the relevancy, and therefore declining to answer the rest of the allegations in the protest, prays that the protest be overruled and the party assigned to appear absolutely and to receive articles, and that Mr. Francis be condemned in the costs of the protest.

The question then for the Court to determine is whether in substance and effect this citation does or does not contain a charge of an offence cognizable in an Ecclesiastical Court, that offence as laid here, if an offence at all, being "for wilfully and contumaciously obstructing, or at least refusing to make, or join or concur in the making of, a sufficient levy, rate, or assessment for providing funds in order to defray the expense of the necessary repair of the parish church of St. George of Colegate."

Now the first thing to be considered is, what is the jurisdiction which the Court has in matters of repairs of the church, and church-rates. It would be a waste of time for the Court to enter into the history of church-rates, or the jurisdiction of this Court in such matters: for it has been decided on the highest authority in law, without any doubt or reservation whatever, that the cognizance of the repairs of the church, and the enforcing rates made for the repair of the church, is, if not exclusively yet peculiarly, within the province and cognizance of the Ecclesiastical Court; and it is expressly laid down, both in the Court of Queen's Bench, and in the Court of Exchequer Chamber in the *Braintree case*, and assented to on all hands without any doubt or hesitation whatever, that it is the duty of the parishioners to repair the parish church; that it is a common law obligation to be enforced in an [214] Ecclesiastical Court, and that it is a duty from which parishioners cannot relieve themselves, and which they may be compelled to discharge: how and in what manner may be matter of some doubt, but I hold the principle to be sufficiently established by what is laid down in the Court of Exchequer Chamber, by Lord Chief Justice Tindal, in delivering the judgment of that Court in the *Braintree case*. His Lordship expresses in few words all that is necessary

for this Court to consider: speaking of the statute *circumspecte agatis*, he observes, "Upon the construction of this statute no doubts have ever been raised, or can exist, but that the Spiritual Court has power and jurisdiction by ecclesiastical censures to compel the churchwardens to perform their duty in relation to the repairs of the church; to compel the parishioners to perform their duty in providing the means to make such repairs, and after a legal rate has been imposed to compel each individual to contribute the sum assessed upon him." The Chief Justice does not enter further upon that question, because it was not before the Court; assuming then the duty of the parishioners to be as stated, and, further, that it is the undoubted power of the Ecclesiastical Court by censures to compel them to perform their duty, the Court will proceed to consider the circumstances of this case.

The objection arises on the citation, not on the articles, and the first question is, what is necessary to be stated in the citation, in order to compel the party to appear before the Court? The citation must undoubtedly contain an offence of ecclesiastical cognizance; it must contain the cause of action, the nature of the charge which is imputed to the [215] party; but the question is whether it need specifically state all the circumstances under which the charge is made, or whether it is not enough to give a general description of the charge, so that the party may be sufficiently informed of what he is called upon to answer.

Now it has been much pressed in argument that the citation should contain a specification of the charge in such a manner that everything should be fully set forth which would render the party liable for the offence imputed to him—that it is not sufficient to give a general description of the charge, but that it must contain specific matter.

The authority of Oughton and of Gail has been referred to, but I would rather look to what has been the course of practice in this Court than to mere speculative writers; although I do not apprehend that, in their view, it was necessary that the citation should be so specific as to enter into all the circumstances, but that a general description of the offence should be set forth, in order that the party may know the charge he has to meet, and whether the offence is of ecclesiastical cognizance. To consider, then, the mode in which such offences are brought before the Court: in cases of brawling it is necessary, undoubtedly, to shew that the offence was committed in such a place as to bring it within the cognizance of the Ecclesiastical Court; but it is not necessary in the citation to set forth the words which constitute the crime of brawling or chiding; it is sufficient, according to the usual practice, to state that the party did, in a parish church, quarrel, chide, and brawl by words, leaving it to be set forth in the articles what were the particular circumstances under which the offence was committed, and what were the particular words used on the occasion.

In the case of a proceeding against a clergyman for irregularity in the performance of divine service, it is sufficient to call upon him to answer the articles to be administered to him for irregularity in the performance of divine worship, without setting out the time when, or the particulars in which, that irregularity consisted. In the case of *Bennett v. Bonaker* (2 Hagg. Ecc. 25) the party is cited "for neglect of, and irregularity in, the performance of divine offices as vicar of the said parish," and for another offence, "indecently and irreverently digging the ground or soil of the churchyard;" the mere general nature of the offence was set forth—not the particulars of which it consisted—so in a case now before the Court, the case of *Sanders v. Head* (ante, p. 32), in which the articles have been admitted: it was set forth that the party had in a public paper printed a letter, that letter containing various erroneous doctrines, but not setting forth the particular words of the letter.

Upon general principles, then, I am of opinion that it is not necessary that the citation should do more than give the general charge against the individual against whom the office is promoted; that it is not necessary to enter into a specification of the circumstances under which the offence was committed, but to leave that to be set forth in the articles; and that it is sufficient, if it appears on the face of the citation, that it is a matter cognizable by the Ecclesiastical Court.

[217] Now I am well aware that this case has been argued with reference to the case of *Cooper v. Wickham*, and the Court has been frequently told, in the course of the argument, that if it shall overrule this protest it must overrule its own decision in that case: if, therefore, the Court is of opinion that it cannot uphold this protest,

it must endeavour to shew in what the two cases are distinguished from each other, and to reconcile its determination in both cases.

The case of *Cooper v. Wickham* is reported in the second volume of Dr. Curteis's Reports (p. 303). It will be necessary to refer to the process in that cause, in order to shew what was the particular nature of that case, and what is the difference between that and the present case. One observation made by the Court in the course of its judgment in that case has been much dwelt upon in argument on the present occasion; I refer to that passage in which the Court stated that "in a criminal proceeding the Court is not to conjecture or presume anything." "In all cases of criminal proceedings the charge should be fully stated in the citation, that, by the refusal of the rate and through the neglect or misconduct of the churchwardens, the church is not in a sufficient state of repair." I have no hesitation in saying that that is still my opinion; the charge should be fully stated, not specifically, but fully to shew that it is a case of ecclesiastical cognizance. It will be necessary to consider what was the nature of that proceeding, and for this reason—many expressions which fall from the Court in delivering its judgment in a particular case may at first sight appear to contain [218] doctrines of general application, whereas they probably are applied to the circumstances of that individual case; and, therefore, in considering the judgments delivered in this Court, it must be borne in mind that the actual expressions to be found in them have reference to the particular arguments used in the individual cases; it is necessary, therefore, to see what were the particular circumstances under which the case of *Cooper v. Wickham* was considered.

Now the tenor of the citation in that case was this—calling upon Mr. Cooper, one of the churchwardens of the parish of Shepton Mallett, to appear, &c.—"to answer to certain articles, heads, positions or interrogatories to be objected and ministered to him, touching and concerning his soul's health, and the lawful correction and reformation of his manners and excesses"—in what respect? "Touching and concerning his office of churchwarden, and more especially for having at a vestry meeting"—he was therefore specifically called upon to answer to articles touching his office of churchwarden—"duly holden on the 31st day of January last, to wit, in this present year, 1839, in the said parish, for the purpose of making a church-rate, in pursuance of notice published according to law, voted in favour of a resolution then and there duly moved and seconded, such resolution being in the words following":—"That this vestry, considering church-rates at all times bad in principle and particularly unjust in practice, and quite uncalled for at the present time, resolve to adjourn all further consideration of the subject for which it has been called till this day twelvemonth; and also [219] for having at the said meeting voted against a church-rate then and there duly moved and seconded." This is the offence which the party is called to answer in *Cooper v. Wickham*; it was in reference to that charge that the Court stated that the proper way to meet that charge would be by appearing under protest, for that in point of fact it contained nothing at all involving an ecclesiastical offence. Does the charge import that there was any necessity for the repairs of the church; that by the resolutions having been so voted the church was not repaired, or that Cooper had been guilty of any neglect of duty in the character of churchwarden, in which alone he had been cited? Does it appear thereby that the rate was necessary to be made for the repair of the church? Does it appear on the citation, or was the Court to infer, that the rate was proper and adequate, and only so to the purpose for which it was asked? Nothing of the kind appears. Cooper simply voted for the resolution set forth; he voted against a rate duly moved and seconded. The rate might have been duly moved and seconded, and yet might, for all that appears on the face of the citation, have been altogether excessive. There was therefore nothing on the face of the citation to call the party to answer in his character of churchwarden. The office of churchwarden called upon him undoubtedly to see the church kept in repair, and to take the necessary steps to procure the adequate means of defraying it; but, upon the face of the citation, there was nothing to shew the necessity of the rate—that it was a rate adequate and proper for the purpose. Therefore the Court expressed itself to be of opinion that if the case [220] had come before it in the first instance, or if an appearance had been given under protest in the Court below, and that protest had been overruled, it would have reversed that decision and dismissed the party. But the case came before the Court in a different shape, after the articles had been admitted, and it was in reference both

to the citation and to the articles themselves that the Court expressed itself in words alluded to, as to the necessity of setting forth the charge in the citation, in order that the party might know the charges imputed to him, and might have an opportunity of judging whether they described an offence of ecclesiastical cognizance.

Before I proceed to the articles exhibited in the cause of *Cooper v. Wickham*, I will state that a meeting of the vestry of the parish of Shepton Mallett had been called in the month of January, 1839, and this vote and these resolutions had passed at that vestry. The citation was not taken out till the 6th of April, and the articles were not given in till June in that year; therefore, as this was a proceeding against Mr. Cooper for the neglect of his office of churchwarden, the Court thought that in the interval of time that had taken place between the meeting of the vestry and the giving in of the articles, or the return of the citation, the church might have been put in a state of repair. If that were so, and this being a proceeding against him in the office of churchwarden, there was no blame to be imputed to him, and these proceedings in April and June, one by a citation and the other by articles, were not necessary.

Now the first of the articles contains this aver-[221]-ment, "That previous to and in the month of January last past, the roof of the nave of the parish church of Shepton Mallett, in the county of Somerset and diocese of Bath and Wells, was in so dilapidated a state that the rain came through the same into the body of the said church to the serious detriment and injury of the fabric, and also of a valuable organ in the said church, and to the great inconvenience of the officiating minister in the said parish church, who, on one occasion, on account of the rain so coming therein, was prevented from reading prayers in the reading desk; and of the congregation of parishioners and others from time to time assembled in the said parish church." There was an averment that this church was in a dilapidated state in the month of January, 1839; and therefore that it required to be repaired there could be no doubt. This was an article on which the Court observed that, standing by itself, it would be proper, because it does aver the necessity of repairs arising from the church being in a state of dilapidation, and it was necessary that a remedy for that inconvenience should be found. But the articles went on in the second place to allege, "That in consequence of the premises mentioned in the next preceding article, a vestry meeting agreeably to a notice in writing, signed in duplicate by Charles Wainwright, and by you, the said Job Cooper, then and now the churchwardens of and for the said parish of Shepton Mallett, was duly holden on the 31st of January last past, to wit, in the present year 1839, in the vestry room of the said parish church, for the purpose of making a church-rate towards effecting the repairs of the said church, [222] and for expenses as necessary for the due administration of divine service and incident to the office of churchwarden. That the said meeting having adjourned to the school-room, belonging to the national school in the said parish, certain estimates were laid before the said meeting by the said Charles Wainwright"—that is, by the brother churchwarden of Mr. Cooper. "That at that meeting a resolution was then and there moved and seconded respectively by two dissenting ministers; and that notwithstanding the premises you, the said Job Cooper, then and there, in violation of the laws, statutes, canons, and constitutions ecclesiastical of this realm, and of your duty and obligations as churchwarden, and what is fitting and right to be observed in respect thereof"—that is, in the office of churchwarden—"voted in favour of the aforesaid resolution, and then and there also voted against a church-rate of two-pence in the pound, then and there duly moved and seconded (as an amendment to such resolution respectively) by the said Charles Wainwright, and by Alfred Gale, a parishioner and inhabitant of the said parish." So that the offence charged in the articles is, first, that the parish church was out of repair, and therefore requires to be repaired; consequently it was necessary that a rate should be made for that purpose; that a meeting was called at which the resolution, in the terms stated, was moved and seconded by two dissenting ministers, and Mr. Cooper, the party proceeded against, voted for that resolution, that being in violation of the duty, the obligation, that rested upon him as churchwarden; and also that he voted against a rate of two-pence [223] in the pound. That is the offence charged in the articles—in the first place, respecting the resolution, I did express myself in that case as being of opinion that it charged nothing against him in violation of his duty as churchwarden: dissenters are liable to be elected churchwardens, they are compellable to serve the office of churchwarden, by themselves or by others substituted for them, and I do not know that if a dissenter entertains a conscientious belief that church-rates are bad in

principle, and unjust in practice, that he is punishable for expressing that opinion, although he has called a vestry for the purpose of taking into consideration the making of that rate. I do not know that it is the duty of a churchwarden to vote for a rate duly made and seconded; I do not know that it is an offence in a churchwarden to vote against a rate of two-pence in the pound, unless it be shewn that it was adequate and only adequate, and not excessive, beyond the purpose for which it was intended to be applied.

The other articles were merely formal. Mr. Cooper was, it seems, the scrutineer appointed to ascertain the votes on the occasion, and he it was who declared the amendment was carried. Annexed to these articles was a copy of the notice for the vestry meeting, signed by both churchwardens, Mr. Cooper being one. Another exhibit is headed, "The items to defray the expenses of which a church-rate was applied for;" the whole amounted to 181l. 5s. 0d. This is stated to be the estimate produced at the meeting by Mr. Wainwright, who was the other churchwarden. The charge against Mr. Cooper was, that he voted against the rate of [224] two-pence in the pound; now the sum which a rate of two-pence in the pound would have raised was not stated, neither was the rental of the parish stated. The rate of two-pence might have exceeded the 181l., or might have fallen short, therefore Mr. Cooper might be very well justified in voting against the rate, though it was proposed by his brother churchwarden; for it might be an excessive rate, with reference to the estimate. Such was the case of *Cooper v. Wickham*, in which the Court expressed itself in the manner observed upon in argument; the accuracy of Dr. Curteis's report I have no reason to impugn; I have no doubt that these were the expressions made use of by the Court in delivering judgment; and I am not inclined to depart from anything there said, with respect to the necessity of setting forth fully the charge against the party; as I have before said, it is for the purpose of giving the party notice of what he is called on to answer, and that the offence is of ecclesiastical cognizance. In that case the Court was of opinion that the charge was not sufficiently set forth, nor sufficient to shew that Mr. Cooper, as churchwarden, in which character he was called to answer, had been guilty of neglect of duty upon the grounds there stated, namely, by voting against a church-rate, as being bad in principle, and voting against the particular rate of two-pence in the pound.

In regard to the necessity of setting forth fully the charge which the party is called to answer, two other cases were adverted to, one before the Court of Delegates—the case of *Greenwood and [225] Spedding v. Greaves* (4 Hagg. Ecc. 77), in which the proceeding was against certain individuals, all included in one citation; it was articulated against them that they had refused to make a church-rate; the case came before the Court of Delegates, from the Court at York, and the Court of Delegates was of opinion that there was no charge against the parties of a criminal offence, of which they could take cognizance, because it did not appear that there had been any withholding of a church-rate, clearly sufficient for the purpose intended; but if it had been shewn that there was a wilful and contumacious refusal, there might have been some ground for the proceeding, but as, according to the statement of the case, there was no such ground for proceeding shewn, the articles were rejected.

Then in the case of *Millar and Simes v. Palmer and Killby* (1 Curt. 540) there was a proceeding against parties in their office of churchwarden, in which the offence was undoubtedly fully set forth; that in their office they had neglected to repair the church, and also had neglected to obey the monition of the archdeacon, who had given them directions to repair. That case shews the manner in which the Court intended its observations in *Cooper v. Wickham*, that the neglect of duty in a churchwarden must be the neglect to repair, or a neglect to obey a monition, emanating from competent authority.

But what is set forth here? Is this case distinguishable from the case of *Cooper v. Wickham*, and the others to which I have adverted? [226] In *Cooper v. Wickham* the decision of the Court was, that the citation did not set forth that the articles did not contain a charge that the party was called upon to answer in the character of churchwarden; and it did not appear that there was any want of repair at the time when the citation issued, or that he had been neglectful of his duty in not pressing that repair. In the present case the cause of offence is this, for "wilfully and contumaciously obstructing, or at least refusing to make, or join or concur in the making of, a sufficient levy, rate, or assessment, for providing funds in order to defray the expense of the

necessary repairs of the parish church"—what is the ecclesiastical offence contained in these words? in the first place, "wilfully and contumaciously obstructing the making of a church-rate," no such words as these were in, nor was anything of the kind, or of similar import, contained in the citation in *Cooper v. Wickham*; it was simply an averment that he had voted for such and such a resolution—one a resolution against church-rates generally, the other against the particular rate, which was not shewn to be necessary for the repairs of the church; here it is fully stated that it is for wilfully and contumaciously obstructing the making of any church-rate. That is the first charge; it is said that a person cannot be contumacious unless there has been a monition issued against him, which has been disobeyed; and perhaps that is correctly argued—what then? The words "contumaciously obstructing" import that there has been a monition, for if contumacy consists in disobeying a legal order, it follows, from [227] the use of the word "contumacy," that there has been such an order.

I have also been told that a party should be excommunicated, that being the extent to which the Court can proceed, in order to compel a parishioner to provide the necessary means for repairing the church, and that this cannot be done, sine monitione; be it so; if no monition has issued, then the Court will not proceed (if that is the law) to excommunicate the party. But it is possible that a monition may have issued, and then the party may be liable to be excommunicated; or if there has been no preceding monition, then the party may have a monition issued against him in the course of these proceedings. But the question is whether contumaciously obstructing the making of a rate, supposing that rate to be necessary for the repair of the church, is an ecclesiastical offence, for which the party is liable to be punished by excommunication, or by monition and excommunication.

The charge goes on, "for having wilfully and contumaciously obstructed;" if that had been the specific offence, I should have thought that the charge had not been sufficiently made out; but there is a second count, for "contumaciously refusing to make, or join or concur in the making of, a sufficient levy, rate, or assessment, for providing funds in order to defray the expense of the necessary repairs;" in either of these cases, accordingly as the proofs may turn out, the party will be guilty of one or other of the offences laid to his charge.

Again, this case is materially distinguished from [228] *Cooper v. Wickham*, "That he wilfully and contumaciously obstructed, or at least refused to make, or join or concur in the making of, a sufficient levy," a sufficient rate, so that it was to concur in making "a sufficient levy, rate or assessment for providing funds in order to defray the expense of the necessary repairs of the parish church," so that the citation in fact contained this averment, that the levy proposed was a sufficient levy, at least not more than a sufficient rate; and it is to make a sufficient levy that he is charged, to defray the necessary repairs. There is then an averment that the repairs were necessary for which the rate was to be applied. It is not a proceeding against the party merely, as was suggested, for voting against a rate when proposed, but against a sufficient levy to defray the necessary repairs.

Every thing is contained in this averment to constitute an offence, "contumaciously obstructing, or refusing to join or concur in making a rate which was necessary to be made for the repairs of the church," so that the repairs were necessary, and if that is shewn, then the rate for providing these expenses was necessary.

I am, therefore, of opinion that this citation does contain what is the charge imputed against the party, and, as I have before stated, it seems to be admitted on all hands that the Ecclesiastical Court may proceed by ecclesiastical censures to compel the parishioners to provide for the repairs of the church; it follows, as a matter of course, that the proceeding must be, as was stated in the course of the argument, against individual parishioners: for what is the argument in that case with which we are [229] all so familiar—the *Braintree case*? The inhabitants of Braintree state there shall be no rate, and there can be no rate unless it be made by a majority of the parishioners; that has been held to a certain extent; whether that is correctly the position is a question hereafter to be determined by the Court, and is now under its consideration; but it is said there can be no rate, except the majority of the parishioners concur in it. The inhabitants of the parish of St. George of Colegate, in the city of Norwich, say, "You shall not proceed against individuals who do not concur in making a rate." So that ecclesiastical censures, which are proposed, cannot be resorted to by the Ecclesiastical Court, in order to compel parishioners to perform

their duty. The Lord Chief Justice Tindal, in delivering the judgment in the Exchequer Chamber, has said, "There is undoubtedly power in the Ecclesiastical Court to compel the making a rate by ecclesiastical censures." It cannot be that the proceedings must be against the whole parish; that must, at all times, be a very inconvenient mode of proceeding, because it does include in the same punishment the innocent and the guilty. But nobody seems to doubt that the process of excommunication may be proceeded with, whatever may be the consequences, and enforced against parishioners not as a body, not universally, but as against individuals who do refuse to make a rate, who obstruct, contumaciously obstruct, making the rate; it is the only way in which ecclesiastical censures can be applied, by proceeding against individuals. In the case in the Court of Delegates (*Greenwood v. Greaves*) ten persons were proceeded against in one citation. In the present [230] case, as we know, there are proceedings against other individuals. The promoter of the suit cannot include them all in one citation; it would be contrary to all practice and all rule to do so. There is, therefore, the necessity for proceeding against them individually, provided the power exists of proceeding by ecclesiastical censures to compel the parishioners to perform their duty in providing means for repairing their church.

Under these circumstances, I am of opinion that I must overrule the protest, and that I may safely overrule the protest without at all deviating from, or in the least degree diminishing the effect of, the observations which the Court made in *Cooper v. Wickham*; for I think there is a clear distinction in the two cases. In the one there is no averment of necessity of repairs—the party is proceeded against in the office of churchwarden—it was a mere abstract proposition, that the churchwarden had voted for a certain resolution against a certain rate proposed, it not being known that it was a necessary rate for the purpose to which it was to be applied. Here it is stated in this citation that the party "wilfully and contumaciously obstructed, or at least refused to make, or join or concur in the making of, a sufficient levy, rate or assessment for providing funds in order to defray the expense of the necessary repairs of the parish church;" containing therefore, in itself, a statement that the church was in need of repair, and that the rate was sufficient for that purpose.

I, therefore, overrule the protest, and assign the party to appear absolutely. I reserve the question of costs until the hearing of the cause.

[231] MALTASS against MALTASS. Prerogative Court, Dec. 13th, 1842.—By the law of Turkey no subject of that country can make a will. By treaty between Great Britain and the Ottoman Empire an English subject domiciled in Turkey may make a will. J. M. was the son of an Englishman who had died domiciled at Smyrna. J. M. himself had never been in England, except for the space of six years, and then only for the purpose of education; he died at Smyrna, having made a will in the form of an English will, but not executed and attested according to the 1st Vict. c. 26.—Probate of such paper refused.

[S. C. 2 Notes of Cases, 23; 1 Roberts 67; 7 Jur. 135. Applied, *Croker v. Marquis of Hertford*, 1844, 4 Moore, P. C. 361; *In re Tootal's Trusts*, 1883, 23 Ch. D. 534. Referred to, *M'Mullen v. Wadsworth*, 1889, 14 A. C. 634.]

This was a business of proving in solemn form of law an attested copy of the last will and testament of John Maltass, late of Smyrna, promoted by the executors named therein, acting by their attorney, against the widow of the deceased.

The allegation given in the cause pleaded that the father of the deceased was born in this country, that about eighty years since he sailed for the city of Smyrna in the Ottoman Empire. That shortly after his arrival at that place he entered a house of business trading under the firm of Lee and Co., and became a partner in that house, and continued therein, and to reside at Smyrna, until his death. That during his residence at Smyrna he married and had issue several children, and, among others, the deceased in this cause. That the deceased, at the age of six years, was sent to this country for the purpose of being educated, and remained here until the age of fourteen, when he returned to Smyrna, became a clerk in the house of Lee and Co., and afterwards entered into business on his own account as a British merchant. That he established a firm of J. and W. Maltass, and ever afterwards resided at Smyrna until his death, which took place in the year 1842. That the de-[232]-ceased was, at the time of his death, possessed of the sum of 40,000l. in the English funds.

The second article pleaded the will of the deceased, dated the 22nd of October, 1841, and subscribed by the testator, but not in the presence of any witness.

The third pleaded the authenticity of the copy of the said will, which had been brought into the registry, and that the original will remained at Smyrna.

The fourth pleaded that by the laws in force throughout the Ottoman Empire it is declared that it is not competent for a Turkish subject to make any disposition of his property by will, but that the same shall be divided among his relations according to a fixed standard. That by articles of peace between Great Britain and the Ottoman Empire, finally confirmed by the treaty of peace concluded at the Dardanelles (1809), it is (26 sect.) agreed, "That in case any Englishman, or other person subject to that nation, or navigating under its flag, shall happen to die in our sacred dominions, our fiscal and other officers shall not, on pretence of its not being known to whom the property belongs, interpose any opposition or violence by taking or seizing the effects that may be found at his death, but they shall be delivered up to such Englishman, whoever he may be, to whom the deceased may have left them by his will. And should he have died intestate, then the property shall be delivered up to the English consul, or his representative, who may be there present: and in case there be no consul [233] or consular representative, they shall be sequestered by the judge, in order to his delivering up the whole thereof whenever any ship shall be sent by the ambassador to receive the same."

The admission of this allegation was opposed by Phillimore and Jenner.

The Queen's advocate and R. Phillimore in support of the allegation argued that the deceased was, by birth and education, the subject of this country, although, for the purposes of trade, domiciled in another country. That the present Will Act did not apply to the will of an English subject made under the circumstances of this case.

Stanley v. Bernes (3 Hagg. Ecc. 373) was referred to.

Judgment—*Sir Herbert Jenner Fust*. The will now propounded is entirely in the handwriting of the party; it is signed by him, but it is not witnessed; it is dated after the operation of the act of the 1st Vict. c. 26; if the will were the will of a domiciled Englishman it is clearly invalid. The question is whether, under the circumstances of this case, such a will can be established? The deceased was the son of a person born in this country; about the year 1762 his father sailed for Smyrna, and there entered into a house of business, and he continued to reside and carry on business there until his death. He had several children born in that city, and amongst them the deceased in this cause, who, when he had attained [234] the age of six years, was sent to this country for his education; he remained in this country about eight years, and then returned to Smyrna, where he established a house of business, and continued to reside there until his death in 1842. The fourth article of the allegation pleads, "That by the laws of the Turkish or Ottoman Empire it is not competent to a Turkish subject to make any will of his property, but that the same is by law to be divided among his relations according to a fixed standard; that by a treaty between Great Britain and Turkey it was agreed in the following terms:—'That in case any Englishman shall happen to die there, his effects should be delivered up to such person to whom the deceased should have left them, or in case he should die intestate, to the English consul, or otherwise to some person appointed by the English ambassador.'" Now when I read this article it at once struck me that if the deceased was domiciled in Turkey, he could make no will at all; if he was a British subject, he must make a will according to the testamentary law of England. I have been told in argument, that he was neither a Turkish nor a British subject in reference to the law, either of Turkey or of England, but that it is a case where a party by the *jus gentium* may make such a will. If the deceased is an Englishman he may, although domiciled in Turkey, make an English will under this treaty, and, if so, must not this will be considered as the will of an English subject, and then is it not invalid? If he is a Turkish subject, I have it pleaded, indeed recognised by the treaty, that no Turkish subject can make a will. I may, perhaps, here mention that if I am asked to grant [235] administration to the deceased, I must have it ascertained who is, by the law of Turkey, entitled to the administration. I reject the allegation for probate of this paper.

GRAVES against GRAVES. Consistory Court of London, Dec. 15th, 1842.—In a cause of separation by reason of adultery it is not competent for a husband in an initiatory libel to plead antenuptial incontinence of the wife; marriage is a condonation of such error: but such fact may be pleaded in reply to a defensive charge by the wife of neglect or connivance.—On the part of the wife her seduction by the husband cannot be pleaded; it involves an issue which this Court cannot try: but she may plead the fact of her cohabitation, when single, with the husband, in order to shew a want of proper vigilance on his part over her subsequent moral conduct.—It is competent to a wife to plead that the husband introduced her to an improper acquaintance; more especially when the husband is counter-charged with having committed adultery with that party.—Minute specification in pleading acts of adultery depends on the opportunities afforded for the commission of the offence; if they have been frequent (e.g. during a period of four months) it is not necessary to allege particular dates and times. Secus, if such opportunities have been of rare occurrence.

This was a suit commenced by Lord Graves against Louise Lady Graves, his wife, for a separation by reason of her adultery; a libel on the part of Lord Graves had been admitted.

An allegation was now offered on behalf of Lady Graves, pleading—

First article. That the party proponent, formerly Louise Malline, spinster, was many years ago in the service of Sophia Lady Graves (wife of the said Lord Graves), since deceased, and whilst in such service she was seduced by the said Lord Graves, and with whom she, at his urgent and repeated solicitations, for some time lived and co-[236]-habited, and during such their cohabitation she gave birth to a child (being the child mentioned in the certificate annexed to the libel admitted in this cause on behalf of Lord Graves).

Second article. That whilst the party proponent and Lord Graves lived and cohabited together Lord Graves became acquainted with Jean Emile D——, a musician at the Academy Royal de Musique, and also with Eliza V——, an actress on the French stage, but then living with, or as the mistress of, Mr. ——, and introduced both such persons to the party proponent, to whom they had previously been perfect strangers.

The sixteenth. That some time prior to his separation from the party proponent, but when in particular is unknown, Lord Graves formed an adulterous intercourse with Eliza V——. That Eliza V—— having called to see the party proponent, who had been then recently confined one day in November, 1840. [The commission of an act of adultery was then charged.]

The seventeenth article. That Lord Graves, soon after his separation from the party proponent, went to England, but, after a short stay there, returned to Paris, and there, as a guest or otherwise, took up his residence in a suite of apartments occupied by Mr. —— and Eliza V.; that from such time until on or about the 1st of April, 1841 (except for a short interval, during which he again went to England), Lord Graves continued to be resident at the said apartments, and during the whole of such time he and Eliza V—— habitually committed adultery.

[237] The eighteenth article. That one day especially, in or about the months of February or March, 1841. [The article went on to charge that the parties were actually seen in the commission of an act of adultery.]

The admission of this allegation was opposed by Phillimore and R. Phillimore. They argued that antenuptial incontinence could not be pleaded; that the charges of adultery were so vague and indefinite as to debar Lord Graves from counter-pleading them; that charges were made against the character of the parties not before the Court.

Addams and Robertson argued in support of the allegation.

Judgment—Dr. Lushington. In this case a libel has been admitted on the part of Lord Graves, charging Lady Graves with adultery, committed with a person named D——. An allegation is now offered on the part of Lady Graves responsive to the libel; and the allegation contains a denial of the offence imputed to her, and prefers against Lord Graves a charge of adultery, committed with a person named Madame V. I do not think that Lady Graves directly charges Lord Graves with collusion in her own adultery, but the allegation goes rather to state circumstances explanatory of her conduct, with respect to the imputations arising out of the intimacy with D.

The objections to the admissibility of his allega-[238]-tion go only to certain parts of it: the first article pleads—"That the party proponent was in the service of Lady Graves (the first wife of Lord Graves), and whilst in such service was seduced by Lord Graves, and lived and cohabited with him, and during that time gave birth to a child."

In enforcing the objections to this article, reference has been made to the doctrine of this Court as to antenuptial incontinence; a doctrine which, perhaps, has never been thoroughly considered in all the different points of view in which, according to varied circumstances, it may arise. I take it to be the rule that the party commencing a suit of this nature—be it husband or be it wife—has no right to plead in the original libel "that the other party was in the habit of leading a lewd and licentious life previous to the marriage;" by entering into the tie of marriage the party has given a final pardon to all antenuptial errors; but it is by no means clear that this doctrine cannot be extended beyond the limit, that it may not be competent to the party commencing the suit, in the event of peculiar circumstances arising in the course of the suit, to plead and prove antenuptial incontinence. I well remember a case which occurred before Sir J. Nicholl in which antenuptial incontinence was pleaded in the first instance, and was directed to be struck out, but Sir J. Nicholl said, "If hereafter the wife should by way of defence think fit to allege or prefer a charge of neglect or collusion, the husband may introduce the antenuptial incontinence by way of reply to the defence;" the name of the [239] case to which I allude is *John v. John* (unreported). In the present case, where a wife is defending herself against a charge of adultery, and where consequently she may plead in defence direct collusion or counter-adultery, it appears to me that circumstances which occurred before the marriage are not so obliterated by the marriage as to prevent a wife availing herself of them to support her defence, although she could not have done so if to substantiate an original charge. If the case rested here I should be of this opinion as to the general admissibility of these charges, but it appears to me that this case is taken out of the general rule by reason of one of the exhibits annexed to the original libel, by which the fact of antenuptial incontinence is proved by Lord Graves himself; the exhibit proves that he had cohabited with Lady Graves before their marriage. If, by the law of France, it is necessary to insert in the marriage certificate the fact of the birth of this child before the marriage, Lord Graves, being under the necessity of producing the certificate, must take the consequences arising out of it.

I have some difficulty as to that part of the article which pleads in express terms "that the party when a spinster was seduced by Lord Graves," because in such case I may have to try a question of seduction, and that, too, after a lapse of ten years; there is a further difficulty, if the party is to be allowed to establish this charge, the husband must have leave to counter-plead it. I think it will be better to reform the article by stating it thus, "that [240] whilst in such service, to wit, in the year 1833, she cohabited with Lord Graves, and continued to do so during the life of Lady Graves;" this will prevent the fact of seduction being given in evidence. I felt great difficulty in dealing with this point in the case of *Dillon v. Dillon* (ante, p. 90), a case much distinguished from this in these respects—the time which had elapsed between the marriage and the suit was much less (about fourteen months), and the fact came out on the cross-examination of Dr. Dillon's own witness, who proved that Dr. Dillon had himself admitted the fact to him, the witness.

The objection to the second article is this, that it pleads Madame V—— to be the kept mistress of _____, and it is said this may introduce a question of difficulty, as the statement may be counter-pleaded that she is, in fact, the wife of _____; but as the gist of all the remaining articles goes to prove cohabitation between this lady and _____, it is of no importance, if she be his wife, at what time she became or began to be called so. The only question is whether an article of this nature is to be admitted. In *Harris v. Harris* (2 Hagg. Ecc. 376) I admitted such an averment; I well remember that case created much anxiety in my mind at the time, but I have upon consideration felt satisfied that I did rightly in admitting it; it would go to sap the foundation of all morality if a husband might introduce to his wife persons of bad character, and when she followed the example [241] held up to her, he be permitted to come to this Court and ask for a separation. In the case of *Harris v. Harris* I thought that the wife should have liberty to plead such fact; how then can I refuse to admit in this case an averment—"That Lord Graves introduced

his wife to a party, and that she continued on intimate terms with that party who was then living in the ostensible character of the mistress of ?" The party may plead this for two purposes—first, with reference to her own defence, and next with reference to this party being the person with whom Lord Graves is counter-charged with having committed adultery.

I now come to the particular articles to which an objection has been raised on account of their being too vague and indefinite: objections of this nature depend on the circumstances of each particular case; in some cases the Court may demand a very accurate and specific description of facts, in others it may not do so. The sixteenth article pleads that a particular occurrence took place shortly after the confinement of Lady Graves, and the precise time of that confinement is in plea. The seventeenth article is objected to, as alleging habitual criminal intercourse, without particular specification of times and dates. Now I do not mean to say that this point is not attended with some difficulty, but yet, I apprehend, I should not be justified in rejecting this article; if you plead a long duration of time (in this case it is four months) during which a constant and habitual adulterous intercourse took place, that is sufficient without pleading specific facts; if you plead circumstances [242] shewing that the intercourse was limited, or of short duration, then you must plead the facts specifically: moreover, it must be remembered that if a witness is produced on general articles, he may be cross-examined as to particular times and places, and it is allowable to a party to counter-plead even after publication of the evidence, if the facts coming out on the evidence were so pleaded that he was not able to counter-plead them before.

With regard to the eighteenth article, I think it should be stated how the parties were seen in the situation described.

Addams. I have no objection to insert this.

Curia. Be it so—with these alterations I admit the allegation.

[This case was carried to the Arches by appeal. On the 17th of February, 1843, the Dean of the Arches affirmed the decision of the Court below and remitted the cause.]

[243] MOORE *against* KING. Prerogative Court, Dec. 17th, 1842.—A testator signed a codicil in the presence of a witness (his sister), who, at his desire, attested and subscribed it. On a subsequent day, when his sister and another person were present, he desired her to bring him the codicil, and requested the other person present to attest and subscribe it, saying, in the presence of both parties, and pointing to his signature, "This is a codicil signed by myself and by my sister as you see; you will oblige me, if you will add your signature, two witnesses being necessary." That party then subscribed in the presence of the testator and of his sister, the latter, who was standing by him, pointing to her signature, and saying, "There is my signature, you had better place yours underneath;" she did not however re-subscribe. Held that the instrument was not sufficiently attested, under 1 Vict. c. 26, s. 9.

[S. C. 2 Notes of Cases, 45; 7 Jur. 205. Followed, *Wyatt v. Berry*, [1893] P. 5.]

Robert King died on the 16th of August, 1842. By his will, dated the 22nd of March, 1841, he appointed C. H. Moore and his brother, E. R. King, to be his executors, and named his said brother his residuary legatee.

On the 8th of August, 1842, the deceased, being confined to his bed by illness, requested his sister, Mrs. Coape, to bring him materials for writing, and upon her doing so, he wrote a codicil (A) in the presence of Mrs. Coape, and she, at his request, subscribed her name thereto in his presence; no other witness was present at the time.

On the 8th of August, 1842, Sir D. Davies, the medical attendant of the deceased, paid him a visit, on which occasion the deceased requested Mrs. Coape to give him the paper (A), and, shewing the same to Sir D. Davies, said, "This is a codicil to my will, signed by myself and by my sister, as you will see at the bottom of the paper, you will oblige me if you will also add your signature, two witnesses being necessary." Sir D. Davies thereupon placed the paper on a chest of drawers by the bed-[244]-side of the deceased, and subscribed his name thereto, Mrs. Coape, standing beside him at the time, said, pointing to her name signed at the bottom of the paper, "There is my signature you see, you had better place yours underneath."

On the 7th of November, 1842, the Court was moved to admit this paper (A) to probate; the Court rejected the motion, and directed the paper to be propounded. An allegation was given in by the executor, Mr. Moore, propounding the paper, and was opposed by Mr. King, the other executor and residuary legatee.

R. Phillimore opposed the admission of this allegation. The question which arises, under the 9th section of the 1 Vict. c. 26, is, Can a witness subscribe by acknowledging a signature, made in the presence of the testator, but not in the presence of the testator and another witness? The Court has already put a construction on this section as regards this case; *In re Allen* (2 Curt. 331), *In re Simmonds*. (b) There is a distinction between the 9th section of the 1 Vict. c. 26, and the 5th section of the Statute of Frauds; in the former, when speaking of the subscribing by the witnesses, an additional imperative is used; the word "shall" is auxiliary to the strict requisite of the witnesses subscribing in the presence of the testator, after the testator has first signed in their joint presence. In *Risley v. Temple* (Skin. 106) the exact point was raised under the Statute of Frauds, but does not appear to have been decided. The [245] Legislature, by affirming, in the 9th section of the 1 Vict., that the testator may acknowledge his signature, have virtually negatived the right of the witnesses to acknowledge their subscriptions. He also cited Roberts on the Statute of Frauds, p. 382.

H. I. Nicholl in support of the allegation. The cases of *In re Allen* and *In re Simmonds* are materially distinguished from this case; in both those cases the testator had signed his name in the presence of one witness, and had afterwards acknowledged his signature in the presence of that witness, and of a second witness; but in both instances, when the signature was acknowledged in the presence of the two witnesses, the animus attestandi was wanting as regarded the first witness; physically speaking, the signature of the testator was acknowledged in the presence of two witnesses present at the same time, but in legal consideration the first witness was not present. *McCraw v. Gentry* (3 Camp. 232).

The common law recognises three modes of signing—first, actual signature; second, signature by mark; third, acknowledgment of a signature: the complete validity of the third mode is established by *Grayson v. Atkinson* (2 Ves. senr. 456); therefore, to have an acknowledged signature deemed equivalent to an actual signature is a right of common law. The statute law, when, in the exercise of its despotic power over the common law, it enjoins the observance of additional ceremonies in the mode of [246] executing legal instruments, always leaves to the common law the privilege of complying with such ceremonies according to its own fashion. Vin. Ab. (tit. Stat. vol. 19, p. 512, pl. 12, 13, 14). Common law rights, and amongst them would be that of performing any ceremonies with regard to the execution of legal instruments after the fashion enjoined by the common law, are never to be taken away without negative words, express or implied (2nd Instit. 200. See 3 & 4 Wm. 4, c. 106, s. 3). Statutes restrictive of the common law are to be construed strictly in favour of the common law; and it was so adjudged, as regarded the Statute of Wills (32nd Hen. 8, c. 1. 34 Hen. 8, c. 5. Co. Litt. 115 a). So the Statute of Frauds (29th Car. 2, c. 3) was held to be restrictive of the common law, *Ash v. Abdy* (3 Swans. 664). This statute imposed the necessity of every will of real estate being signed by the deviser; it was held that this ceremony might be complied with in any one of the three common law modes of signing. In *Baker v. Dening* (8 Ad. & Ell. 94) a will signed by a mark was held good. Signing by acknowledgment of the signature of the deviser was established in *Grayson v. Atkinson* (2 Ves. senr. 456). Moreover, every will was to be subscribed in the presence of the deviser, by three or more witnesses; here again it was held that the ceremony of subscribing might be fulfilled by the two first of the three common law modes of signing. *Harrison v. Harrison* (8 Ves. 185), *Addy v. Grix* (ib. 504). The third mode of signing, namely, acknowledging a subscription, could scarcely arise under the Statute [247] of Frauds, inasmuch as it was early decided that the simultaneous presence of the three witnesses was not necessary; a witness, who must be present when the deviser complied with the requisite of "signing" would, for the sake of convenience, at once subscribe in the presence of the deviser, and, having done so, he could not confer any additional validity on his subscription, by subsequently acknowledging it in the presence of the deviser and other witnesses.

(b) Ante, p. 79, and see *Flott v. Genge*, ante, p. 160.

How stands the point on principle? The common law required the party from whom an instrument moved to sign his name to it in the presence of a witness, but it did not require the attesting witness to subscribe that instrument in the presence of the party signing; if then, where the rule of the common law has required signature in the actual presence, it allows, as an equivalent, the acknowledgment of a signature, à fortiori would it be allowed in a case where signature in the actual presence would not, but for the statute, be required. The statute of 1 Vict. is to be construed by precisely the same rules as have governed the construction of the Statutes of Wills and of Frauds; if then, in principle, the latter statute allowed an acknowledged signature to be equivalent to an actual signature, is that common law right taken away by the 1 Vict.—by negative words, express or implied? By express words undoubtedly it is not; it is contended that the words which affirm “that the deviser may acknowledge his signature” impliedly negative the right of the witnesses to acknowledge their subscriptions. The statute of 1 Vict. is an amending Act; to arrive at a proper construction of its 9th section, the language of that [248] clause must be construed by reference to the already interpreted language of the corresponding section (5th) of the Statute of Frauds. One interpretation on this last section is, that the word “signed” may be satisfied, although the attesting witnesses did not see the deviser actually sign, provided it be shewn aliunde that his signature was actually existent on the face of the will at the time when the witnesses subscribed. *White v. The Trustees of the British Museum* (6 Bing. 310). The 9th section of the 1 Vict. was clearly intended to cure the mischief of this decision, which was a virtual repeal of the whole scope of the 5th section of the Statute of Frauds. The 9th section of the 1 Vict. provides, “That every will shall be signed by the testator at the foot or end thereof”—if the clause had stopped here there would have been no need of any witnesses to a will; it goes on, “And such signature shall be made by the testator in the presence of two witnesses present at the same time”—that is, such will shall be “signed” in the presence of two witnesses, the expression “such signature shall be made” being used instead of “such will shall be signed,” in order to accommodate the language to a second alternative mode of signing, namely, “or (that is, such signature) shall be acknowledged in the presence of two witnesses, &c.” The *British Museum* case having established that a will may be “signed” in the presence of the witnesses, without their actually seeing the signature of the testator, that decision must govern the first alternative mode of signing under the 9th section of the 1 Vict., but [249] the Legislature never could mean that the testator should sign, and yet the witnesses not see his actual signature, because the second alternative mode of signing is by the testator “acknowledging his signature,” in which case the actual signature must be seen. Then has the Legislature excluded the interpretation put on the word “sign” under the Statute of Frauds, by express or implied negative? Certainly not by express but by implied negative they have, namely, by the deducing, from the words of the second alternative mode of signing, a negative by implication, that a will shall not be signed according to the first alternative mode, unless the witnesses actually see the signature. Then as, according to the rules of construction, the same words are not susceptible of a double meaning, when one implied negative has been drawn from them, a second cannot be deduced, and then it follows that there is no negative by implication to take from the witnesses the common law privilege of subscribing by acknowledging their subscriptions. If the Court has any doubt on which side to employ the negative implication, the intention of the Legislature ought to determine it, 4 Instit. 330; such intention may sometimes be collected from “foreign circumstances.” Vin. Ab., vol. 19, p. 512, pl. 81. The intention of the Legislature is made clear by the Report of the Real Property Commissioners on the subject of wills. The commissioners say, “We, therefore, propose that every will should be signed by the testator in the presence of, or the signature be acknowledged to, two witnesses present at one time, and that they should subscribe their names in the presence of [250] each other, or that one having signed first should acknowledge his signature and be present when the attestation is signed by the other.”

R. Phillimore in reply. The portion of the Statute of Frauds relating to wills was not restrictive of the common law, for there could be no will of real property without the statute: the common law not allowing of wills of real estate, Co. Litt. 111 b.

Sir Herbert Jenner Fust. The question before the Court is one of great import-

ance with regard to the construction of the Will Act (1 Vict. c. 26). It turns upon the due execution of a paper bequeathing personal property, which is now regulated by the same law as regulates the disposition of real property. The duty imposed upon the Court is to find its way to a due and proper construction of the whole of the Act; not of one single isolated clause, but of the entire intention of the Legislature in passing the Act. This case must form a leading case of its class; two other cases, of a similar nature, have been brought before the Court, but only on *ex parte* motion; unfortunately they were cases where the property involved in the decision was so small as to render them unable to bear the expense of litigating the point. As far as I am able to judge, the present case differs in some respects from both those cases. In the case of *Allen* (2 Curt. 331) the paper was attested by the [251] one witness alone present on one day, the deceased having then signed it in her presence; on a subsequent day it was signed in the presence of a second witness, and attested by that witness in the presence of the first, but the first witness was not called on to attest the second execution. The Court was of opinion that the execution was not sufficient. The other case of *In re Simmonds* (ante, p. 79) was very similar. In this case, as has been observed, there is this material distinction; the deceased having in the first instance signed the paper in the presence of his sister alone, does on a subsequent day acknowledge his signature in the presence of his sister, and his sister pointed out her signature to the second witness, but I do not understand that the deceased desired her to re-attest the acknowledgment of his signature. I admit all that has been said as to the construction of statutes, and the interpretation put upon the Statute of Frauds as to signing by the testator, but is the same interpretation applicable to the subscription of the witnesses? It has been argued under the present statute, as against the admission of this allegation, that although this might have been a good subscription under the Statute of Frauds, it is not sufficient under the altered language of the present Act; on the other side, it has been said that a construction is to be put on this Act the same as if on the Statute of Frauds; but it must be remembered that the doubts expressed by Judges of Courts of law and equity on the Statute of Frauds led to the introduction of the present Act. It has been well said [252] that the 1 Vict. c. 26 is not an original Act, but an Act to amend a former law; so it is—it is an Act to amend a former law, for removing all doubts whatever existing with regard to that law, and I find in the 9th section of the new Act a considerable departure from the language of the corresponding section (5th) of the Statute of Frauds. The language of the 9th section of 1 Vict. is expressly prohibitory, “No will shall be valid unless it be in writing, and signed at the foot or end thereof”—clearly thereby intending to remove all doubts, in regard to the construction of the Statute of Frauds, as to signing by putting the testator’s name at the beginning of the will; “and such signature shall be made or acknowledged by the testator”—it had been formerly doubted, under the Statute of Frauds, whether an acknowledgment of the signature was sufficient, whether the will must not be actually signed in the presence of the witnesses; here, again, all doubt is removed by the present section. Under the Statute of Frauds it had been held that the witnesses need not be all present at the same time; the signature might be acknowledged to the three or more witnesses at different times; again, by the present Act, all doubt on that point is removed, the witnesses must be present “at the same time.” Now when I clearly find that the object of this Act is to remove every possible doubt—thereby taking away all latitude and discretion in its interpretation—and that it expressly provides that the two witnesses who are to be present at the same time shall attest and subscribe, can I hold that the one may attest and subscribe on one day, and acknowledge his or her [253] signature on a subsequent day? I am inclined to think that the Act is not complied with, unless both witnesses shall attest and subscribe after the testator’s signature shall have been made and acknowledged to them when both are actually present at the same time. If the one witness has previously subscribed the paper, and merely points out her signature when the testator acknowledges his signature in her presence, and in that of the other witness, which latter witness alone then subscribes, that I hold not sufficient; I have no explanation why the first witness did not re-subscribe. The Act says the testator may acknowledge his signature, but does not say that the witnesses may acknowledge their subscriptions. I reject the allegation.

VELEY AND JOSLIN *against* GOSLING. Consistory Court of London, May 4th, 1842, and Arches Court of Canterbury, March 25th, 1843.—The parish church of Braintree being very much out of repair, a monition issued from the Consistorial Court of London commanding the churchwardens to summon a vestry for a specified day and hour, and ordering the parishioners then to attend and make a church-rate. A vestry having been convened, a survey and estimate of the repairs and the expenses was produced, and no objection made to either. A rate having been proposed and seconded, an amendment (in effect) "That no rate be granted" was moved and seconded, and on a shew of hands was carried. The majority of the parishioners who had negatived the granting a rate having quitted the vestry, the churchwardens and the minority continued to remain in vestry, and re-proposed and carried the necessary rate. Held, by the Dean of the Arches, reversing the decision of the chancellor of London, that such rate was a legal and valid church-rate.

[S. C. 2 Notes of Cases, 278; 6 Jur. 739.]

In the year 1836 the parish church of Braintree, in the county of Essex, and in the diocese of London, being considerably out of repair, in the month of December in that year the parishioners were duly convened in vestry for the purpose of making a church-rate. A rate having been [254] moved and seconded, an amendment was moved, seconded, and carried to the following effect:—"Resolved, that it appears to this meeting that the existing law which authorizes churchwardens to convene a parish meeting for the purpose of levying a church-rate does also recognise what is called the voluntary principle, to this extent, that by it no church-rate can be laid but by the free consent of the majority of the parishioners duly assembled in vestry to determine upon it; that the parishioners of Braintree are fully prepared to vindicate this redeeming feature of the law as it now stands, by freely exercising the just rights that the law secures to them, and determining for themselves whether a church-rate shall now be laid or not; that having accordingly well considered the proposition to levy a church-rate on the present occasion, and the principles involved in that proposition, it is their matured conviction that, so long as the parochial churches are exclusively devoted to the use of the established sect, all expenses of repairs should be defrayed out of the ample revenues of that richly endowed sect, or if there be no ecclesiastical funds available for such purposes, that all expenses of repairs should be defrayed by the voluntary contributions of those who exclusively enjoy the use of the buildings; and, finally, that the consideration of a church-rate be postponed to this day twelve months." In consequence of this resolution the church remained unrepaired.

On the 22nd of June, 1837, the vicar, churchwardens, and several of the parishioners met together in the vestry-room of the parish, pursuant to a public notice previously and duly given, for the purpose of making and granting a rate for the [255] repairs of the church, and for defraying the expenses necessarily incidental to the office of churchwarden. At this meeting the vicar, the Rev. Bernard Scale, took the chair, ex officio, and the churchwardens, Messrs. Veley and Joslin, produced to the meeting a survey of the repairs needed, and an estimate of the expense thereof, which survey and estimate had been made by a party of competent skill; the estimate for the repairs amounted to 508l. 12s., in addition to which was a sum of 23l. 18s. for the expenses of executing the office of churchwardens. No objection having been made to this survey or estimate by any person present, it was proposed and seconded that a rate of 3s. in the pound should be granted and made, in order to raise the sum of 532l. 10s., whereupon an amendment was moved and seconded to the following effect:—"That as little more than six months have elapsed since the parishioners of this parish in vestry assembled resolved, by a large majority, that the consideration of the church-rate be adjourned for twelve months; the churchwardens have shewn themselves to be greatly wanting in that respect to the parishioners, as a body, which is due to them from every parochial officer, in assembling the parish again to agitate the question of church-rate before the expiration of the time to which the consideration of that question had been postponed, and that this meeting cannot but deeply regret that the clergyman of the parish should have given his sanction to a proceeding at once so frivolous and vexatious as that which now calls this numerous assembly of rate-payers from their several occupations; that, thus conveying to the vicar of the [256] parish, and to the churchwardens, the expression of their grave disapprobation for the uncalled for and improper agitation of the parish, this meeting will give to the demand of the

churchwardens no other answer than that which they have already within six months received, and which will be found on the minutes of the vestry, signed by the vicar as chairman (the resolution of December),—‘resolved, that the consideration of a church-rate be postponed to this day twelve months.’”

A shew of hands was taken upon this amendment, and the chairman declared the amendment to be carried; a poll was thereupon demanded and taken, at the final close of which, on the 6th of June, the number of voters were found to be two hundred and seven for the amendment, and seventy against it; the amendment was thereupon declared by the chairman to be carried, and the meeting was dissolved.

On the 10th of June Messrs. Veley and Joslin met together, and privately, without any previous notice to the parishioners, or summoning any vestry for the purpose, did of themselves rate and tax the inhabitants and parishioners of the parish for the necessary repairs of the church, and the other expenses incidental to the office of churchwarden, at the rate of three shillings in the pound on the annual value of the rateable lands within the parish, in order to raise the sum of 488l. 10s. 4d. in part of the estimated amount of the repairs of the parish church, and for the other incidental expenses.

Mr. Burder, an inhabitant of the parish, having been assessed to this rate in the sum of 37l. 18s. 2d., and having refused to pay the same, was duly cited [257] to appear in the Consistorial Court of London in a cause of subtraction of church-rate. [See the proceedings, ante, vol. 1, p. 372.]

The Judge of that Court having, on the authority of a case of *Gaudern v. Selby* (1 Curt. 394), admitted a libel in the cause, a writ of prohibition was moved for in the Court of Queen’s Bench, and on the 1st of May, 1840, Lord Chief Justice Denman delivered the opinion of that Court, pronouncing the rate in question to be illegal, and affirming the jurisdiction of that Court to prohibit in the matter (12 Ad. & Ell. 233). From this decision a writ of error was brought in the Exchequer Chamber, and, after the case had been very fully argued, Lord Chief Justice Tindal, on the 8th of February, 1841, delivered the unanimous opinion of the Judges who sat in error, whereby they affirmed the decision of the Court below (12 Ad. & Ell. 265).

The judgment of the Exchequer Chamber having contained many expressions affirming the common law obligation of the parishioners to repair their churches, and the church of Braintree becoming more and more dilapidated, in consequence of no repairs being done to it, and Messrs. Veley and Joslin having, in the year 1841, again been elected the churchwardens of this parish, the following measures, which are fully stated in the libel given in by the churchwardens, in the present suit of subtraction of church-rate, promoted by them against Mr. Gosling, a parishioner, were adopted by them and by several of the parishioners, in order to make a church-rate.

The libel in question pleaded, in the first article, that the parish church of Braintree had [258] been for some time past, and now is, in a dilapidated state, and in urgent need of repair; that no rate has been made for such repairs since March, 1834, and that the parishioners, from time to time, have refused to make any rate for the necessary repairs. That a rate had been made on the 10th of June, 1837; that proceedings had been commenced in the Consistory Court of London to enforce that rate, and that that Court had been prohibited from proceeding in the matter.

The second article pleaded that on the 13th of May, 1841, a vestry meeting was duly called and assembled, for the purpose of making and granting a rate for the repair of the church, and for other incidental expenses, but that the majority of the parishioners there assembled had refused to grant a rate; that the church still continued in urgent need of repair; that the churchwardens had no funds in hand to effect the same; that a survey and estimate of the repairs necessary to be done, and also an estimate of the other necessary expenses incident to the office of churchwarden, in and for the parish, for the current year, were submitted to the parishioners then and there assembled.

The third article pleaded that on the 11th of June in the same year an application was made to the Consistory Court of London, grounded on an affidavit of the Rev. Bernard Scale, the vicar of the parish, for a decree against the churchwardens and parishioners of Braintree, to shew cause why a monition should not issue against them, the churchwardens, calling on them to provide for the necessary repairs of the church, and the necessaries for the decent celebration of divine service, and to call

[259] a vestry meeting for that purpose.(a) That the monition was returned into Court, and an appearance thereto given on behalf of the churchwardens, who submitted themselves to the lawful orders of the Court; but no appearance was given on behalf of the other parishioners; that, no cause being shewn according to the intimation of that decree, a monition issued, directed to the churchwardens, commanding them to call a vestry meeting, and ordering the parishioners to assemble for the purpose of making the rate.

The fourth article pleaded that the monition was duly served; that a vestry meeting was summoned by the churchwardens, and took place on the 15th of July, 1841; that at that meeting the vicar was in the chair; that the parishioners and inhabitants attended in large numbers, and the meeting was adjourned into the body of the church; that a survey and estimate of the repairs necessary to be immediately done to the parish church, and of the probable expenses thereof, were laid before the vestry; that in the opinion of the persons by whom they were made the sum of 713l. was requisite for the repair of the church, and 20l. 6s. for the incidental expenses, in all 733l. 6s. That no dispute arose, and no objection was made, either to the necessity of the repairs, or to the amount of the estimate; that the parishioners, being in vestry assembled, an assessment was proposed of 2s. in the pound, which was duly seconded; that a long amendment was proposed by a parishioner, which was seconded, which it is not [260] necessary to go into, the result of it being this: "That this vestry feels bound by the highest obligations of social justice and religious principle not to grant a rate, and, accordingly, that no rate be made." That a shew of hands was taken, and the amendment found to be carried by a large majority, but that no poll was demanded.

The fifth article pleaded that whilst the parishioners still continued in vestry assembled the question was then and there put "whether any other amendment was proposed or any other proposition as to the amount of the rate proposed to be made." That no affirmative answer was given to such question, nor was any proposition made for discharging the obligation of the parishioners of repairing their parish church, and providing necessaries for the celebration of divine service, and for the other expenses necessarily and legally incident to the office of churchwarden for their year of office. That the majority of the said vestry having by the means aforesaid refused to furnish the churchwardens of the said parish with the necessary funds as aforesaid, the churchwardens and others of the rate-payers and parishioners of the said parish, then and there present in vestry, on the said 15th day of July, in obedience to the aforesaid monition, and in discharge of the obligation cast upon them and the other parishioners of the said parish by the law and custom of this realm, at the said meeting, and whilst the parishioners so continued in vestry assembled, did rate and tax all and every the inhabitants and parishioners of the parish of Braintree liable to contribute to a church-rate for and towards the necessary repair of the church and for and towards providing necessaries for the decent celebra-[261]-tion of divine service and offices therein, and for and towards the other expenses necessarily and legally incident to the office of churchwarden for the current year, the several sums of money mentioned in the said rate being a rate or assessment of 2s. in the pound on the annual value of the rateable property within the said parish. That several of the parishioners are excused from paying rates in consequence of their property; and that a rate of 2s. in the pound is not more than sufficient to cover the estimated amount for the repairs of the church and the other incidental expenses.

The admission of the libel was opposed.

Adds against the admission. First, the principle upon which this rate is made is bad.

Secondly, if the rate can be supported upon principle, this is not the proper Court in which to enforce it.

Thirdly, this particular rate is bad.

This rate is founded upon the hint given by the Judges in the Exchequer Chamber, where it was said, "That there is a wide and substantial difference between a rate made by churchwardens alone at a subsequent time after a rate has been refused by a majority of the parishioners, and a rate made by the churchwardens and a minority at the same meeting where the rate has been refused." What is the distinction

(a) See *Fielding v. Standen*, 2 Curt. 663, for a similar decree and proceedings.

between a rate made by the churchwardens alone, and the churchwardens and a minority? what will be a sufficient number to constitute a "minority?" suppose all the parishioners to vote against the rate, would the churchwardens constitute a minority?—that would be to bring the case back to the original question.

[262] But it has been said that this rate may be supported by analogy; and one of the fancied analogies is that of voting at the election of a corporate officer or of a member of Parliament. What is the meaning of "analogy?" Quintilian,^(a) in speaking of "Analogia," says, "ejus hæc vis est, ut id quod dubium est, ad aliquid simile, de quo not quæritur, referat: ut incerta certis probet." What is the aliquid simile between making a church-rate and voting at the election of a corporate officer? There is no similarity. The first is an imperative duty, a perfect obligation; the second is a privilege or imperfect obligation; the repair of the church is an obligation which every parishioner is bound to fulfil, and which in former times it was highly penal not to fulfil, but the voting at the election of a corporate officer is a franchise of which a party may avail himself or not as he pleases; there is nothing penal in abstaining from exercising the privilege of voting for a member of Parliament.

A church-rate is a tax, and nothing short of an Act of Parliament can impose a tax on a British subject; if this rate is good, a minority of rate-payers can impose a tax on the majority.

To pursue the analogy—suppose in the election of a mayor or of the Speaker of the House of Commons the majority of corporators in the first instance, or the majority of the members in the other case vote for a person ineligible to serve the particular office—they throw away their votes—they lose their privilege of voting; but suppose that a majority of the House of Commons refuse the supplies and the minority vote them, could the sup-[263]-plies be enforced by taxation? This last appears to me to be the more correct analogy.

It is said that the rate is founded on a common law obligation, and to support the analogy, in reference to a mandamus, a motion has been taken out calling on the parishioners to meet at a particular time and place to make the rate, I presume, upon the notion that if the majority refuse the rate the minority may then make it. But is the repair of a church a common law obligation, and, if so, in what sense? As I submit, in this sense only, as being a portion of the canon law which has been adopted into and incorporated with the common law.

There is a distinction between the commune jus laicum and the commune jus ecclesiasticum (Gibson's Codex, preface). The obligation upon parishioners to repair their church is by the commune jus ecclesiasticum, it is not a common law obligation in the sense in which that expression is used in reference to the repair of bridges or highways.

Per Curiam. No doubt the common law of the church has been imported into this country, and has, by custom, become a part of the common law of the land; the difficulty of your argument is this, you say the commune jus laicum and ecclesiasticum are still distinct, then how comes it that the church is not kept in repair according to the canon law, which threw the burden of the repair on the ecclesiastical revenues and not on the parishioners?

Addams. The Court of Queen's Bench has invariably refused to grant a mandamus to churchwardens or to parishioners to make a church-rate; and the reason invariably assigned is, that it is a [264] matter solely of ecclesiastical cognizance. *Rex v. St. Peter's Thetford* (5 T. R. 364); *Rex v. St. Margaret's and St. John's Westminster* (4 M. & S. 252).

If this be a rate proposed on a common law obligation, in the sense used by C. J. Tindal, this is not the proper jurisdiction in which to enforce it; the proper remedy is by distress; the party may replevy, and the question be tried at law in a simple action of replevin; it has never been held that a Court of law will not entertain the question of a church-rate in that shape; moreover, the party may not replevy; he may allow his goods to be distrained; if so, the matter will be disposed of.

Supposing, however, that a rate made upon the principle involved in the present question could be sustained, still this particular rate is invalid; in the first place, it does not appear that the rate proposed by the churchwardens was rejected, the majority never was properly ascertained; a shew of hands was made, but no poll was taken, which latter is the only correct mode of ascertaining the result; a majority of

hands does not necessarily prove a majority of votes: certain parties, under the 58 Geo. 3, c. 69, are entitled to a plurality of votes; a numerical minority may have a legal majority of votes: (c) again, the rate purports to include the chancel as well as the nave of the church.

Further, the rate upon the face of it is excessive; it excuses persons assessed to the amount of 1000l. per annum from payment of the rate; it has certainly been said that the parishioners may excuse parties from payment of a rate, (d) but it by no means [265] follows that the churchwardens and a minority have that power.

The present libel, therefore, ought to be rejected.

The Queen's advocate and Haggard contrâ. It has been argued that the making a church-rate is similar to the imposition of a tax; that is not so; in the case of a church-rate the tax is already imposed by the common law; a parishioner, when he enters into the occupation of lands or tenements assessable to a rate, at once binds himself to contribute his quota of the necessary repair of the church; he stands concluded by the common law of the land from voting against a rate. He may shew that the rate is improper or excessive, or that he is unequally assessed, but he cannot refuse a rate when the necessity of it is proved or is unquestioned. A person becoming a member of a corporation binds himself to vote for persons eligible to hold any corporate offices, and if he votes for an unqualified person he throws away his vote; *Oldknow v. Wainwright* (3 Burr. 1017), because he exercises his franchise in a mode which he had previously bound himself not to do. The analogy is complete between the cases of a parishioner voting against a rate which he has previously bound himself not to vote against, and a corporator voting for a person whom he has previously bound himself not to vote for.

There is no distinction between the common law of the land and the common law of the church, save that the law is enforced by different Courts. The case of *Gaudern v. Selby* is a direct authority and precedent for this rate. [Per Curiam. The Court of Queen's Bench has completely repudiated [266] the authority of that case.] The case was not before them, the Court of Error has supported that case. [Per Curiam. The utmost that the Judges of the Court of Error have said is that they reserved to themselves the power of giving an opinion on the point whenever it should occur.] The Court of Error has said that there is a wide and substantial difference between the case of *Veley and Burder* and a possible case—the case which now arises.

Addams replied.

Judgment—*Dr. Lushington*. Before I proceed to consider the principal question at issue in this case, I think it expedient to dispose of some minor objections which were raised to the validity of the rate and the admissibility of the libel. One of these objections arises thus: the rate being proposed in vestry, an amendment was moved, which concluded by refusing the rate; no poll was demanded or taken, but on a shew of hands the amendment was declared to have been carried; thereupon the churchwardens and the minority in vestry assembled proceeded to make the rate now in dispute. It is contended that a poll should have been taken in the first instance, on the ground that, as there might be individuals entitled according to the statute to a plurality of votes, the real number could not be ascertained otherwise than by a poll, and it is undoubtedly true that, in the mode of voting by shew of hands, a majority of individuals may not constitute a majority of votes; I think, however, that the objection cannot be sustained, and for this reason, no poll [267] being demanded, the whole vestry must be considered as acquiescing in the decision of the chairman. Indeed, if I were to hold otherwise in every case of a difference of opinion in vestry, there must be a poll, whether demanded or not, which would be a great impediment to the dispatch of business and occasion much inconvenience; it must also be remembered, though the argument is not conclusive, that if it could be supposed that the majority present were not in favour of the amendment, the fair presumption in this case, though not always, would be that they were in favour of the rate; that presumption, however, is not always conclusive; some might have voted against the amendment who, at the same time, would have negatived the rate itself. On this head, therefore, the present defendant can have no substantial ground of complaint, though possibly the fact may have some bearing on a subsequent part of the case.

(c) See Rogers's Eccl. Law, p. 879.

(d) *Thompson and Sandford v. Cooper*, 3 Phil. 640, n.

It was also said that the rate includes sums for the repairs of the chancel, and it is said that in all ordinary cases parishioners are not bound to repair the chancel, and therefore that this rate could not be sustained; but, as matter of fact, I am not satisfied that the estimate does include the chancel; it does certainly specify the oak door to the chancel, but this may, for anything I know to the contrary at present, be a burthen properly falling on the parishioners; it may be a door common to the nave and chancel, therefore I should not in this stage of the cause consider the including this door in the rate as fatal, as it is a circumstance which may be explained.

The last of these objections arises upon the pleading; in the fifth article of the libel it is alleged that a large number of the inhabitants who [268] are rated are in such a state of poverty that the rate could not be recovered from them, and that to an extent of no less than 1000l. per annum. I presume that this fact is so pleaded, in order to meet any objection, that the rate is excessive; but whatever was the motive which led to the making of this statement, I do not apprehend that it can vitiate the rate, or render it my duty on that account to reject the libel; the rate does, as it ought, contain the names of all persons, by law, liable to pay, and both authority and necessity shew that in fact some must be excused on account of poverty: Prideaux says (p. 41, ed. 1805), "Those who are so poor that they cannot pay poor-rates ought to be excused from paying church-rates;" here the amount in respect of value which it is pleaded cannot be recovered is doubtless very large, but I cannot say that it may not be shewn that these occupiers must be excused on account of poverty, nor that it is not lawful so to excuse them.

Having disposed of these objections I now approach the new and important question raised on the admission of this libel. It is necessary first to state a brief summary of the facts. A decree, founded upon an affidavit setting forth that the church was out of repair, and that rates had been refused for several years, issued from this Court—the libel also setting forth the prohibition which had emanated in the former case from the Court of Queen's Bench—that decree, drawn up in the form sanctioned by the Court of Arches, called upon the churchwardens to shew cause why a monition should not be granted against the churchwardens to take the proper steps to put the church [269] into repair, and to call a vestry for a certain day for the purpose of making a rate, and directed the parishioners to attend and make a rate; that decree having been duly served, the churchwardens appeared and declared their readiness to submit themselves to the lawful commands of the Court—no appearance was given on the part of the parishioners—a monition was then issued to the churchwardens and parishioners to the effect of the decree, and was served and returned. The vestry met on the 15th of last July, a rate was proposed, an amendment, refusing the rate, was moved, and the amendment being put, on a shew of hands the vicar, who was in the chair, declared the amendment carried: no poll was demanded, all acquiesced in his declaration. The churchwardens with several other individuals then signed the present rate, which was not again put to the vestry. The defendant in this case is sued for the rate, and the question I have to decide is whether a rate so made is a valid and legal rate; if it be, the libel must be admitted; if not, it must be rejected; but I wish it to be borne in mind that the validity or invalidity of this particular rate is the sole question which it is my duty to determine, and that all my observations will be directed solely to that end.

I am anxious, as far as lies in my power, to state my opinion and the grounds of it clearly and intelligibly, and I propose therefore to pursue the following course:—

To consider, first, the case of *Gaudern v. Selby* (1 Curt. 394), what bearing it has on the present case, what weight it is entitled to; secondly, the effect of the judgment of the Court of Queen's Bench in the former [270] *Braintree case* (12 Ad. & Ell. 233) with reference to the present case; thirdly, I shall do the same by the judgment of the Court of Exchequer Chamber in that same case; fourthly, I shall endeavour to examine the ecclesiastical and common law authorities with respect to the validity of this rate; fifthly, I shall apply myself to the doctrines as to the elections of corporate officers, and members of Parliament, which it has been contended ought to govern the present case, and uphold the validity of the rate.

With respect to the case of *Gaudern v. Selby*, I did upon a former occasion, having found that case to be a precedent in the proper sense of that term, yield my own judgment to the superior authority of the Court of Arches, and decided agreeably thereto. During the present argument it has been again urged at the Bar that I

ought to pay the same deference to that case as I did formerly, but I was at the argument, and am now, most clearly of a contrary opinion; because it appears to me that not only has the doctrine laid down by that case been repudiated by the Court of Queen's Bench and the Exchequer Chamber, but the Court of Queen's Bench has impugned that case, by reason that no authority or precedent is cited to support it; and that too in very strong terms.

The Court of Queen's Bench, in speaking of that case (12 Ad. & Ell. 253), say, "The question on the effect of this single authority really is neither more nor less than this, Can the ecclesiastical Judge make a law? If he only declared one, the sources of his information are equally open to us. If he drew his conclusions from reasoning, we may examine it, and must form our opinions on its force. But, in truth, so im-[271]-portant and novel a doctrine was never promulgated with so little effort to conciliate the concurrence of others. The point is not discussed at all: neither reason nor authority is vouched in its behalf. The proceeding wears the appearance of being *ex parte*; perhaps it had in truth become such by the withdrawal of opposition which may be well explained by the smallness of the sum and the probable change in the inhabitancy, or the exhaustion of all means and spirit of resistance by a litigation protracted for years. With all respect due to the venerable person from whom this judgment proceeded, we are bound to declare that it does not appear to rest on principle or to be admissible as authority." Discarding therefore the notion that *Gaudern v. Selby* is any longer a precedent to govern my judgment, I will now consider whether, though no longer an authority for the position attempted to be established by it in the former case, it is an authority to guide me in the present. I have again carefully examined all the proceedings in that cause; I thought I had done so before, and I am now not disposed to retract any one observation I formerly made on that case. I will not occupy time by referring to all the particulars, but some must be mentioned, that the grounds of my opinion may be made known, and that such opinion may not rest solely on general declaration. I disclaim having at any time laid any stress as to the discrepancy of dates; for I observed at the hearing of the former case that any such discrepancy might possibly be explained they might be mere clerical mistakes; but there are some facts and circumstances connected with that case which, after all the consideration I could bestow upon them, and after having read all that has been [272] written in explanation, still appear to me utterly inconsistent with all regularity of proceeding in our Courts, and that beyond all that has ever happened. [Here the Court went into a minute examination of the case of *Gaudern v. Selby* in the Court below (a) and proceeded.] Having now considered the

(a) The following is an abstract of the case of *Gaudern v. Selby* (or rather Silby) as taken from the process now remaining in the registry of the Arches Court.

It is there described as a cause of appeal and complaint of nullity, promoted by William Gaudern, a parishioner, inhabitant and landholder within the parish of Easton Maudit, in the county and archdeaconry of Northampton and diocese of Peterborough and province of Canterbury, of the one part, and Samuel Silby, churchwarden of the said parish, of the other part; which was in the first instance a pretended cause of church-rate lately depending in the Consistorial and Episcopal Court of Peterborough.

The monition to transmit the process was directed to "the Worshipful George Watkin, clerk, B.D., surrogate of the Reverend and Worshipful Spencer Madan, M.A., vicar-general, commissary-general, and official principal in spiritual matters, &c. of the lord bishop of Peterborough, and also surrogate of the Reverend Wm. Brown, D.D., archdeacon of the archdeaconry of Northampton, lawfully appointed his surrogate or surrogates."

The Return to the Monition.

To the Worshipful Wm. Wynne, &c. &c., we, Spencer Madan, vicar-general, commissary-general and official principal, &c., of the lord bishop of Peterborough, and Wm. Brown, D.D., archdeacon of the archdeaconry, &c. (after setting forth the monition received from the Dean of the Arches) proceeded, "which said letters monitory being so received, we, the said Spencer Madan, clerk, the Judge aforesaid as by our office in duty bound, do certify and make known that we have caused the registry and public archives of the aforesaid Father in God, his Consistory Court of Peterborough, and of the archdeaconry of Northampton, to be diligently searched, &c." (dated 21st of January, 1797).

facts and circumstances of that case in the Court below, I [273] will now look at its progress through the Court of Arches. It does clearly appear to me that the case [274] did not attract that attention which, under ordinary circumstances, such a case must necessarily have [275] demanded; the allegation given in the Arches Court pleaded that the rate was made without the [276] consent of the majority of vestry; this allegation is signed by Lord Stowell, then Sir William Scott, and [277] its admission was not opposed; at the hearing of the case neither in the argument nor in the judg-[278]-ment was a single authority cited on one side or the other, and it is clear from the notes both of Dr. Arnold and Sir C. Robinson that Sir William Wynne had not the slightest notion that he was considering the present question, and consequently could not have decided it; how can I shew deference to an opinion never entertained or expressed? the case was decided on other grounds; Sir William Wynne thought he was deciding the question whether, when the vestry had refused a rate, it was competent for the churchwardens alone to make that rate; he said nothing as to its being made in vestry or not; nothing as to the minority having any weight or [279] power; looking, therefore, to these circumstances, considering that

The Citation.

“Wm. Brown, D.D., archdeacon of the archdeaconry of Northampton, lawfully constituted, to all, &c. we do hereby charge and strictly enjoin and command you, &c., to cite, or cause to be cited, William Gaudern, of Easton Maudit, in the county and archdeaconry of Northampton and diocese of Peterborough, that he appear before us, or our surrogate or some other competent Judge in this behalf in the Consistory Court on Wednesday, the 28th day of this instant May, at the usual hours of hearing causes, &c.” Dated the 17th day of April, 1794.

Libel.

In the name of God, Amen: before you the Rev. and Worshipful Spencer Madan, clerk, vicar-general, commissary-general, and official principal in spiritual matters of the Right Rev. Father in God, Spencer, by divine permission, lord bishop of Peterbro; and also before you, the Reverend and Worshipful William Brown, clerk, D.D., archdeacon of the archdeaconry of Northampton, your surrogate, or any other competent judge in this behalf, &c. 1st article. That the parish church of Easton Maudit being ruinous, dilapidated, and very much out of repair, the said Samuel Silby, the churchwarden of the said parish for the year 1793, being obliged to lay out some considerable sums of money in and about the same, and for other things relating to the office of churchwarden of the said parish, the said churchwarden and several of the most considerable inhabitants of the said parish, on or about the 12th day of May, 1794, did meet together pursuant to due and legal notice given in that behalf, in order to make a church-rate, and being so met did agree and resolve that a rate should be made, and that every parishioner or person rateable should be taxed and pay after the rate of nine-pence half-penny, per pound, for all such houses, lands or tenements which they held, occupied, or enjoyed in the said parish, amounting in the whole to the sum of 31l. 6s.

Second article. That the ruins and defects of the said parish church could not be repaired without a proportionable assistance from the parishioners, inhabitants and occupiers of houses and lands within the said parish.

Third article. That William Gaudern occupied land within the said parish of the yearly value of 235l., for which he was rightly and equally rated and assessed to the rate aforesaid at the sum of 9l. 6s. 0½d.

Fourth article. Pleaded that public notice of making the said rate was given in the said parish church, and that William Gaudern was, or might have been, there.

Fifth article. Exhibited a copy of the rate. And that in submission and conformity to, or in compliance with, the said rate, most or the greatest part of the parishioners and persons therein named and rated have paid and satisfied their respective assessments.

Sixth article pleaded applications to William Gaudern to pay the sum of 9l. 6s. 0½d. to Samuel Silby, and refusal to pay the same.

Seventh article pleaded that Samuel Silby was lawfully and rightly elected, and acting as churchwarden for the said parish.

Eighth article pleaded that William Gaudern was and is of the parish of Easton

the case of *Gaudern v. Selby* has been expressly disclaimed as an authority by the Court of Queen's Bench; that having lost its original authority it was not set up by the Court of Exchequer Chamber, for that Court, having disclaimed giving any opinion upon the present question, neither did nor could pronounce any opinion as relating to this question of *Gaudern v. Selby*; for these reasons I think that the case of *Gaudern v. Selby* is not only not a precedent binding on this Court, but is not even an authority upon the present question. I think it more than probable that the great pressure of business in the Courts in 1799, when Lord Stowell had just become Judge of the Admiralty Court, and there were great arrears, may have been the reason why so little interest was excited, and the case discussed with less research than under other circumstances would probably have been the case.

Proceeding in the course I have prescribed to myself, I will now examine the judgment of the Court of Queen's Bench in the former *Braintree case*; and, first, what was decided by the Court of Queen's Bench, and how far is the decision applicable to the altered circumstances of the case now before me; I must look to the facts. It was decided that churchwardens could not, after a rate had been refused by a majority of

Maudit, in the county and archdeaconry of Northampton and diocese of Peterborough aforesaid, and, therefore, subject to the jurisdiction of this Court.

The rate exhibited contained the names of twelve persons whose respective assessments amounted to 31l. 6s., the total amount of the rate.

Monition for Answers.

William Brown, clerk, D.D., archdeacon of the archdeaconry of Northampton, lawfully constituted, to all, &c.; whereas the Rev. John Watkin, clerk, B.D., our surrogate, lawfully appointed, &c. We, therefore, hereby charge, &c., that you cite or cause to be cited William Gaudern, that he appear before us or our surrogate in the Consistory Court, &c.

Personal Answers.

In the Consistory Court of the Lord Bishop of Peterborough and Archdeacon of Northampton.

The personal answer of William Gaudern:

To the first and second positions this respondent answers and admits that some little repairs might be wanted in the said church, but cannot say what sum of money has been necessarily laid out and expended on such account; and admits that such repairs should be discharged by a proportionable rate on the occupiers, of houses and lands within the said parish.

To the third article, admitted the occupation of land of the yearly value of 235l.

To the fourth and fifth articles, denied that any public notice of making the rate had been given, and that the pretended levy, rate, tax, or assessment, mentioned in the said fifth article, was not made in pursuance of any notice or public vestry held for that purpose, nor is the same signed by the promoter; or if such rate was made at a public vestry by the promoter, such rate was not approved and allowed by the major part of the inhabitants, or the occupiers of any messuages, lands, or premises in the said parish attending such vestry.

To the sixth article, admitted applications and refusals.

To the seventh article, admits the same to be true.

The eighth and ninth articles, formal answers.

Depositions.

Samuel Clifton, a witness examined on the libel, deposed to the ruinous and dilapidated condition of the parish church of Easton Maudit, and that the same wanted repair, but what sum was sufficient to repair the same deponent could not say. That the ruins and defects could not be repaired or provided for without a proportionable assistance from the inhabitants, owners, and occupiers by way of rate. Deposed to notice of the meeting for making the rate being given. To the fifth and sixth articles could not depose.

James Hardwick deposed that the repairs of the church could not be done for a less amount than the sum mentioned in the libel. That the repairs could not be done without a proportionable rate on the inhabitants and occupiers. That due notice of making the rate was given. To the fifth and sixth articles could not depose.

William Revitt deposed that the parish church was ruinous, dilapidated, and much out of repair, and could not be repaired for a less sum than is set forth in the

vestry, make a valid rate of their own sole authority at a subsequent time. It is clear that, accurately speaking, that was the sole question before the Court, and in legal strictness the sole question decided; but it is equally clear that the Court of Queen's Bench did not contemplate, in their judgment at least, the distinction [280] taken by the Court of Exchequer Chamber, and consequently they laid no stress upon the fact that the rate was made by the churchwardens alone out of vestry, and not by the churchwardens and a minority in vestry. The opinion of the Court of Queen's Bench is plain; that Court decided on the principle that a rate made against the consent of a majority of the vestry was illegal. How, then, shall I deal with that case? not as a precedent fettering and controlling the free exercise of my own opinion upon the present case, for the Court of Exchequer Chamber has told me that in that light it ought not to be so considered; but I apprehend it is my duty to look at the principles on which that judgment is founded, and the whole train of reasoning adopted by the Court of Queen's Bench, and consider, to the best of my power, how far those principles and reasoning are applicable to the present case.

Then, first, what are the leading principles of that judgment? and, secondly, how

libel, including other things relating to the office of churchwarden; that deponent went down to the vestry with the promoter Silby; that Gaudern was there also with several others of Easton Maudit, and that Mr. Manning and Mr. Howes, who occupy lands in Easton Maudit, were also present; that deponent believes due and legal notice was given of such vestry, otherwise the two last mentioned persons would not have known of the meeting; that the repairs of the church could not be provided without proportionable assistance from the inhabitants, owners, and occupiers.

To the remaining articles could not depose.

Compulsory to Witnesses.

Spencer Madan, M.A., vicar-general, commissary-general, and official principal in spiritual matters of the Right Reverend Father in God, Spencer, &c. Whereas the Rev. George Watkin, clerk, our surrogate, &c., rightly and duly proceeding in a certain cause of subtraction of a rate, levy, or assessment made for and towards the repairs of the parish church of Easton Maudit in the county and archdeaconry of Northampton and diocese of Peterborough, &c.

Depositions.

William Brearley deposed that the church was ruinous and wanted repairs, which could not be done for a less sum than is set forth in the libel, and if they had been done at a less expense they could not have been done so well. To the third article he deposed that William Gaudern occupied certain land in the parish, as he verily believes, of the yearly value as set forth in the libel, and he is the more convinced thereof, having served the office of overseer of the poor of Easton Maudit, and having collected a levy after the rate of sixpence in the pound. Mr. Gaudern's share came to 5l. 17s. 6d., and that he, this deponent, would have paid the surplus then remaining in his hands, which was about 13l., to the said Samuel Silby, as had been usual for many years before, but this deponent was discharged from so doing by the principal charge-bearers.

To the fourth article, after deposing that public notice was given for the inhabitants to meet to make a levy for reimbursing the said Samuel Silby such expenses as he had incurred by virtue of his office; that deponent was present at the vestry; that William Gaudern was there, as were also Mr. Howes and Mr. Manning; that the parishioners offered to pay Mr. Silby after the rate of sixpence in the pound, which the said Silby declined accepting.

To the fifth and sixth articles he verily believes the levy or assessment is of the proper handwriting of Silby; that, in conformity thereto, deponent has paid his share of the rate, and he believes several others have done the same.

Christian Pettit (so far as her testimony was conformable to the rules of evidence) deposed to the same general effect as the other witnesses.

Sentence.

In the name of God, Amen. We, George Watkin, clerk, B.D., surrogate of the Rev. and Worshipful Spencer Madan, clerk, M.A., vicar-general, commissary-general, and official principal in spiritual matters, of, &c., and also surrogate of the Rev. William Brown, clerk, D.D., archdeacon of the archdeaconry of Northampton, &c., do pronounce, decree, and declare that the said Samuel Silby was, at the time of

far do they apply to the present question. First, the law requires clear demonstration that every tax is lawfully imposed, and this doctrine is in strict unison with the principles laid down by Lord Tenterden and the Court of King's Bench in the case of *Cockburn v. Harvey* (2 Barn. & Adol. 799), in which it was decided that, with respect to the church-building acts, a select vestry had not the power of imposing a church-rate, because it was not specifically given to them by the act itself. I advert to that judgment as shewing that the power of taxation is not to be raised up by inference, but is to be established to demonstration. The next point is a matter on which no lawyer could entertain [281] a doubt—that the power to impose a tax must be derived from Act of Parliament, common law, or immemorial custom—a third is, that the fact of no usage prevailing in support of such power of taxation is evidence against it. A fourth is, that a usage of imposing the same tax in a different way is evidence against the power claimed. A fifth, that the absence of any mention of such power in the books of reports is evidence against it. A sixth, that the onus of proving the legality

making the rate or assessment, churchwarden, &c.; and also that in the year 1793, the parish church of Easton Maudit standing in need of repair, the said Samuel Silby did, in order for the raising of money to defray the same, call a meeting of the principal parishioners and inhabitants; and, accordingly, a meeting was held in the vestry (timely notice thereof being first given, as mentioned in the proceedings in this cause), and a rate was then agreed on and made accordingly, in which said rate (it appears to us) that all and every the parishioners, or persons rateable, were rated and taxed to pay after the rate of ninepence in the pound rent for all such houses, lands, and tenements in the parish of Easton Maudit aforesaid, as had customarily obtained. And we pronounce, decree, and declare that the said rate, so agreed on and made, was and is a good and effectual rate, and rightly and lawfully made. (The sentence then condemned Gaudern in the rate and costs.)

From the above abstract of the proceedings the following irregularities appear:—

The appeal is stated to be from the Consistorial and Episcopal Court of Peterborough.

The monition for process is addressed to George Watkin, as surrogate of the chancellor of Peterborough, and also as surrogate of the archdeacon of Northampton.

The return to that monition is made by Spencer Madan, chancellor of the bishop of Peterborough; but who says that he has also searched the registry of the archdeaconry of Northampton.

The citation is in the name of Dr. Brown, the archdeacon of Northampton, calling upon Gaudern to appear in the Consistory Court.

The libel is in the name of Spencer Madan, the chancellor, and of Dr. Brown, the archdeacon—the concluding article pleading that Gaudern was of the parish of Easton Maudit, in the county and archdeaconry of Northampton, and, therefore, subject to the jurisdiction of this Court. (The libel being headed in two Courts.)

The monition on Gaudern to give in his answers is in the name of Dr. Brown, the archdeacon, and calls upon the party to appear in the Consistory Court.

The answers of the party are entitled in the Consistory Court of the bishop of Peterborough and the archdeacon of Northampton.

The deposition of Clifton, the first witness, is entitled merely in the Spiritual Court—he says nothing of the making of the rate.

The deposition of Hardwick is entitled in the Spiritual Court: he is silent as to the making of the rate.

Revett's deposition is headed in the Spiritual Court—he was at the vestry: he says that Gaudern was also present; he is silent as to the making of the rate.

Then there is a compulsory against Brearley, in the name of the chancellor only; it charges Brearley to appear before him or his surrogate in the Consistory Court. Brearley's deposition is not entitled in any Court.

The sentence is given by Watkin as the surrogate of the vicar-general, and also of the archdeacon; and it is to be observed that it states "that a meeting of the principal inhabitants was called; that a meeting was had in the vestry; that a rate was then agreed on, and made accordingly, in which rate the parishioners were taxed at ninepence in the pound;" in effect pronouncing that the rate was made in the usual way by a majority in vestry.

of the power claimed must devolve on those who maintain its legality. Those were the chief general principles which the Court of Queen's Bench applied to the case before them.

I now proceed to examine the same case in the Exchequer Chamber. What did the Judges of that Court do? They agreed with the Court of Queen's Bench in the decision to which that Court had come; they agreed that there was no custom to warrant a rate so made, and no authority for its validity, but they held that "there was a wide and substantial difference between the churchwardens alone, or the churchwardens and a minority together making a rate at a meeting of the parishioners where the refusal takes place, and the churchwardens possessing the power of rating the parish by themselves at any future time however distant."

This opinion is plainly and distinctly stated in the words I have read, and it is to this, which is stated to be a wide and substantial difference between that case and the present, to which I must devote my best attention: but it is first necessary to note what the Court of Error declared they would not do, and what they reserved. The Court, advertng to the case of *Gaudern v. Selby*, said: [282] "We do not enter into the discussion whether a rate so made by the churchwardens at the parish meeting, where the parishioners were then met, would have been valid or not; or how far such case may be analogous to that of the members of a corporation aggregate, who, being assembled together for the purpose of choosing an officer of the corporation, the majority protest against, and refuse altogether to proceed to any election; in which case they have been held to throw away their votes, and the minority who have performed their duty by voting have been held to represent the whole number." Again, on the question of a rate made in vestry, by the churchwardens and a minority, they say: "We give no opinion upon it; we desire to be understood as reserving to ourselves the liberty of forming an opinion whenever the case shall occur."

I conceive that I have now sufficiently discussed the case of *Gaudern v. Selby*, and the cases of *Veley v. Burder* in the Court of Queen's Bench and the Exchequer Chamber, and that I am justified in approaching the present question unfettered by *Gaudern v. Selby*, as a question undecided by the Court of Queen's Bench and Exchequer Chamber, deemed by them as deserving of great consideration, as I conceive, both with reference to the general law, and with regard to its possible analogy to a case of frequent occurrence in corporation law.

Fourth head. First, then, is the present rate valid by ecclesiastical and common law, without resorting to the analogy of corporation law? "There is," says the Court of Exchequer Chamber, "a wide and sub-[283]-stantial difference between a rate made by the churchwardens and minority in vestry, and a rate made by the churchwardens alone, out of vestry." Remembering that I am not speaking with respect to the analogy of corporation law, it is with reference to other legal considerations most important to weigh, and ascertain in what that wide and substantial difference consists; for, upon the existence of that distinction must, so far as this view extends, depend the applicability of a decision, opposite to that which the Courts of common law applied to the former case. Now, between the two cases there is one important and substantial difference, namely, the time when the rate was made; whether made in the vestry immediately after the refusal of a majority of the vestry, or at a subsequent period by the churchwardens alone; for it is obvious that if valid, when not made in vestry, it would be impossible to fix any period short of the whole incumbency of the churchwardens, within which it must be made; there would be nothing to conclude the time—a month, six months, or even ten—and the effect might be that the churchwardens, by postponing making the rate, might make one upon the consideration of subsequent circumstances, which most, though not all, would agree ought to be submitted in the first instance to the vestry. It is true, indeed, that this difference would be less important if the doctrine that a vestry is purely ministerial should be adopted to its full extent; for if the churchwardens are the sole judges, in the first instance, of what are essential repairs, and the mode of making them, and the vestry are bound to raise the money, it would matter little whether the [284] rate were made by the vestry, or by the churchwardens and minority in vestry, or by the churchwardens afterwards; but upon the supposition that the vestry have some discretion to exercise, the distinction is not unimportant.

The next point of difference is, that where the rate is made by the churchwardens in vestry, there may be a minority; if made out of vestry, it must be the act of the

churchwardens alone. I cannot, after much reflection, perceive that this is a distinction of any essential importance, for I cannot understand how, in this view of the case, the minority can confer any legality upon the act, which would not equally attach upon it if done by the churchwardens alone. The minority may vary from approaching close to a moiety of the vestry, down to a single individual. Upon this difference I cannot rely, and, save what I have already noticed, other difference between the case decided and the present case I can find none.

The first point I have to consider, then, is whether any authorities in common law or ecclesiastical law so apply to the present case, thus distinguished, as to render this rate valid, though the former rate was illegal. There is, however, one peculiar circumstance attending the making the present rate, which must not be left out of consideration; possibly it may be deemed of great importance. This is a rate made, not by a vestry summoned in the ordinary manner, but in consequence of a monition issued from this Court, calling upon the churchwardens to take the necessary steps to put the church into repair, and directing them to call a vestry for a particular day, for the purpose of making a rate; [285] a mode of proceeding authorized by a precedent recently set in the Court of Arches. I have some doubts, which I expressed at the time, now not altogether dispelled, as to the propriety of fixing the day and hour; but be that as it may, the rate howsoever otherwise made is made in pursuance of the directions of this Court, and such directions, until the contrary shall be decided, I must consider as legal; indeed there is an abundance of precedent to support this course of proceeding. What are the authorities in the ecclesiastical law, in favour of a rate so made? With the single exception of *Gaudern v. Selby*, I am aware of none, and that case, if it be an authority at all, which I do extremely doubt, is an authority for making a rate by churchwardens alone, and not in conjunction with the vestry; for however the fact might be, nothing can be more clear than that Sir William Wynne never contemplated the present question.

Since the former *Braintree case* was agitated, Mr. Archdeacon Hale (a) has rendered a very valuable service, by bringing to light a collection of precedents with reference to the proceedings of the Ecclesiastical Courts to enforce the repair of churches; I have examined them all carefully, but in no one of them can I find the trace of an authority affirming the validity of a rate made by the churchwardens and minority of vestry. One indeed, though it is scarcely proper to cite a single precedent from a country Court, would shew that the supposed course was to direct the churchwardens alone to make a rate, and that to reimburse the [286] churchwardens of a former year (p. 98, anno 1601). I think I must be correct in saying that none of the precedents come up to the existing circumstances of this case; for if there were, they would not have escaped the learned counsel as well as myself. It may be well briefly to notice some of these precedents, observing at the same time that there is a manifest distinction between the actual making of a rate and the voting by vestry that a rate should be made; that if this distinction be not kept in mind, these precedents may go to a length which could not for an instant be now maintained, viz., that a rate might now be made by order of the Ecclesiastical Court without, in the first instance, calling a vestry at all; this done, whether by commission from the Ecclesiastical Court, or order to the churchwardens, is clearly illegal. It may be that some of the precedents collected by Mr. Archdeacon Hale are of this description, namely, precedents, before it was decided that a rate made by commission from the Ecclesiastical Court was illegal. The decision in *Rogers v. Davenant* was not till 1675, where it was then decided that such rating by commission was illegal. A precedent applicable to the present case would be a case where the rate was made by the churchwardens and minority in vestry, and afterwards enforced by the Ecclesiastical Court; a case where proceedings were had against individual parishioners, not to recover the rate, but to punish them, would not tend to uphold the validity of the rate, but the contrary. I shall endeavour, though very imperfectly, to classify some of the precedents.

[287] First. There are monitions to churchwardens to repair—a proceeding strictly legal.

Secondly. Monitions to the churchwardens to call the parishioners together to make a rate, as in the present case.

(a) Precedents in Causes of Office against Churchwardens and Others. London, 1841.

Thirdly. Commissions for making rates—which are illegal.

Fourthly. Monitions to churchwardens to make rates; but not, so far as I can discover, alone, but in the usual way, in vestry.

Fifthly. Orders that if the churchwardens do not certify repairs done, the case should be referred to the High Commission Court.

Sixthly. Instances of persons being punished for not paying rates made by vestry.

Seventhly. Several cases of interdict.

Not one case can I discover of a rate made by the churchwardens and minority, much less a case where a rate so made was enforced.

Recollecting the deep interest which this question of church-rates has excited, what laborious and painful investigations have been made by the most learned persons; and also that a question nicely divided from the present point, and intimately connected with it, has been adjudicated upon by no less than twelve of the Judges of this realm, and no ecclesiastical authority produced, I may, I think, without relying on my own pains, venture to say that none is in existence. It would be mere waste of time to go over the books cited in former discussions, and I shall abstain from such fruitless trouble.

Similar observations apply to common law authorities; the Judges say there are none applying [288] to a rate made by churchwardens alone; had there been any applying to a rate made by the churchwardens and a minority in vestry they must have been produced. The solitary authority which used to be cited in support of a rate made by churchwardens alone, I mean the case in *Ventris* (1 *Ventris*, 367), has been disposed of by the Court of Error, so far as applied to the former *Braintree case*; and there is nothing but conjecture, unsupported by facts, to make it applicable to the present. There is then no authority in the Ecclesiastical Courts or at common law to support this rate, but I am of opinion that the authorities cited against the validity of the former rate have a strong application to the present case, and for this reason, all those authorities speak of a majority in vestry; all appear to assume that the very foundation of a rate was the resolution of the majority; not one speaks or hints at a rate made by a minority as possessing any validity.

There is then, in my opinion, a total absence of any authority either in ecclesiastical or common law in support of the validity of this rate; it is clear, therefore, that upon such grounds it cannot be supported; and that if I am to enforce such a rate on such a supposition I should be making law, and not declaring it; and that too in a matter where every Court has been most cautious, namely, the imposition of a tax.

Fifth head. These preliminary considerations being disposed of, I now address myself to the last question, namely, [289] whether, there being no authority in common or ecclesiastical law in support of the validity of this rate, nevertheless it is to be sustained by analogy to the law applicable, in particular cases, to corporations and elections. In applying my mind to this point I feel the utmost distrust of my own ability to discuss or determine upon it with adequate learning or legal discrimination. The branch of learning, necessary to be known safely to understand this proposition, is wholly foreign to the practice and ordinary jurisprudence of these Courts, and if this doctrine be really the foundation on which such church-rates stand, it seems not a little extraordinary that it should have been for ages unknown to those Courts to whose exclusive jurisdiction belong all causes for the recovery of church-rates. I do most strongly feel that this argument belongs to Courts accustomed to cases of *mandamus* and *quo warranto*, and I distrust myself at every step I take regarding it. In stating the proposition, I shall endeavour to use, as far as I can, the words of the judgment in the Court of Error (p. 308): "Members of corporations aggregate, being assembled together for the purpose of choosing an officer of the corporation, if the majority protest against and refuse altogether to proceed to any election, they throw away their votes, and the minority who perform their duty by voting are held to represent the whole number." On the same principle it is contended that parishioners duly assembled in vestry for the purpose of making a church-rate wanted to defray the expense of re-[290]-pairs (and to this may be added that the vestry was called in pursuance of a monition from the Ecclesiastical Court), the majority refusing, their votes are thrown away, and the rate made by the minority is good. To ascertain whether the two cases are analogous two things are necessary: First, to understand the principle on which the proposition is supported at common law. Secondly, to understand and compare the facts of the two propositions said to be analogous, in

order to see if there be a real analogy between them. I will extract, as well as I can, the common law doctrine from the authorities—perhaps I ought more properly to say the only authority cited; but before the comparison can with any propriety be made, another task remains to be accomplished. Before I can trace the analogy between the case of elections corporate, or otherwise, with church-rates, I must also consider the legal origin and usages with regard to church-rates; similarity or dissimilarity are not to be ascertained till the two things to be compared are understood. Reluctant as I am to attempt to enter at all at large into the history of church-rates, yet, in order to compare the making a church-rate with the election of an officer of a corporation, it is necessary that I should give an outline as to what, in my opinion, church-rates are, and the legal remedies for enforcing the repair of churches. That the parishioners are bound to repair the nave of the church is a proposition established by all authorities in all books of ecclesiastical or common law; but with regard to the origin of that obligation, its nature and the remedies for enforcing it, there is much room for difference of opinion. [291] I do not venture into paths proper to be trodden only by the learned antiquarian; I look to legal authority. The statute of *circumspecte agatis* (13 Edw. 1, s. 4) has, whatever it might have been originally, all the force and effect of a statute, and it, as appears to me, establishes the following points:—

First. That the parishioners were accustomed to repair the nave or body of the church.

Secondly. That the Spiritual Courts in those days punished persons who refused to do so; the words are: “If prelates do punish for that the church is uncovered or not conveniently decked, the spiritual Judge shall have power to take knowledge notwithstanding the King’s prohibition.” The object of this statute was to prevent Courts of law using the power of prohibitions, preventing proceedings taking place by ecclesiastical authority to compel repair of the church.

Thirdly. That the temporal Courts had interfered by prohibition.

Fourthly. That by this statute they were restrained from so doing; consequently the legality of the obligation, and the right of the spiritual Courts to punish, were established. As to the nature of that obligation, nothing is said in that statute, but all the authorities from the earliest times to the present day appear to me to shew what it was. The whole nation in those times was of one religion, to profess a different opinion was heresy and a capital crime; to support that religion was a religious duty, binding on the consciences of all, indispensable for securing the [292] performance of those rites, which were deemed essential to the safety of the soul; therefore, upon every account, the upholding of the sacred edifice, by those who were bound to uphold it; and the religious nature of the obligation gave the jurisdiction to enforce such obligation to those Courts which arose out of, and were connected with, the religious establishment; the foundation of those proceedings was *pro salute animæ*, and it belonged to those Courts exclusively. The obligation was in *personam* and not in *rem*; it existed wholly independent of property, though of course and necessarily the extent and degree to which the obligation was to be enforced must be measured by property, or, in other words, the ability of the individual. There could be neither religious, nor moral, nor equitable obligation to compel one individual to contribute in a greater ratio than another, and therefore ability was a standard; ability included every species of property; it was a direct tax upon none; if I am correct in describing the nature of the obligation, it appears to me to follow that it did not necessarily attach more particularly on any species of property; it was no lien on land or on stock; nor on one more than the other; in those days, however, land and stock constituted the sole property yielding a profit; therefore land and stock became in practice the criterion of ability. If I am asked for authority as to these positions, I need only refer to those collected in *Prideaux* (p. 58), from John of Athon and *Lyndwood*—the opinion of the profession in *Doctors’* [293] *Commons*, down to the *Poole case* (*Miller v. Bloomfield*, 2 Add. 33), which decided by the authority of the Delegates that in ascertaining the ability other property may be taken into consideration, as ships and stock in trade; with regard to land, it mattered not whether the individual who occupied it lived out of the parish; he was an inhabitant by his occupation, and rateable to church-rate as well as liable to other burthens and duties as an inhabitant.

I propose next to consider the mode by which this obligation was carried into effect. The statute of *circumspecte agatis* is wholly silent as to church-rates; the expression

punishing those who left the church uncovered affords no reason for supposing that church-rates then existed. I know not the origin of church-rates, nor any authority which fixes a date. The earliest case on the subject is in the year-book of Edward 3; but though there may not be any direct evidence, yet their origin is most naturally accounted for. The legality of the usage of compelling parishioners to repair, established by the statute of *circumspecte agatis*, naturally led to the ascertainment of the ability of those so bound; a rate made in vestry by themselves was the fairest and most equitable mode of measuring the liability—the rate was incidental to and followed upon the obligation; it matters little whether it be called a bye-law or not.

I now approach the question of remedies, and it appears to me that all the remedies were in strict keeping and unison with the origin and nature of the obligation; they emanated from the Ecclesiastical [294] Court alone, because the obligation was, as I have said, a religious obligation on the conscience, and not a charge upon property, nor a common law obligation with regard to property, in the ordinary sense of that term. Before the statute, the spiritual Courts punished not for refusing to make rates, for non constat that rates existed; but because the repairs were left undone by those who ought to have done them; such punishment must have been excommunication, and other ecclesiastical inflictions, and the imposition of fines, as the statute shews; and that this was so is further demonstrated by the writ of consultation to be found in Fitzherbert (*Nat. Brev.* 116), which I find in the pamphlet of Mr. Swan (*Appendix*, No. 8). The ordinary being desirous to proceed against one R. de C. Knight for the correction of his soul for neglecting or rather refusing and expressly declining to amend and repair the nave or body of the church, it was suggested that the matter concerned a lay fee, and was a ground for prohibition. The Court was of opinion that the party being impleaded of a lay fee was not a sufficient ground for granting a prohibition, and a writ of consultation went to the bishop; from which the inference is, that it is not a burden on property itself, but on the individual generally.

Precisely a similar course of proceeding followed, when rates had become usual and customary—criminal proceedings issuing from the Ecclesiastical Court—the result interdict, and excommunication of individuals. Looking at the consequences, both civil and spiritual, and to the writ *de excommunicato* [295] *capiendo*, these remedies were all-powerful in those times, both with regard to the making of rates and enforcing the payment of them. Then came the Reformation, but no toleration; no one then could venture to offer resistance on the ground of difference in religious opinions; opposition was seldom offered, for not only the old remedies remained, but a new and most powerful engine for enforcing obedience was established; the High Commission Court was called into existence by the statute 1 Eliz., and continued to exercise its extraordinary power until finally annihilated by statute 17 Car. 1. Its authority was invoked for the purpose of compelling the repairs of churches. The 86th canon directs all having ecclesiastical authority to hold visitations, to declare to the High Commission Court every year such defects in churches as they may find unrepaired, and the names and surnames of the parties found faulty therein. The high commissioners are then to proceed against them *ex officio*, and compel them to obey the decrees of the ecclesiastical ordinaries. Can any one doubt the efficiency of this tribunal, when its powers were administered by Archbishop Land and his coadjutors? After this Court had been deprived of its functions the ordinary Ecclesiastical Courts still exercised the powers with which they were invested, and it clearly appears, not only from Mr. Hale's book, but from other authorities, that for the most part this power was exercised in the criminal and not the civil form, by proceeding *ex officio* and not in a church-rate cause; most of his precedents are criminal. That such powers were effectual for their [296] purpose, up to a very late period, I think no one can doubt, though true it is they were induced for the purpose of enforcing their authority to resort to illegal measures, as the issuing commissions to make church-rates; all their original and legal powers remain untouched by statute; whether effectual now it is not for me to say; into that question I must not now be led; they are not obsolete in law—they have a legal existence; but they never have been applied to enforce, or punish for not paying, such a rate as this.

Before I quit this subject of remedies I must very unwillingly speak of *mandamus*; unwillingly, because it is not a subject with which I am conversant or can attempt to

fathom, but because it may have some connection with the analogy which I am now endeavouring to examine.

It is said that a mandamus to make a church-rate has been refused, because church-rates are of ecclesiastical cognizance; what is the true meaning of this reason? I conceive that the history of the obligation to repair affords the true explanation; that church-rates are a mere incident to that obligation, and that obligation is of spiritual and not of lay cognizance, because that obligation is purely religious and binding on the conscience, and, therefore, enforceable in the Ecclesiastical Courts on that ground, which is the foundation of all its proceedings, *pro salute animæ*.

Having thus as briefly as I could with a just regard to perspicuity stated my notion of the obligation to repair, and of the means of enforcing such obligation, I now come to the rules governing ques-[297]-tions of election in order to compare the two subjects. The case of *Oldknow v. Wainwright* (2 Burr. 1017) is cited as establishing a doctrine which is said to be strictly analogous to the present case, and ought to decide it in favour of the rate. Now what are the facts of that case? An election was to take place for the office of town-clerk of Nottingham; there were twenty-five electors, twenty-one of whom assembled, pursuant to summons; the mayor put Thomas Seagrave in nomination; no other person was put in nomination; nine of the electors voted for him, twelve did not vote at all, eleven of them protesting against any election, because the office was then full. The Court of King's Bench held that as the majority who dissented from the election voted for nobody else, the election by the minority was good. It is manifest that this case is wholly different in all its circumstances from the present, still it may afford a principle fairly applicable to it. Lord Mansfield decided in favour of the election of Seagrave, and upon a very clear and intelligible ground—that the electors present who did not vote at all virtually acquiesced in the election made by those who did. Another principle was adverted to in that case, viz., that at an election those voters who vote for an unqualified person with notice of his incapacity throw their votes away. Let us look at the present case. A vestry is held pursuant to a monition from this Court calling on the parishioners to meet on a certain day and make a church-rate; the subject matter is church-rate and not the election of a corporate officer; a rate is proposed, an [298] amendment is proposed, put, and carried by shew of hands, and no poll is demanded; then the churchwardens produced a rate of two shillings in the pound, which is signed by the vicar, churchwardens and several rate-payers; this rate was not proposed to the vestry, nor put by the chairman to the vestry; there was no voting of any kind thereon. The facts of the two cases being thus totally different, I must now inquire whether such differences constitute distinctions. Is an election of a corporate officer or member of Parliament in *eâdem materiâ* with the making a church-rate? It appears to me that it is not. In the case of elections, a vacancy being admitted, the act to be done is choosing a qualified individual to supply the place; discretionary choice amongst qualified individuals is all that belongs to the electors. An election being begun, it must be finished. The making a church-rate under ordinary circumstances at least involves many other considerations; how is it possible to say that because a rate is proposed it must be carried? or that like an election once begun, it must be finished by making some rate? other points arise—what repairs are necessary—in what manner they shall be done; whether the estimate be sufficient; whether the repairs shall be done at once; whether one rate shall be made for the whole or separate rates; in what manner the rate itself shall be made. Surely even upon this brief comparison it would be difficult to say that an election and the making of rates do not involve very distinct considerations. But compare the cases a little further; *Oldknow v. Wainwright* was decided on the principle that the electors who did not vote for Seagrave [299] did not vote at all; that they acquiesced in his election; those are the words of Lord Mansfield; can the same thing be predicated of this vestry meeting? did they not vote at all? They voted for an amendment, refusing the rate; or, in other words, they in substance negatived the rate; most clearly then they did vote on the subject matter; to say in the face of these proceedings that they acquiesced in the making of the rate would be to make a declaration in defiance of common sense and common reason; and, what is more, this rate was not put to the vestry at all after the amendment, it was made by the churchwardens and some individuals putting their names to it. Then if acquiescence be the principle which governed the case of *Oldknow v. Wainwright*, such principle does not exist here; the voting for the amendment is not acquiescence. I will now take notice of another

supposition, that though the majority did vote against the rate, their votes were thrown away in the same manner as votes are thrown away when given to an unqualified candidate at an election, with notice of the want of qualification. Are all votes given against a church-rate thrown away, or only in particular cases, and is this one? No one can contend that all votes against a church-rate are in all cases thrown away, for if this were so, it would be absurd to call a vestry for such purposes. Are the votes to be held to be thrown away because the repairs were wanting and a rate necessary? Why, no rate made by a majority would be good unless these circumstances concur; ergo, all votes against all rates proposed, when a legal necessity arises, are thrown away. From this conclusion I cannot escape, save I could adopt the principle that any vestry is merely ministerial without any discretion, and for such position there has been neither argument nor authority.

Again, what difference arises from this vestry being called in pursuance of a monition issued from this Court, founded on a decree duly served on the parishioners, and supported by an affidavit as to the church imperatively requiring repairs—a monition calling on the parishioners to meet on a certain day, and then make a rate? That this monition has been disobeyed is perfectly clear, but the question now is, not how disobedience is to be enforced, or the parties disobeying punished, but whether the rate by the minority is valid? Whether the votes of the majority are thrown away? The act directed to be done by the parish is not done; the parishioners have not made a church-rate; some individuals have consented to one. Can I hold this to be a substitute for what is at least the ordinary definition of a legal church-rate—a rate made by the majority in vestry? Here I am compelled, much against my will, and with a full consciousness of my own inability accurately to understand or perspicuously to explain it, to consider the analogy with regard to proceedings at common law. Suppose a mandamus to do an act ordinarily and legally done by certain persons, as to put a corporate seal to an instrument, and suppose part willing to obey and part not, would the Court of Queen's Bench accept the will of a part for the deed of the majority, or rather would they not proceed to compel [301] the majority to do the act? Would it not be a bad return, or if the return stated that the writ had been obeyed, would it not be a false return?

Having now to the best of my ability considered the analogy adverted to by the Court of Exchequer Chamber as a question thereafter to be considered, having sifted the case of *Oldknow v. Wainwright*, and the reference to the law of elections, the impression upon my mind is, that none of these principles or authorities are applicable to the present case; but even if I could discover similitude where I can see nothing but dissimilarity, even if the arguments were apposite to the subject-matter instead of discrepant from it, I should still hesitate before I ventured upon my own authority, as Judge of an inferior jurisdiction, in a matter of taxing the subject, to introduce, for the first time, a doctrine hitherto unheard of in these Courts, and, so far as I know, never applied to church-rates in any other. If this new doctrine be the law, it is a matter to me of extreme wonderment that in the usage of centuries, when so many cases must have called for its application, when so many powerful minds have dedicated to the question their learning and ingenuity, it should first have been discovered in the year 1841; and more especially am I moved with astonishment when I recollect that this doctrine, if tenable, would have taken away all necessity for interdict, excommunication, all ecclesiastical process, all interposition, on the part of the High Commission Court. A more easy remedy for the disease, a surer preventive against its re-occurrence, a more efficient substitute for severer and harsher remedies which were used, could not, I think, have been devised, yet, till the year 1841, though the necessity for the use of it so often must have occurred, there is in all the books in all the reports, ecclesiastical or common law, *altum silentium* respecting this panacea. And not only is there no mention of this mode of making a valid church-rate, not even when once or twice reference has been made to rates made by churchwardens alone, but all the authorities, on the contrary, describe a church-rate as a rate made by a majority in vestry. Surely stronger presumptive proof against the admissibility of this analogy could not be adduced. It has, however, been argued, that admit it I must, for that the ancient remedies are no longer fitted for the times we live in; that argument has already been answered by the Court of Queen's Bench, but if it had not been, am I judicially to decide that that which the law has not altered is either inefficient for its purpose, or extinguished as obsolete? Did the Court of King's Bench

treat wager of battle so, though a more revolting and unchristian practice could not have been retained from the ages of the darkest barbarism? Lord Ellenborough said (*Ashford v. Thornton*, 1 B. & Ald. 460), "The general law of the land is in favour of the wager of battle, and it is our duty to pronounce the law as it is, and not as we may wish it to be; whatever prejudices, therefore, may justly exist against this mode of trial, still as it is the law of the land, the Court must pronounce judgment for it." But if I were at liberty to pronounce the ancient remedies insufficient or obsolete, could I invent a new one? Could I usurp the office of the Legislature, and, [303] "jus facere non dicere?" One more observation occurs before I leave this discussion: if I could consider the doctrine laid down as governing cases of election to have an analogy to the present case, and I entertain no such opinion, still if I did, I am bound to decide this case, not by the rules of common law, but by the Queen's ecclesiastical law—so says the statute—so says Lord Coke. Now that this doctrine exists in the ecclesiastical law, or has been imported into it by usage or otherwise, it has not even been attempted to be shewn; I cannot find even the faintest trace of it.

I am therefore of opinion that this rate, so made by the churchwardens and minority of vestry, is not supported by any authority to be found in ecclesiastical or common law, and that the supposed analogy between these proceedings and elections corporate or parliamentary does not apply; it is, therefore, my duty to pronounce this rate invalid, and to reject the libel.

I am well aware of the heavy responsibility which has attached upon me in the discharge of this arduous duty; I well know how many evil consequences, or supposed evil consequences, may be attributed to my miscarriage if I have failed to discover the legal truth; but this I know also, that I have industriously, earnestly, and fearlessly done my best to ascertain the law. Once convinced as to what the law is, I never will be induced to resort to subtle and ingenious refinements to defeat that law. Whatever may be, in the opinions of others, the pernicious consequences of adhering to it, I am well persuaded, from the history of this country, that the continuance of bad laws, and the prevention [304] of good laws, have, in no small measure, been occasioned by laudable though mistaken endeavours to wrest the law to particular notions of justice and expediency, and by the invention of subtle distinctions to ward off evil and injurious results, which, if they be the effects of the law, ought to be remedied, not by Judges, but by the Legislature.

From this decision an appeal was prosecuted in the Arches Court, and on the 25th of March, 1843, judgment was delivered in that Court reversing the decision of the Judge of the Consistory of London.

March 25th, 1843.—Sir Herbert Jenner Fust. This is an appeal from the Consistory Court of London, in a cause of subtraction of church-rate, promoted by Messrs. Veley and Joslin, the churchwardens of the parish of Braintree, in the diocese of London, against Mr. Gosling, a parishioner and inhabitant of that parish. A citation in the cause was taken out in January, 1842; it was returned into Court; an appearance was given for Mr. Gosling, and a libel was given in, which came on for discussion before the learned Judge of the Consistory Court on the 23rd of February, who took time to deliberate, and, on the 4th of May, 1842, he was of opinion that the libel was not entitled to be admitted, and, accordingly, he rejected it. From that rejection the present appeal has been brought, and on the appeal the usual proceedings have been had. The case was argued some time ago, and the Court, from the importance of the case, took time to consider it, in order, as far as possible, to arrive at a correct decision. The arguments were to the same [305] effect, though not so extended as on former occasions; they were rendered unnecessary by the nature of the proceedings—they were, however, the same as those in the Court below, and the case now comes before the Court for its decision. The parish of Braintree has obtained a considerable degree of notoriety from the fact of the determined opposition given by the great majority of the inhabitants of that parish to church-rates; and, as we are all well acquainted, a church-rate in that parish in 1837 gave rise to elaborate arguments and decisions in Courts of law, as well as in the Consistory Court of London. As the present case is admitted to have grown out of the former proceedings, it may not be inconvenient, indeed it is necessary to a proper understanding of the point now to be decided, and to the grounds upon which the decision will be made to rest, to consider the nature of those proceedings, and how far they relieve the Court from the task of entering upon the topics which were, of necessity, introduced into the discussion in

the course of those proceedings. [The Court here stated the proceedings in the former case, and continued.] From the nature of the proceedings, and the tenor of the judgment of the Exchequer Chamber, it seems that if it had simply affirmed the judgment of the Court below; if the Judges who sat in error had contented themselves with merely affirming that judgment, without giving any reason the present question, in all probability, never would have arisen; but the Lord Chief Justice of the Common Pleas, in delivering the judgment, which he was authorized to do by the seven learned Judges who sat with him, took care to state [306] specifically the precise points decided by that judgment; and the only points decided were, first—that the rate, as it appeared on the face of the libel, was illegal, as being made without competent authority; and, secondly, that a prohibition ought to go, restraining the spiritual Court from enforcing it. This precise declaration of the points decided, naturally leads to the inquiry what did appear on the face of the libel, and upon reference to it, it appears that a vestry duly summoned, had refused to grant a rate which had been proposed, and the churchwardens, three or four days after that vestry meeting had been formally dissolved, of themselves made a rate, without giving any further notice to the parishioners; and the point therefore decided was that a rate made under such circumstances was illegal and invalid. The question being, as stated by Lord C. J. Tindal (12 Ad. & Ell. 300), “whether the churchwardens of a parish, after a rate for the necessary repairs of the parish church has been proposed by them to the parishioners, at a vestry meeting duly convened for that purpose, and has been refused by a majority of the parishioners there assembled, can, of their own sole authority, at a subsequent time, by themselves, and not at any parish meeting, impose a valid rate on the parishioners?” In a subsequent part he says (p. 305, line 27): “The question to be resolved is whether, after a meeting has been duly convened, and certain of the parishioners have attended, and the majority of those who so attend have refused to make any rate for the necessary repairs of the church, the churchwardens have autho-[307]-rity, by themselves, and not at the meeting at which the refusal took place, but at a subsequent time, to make a rate that shall be binding on the parish.” Now the precision with which the question to be resolved, as stated by Chief Justice Tindal, is very remarkable; he does not state, as a general proposition, that after a refusal of a rate by the parishioners no rate can be made by the churchwardens, under any circumstances, but simply that, a rate having been refused by a vestry duly assembled, the churchwardens had no authority, without notice, at a subsequent time to impose a valid rate upon the parishioners. He carefully guards the judgment from going one iota beyond the precise limits of the case before the Court; and the reasons for this extreme care and caution are apparent, when that judgment is examined with greater particularity. The points to be decided in the two Courts of law were the same, and the opinions of both Courts were the same, namely, that the rate in question was illegal, and could not be enforced; but there was a material variation in the two judgments in regard to the mode in which a rate might be made. Upon reading the judgment of the Lord Chief Justice of the Court of Queen’s Bench, it would seem that, in his opinion, and that of his learned brethren, no valid rate could be made, unless with the consent of the majority of the parishioners in vestry duly assembled. The whole tenor of his reasoning, and his comments on the authorities cited, go to that effect. He states the question raised by the decision of the Consistory Court to be, whether the churchwardens have power to impose a church-rate against the declared will of the [308] majority of the parishioners? He says (12 Ad. & Ell. 255): “The conclusion at which we arrive is, that the Court Christian was wrong in admitting a rate made against the wishes of the majority of the parishioners in vestry assembled, and, on the ground that this supposed church-rate was a nullity, as having been made by persons who had no authority to make one, in defiance of the declared dissent of the vestry.” Now, from this manner of stating the question, it seems to follow that, in the opinion of the Judges of the Queen’s Bench, no rate could be made, after the dissent of the vestry, under any circumstances; that churchwardens have not, in themselves, any authority to make a rate at any time; that the refusal of the vestry was decisive; and that there is no qualification or restriction to the proposition “that no valid rate can be made when once the vestry have declared their dissent.” But when we come to look at the judgment of the Exchequer Chamber we find that it is not couched in such general terms. The Judges of that Court did not think themselves called on to affirm so general

a proposition ; they guarded themselves against doing so ; they thought it right to say "that the case might arise, where a rate, made against the express and declared dissent of the majority of a vestry, might be sustained, though they declared they gave no opinion upon the point ; they reserved to themselves the liberty of forming an opinion on the point, whenever it should occur ;" and the particular point alluded to clearly is, "whether a church-rate, made by the church-[309]-wardens and a minority at the same vestry meeting, duly summoned, at which a rate has been refused by the majority of the parishioners present, might not be valid ;" it being obvious that (12 Ad. & Ell. 309) "there is a wide and substantial difference between the churchwardens alone, or the churchwardens and a minority together, making a rate at the meeting of the parishioners where the refusal takes place, and the churchwardens possessing the power of rating the parish by themselves at any future time, however distant."

These were the points and the several grounds with respect to which the Court of Exchequer Chamber reserved to themselves the right and power of forming an opinion whenever the case should occur. The possibility of the case arising seems to have been suggested by the case decided by my learned predecessor Sir W. Wynne in 1799—the case of *Gaudern v. Selby*—upon which so much observation has turned in the Courts of the Consistory of London, in the Queen's Bench, and in the Exchequer Chamber, and which case it will be necessary for the Court to examine with more particularity hereafter.

These being the judgments and the reasons assigned for the judgments of the Queen's Bench and the Exchequer Chamber, a prohibition was issued to the Consistory Court. The parish church of Braintree still continuing in a state of great dilapidation, and the necessity of the repairs being still greater than before, the churchwardens adopted the course suggested by the Chief Justice and the other [310] judges of the Exchequer Chamber as to the mode in which a rate might be sustained against the opinion of the majority of the parishioners in vestry assembled ; and accordingly it appears that in the course of the year 1841 the proceedings stated in the libel given in in this suit were adopted. [The Court here went through the several articles of the libel.] I understand that when this libel came on for discussion in the Court below, various objections were made to the form of it ; they were there overruled, and they have not been pressed in this Court, and the libel now comes on to be considered on the real and substantial question—"Whether the churchwardens, and those who are admitted to have been a minority of the parishioners in vestry assembled, can impose a valid rate on the parishioners, after a rate has been refused by the majority of that vestry duly assembled in pursuance of a notice legally issued, and whether such rate can be enforced in this Court?" It is not necessary for the Court to go into a lengthened inquiry as to the nature and origin of the obligation of the parishioners to repair their parish church, or to inquire into the antiquity of church-rates ; all that discussion might have been very important when the question first arose, but it is obvious that it would be perfectly useless and superfluous in the present instance ; the whole result of all the arguments and authorities on the point are most perspicuously stated by Lord Chief Justice Tindal in delivering the opinion of the Court of Exchequer Chamber : he thus states the extent and nature of the obligation by which parishioners are bound to repair their churches (12 Ad. & Ell. 301) : [311] "We are all of opinion that the obligation by which the parishioners, that is, the actual residents within, or the occupiers of lands and tenements in, every parish, are bound to repair the body of the parish church whenever necessary, and to provide all things essential to the performance of divine service therein, is an obligation imposed on them by the common law of the land. That such obligation is not grounded on the force of the general ecclesiastical law is manifest from this, that, by the authority of all the writers on the general canon law, the repairs of the whole of the parish church, both the body and the chancel, fall upon the rectors or owners of the tithes ; except that by custom, in some countries, part falls upon the parishioners ; whereas in England, by the common custom of England, the repairs of the nave of the church, in which the lay parishioners sit, fall upon the parishioners themselves, and the repairs of the chancel fall on the rector. No trace can be found in any of our books of an obligation on parishioners to repair the parish churches throughout the whole of the realm less wide and extensive than this ; and, as to the antiquity of this obligation, the case cited in argument from the Year-book, 44 Edw. 3, fol. 18, whilst it establishes the fact that church-rates were

made by the parishioners at so early a period as the year 1370, does at the same time, by a plea therein contained of a custom from time immemorial within the particular parish to levy the amount of the rate on each parishioner by distress, necessarily carry back beyond the time of legal memory the obligation of the parishioners to make a rate upon themselves for the reparation of the [312] parish church; and such a custom, existing beyond the time of legal memory, and extending over the whole realm, is no other than the common law of England." And then his Lordship cites a position of Lord Holt's in support of this proposition: so that, according to C. J. Tindal, the obligation of repairing churches by the parishioners is carried beyond the time of legal memory, by necessary inference or by special custom, in those parishes in which occasion for the repairs arose. This is abundantly sufficient authority to enable this Court to hold that the burden of the repair of a church is cast on the parishioners, and that it has existed beyond the time of legal memory. The mode of making rates for providing for such repairs, and apportioning the expenses among the parishioners, has also existed beyond the time of legal memory. Take it to have been originally nothing more than custom, when once a custom is proved to have existed beyond the time of legal memory, it becomes the common law of the realm, which is nothing more than a body of customs.

This being the result of that investigation, the next inquiry is, What is the extent of the obligation? We are told by the same authority, which cannot be disputed (p. 303): "The repair of the fabric of the church is a duty which the parishioners are compellable to perform, and not a mere voluntary act, which they may perform or decline at their own discretion; the law is imperative upon them, absolutely, that they do repair the church; not binding on them in a qualified limited manner only, that they may repair or not, as they may think fit; and that, where it so happens that the [313] fabric of the church stands in need of repair, the only question upon which the parishioners, when convened together to make a rate, can by law deliberate is, not whether they will repair the church or not (for upon that point they are concluded by the law), but how, and in what manner, the common law obligation, so binding on them, may be best and most effectually, and at the same time most conveniently and fairly between themselves, performed and carried into effect." Every word of the passage of this judgment which I have just read is most important, and deserving of the utmost attention, not only from the high situation of the very learned person by whom it was delivered, but as conveying, in the most clear and lucid manner, what is the law, and what its extent as to the obligation of parishioners to repair their church, and as expressing not only his Lordship's own opinion, but that of the seven other learned judges with whom he was associated on that occasion. I take the judgment of the Queen's Bench to be the unanimous opinion of the four judges of that Court; and so I take this judgment to express the unanimous opinion of the eight judges who met in the Exchequer Chamber; and I also assume that the Lord Chief Justice of the Common Pleas was fully authorized to deliver the unanimous opinion of the Court of Exchequer sitting in error.

The next question seems to be, How is this common law obligation to be performed? I consider it quite unnecessary to go into the question whether this is "*commune jus laicum*," or "*commune jus ecclesiasticum*," because, if it be the first, the temporal Courts have jurisdiction to enforce it; if it be [314] the latter, the Spiritual Court has the jurisdiction; it is still the law of the land; C. J. Tindal says (p. 303), "The parishioners have no more power to throw off the burden of the repairs of the church than that of the repairs of bridges and highways, the compelling the performance of the latter obligation belonging exclusively to the temporal Courts, whilst that of the former has been exercised usually, although perhaps not necessarily exclusively, by the Spiritual Courts from time immemorial"—thereby affirming, not only the imperative nature of the obligation of the parishioners to repair their church, but that the mode of doing so is by rates, and which mode has existed from before the time of legal memory; and also affirming the jurisdiction of the Spiritual Court, if not quite, yet almost exclusively, to enforce it, according to law.

The following results seem to flow from this:—First, the obligation to repair is absolute; second, the performance of the obligation may be compelled; third, the performance of the obligation may be properly enforced in the Ecclesiastical Court; subject nevertheless, as appears by the former *Braintree case*, to be controlled by the common law Courts, whenever the Ecclesiastical Courts are exceeding their jurisdic-

tion, or attempting to enforce an illegal or invalid rate. The question then is reduced into a very narrow compass, namely, what is necessary to constitute a valid church-rate, and in what manner is the payment of it to be enforced? Now, as to the first, it is quite clear that a rate made for the repair of the church by a majority of the parishioners in vestry assembled, after due and legal notice, is a valid rate, and may be enforced, against [315] persons who refuse to pay the amount at which they are assessed, by the process of the Ecclesiastical Court, and that without the fear of prohibition. The same may be said of a rate made by the churchwardens, where the parishioners, after having been duly summoned, refuse or neglect to attend the vestry. "As little difference (says C. J. Tindal) (12 Ad. & Ell. 305) arises as to the validity of a rate imposed by the churchwardens alone, where a meeting of the parishioners has been duly convened in vestry for the purpose of making a rate, but where none of the parishioners have thought fit to attend"—certainly not, for in this, as in the former case, the rate would be made by the whole of the parishioners; for those who do not think proper to attend, after being duly summoned, must be considered as concurring in the judgment of those who do attend, and as submitting themselves to pay any rate they may think proper to make. In either of these two cases, therefore, no difficulty can arise; the difficulty is, what is to be done when the parishioners, on whom is cast the absolute obligation of repairing their church, refuse to make a rate for that purpose? is the church to remain in a dilapidated state, of course becoming deteriorated more and more every day, or is there any mode by which they may be compelled to discharge the imperative obligation cast upon them by the common law? It is quite clear that the rate sued for in the former *Braintree case* was invalid, for it was made by the churchwardens alone, not at a vestry meeting duly summoned for the purpose, not at a parish meeting of [316] any kind, or after notice given, but at a meeting held four days after a vestry legally called for the purpose of making a rate had been formally dissolved. The present is a totally different case; it is that of a rate made at a vestry meeting whilst the parishioners continued duly assembled in vestry, after due notice of a vestry meeting, for the purpose of making a rate to repair the church, had been given, and after a monition had issued from the Consistory Court of London calling on the parishioners to meet and make a rate; at a time, therefore, when all the parishioners, who might wish to attend, had ample opportunity of seeing what was the nature of the rate, what were the repairs proposed to be done, and what was the estimated amount of the expense of the repairs, and the mode in which the rate was proposed to be apportioned; a very different rate from that made in the former case. In the language of C. J. Tindal, "there is a wide and substantial difference" between the two rates; the one was made at a secret conclave of the churchwardens, with no check upon them, the parishioners having no opportunity of knowing what was the estimated amount of the repairs, and having no opportunity of controlling the expense; for although parties have an opportunity of objecting, after a rate has been made, to the amount, by objecting to their proportion being levied, they can only do so by incurring some expense; on the other hand, they incur no expense by making the objection when the rate is proposed. If a rate made as this rate has been made is invalid, there is no possible mode, which I am aware of, by which this church [317] can be repaired; the necessary result will be, it will become a wilderness, with a heap of ruins: view the progress made towards this consummation of things in this case; what is the history of this church? In 1834, it was repaired at an expense of 35l. In 1836, 105l. was required, and a rate was refused; in 1837, 508l. was necessary; and in 1841, 723l. is the estimated sum: indeed, the schedule of the necessary repairs shews that, unless some measures are speedily adopted, the church must become unfitted for divine worship. Where then must the performance of the obligation to repair the church be sought? That the Courts of common law have no power to enforce it is, I think, clear from the case of *Rex v. Thetford, Inhabitants* (5 T. R. 514), in which Lord Kenyon refused a mandamus against churchwardens to make a rate, because it was a matter of ecclesiastical cognizance; although in another case a Court of law did go so far as to grant a mandamus to the churchwardens of the united parishes of St. John's and St. Margaret's, Westminster, not to make a rate, but to call a meeting, for the purpose of agreeing upon and ascertaining the monies and rates to be assessed for the repair of the church of one of the parishes. The only remedy, therefore, is in the Ecclesiastical Court, if there be any remedy at all. Now it has been said that there were anciently

two modes of enforcing the performance of this obligation in the Spiritual Courts, one by interdict of the place, the other by excommunicating those who refuse to contribute their proportion of the expense. Both of these were [318] formerly most efficacious remedies, the consequences were so serious that there was scarcely, if ever, a necessity for having recourse to them. In the words of Lord C. J. Denman (12 Ad. & Ell. 245), "Either of these penalties was too awful in itself, and in the sufferings of those who incurred it, to fail of producing the desired effect; or more probably the denunciation was alone equal to its purpose, and the mischief may never have existed in the earliest times."

There is authority no doubt for both these measures; even in the earliest times there are not wanting instances of the necessity of proceeding to them, but the injustice of one of them (interdict) is apparent on the face of it: "*ecclesiastica censura prohibens celebrationem Divinorum.*" By that mode of proceeding the whole parish was punished for the fault of a part of it; the misfortune of it was, that in those times, and under those circumstances, the innocent were punished with the guilty; it was no light matter the placing a whole parish under interdict from attending divine service, and partaking of the divine offices of its church; it could not be right that for the fault of one person the many should be deprived of the opportunity of attending divine service in the parish church; the interdict extended to the whole of a parish, and it was no easy matter to resort to other churches for the purpose of partaking of the divine offices, such as marriages, and so forth; for excommunicated persons were cut off from all places of worship: indeed, if any person knowingly held communion [319] with an excommunicated person, that person himself became *ipso facto* excommunicated. If this process could now be put in force by this Court, the effect would be to punish the innocent alone; the persons by whose fault such a proceeding is called for would be the very persons who would consider it a matter of congratulation and triumph that they had reduced the parish church to such a state that no divine worship could be celebrated there, whilst those who were ready to pay their proportion of the repairs would be deprived of partaking of the offices of their own parish church. What would be the effect of the other remedy? Excommunication—that also was found in former times an efficient remedy; but civil disabilities are now all removed from excommunication; the utmost effect would be that a few of the most pertinacious opponents to a rate might, in order to compel them to contribute their proportion of it, be imprisoned—the present substitute for excommunication. Would that have the effect of compelling the performance of these repairs—would the punishment of a few produce the desired effect? It is admitted that such a power does exist, but it is manifest that the effect of it will not accomplish what is desired, namely, performance by the dissentient parties of that obligation which the law of the land has thrown on them; therefore both these modes are utterly inefficacious at the present period. In what mode is the process of excommunication to be put in force? How is the Ecclesiastical Court to be put in motion? By what means is the necessary expense of the proceedings to be defrayed? The proper persons to institute the ne-[320]-cessary proceedings are the churchwardens; it is their business to take care that the church is repaired, and the necessities for divine service provided: are they to do so at their own expense? According to this modern doctrine they cannot be reimbursed, for there can be no hope of procuring the necessary funds from the parish; the very majority who have caused the necessity for the proceedings would be sufficient to negative any rate for defraying the expenses of them. Both processes then, interdict and excommunication, are unavailing. Then can a rate be made in any other manner? Or are those parishioners who are willing to discharge their part of the obligation, and desirous of attending divine worship in this parish church, to be compelled to see that church become a heap of ruins? are they to be driven to resort to private establishments or to meeting houses? If such be the state of the law, every person who will consider the subject must surely feel desirous that some mode should be devised by which this singular anomaly may be put an end to. Is this rate a legal rate, and is there any mode of enforcing it? It has been argued that if these two processes (interdict and excommunication) are inefficacious, there must be some other mode of compelling the making of a rate; that this Court must necessarily have the power to adopt some other mode; but it must be remembered that this Court cannot of itself make a law to meet the exigency of the times; any measure adopted by this Court must

be supported by principle, or by the authority of legal precedents. Can this rate be so supported? how stands the question on principle? The object of [321] the rate is the repair of the parish church—an existing obligation on the parishioners; the only point on which the parishioners have the power of deliberating is as to the manner of repairing their church; they cannot deliberate whether they will repair or not; on that point they are concluded by the law. Is there anything unreasonable in this? Can it be said that this is an imposition of an improper burthen on the parishioners? It has been said that this is a tax; and then it has been argued that no tax can be imposed on any person without his consent, either virtual or express; no one can doubt the truth of this as a general proposition, but is this a tax? Will a vote of vestry make this rate a tax? Is it not a burden already imposed by the law? Does it not attach on every occupier of land? Is not the tax already imposed on the land? How, in principle, does it matter whether it attaches on the land or on the person who occupies the land? Every person who enters on a house or land in a parish does so subject to the burdens which either the common law or the Legislature has imposed on the house or land; and the duty of repairing the parish church is a burthen imposed by the common law on houses and lands. The question is not whether the parishioners will repair or will make a rate, but how a rate shall be apportioned among them; how they will discharge the burden which the law has already cast on them, and to which they have virtually assented, by occupying the houses or lands on which it is imposed. Lord C. J. Tindal has said, "The parishioners are not to deliberate whether they will or will not repair their church; the law has concluded [322] them on that point." This was a burden—or call it a tax—existing long before this vestry meeting was summoned. It has been asked more than once in the course of this discussion, of what use is it to call a vestry meeting if, when the parishioners are assembled, they have no voice to exercise in the matter? there is no difficulty in the question; the answer is, they have a voice in the matter; the churchwardens cannot make a rate without calling a vestry meeting, and when the parishioners are met, it is the duty of the churchwardens to lay before the meeting the nature of the repairs required; the estimated amount of them, and the mode of apportioning the amount among the parishioners; all these points are proper subjects to be discussed at such meeting. Making a rate and imposing a tax are two very different things: the real meaning of "making a rate" is the equal apportionment of an existing tax among the persons liable to contribute to defray it; in this case the tax is already imposed; this vestry has declared they will not make—they will not apportion the rate among themselves; in other words, they will not do what the law has said they are bound to do. The law has said that it is a legal obligation on them to repair their church; they have declared they will not fulfil the legal obligation; and in saying so they prevent the rest of the parishioners doing their duty, for if the minority can make no rate, it follows that no rate at all can be assessed or collected; by a sort of solecism the minority will be compelled to resort to the voluntary system.

There is, therefore, no difficulty in finding principles on which to act in this matter; the difficulty [323] is to find authorities to support the principles. On principle, first, there is no injustice apparent in the case; it has not been shewn that the rate is unnecessary, or that the parishioners had not an opportunity of canvassing the repairs proposed; estimates were brought forward, but the majority of the vestry would not inspect them; they would have no rate at all; and, be it remembered, they may now withhold their shares of the rate, and may thus object in this, or in other Courts, to this very rate, on every ground and on all circumstances under which, in any event, they would have a right to object to it. Cases have been cited to shew that churchwardens cannot make a rate binding on a parish, unless where the parishioners, duly summoned, have refused or neglected to attend. It is admitted that in such case the churchwardens may of themselves make a rate, and on this principle that then they virtually represent the whole parish; they are the majority of the parishioners in vestry assembled. This is a general proposition of which there is no doubt. I know of no decision, except the one I am now reviewing, in which it has been held that, after due notice of a vestry, a rate made by churchwardens, and a minority, in vestry duly assembled, after a majority have, at the very same vestry, refused to make any rate, is an invalid rate; true it is that the reasoning of the judgment in the Queen's Bench seems to infer that it would be so, but it is no decision,

for it was not the point before the Court; the circumstances of the case before that Court were very different. Moreover, the Judges in the Exchequer Chamber guarded themselves against being supposed to concur in the [324] general proposition of the Queen's Bench, "that no rate could be made, without the consent of the majority of the parishioners in vestry assembled;" they stated "that they gave no opinion on the point;" but this Chief Justice Tindal did say—"that there was a wide and substantial difference between a rate made by churchwardens alone, without notice, at a time subsequent to the dissolution of a meeting which had refused a rate, and one made by churchwardens and a minority at the same meeting where the refusal took place." The Judges of the Exchequer Chamber would not have gone out of their way to notice the distinction unless it was one which, in their opinion, clearly existed. It is scarcely necessary to notice the authorities; they have all undergone a thorough revision in the former case. Degge says: "If the parishioners, duly assembled, refuse to make a rate, the churchwardens may of themselves make one;" but, in the third edition of his book (1681) he adds, "but some are of opinion that the churchwardens cannot proceed alone, *ideo quære*." *Thursfield v. Jones* (1 Vent. 367) is to the same effect; but that has been stated by the Courts of Queen's Bench and Exchequer Chamber to be a "suspicious" and an "unsatisfactory" authority. But among the authorities the case of *Gaudern v. Selby* (1 Curt. 394) has been much dwelt on. I think this case did not meet with the attention in the Court of Queen's Bench which is due to it; I think, to a certain extent, it has been calumniated. The Court of Queen's Bench repudiated it as an authority, but I think the case was not properly presented to that [325] Court, so as to enable it to form a correct opinion on the case; it went to that Court with many seeming anomalies and irregularities, pointed out by the Judge of the Consistory Court, and with the knowledge that he had expressly stated his dissent from it. Most certainly in that case there were irregularities in the proceedings in the inferior Court, but they were not treated of in the Arches Court. The case came to the Arches Court on the merits, on the question whether the rate was a valid rate; there was no appeal in any of the intermediate stages. [The Court stated the nature of the case and the technical proceedings, observing that they were fully stated in the judgment of the Court below.] I cannot say the proceedings were very regular, but no objection on that head was taken when the cause came up by appeal; there was no motion on the subject; no application to suspend the hearing until the irregularities had been cured; the proceedings were in the usual form of an appeal, with one important exception—that in this Court a new plea was given in, stating expressly this fact—"that the rate had not been allowed by the major part of the parishioners, who, on the contrary, had disapproved of and disallowed it;" bringing the main question directly to the notice of the Court—Sir W. Scott was the counsel who signed this plea—the point was argued, and true it is no authorities were cited either in the argument or in the judgment, but it cannot be said that Sir W. Wynne, in the year 1799, was ignorant of the law of church-rates; he would not be unprepared to give a decision on the point. It has been surmised that [326] Sir W. Wynne did not intend to decide this point; that, in point of fact, he thought he was deciding on the question whether, in any event, churchwardens could make a rate of themselves? whether, after a vestry had been duly summoned, and the parishioners did not attend, a rate could be made by the churchwardens without a majority of the parishioners; but this is mere conjecture; the true distinction between the two cases, as it appears to me, has never been understood. But am I to assume that all the circumstances of the case were laid out of Sir W. Wynne's consideration? that they had no weight in his decision, when they were so pointedly called to his attention; namely, that this was a rate made by the churchwardens without a majority? In deciding that case Sir W. Wynne decided on all the circumstances of it, and on the consideration due to them. I have been told—what is perfectly true as a general observation—that judgments are to be confined to the cases immediately before the Courts in which they are given. Is this case an exception? Why, suppose Sir W. Wynne decided this case, when all these circumstances were not present to his mind. I am not at liberty to assume any such thing; and, as this case may be of some importance, I have no hesitation in saying that it is not liable to be impeached, on the ground of being an anomalous case, and not worthy of notice. Grant that there were irregularities—they were committed in the Court below; no objection was taken on that ground in the Court of Arches; Sir W. Wynne, sitting as the Judge of this Court, could not

dismiss the appeal on account of irregularities in the Court below ; in the further-[327]-ance of justice he was bound to hear the case on the merits. But, in point of fact, were the irregularities in *Gaudern v. Selby* such as the party appellant could take notice of ? I very much doubt if they were such irregularities ; I have found a case in which it was held that irregularities of such a nature were not sufficient to vitiate proceedings in an appellate Court ; it is a case in 1713, *Townshend v. Lewitt and Page*.^(a) A citation issued in the name of John Rogers, as the commissary of the archdeacon of Leicester, and also in the name of George Newell, official to the archdeacon ; it called on Mary Townshend to answer to Lewitt and Page, the churchwardens of All Saints', Leicester, in a cause of subtraction of church-rate. Articles were exhibited against her in the name of the commissary and official. Some of the acts were sped before the commissary only ; in others he had acted for Newell as official. Sentence was given by Newell, the official ; he signed the sentence as surrogate to the commissary ; the party cited was condemned in the rate and expenses ; the cause was brought to the Arches by appeal ; it was objected that the proceedings were a nullity ; in other words, the manner in which the cause had been conducted in the Court below was so irregular that the party ought to be dismissed, without the Court proceeding into the merits of the case ; the arguments were of considerable length, and it was insisted that the same person could not sit as Judge in two distinct capacities. Cases were cited on each side, one, *Deakins v. Newell*, from the same judges, which it was said [328] was dismissed on the same account ; on the other side, *Biddle v. Parsons*, determined in the Arches, on appeal from the same judges, and no objection made to their acting jointly. Reference was made to an award of the bishop of Lincoln, between the official and commissary—and this shews how impossible it is for this Court to decide on such cases without knowing all the circumstances of them—it turned out there was an arrangement that these two persons should sit simul et conjunctim. An award of the same nature was made by Archbishop Whitgift. The answer to the objection was that it should have been made before issue joined, exceptio fori declinatoria est, et ante litem contestatam opponi debet (Parnormitan) ; the result of the proceedings was this, that the objection not being taken when it ought to have been, the Judge decided that he must proceed to hear the case on the merits, and the result was, the party was dismissed with his costs. In *Gaudern v. Selby* there are a variety of seeming irregularities, but if an opportunity had been given for explanation, they might have been explained ; at all events they ought to have been objected to before issue was joined on the appeal, but no objection was taken by counsel on behalf of the appellant. It has been attempted to explain this by saying that, owing to the press of business in the Admiralty Court in 1798, Lord Stowell had just become the Judge of the Admiralty, and that he had signed the appellant's case. But who were the counsel for the appellant ? Dr. Arnold and Dr. Sewell, neither of these persons were likely to neglect the interests of their client, [329] they would have seen any objection of the kind, and would have advised their client accordingly ; no objection was taken to the proceedings, and the cause proceeded to a hearing. If this judgment of Sir W. Wynne had not met with the approbation of a large majority of the profession ; if it had been thought that the case was not rightly decided, and that the rate was invalid, would not the party have been advised to appeal. Under these circumstances surely Sir W. Wynne must have decided the case on the merits. Be the irregularities what they may, they do not detract one iota from the judgment ; Sir W. Wynne must be taken to have decided that the rate was a good, valid, and legal rate, capable of being enforced in the Ecclesiastical Court. Sir W. Wynne was the last Judge who would have made a law ; he invariably took the greatest care to satisfy himself as to what the law was, but when he had once done so, he never hesitated to pronounce what the law was. I look upon his decision as a direct, positive, and absolute decision on the present point, as a precedent binding on this Court, and which neither I, nor any Judge of this Court, am at liberty to depart from. Whether the judgment in the Courts of Queen's Bench has shaken the authority of the case is a question I am not at liberty to enter into ; if I was satisfied that the judgment was not founded on authority and a just apprehension of the law, I might then refuse to be bound by it ; but not thinking so, I have no objection to shelter myself under

(a) Arches, 4th Session, Hil. Term, note of Dr. Andrew.

the authority of Sir W. Wynne, and to express my opinion that what he has pronounced to be law is law. That judgment in no way militates against the decision of the Queen's Bench; the point before that Court was not the point decided in *Gaudern v. Selby*. Did the Court of Exchequer Chamber repudiate this case as an authority? Undoubtedly they have not so expressed themselves; it was no precedent for the case before that Court. Have not the Judges of the Court of Error said that there is a wide and substantial difference between the cases—between the case then before them, and a case which might possibly occur—in fact this very case? What is the meaning of the term “wide and substantial difference?” must it not mean such a difference as will tend to a different result in the decision of the two cases. So far then from repudiating that case, if compelled to do so, I should rather say they adopted it; otherwise I think they would not have thrown out the observation that it was a point deserving of great consideration, on which they reserved to themselves the power of forming an opinion whenever it should occur. Can I suppose those Judges would have gone out of their way to make use of such marked expressions, unless they really attached some importance to the distinction between the cases? on the contrary, I think the supposition is rather in the alternative, that they would have guarded themselves from the possibility of being supposed to have entertained even a notion of the existence of any such distinction. I therefore consider the case of *Gaudern v. Selby* as a direct authority for this rate; the learned Judge of the Consistory Court has said that it is neither a precedent nor an authority; I am of a different opinion; I think it a very considerable authority. It has been said that the decision in that case came [331] by surprise on the profession; that the Ecclesiastical Commissioners, in their investigation of the law, were not aware of such a case. As a member of that commission I do not know that I ever heard of the case by its real title, but, at a very early period of my entering this profession, I was always led to think that the law was such, and had been so laid down; nothing can be more clearly shewn by the report of the Ecclesiastical Commissioners than this, that in their opinion such a case might arise. If my recollection serves me, I always understood that, although the point was doubted, the better opinion was that such a rate was a good and valid rate; but I well remember that, at an early period of my communication on the subject with the learned Judge of the Consistory Court, he entertained a different view of the law.

The Judges of the Exchequer Chamber have assimilated this case to that of the members of a corporation meeting to elect corporate officers; the Chief Justice says (p. 308), “We do not enter into the discussion how far such case may be analogous to that of the members of a corporation aggregate, who being assembled together for the purpose of choosing an officer, the majority protest against, and refuse altogether to proceed to any election, in which case they have been held to throw away their votes, and the minority, who have performed their duty by voting, have been held to represent the whole number.” It has been already seen that parishioners cannot deliberate on the question whether they will make a rate or not, after once the necessity of the repair of the church has been made out or not disputed; then, [332] if they have no power to vote against a rate, and yet persist in doing so, do they not throw away their votes, just as much as in the case of a corporate election the majority of the corporators throw away their votes, or privilege of voting, when they refuse to proceed to the election of the officer; and are not the minority entitled in the one case to make a rate, as in the other to elect the officer? Surely there is no great difference between the cases, although the one may concern the exercise of an elective franchise, and the other the defraying of a tax, already imposed by law. Whether there is a real distinction between the cases in the view of the law I will not undertake to say; in principle, there seems none; in both instances, those who vote for the rate, or for the officer, are, numerically speaking, the minority, but, legally speaking, they are the majority; they represent, in the one case, all the parishioners, in the other, all the corporators. I do not know that it is absolutely necessary for every parishioner or for every elector to give an actual vote; there may be persons who may wish to attend, and yet to be neuter, and there may be others who may content themselves, simply by protesting against the rate. Neither do I intend to enter into the question whether this is not in some manner analogous to voting for a disqualified candidate at a public election, though there certainly does seem some analogy in principle, for if a party will give his vote in a manner in which he has no right to give it, is not this similar

to voting for a party who is not entitled to hold the office to which it is sought to elect him?

[333] I am of opinion on these principles, which are supported by the decision of Sir W. Wynne, that this is a valid legal rate; there is no decision at present against it, with the exception of the judgment I am now reviewing. The judgment of the Queen's Bench may have gone to the extent that it is an illegal rate, but the Exchequer Chamber has stopped short of affirming this; so far from repudiating the case of *Gaudern v. Selby*, the Judges of the latter Court seem to me to have affirmed the principle of it.

Without entering into the questions raised in the objections, which have been most ably urged, and which have caused me much anxiety and difficulty in upholding this rate, although one that is perfectly reconcilable with justice and equity, as is shewn by the principles arising out of the questions on corporation law; looking to all the circumstances of the case; to the reasonable nature of the repairs to be done; seeing that the measures of interdict and excommunication are ineffectual; that the mode of proceeding is simple and just; and that the party will still have every opportunity, which under any state of circumstances he could have, of objecting to the rate, it appears to me that reason and principle do strongly support the authority of *Gaudern v. Selby*, supported as I think that case is by the opinion in the Exchequer Chamber. As to the case of *Thursfield v. Jones*, although, after the observations made on this case, and to which I have alluded, I consider it as no authority on the main point, it certainly contains an expression of an opinion that [334] in the matter of enforcing the repair of a church the churchwardens are the parties to be cited; undoubtedly it is so. We are indebted to Archdeacon Hale for a publication of great importance and value, containing very many precedents of such proceedings; in all the cases the churchwardens are the parties cited; they are the parties liable to do the repairs; they are called on to certify the doing of the repairs; they are to summon the parishioners to meet and make a rate; and if, when summoned, the parishioners will not meet or concur in making a rate, the churchwardens may make a rate of themselves. The churchwardens are the parties to be proceeded against; if they are not able to obtain funds, they are still the parties to be cited; on a presentment of the state of a church being made, the churchwardens are to shew cause against it; they are the persons primarily liable, and they must excuse themselves as they best can. In many instances it appears that the churchwardens have been assigned to do certain acts, and to certify they had done them; in others, they have appeared and alleged the inability of the parishioners, by reason of poverty, to repair; in those cases they have been relieved from the present effect of the citations, and further time given them to make the repairs. In one of the cases in this book it appears, among other things, that a commission issued against the churchwardens—illegally so, undoubtedly. In another case a monition issued to the churchwardens; they returned they had done all they could to compel the repairs, but that the parishioners would not do [335] them. In one case a monition issued, and no appearance being given, it was held that the necessity of the repairs was thereby admitted.

Therefore, without entering further into this question, it does appear to me that both law and justice require that I should reverse the judgment of the Court below; my opinion is, that the law is as stated by Sir W. Wynne, and according to my opinion of the law and justice of the case, to reject this libel would be to do that which would be contrary to law. I may not be supported in this judgment, a prohibition possibly may issue from the Court of Queen's Bench; possibly if that be so, the result may be, that a writ of error may be sued out, and it is further possible that the Court of Error may think that that is not law which is now stated by this Court, and was formerly stated by Sir W. Wynne, to be law. All this may be the result of my decision, but I have no right to anticipate such a result but that the distinction will be upheld, when I find that the Judges of the Exchequer Chamber have reserved to themselves the power of forming an opinion upon this very case, if ever it should occur. It is also possible that the case may go up to the Judicial Committee, a distinct branch of the profession; the members of that Court will have to hear the case, and to consider it with reference to the conflicting judgments, and I do not doubt they will do justice. If this case goes up to the Judicial Committee, the whole point in difference will be settled; at present all that is decided is, that churchwardens cannot by themselves make a rate out of vestry, at a subsequent time

after a rate has been refused by a [336] majority of the parishioners, but it has not yet been decided that they cannot make a rate under the circumstances in which this rate was made, where the majority have refused to make any rate at all. It may hereafter be a question whether the Legislature ought not to take some steps to enforce the repair of parish churches. I think the judgment of the Court below is erroneous, and, therefore, I reverse it, retaining the cause, and reserving the question of costs.

[337] *KEED v. EVERARD*. Arches Court, January 11th, 1843.—An interested witness who had been examined and repeated, ordered to be re-examined on motion before publication.

[S. C. 6 Jur. 66.]

Addams moved for leave to re-examine a witness under the following circumstances :—The witness, a solicitor, had retained the proctor in the cause, and considered himself responsible for costs ; the proctor was now ready to release the witness ; publication had not passed.

Phillimore and Haggard *contrà*.

Sir Herbert Jenner *Fust*. The present application is for leave to have reproduced, sworn, and re-examined a witness who has been already examined, and who, as I am informed, is an important witness in the cause. This person is a solicitor, and he has retained the proctor in the cause, and, as I suppose in answer to an interrogatory, has admitted that he considers himself responsible to the proctor for his costs. A release is now tendered to the party, and the Court is moved to permit him to be re-examined, and I see no reason for supposing that this measure has arisen from a disclosure of any portion of the evidence given by the witness in the cause, save as to his having admitted his responsibility for costs. I know of no instance where such a motion has been refused, when made before publication ; it is a very different thing when it is made after publication, and the reason for the difference is self-evident ; when once the evidence is published and known to the proctor, or to the parties, it would be very in-[338]-convenient if parties could add to the evidence ; but this reason does not apply to an application before publication. The Court is disinclined to shut out the evidence of any party, more especially of important witnesses.

Motion granted.

WOOLLEY v. MORGAN, FALSELY CALLING HERSELF WOOLLEY. Court of Peculiars, January 11th, 1843.—A citation “to appear and answer in a cause of nullity of marriage.” Held, a sufficient description of the nature of the suit. Protest to appearing thereto overruled.

In this case a citation had issued, calling on Mary Ann Morgan, falsely calling herself Woolley, and the wife of John Woolley, “to appear personally or by proctor, at a certain place, on a certain day and hour, then and there to answer to the said John Woolley in a cause of nullity of marriage.”

The party cited appeared under protest.

Addams in support of the protest. A sentence must be conformable to the citation, and to the libel, and more especially to the citation. There may be precedents in which citations have issued in a similar form to the present, but there is no recorded case where an objection to such a citation has been taken by protest ; it would be too late to take such an objection after appearance. A party [339] is entitled to know the particular grounds of the offence for which he is cited, *Wright v. Ellwood* (1 Curt. 49, 662).

The Queen’s advocate and Robinson *contrà*. A citation must contain the name of the Judge, of the plaintiff, of the defendant, the cause of suit, the time, and the place of appearance. The object of the citation is to procure the attendance of the party cited in this Court ; it is analogous to the writ of the Common Law and the subpœna in Chancery. A party may be compelled to answer to matter not contained in the citation, *Barrett v. Barrett* (1 Hagg. Ecc. 22). A citation in a suit for subtraction of tithes never specifies whether the particular subtraction is of corn or of hay ; so, in causes of perturbation of seat, the particular acts of perturbation are never set out ; in a suit for dilapidations the citation does not mention whether the dilapidations exist in the parsonage house or in the out-buildings. In a suit for defamation a party is cited “to appear in a certain cause of defamation or slander ;” this last is a strong

instance, because this Court has not exclusive cognizance of defamatory words, whereas it has in causes of marriage. In the cases of *Ruding v. Smith* (2 Hagg. Con. 371), and *Cope v. Burt* (1 Hagg. Con. 434), the citations were in the same form as in the present case. *Wright v. Ellwood* (1 Curt. 49) only shews that a party may in a citation elect to bind himself as to the explicit grounds of his charge.

Addams in reply. In neither of the two cases mentioned did the parties cited appear under pro-[340]-test. There is no analogy between a citation and the Common Law writ or Chancery subpoena; this is a Court of very limited jurisdiction, and a citation must shew that the Court is not about to transgress it.

Judgment—*Sir Herbert Jenner Fust*. A citation ought to contain the grounds for which, and the matter to which, the party is called to answer; but when nullity of marriage is stated as the *causa ob quam*, this Court having general jurisdiction over all grounds of nullity of marriage, and there being no inveterate practice the other way—indeed, examples to the contrary are shewn—I think that this citation is sufficient. I see no inconvenience which can result from the party being compelled to appear to this citation. The case of *Wright v. Ellwood* in no way militates against this; there the party had elected by the terms of the citation to confine the causes of nullity to certain particular grounds. It may perhaps be convenient, in many instances, to set forth the particular grounds of nullity on which the libel is to be founded; but I do not think that it is absolutely requisite to do so. In this case I must assume that the party cited has a sufficient knowledge of the cause for which she is cited to appear.

I think the instances cited at the bar, and particularly the case of a citation in a cause of defamation, bear out this view of the case.

Overrule the protest and assign the party to appear absolutely.

[341] *STONE v. STONE*. Consistory Court of London, January 18th, 1843.—In allotting alimony pendente lite the reversionary interest of the husband may be pleaded. *Secus*, a mere expectancy.

[S. C. 7 Jur. 380.]

This was a question as to the allotment of alimony pendente lite. The allegation of faculties was objected to by

Addams and Jenner, and supported by the Queen's advocate and Bayford.

Judgment—*Dr. Lushington*. The whole of the objections to this allegation of faculties are concentrated in the objection to the article which pleads the presumptive interest of the husband. The general principle, regulating such allegations, is this, the wife is at liberty to plead the income of the husband, and the sources from whence it is derived; with regard to his reversionary property—and by the word reversionary I mean such property as the husband is entitled to for a vested interest expectant on the death of some person, or on the happening of some other contingency—it is both usual and proper that such property should be stated. I think that with regard to permanent alimony the Court would make a different allotment in a case where the income of the husband was derived from his sole personal labour or exertions, [342] from what it would do when he had moreover a large reversionary property in expectancy. Therefore it does not appear to me that there is any objection to pleading the husband's reversionary property. The article, however, pleads what is the amount of the property of the father of the husband, without discriminating between what is reversionary interest and what a mere presumptive expectancy in the husband. A case may possibly arise in which, under very peculiar circumstances, the Court would allow the property of the husband's father to be stated; this, however, is not such a case.

I think this allegation must be reformed, by pleading that G. S., the party in the cause, is entitled—by this I mean legally and absolutely entitled, not in mere expectancy—to freeholds, leaseholds, and copyholds, of such and such a value.

I see no objection to such pleading, it will exclude all question as to mere expectancies, and allay all fear as to the father of G. S. being led to make a disposition of his property so as to defeat any reasonable expectation which his son may have from his bounty.

[343] WILLIAMS v. GEORGE AND NUNN. Arches Court, January 20th, 1843.—The executor of a deceased parishioner cannot be cited in an Ecclesiastical Court in respect of a church-rate due from his testator.—An appeal Court, in order to prevent a failure of justice, may correct the irregular procedure of an inferior Court (e.g.) by permitting an examination of witnesses, or receiving additional articles, in supply of requisite averments omitted in a libel given in in an inferior Court.

[S. C. 2 Notes of Cases, 85; 7 Jur. 241.]

This was an appeal from a decree of the Consistorial Episcopal Court of Saint David's, Carmarthen; the facts of the case are as follows:—

In the year 1835 the parish church of Minever, in the county of Pembroke, being in a dilapidated state, it was resolved, by the parishioners in vestry assembled, that the church should be taken down and rebuilt; and that, to defray the expenses thereof, a rate of five shillings in the pound, on the annual value of the rateable property in the parish, should be made. To this rate Mr. John Moy, a parishioner, was assessed in the sum of 61l.; this sum he refused or neglected to pay. Mr. Moy died in the month of February, 1837: at the time of his death no proceedings had been instituted to recover from him the proportion of the rate at which he had been assessed. Mr. Moy, by will, appointed Mr. Williams (the appellant in this case), and a Mr. Lewis, his executors; Mr. Williams proved the will in the year 1837. In the month of March, 1841, a citation was served on Mr. Williams, as the sole acting executor of Mr. Moy, calling on him to appear in the Diocesan Court to answer to William George and James Nunn, the then churchwardens of the parish of Minever, in a cause of [344] subtraction of church-rate. Mr. Williams having appeared to this citation, a libel was given in; whereupon the proctor for Mr. Williams applied to the Court to suspend all proceedings until a prohibition could be moved for; the application was refused and the libel admitted. In September, 1841, four witnesses were produced on the libel, three of whom were sworn and examined, and were cross-examined on behalf of the defendant. The defendant gave in no allegation; on his behalf, however, two witnesses were produced and examined, and one of them was cross-examined. On the 14th of October, 1841, the Judge pronounced the contents of the libel to be fully proved, and condemned the defendant in the sum of 61l., and the costs.

From this decree an appeal was prosecuted to this Court. On the process being transmitted no depositions were found annexed, and on inquiry, the fact of the witnesses having been examined and cross-examined *vivâ voce* in the Court below was shewn.

A motion was now made to this Court, by the proctor for the respondent James Nunn, to permit evidence to be taken on the libel; the Court refused to accede to this request by way of motion; whereupon the proctor prayed to be heard in the matter on his petition, which the Court was pleased to allow of. An act on petition was given in, praying that witnesses might be examined on the libel, and, if necessary, cross-examined.

William George, one of the plaintiffs in the Court below, had ceased to be churchwarden in April, 1841, and he then sent a notice to the proctor employed for himself and Mr. Nunn to the following [345] effect:—"Take notice that John Thomas is made churchwarden in my stead, and you are requested to get his name put instead of mine." The proceedings in the cause had been continued to be prosecuted in the joint names of Messrs. Nunn and George. Mr. George refused to appear to the citation on the appeal; this Court, on motion, decided that he was properly made a party respondent, and directed that he should be admonished to appear: this having been done and Mr. George not having appeared, the Court pronounced him in contempt, and directed his contempt to be signified. Mr. George then appeared, and having purged his contempt gave a negative issue to the libel of appeal.

The grounds of the appeal were as follows:—

That the citation in the Court below was issued against the appellant Mr. Williams only, and not against him and Mr. Lewis, they both being named as executors in the will of Mr. Moy: "That on the face of the rate it does not appear, neither is it proved, that any license or faculty for pulling down the parish church of Minever was obtained at the time when the rate was made; that by the exhibit annexed to the libel (a copy of the minutes of the vestry at which the rate sued for was made)

it is recited that a rate of five shillings in the pound, upon the annual value of all the rateable property within the parish, was made upon all the parishioners, towards removing and rebuilding the parish church, by virtue of the 40th section of the 59 Geo. 3, c. 134; and that it does not appear that the consent of the ordinary, or of the patron, or of the incumbent, or of the lay impropriator has been [346] obtained for such purpose: that, by the 25th section of the same act, no rate, for the purpose of building or enlarging any church, shall exceed one shilling in the pound in any one year, or the amount of five shillings in the pound in the whole, upon the annual value of the property in any parish."

Addams in support of the petition of the respondent Nunn. Every Court possesses the power of regulating its own practice; this is a privilege inherent to every Court. It appears that the Diocesan Court of St. David's takes evidence *vivâ voce*, a mode generally considered preferable to taking depositions in writing: such is not the practice of this Court, but, inasmuch as an appeal lies to this Court from the Court of St. David's, and this Court will not examine the witnesses *vivâ voce*, it must order them to be examined according to its own form. The Court of St. David's was not bound to conform its practice to that of this Court, merely because an appeal may be had to this Court; no inferior tribunal is bound to contemplate an appeal from its sentence. The appellant has himself committed the irregularity of which he now complains.

With respect to the objections to this rate, they are of a nature which can only be taken advantage of by way of plea, and the appellant has not given in any plea.

The appeal proceeds partly on a mistaken construction of the 25th section of the act; the words "not exceeding the amount of one shilling in the pound in any one year, or the amount of five shillings in the pound in the whole," mean, that [347] if the whole sum does not exceed five shillings it may be raised in one year; but if it exceeds five shillings, then it must not be raised all in one year, but by instalments of one shilling in each year, until the whole is raised.

Phillimore, R., for the respondent George.

Robinson and Jenner for the appellant. An appeal is a matter of right, and a party seeking for a sentence in an inferior Court must take care to obtain it in such a form that he can abide by it in a Court of Appeal. The proceedings in this case are not simply irregular, but erroneous; irregularity may be cured in a Court of appeal, error cannot, *Levi v. Ward* (1 Sim. & Stu. 334). It has been held by the Judge of the Consistory Court that a church-rate is a personal obligation; if so, *actio personalis, moritur cum personâ*; if otherwise it be a debt, the executor cannot be sued for a debt in this Court, *Williams on Executors* (p. 1230). The requisites of the Church Building Act are not pleaded to have been complied with; it was the duty of the parties who sought to recover the rate to shew that the act had been complied with. *Blunt v. Harwood* (1 Curt. 649).

Sir Herbert Jenner Fust. This is an appeal from the Consistory and Episcopal Court of the diocese of St. David, and the proceedings certainly do not afford a very favourable specimen of the practice in that Court: I never, in the whole course of my experience, saw a [348] case in which such great irregularities have been committed.

The proceedings commenced by a citation for subtraction of church-rate, issuing in April, 1841, and calling on Mr. Williams, as the sole acting executor of John Moy, late a parishioner of the parish of Minever, in the diocese of St. David, to appear and answer to the suit: the party cited having appeared, a libel was given in. The sum sued for is 61l., for one rate only; this certainly does seem a very large rate to be sued for as the contribution of one individual parishioner for the ordinary repairs of the parish church; but, on looking to the libel, it appears that the rate was not for repairing, but for pulling down and rebuilding, the parish church; the rate is annexed to the libel, it is in this form: "Be it remembered that we the churchwardens and other parishioners of the parish of, &c., do hereby at our vestry meeting, duly convened in pursuance of a notice, and of several acts of Parliament, and more especially of an act of the 59 Geo. 3, c. 134, ss. 23-40, for building and enlarging churches, wholly or in part by means of rates, tax and rate the parishioners of this parish at five shillings in the pound upon the annual value of the rateable property within the parish, the same being for and towards the removal and rebuilding of the parish church."

Therefore this is no common church-rate, and although the sum sued for is large,

when considered as the share of one parishioner of a rate for repairing the church, it probably is not so when made for the purpose of removing and rebuilding the church.

It appears by the libel, as given in the Court [349] below, and by the tenor of the sentence, which was pronounced so long ago as October, 1841, that the rate in question was made in 1835: this is a most startling fact at the very outset of the proceedings.

It has been objected to entertaining this appeal that the proceedings are not simply irregular, but erroneous, and it is said that, although this Court would be anxious to prevent a failure of justice from mere irregularities in an inferior Court, yet, that where the whole proceeding has been of so erroneous a character, as in this case, the Court would not be inclined, even if able to do so, to extend any indulgence to the respondents. Now, if the circumstances of this case shall be found to be such as to induce the Court to extend any indulgence, I think the fact that the evidence was not taken in writing would not prevent this Court from taking those steps which it has done in other cases; namely, such steps as will prevent the real justice of the case from being defeated; it is necessary, therefore, to consider what has been asserted on behalf of the appellant, the executor of the party on whom the rate was assessed. It must be remembered that the appellant has concurred in the irregularity in the Court below in regard to the mode of taking the evidence. Is there then any necessity for this Court permitting witnesses to be examined in support of the original libel? *Primâ facie*, there is no reason why this Court should become auxiliary to the respondents, or should be anxious to assist in extricating them from the errors of the Court below.

Now this rate was made in the year 1835; Mr. Moy was then living, and was a parishioner of [350] Minever; he did not die until 1837, and although it is stated that demands were made for this rate, and that he refused to pay, yet, inasmuch as he died in 1837, and his will was proved in the same year by the appellant, and no demand was made against the appellant as the executor until 1841—very nearly six years after the rate was made, and quite four years after the death of the party against whose executor these proceedings are instituted—the Court has wished to have heard some explanation why the churchwardens were so negligent in collecting this rate, and why these proceedings were adopted, not against the party assessed, but against his executor, and that too after this lapse of time.

When I look to the facts of the case, I find that this is a rate assessed upon a parishioner no longer living, and that his executor is the party called on to pay it. I should have much liked to have had some case or some principle produced shewing that a churchwarden can in these Courts sue an executor for a rate due from his testator. The present Judge of the Consistory Court has held that the obligation to pay a church-rate is a personal obligation; but supposing it to be a debt, clearly it is not recoverable in this Court; it must be sued for in some other Court. The executor was not personally assessed to this rate; he was not even a parishioner of Minever at the time; there could be no proceeding against him personally. This Court has no jurisdiction, at least as far as I am aware of, to enforce as against the executors of a parishioner the payment of a church-rate, even admitting that the parishioner, if living, might have been liable to be called on for payment of such rate; and more especially if that parishioner was never, when living, [351] cited in respect of such rate in the Ecclesiastical Court. I know of no principle which can authorize such a proceeding against the executor.

There is another ground of objection, namely, that the executor has no assets, *plene administravit*. I am aware that this is rather going into the merits of the principal cause, but then the present application prays a special indulgence, and although I think that in furtherance of justice the Court might grant such indulgence, it would do so only on the terms that there should be no controversy on the real merits.

What are the circumstances of this case? This is not a rate for repairing, but for removing and rebuilding a church, the sum assessed on this parishioner being no less than 61l. The question must be considered whether this is a rate properly made. The 59 Geo. 3, c. 134, noticed in the rate itself, requires that, before any such rate be sued for, certain requisites and consents should be obtained, to wit, those of the patron, of the ordinary, and of the incumbent; but not a single syllable on this point is mentioned in the libel: it is simply pleaded that the rate was legally made; however, the question still is whether, though not so pleaded, these consents can be proved. If I saw any hope of further information being furnished, I might have permitted an

amendment of this libel, with a view to evidence being taken on this point; but the material question would remain, whether under this Act of Parliament this rate of 5s. in the pound is a legal and valid rate. It has been said that additional articles may be given in; but I am not inclined to grant any special indulgence in this case, because I am of opinion that in this libel there is no sufficient [352] ground for such indulgence. Looking to the amount of this rate; to the fact that the person proceeded against is simply the executor of the party assessed; to the delay; and to the manner in which the suit was conducted in the Court below, I am of opinion that I should not be acting in the furtherance of justice if I permitted the parties to examine witnesses *vivâ voce*. I therefore reject the prayer of this petition.

I reserve the question of costs until the principal question comes on.

At the request of the counsel for all parties the Court proceeded to conclude the cause and assign it for sentence; and, having done so, pronounced for the appeal, reversed the sentence of the Court below, gave the appellant costs of the appeal, but made no order as to the costs of the Court below.

NUNN against VARTY AND MOPSEY. Arches Court, January 27th, 1843.—Appeal in a matter of church-rate—Held, rate properly made on inhabitants of district parish in respect of district church. Churchwardens declared to have been duly elected. Sufficient notice of making a rate. Construction of local and public Church Building Acts.

[S. C. 2 Notes of Cases, 108. Distinguished, *Taylor v. Timson*, 1888, 20 Q. B. D. 678.] [See this case reported ante, vol. ii. 877.] The defendant appealed from the decision of the Consistory Court.

Bayford for the appellant.

Addams for the respondents.

Judgment—*Sir Herbert Jenner Fust.* This is an appeal from the Consistory Court of London in a cause of subtraction of church-rate, promoted in that Court by Messrs. Varty and [353] Mopsey, as the churchwardens of the parish of St. John's, Hackney, in the county of Middlesex, against Mr. Nunn, an inhabitant and parishioner of that parish. The usual proceedings were had in that Court; the citation being returned, an appearance was given by the party cited, and the libel, which is very much in the usual form, was given in and admitted without opposition. The answers of Mr. Nunn were given to that libel and witnesses were examined upon it. Publication was prayed on the part of the churchwardens, and an allegation was then asserted by the proctor for the party cited. That allegation was afterwards brought in, and its admissibility debated before the chancellor of London, who was of opinion that it was not entitled to be admitted; inasmuch as, if all the facts pleaded were proved, it would not, in his opinion, be a valid defence against the demand which had been made upon Mr. Nunn: it is on the rejection of that allegation that the present appeal is brought.

The appeal has been proceeded upon here in the usual form; and it is now for this Court, having heard arguments at great length, to decide whether the Judge of the Court below did right in rejecting that allegation, or whether he ought to have admitted it.

Now the allegation consists of twelve articles, besides the usual concluding article. It sets forth a variety of objections to the validity of the rate which is sued upon. That rate bears date the 23rd of July, 1840; the amount at which Mr. Nunn has been assessed, and which is sought to be recovered in this suit, is 3s. 4d., the rate being [354] made at 2d. in the pound, for premises in his occupation rated at 20l. a year. It is not therefore the amount which is in question between these parties that renders this case of importance or of difficulty; but it is the principle on which the rate has been made.

Now the objections which are set forth in this allegation may be classed under six heads. I think they were so classed by the learned Judge in the Court below; and, in point of fact, that classification arises out of the allegation itself. But in order to consider what weight is due to each of these objections, and to see how far each constituted a defence to the suit, it will be necessary, and perhaps convenient, to state briefly the history of this parish.

It appears that in the year 1763, which is the first date referred to in the allegation, because, as it is stated, at that time there were certain fees which were paid, and had been paid up to that time, for the old burial ground of the churchyard belonging to

the parish, and which were afterwards claimed for the new burial ground ; the important point in regard to 1763 is, in order to the consideration whether the same fees which were then paid are now payable, and ought to be paid for the present churchyard. In 1763 it was found necessary, in consequence of the increase of the population of the parish, to enlarge the churchyard ; and for that purpose a piece of copyhold land was purchased and paid for out of certain monies which formed a part of what was called the unappropriated fund ; which fund is explained in the first article of the allegation to have been created by means of [355] fines imposed on persons in lieu of compelling them to serve, and as an excuse for not serving certain parish offices.

The ground having been consecrated, was from that time used as the burial ground of the parish. The old churchyard was scarcely resorted to for the purpose of burial ; and, according to the resolution of the vestry, which is annexed to this allegation, never except with the leave of the churchwardens or under particular circumstances. For all the interments in that ground—that is, in the old burial ground, and in this new burial ground—it is asserted that the churchwardens of the parish were accustomed to receive certain dues for the use of the ground, and also for the tolling of the bell at funerals.

Now in this state the parish continued until 1790. The old church had then become in a state of great dilapidation ; it was too small for the increasing population of the parish and the accommodation of the parishioners ; it was therefore thought expedient that a new church should be built, and an additional cemetery or burial ground should be procured ; and, in order to facilitate those objects, an Act of Parliament was passed, the 30th of George the Third, chapter 71, by which trustees were appointed for the purposes of the act ; and that act contained a variety of provisions to which it will be necessary for the Court hereafter more particularly to refer. At present it will be sufficient merely to state that the effect of that act was to vest the church and churchyard in trustees during the continuance of certain annuities ; in fact, until the incumbrances created by [356] the new churchyard and burial ground, and so forth, had been cleared.

Now, in the first instance, the act limited the expenditure to 12,500l. ; but it was afterwards extended by two other acts, namely, the 35th of George the Third, chapter 70, and the 43rd of George the Third, chapter 143, to 12,500l. more, or to a considerable sum, and the whole expense was about 25,000l. It was also provided by the act of 1790 that after the annuities ceased—that is, after the incumbrances had been all cleared off and it was no longer necessary to make rates—that the fee simple of the church and churchyard, and pews, should be vested in the vicar and the churchwardens in trust for the inhabitants of the parish. Power was also given to the trustees, when the new church was completed and consecrated, to cause the old church to be taken down (except the chancel), and to sell the materials ; and the monies arising from such sale were to be applied to the purposes of the act.

The churchwardens were also authorized to receive the same dues which they had been accustomed to receive for funerals in the original churchyard, and for tolling the bell at funerals, and to apply those dues in aid of the church-rate of the parish. It does not appear at what time this new church was consecrated (in 1798). According to the first act, of 1790, all this was to be completed in three years ; in 1794 and in 1803 it should seem the church had not been completely fitted up, or at least the expense had not been de-[357]-frayed, because these two acts are to authorize the raising of certain other sums, the whole amounting to 25,000l. It is not very material to inquire into the fact, because the church had been consecrated long before the rate now in question was made ; but as part of the history of the church, it would have been perhaps satisfactory to the Court to have known at what particular period it was that this church became vested in the trustees after the consecration of it for the use of the parishioners. It is not, however, very material to the inquiry.

Now it seems that the trusts created by these acts are not yet entirely executed ; for it is pleaded that rates to the amount of 700l. are still raised by the trustees for the purposes of the acts ; that is, for the purpose of the acts 1790, 1794, and 1803.

These two last acts passed between 1790 and 1824 ; at this time rates were collected throughout the whole parish, there was no division of the parish of Hackney at all ; but in 1824, by the Church Building Acts of the 58th and 59th of his late Majesty George the Third, the parish of Hackney, which is large in extent and very populous, was divided into three separate and distinct parishes for ecclesiastical purposes, and

this part of the parish was to be called, under the provisions of the act, the parish of Hackney, or Saint John's, Hackney; and the other two divisions were to be called South Hackney and West Hackney. And two additional parish churches were to be built, one for each of these newly created parishes.

The old parish church remained as the parish church of that part of the parish of Hackney [358] which consisted, I may say, of the remaining part of the old parish of Hackney. These churches and these parishes have continued, for ecclesiastical purposes, separate and distinct from that time down to the present.

This is the short history of the parish, and of the passing of these acts; it is important for the Court to consider them with reference to five or six of the articles of this allegation. Other objections have been made in the allegation on different grounds, which do not depend very much, or perhaps at all, on these local Acts of Parliament—they are general.

One is, that the rates are not assessed upon the occupiers of the premises, but upon the landlords; another is, that the rate is unequally assessed; and these do not depend at all on the construction of these acts, on which the main and important question arises, and with reference to which the difficulties which pressed upon the mind of the learned Judge of the Consistory Court of London, and which have also pressed themselves on my mind, arise. I say, it is on the construction of the Acts of Parliament; and it therefore becomes necessary to consider, in the first instance, what is the effect to be attributed to these local acts; leaving the consideration of those parts which depend on the Church Building Acts for the separate and subsequent attention of the Court.

Now the first objection that was raised against the validity of the rate on the construction of these Acts of Parliament is, that the rate ought not to have been made by the churchwardens; that it ought not to be in the nature of a church-rate at [359] all; but that it ought to have been made by the trustees, and to have extended over the whole of the ancient parish of St. John's, Hackney; which comprised at that time the present parish of Hackney, and the portions which are called South and West Hackney.

The second objection was that the rate, if made even by the churchwardens, ought to have been made by the churchwardens of the whole parish.

The third is, that the churchwardens were not duly elected; and therefore that they are not qualified to sue.

The fourth is, that no due notice of making the rate was given; and fifth, that the churchwardens had funds which they might have applied to the repairs of the church, and therefore a rate was not necessary.

What then is the effect of the 30th of George the Third, chapter 71?

The purpose for which that act was made may be collected from the title, from the preamble, and the several sections of the act. Now the title of the act is, "An Act for taking down the Church and Tower belonging to the Parish of Saint John at Hackney, in the County of Middlesex, and for building another Church and Tower for the use of the said Parish, and for making an additional Cemetery or Churchyard." The preamble is, "Whereas the parish church of Saint John at Hackney, in the county of Middlesex, is very ancient, much out of repair, and too small for the accommodation of the inhabitants of the said parish, and it is therefore expedient that a larger church, in a more convenient situation, with [360] proper requisites and conveniences thereto, should be built and provided. And whereas the increase of inhabitants of the said parish has made it necessary to have an additional cemetery and burial ground: therefore, be it enacted that the rector, the vicar, and the churchwardens of the parish of Hackney for the time being," and the several persons whose names are therein mentioned, "shall be, and they are hereby appointed, trustees for putting this act in execution." This is the creation of the trust.

The act goes on to detail the duties of the trustees; but the purpose of the act was to take down the existing church—to build a new church—to add a new cemetery for the parish; and these were the purposes of the act which were to be carried into effect by these trustees.

The act went on to detail, as I have said, the duties of these trustees, and to vest the freehold of the church, the pews, and churchyard in them. And this is an important point on which a great deal of argument has been bestowed by the learned counsel who argued the case on the part of the appellant, in order to establish (that I believe to be the extent of his argument) that the freehold of the church being vested

in these trustees, they were the persons who were bound to maintain the fabric to provide the ornaments, as they were also vested in them, and to keep them in repair; although it is admitted that the rates for the purpose of providing the means for the due performance of divine service would still be a rate on the parishioners. I take that to be the position of counsel; and it is with reference to this that the first objection necessarily [361] arises. Are the parishioners of the parish of Hackney discharged from that which is, and must now be admitted after all the discussions and decisions which have taken place upon it, to be the common law obligation of the parishioners to repair their parish church?

The first thing to be considered then is: Is this the parish church of Hackney?

Now I think it would be a waste of time, and would hardly be thought necessary by any person, to go into the inquiry whether or no, under the provisions of this Act of Parliament, this church is now the parish church of the parish of Hackney; for in the act of 1790 it is distinctly pointed out, independent of what I have referred to in the title, that it was to be substituted for the parish church. [The Court read the 13th, 19th, and 20th sections.]

There can be no doubt, on the construction of this act, that this new church and churchyard were substituted for the old church and churchyard, and consequently if that were so, and there was nothing else in this Act of Parliament, the rights belonging to the old parish church would be transferred to this newly erected parish church and burial ground, and the rights and liabilities of the parishioners to the use of the church and churchyard would also have been transferred with it, and whatever obligation there was on the parishioners to repair the old church would also fall on them in the new church: and the question therefore which has been raised on this Act of Parliament—on this part of the act at least—is simply this—whether, as the freehold was vested in these trustees, the obligation of repairing the church was not also cast on them?

[362] Now it will be necessary to consider what is the effect of these allegations; or the effect of the argument raised upon them.

It is argued that the reparation of the church and churchyard arises from custom, and custom only; that it must be construed strictly, and that, as by the general canon law the onus and burthen of repairing the church, and providing the ornaments, was cast on the incumbent—the freeholder—so in this case, where the freehold is transferred from him to the trustees, the burthen must follow.

Now it is certainly true that by the general canon law the burthen of repairing the church does fall on the incumbent of the parish; and therefore it must be shewn that there is a difference in this respect in the law of England from that of many other countries; and I think there was a great deal of industry bestowed, and a great deal of learning displayed,^(a) in order to establish that at one time at least in England the repairs of the church were thrown on the incumbent, and that it was only by supervening custom that he was relieved from that burthen, which was cast, as far as the body of the church was concerned, on the parishioners; the reparation of the chancel still continuing in the incumbent or rector of the parish.

Now in support of that argument reference was made to ancient records—to writers of estimation and of repute, in order to establish the fact that at least at one time, as to repairs, that was the law of England. But it seems to be unnecessary very much to enter into that question, because it cannot [363] be denied, and it was even proved by the very authorities referred to, that as early at least as the beginning of the 11th century a custom prevailed in England that the church should be repaired by the parishioners. At the time of Canute the custom existed (supposing that even to be the origin of the custom), that churches were repaired by the parishioners, and not by the incumbent; and as this has now continued to be the custom—not prevailing in any particular city, town, and district, but universally through England—it can hardly be considered as a custom; but it is rather entitled to be considered, as was stated by Lord Chief Justice Tindal in delivering the judgment of the Exchequer Chamber in the *Braintree case*, as the common law of England; for in point of fact the common law of England, *lex non scripta*, is nothing but custom: and when it is once proved that the general law, the universal law of England, is that the church shall be

(a) A summary of the whole of the argument on this point will be found in Mr. Rogers's *Ecclesiastical Law*, p. 163, n.

repaired by the parishioners, it can hardly be considered that it is giving a fair description of it to say it is a custom, and to be construed strictly.

A claim of any particular place to be exempt from the obligation imposed by the common law may be fairly called a custom, and may be maintainable, supposing it to have a reasonable foundation or a reasonable origin; but the general law of England, the common law of England, is that which must prevail, unless it can be shewn that the burthen, which that common law imposes on certain individuals or certain places or districts, has been modified or altered by some special enactment or by necessary implication. Now I cannot consider it [364] to be a necessary implication that the mere vesting of the freehold in trustees for certain purposes is sufficient to throw on them the burthen of the repairs of the church. At all events, the utmost extent to which the argument could go would be this: that the trustees are placed in the same situation as the freeholder in whom it was before vested; that is, in the same situation as the incumbent of the parish; if he repaired the church, then divesting him of the freehold might perhaps carry with it the obligation of repairing the fabric of the church; but if the incumbent did not repair the church in virtue of that freehold, why then are the trustees, by the transfer of that freehold, to have that burthen cast on them? Without considering therefore whether the analogy which was stated between repairs of bridges and highways and so forth would hold good, it seems to me that when, by the common law of England universally prevailing throughout the kingdom, the repair of the church is cast on the parishioners, the mere transfer of the freehold from the incumbent, and the vesting it in these trustees, will not impose upon them any other liability than that which the incumbent of the parish at the time had cast upon him; and that certainly did not extend to the repairs of the body of the church.

The freehold, it is true, is stated to be in the incumbent; but the freehold is subject to the exercise of certain rights by the parishioners. The herbage of the churchyard is in the incumbent; the right of interment in the churchyard is the right of the parishioners. The freehold of the church, as well as the churchyard, being in the incumbent, is [365] subject to the rights of the parishioners for the purpose of attending divine service, of receiving the sacrament, baptisms, marrying, and interments.

Under these circumstances then I am quite clear that the Judge below was right in considering the mere transfer of the freehold, and vesting it in the trustees, did not relieve the parishioners from the burthen of repairing the church, or throw it upon the trustees themselves. It must be therefore by virtue of some special enactment, or necessary implication, that the trustees are to take upon themselves that burthen.

Now, what are the circumstances of this case? The trustees are to act according to the duties which are pointed out (they being appointed in order to carry them into effect for the purposes of the act); those duties are to be collected from the preamble and from the whole of the act, where they are pointed out much in detail. In the first place they are to purchase, by the 10th section of the act, a certain piece of ground, and having purchased this, which is to be paid for out of the monies to be raised in the manner pointed out by the 11th section of the act, they are to cause (section 13) the new church to be built on part of that land—they are then to cause a new cemetery to be made on the residue; and if there should be any part not required for the purpose of the church or churchyard, they are empowered to let or dispose of such remaining part; they are to cause the church and churchyard to be consecrated—they are empowered to pull down the old church after the new church had been consecrated, and to dispose of the materials (the old chancel was to be left standing, section 16), [366] and the churchyard was to remain as consecrated ground. The monies arising from the sale of the materials, and the rent or sale of that part of the new ground not required for the cemetery, were also to be applied to the purposes of the act. The trustees were also empowered (section 24) to let certain pews in the church to schools in the parish, at certain rents, and these rents, during the continuance of the rates, are to be applied by them to the purposes of the act; and after the cessation of the rates—after it shall become no longer necessary to provide for the payment of the interest of the money borrowed, or the annuities on which it was borrowed—are to be applied in aid of the church-rates of the parish. The duties therefore which were imposed on the trustees by this act were those which I have here enumerated; and the monies

which were to be procured by these different modes—by the letting of the pews, and by letting such part of the churchyard as was not required for the church or for the burial ground, and by the sale of the old materials—were to be applied for the purposes of the act.

But besides this, in order to enable the trustees to meet the expenses, which must necessarily arise in carrying this act into execution, they were empowered (29th section) to borrow money; and the preamble of that section of the act may perhaps not be unimportant, because something turned upon it in the argument, in reference to the sums that were paid to the churchwardens in the new cemetery for burials there.

Now the 29th section is to this effect, "That as the aforesaid dues and duties (that is the dues and duties [367] payable to the churchwardens, under the previous section) will be insufficient for the purpose"—not may be insufficient—but will be insufficient; assuming the fact that they will and must be insufficient; "it shall and may be lawful for the said trustees, by writing under their hands, to make an assessment or assessments, rate or rates, on the occupiers of all lands, houses," &c. It is unnecessary to enumerate all the particulars of the property on which that assessment is to be made, "all which rates and assessments are hereby vested in the said trustees; in trust to be applied by them for the purposes of this act, and shall take place from the 21st day of March, 1790, and continue for and during such time as any of the moneys to be borrowed on bond, or raised by the sale of annuities upon the credit of this act (as herein mentioned), shall remain owing or have continuance and no longer."

This shews that the purpose to which these rates were to be applied was to discharge these bonds and to pay these annuities. The rates were to continue only so long as it was necessary to pay these annuities; when they ceased, and all the bonds were discharged, the trusteeship was to cease; and the property was to be vested in the vicar and churchwardens of the said parish for the time being, in trust for the inhabitants of the said parish.

Now nothing can be more clear on these several sections than this, that the duties of the trustees being such as I have mentioned, the monies raised by them were to be applied for the purposes I have here described, viz., to the purpose of the redemption of the debts which had been incurred, by carrying into effect the purposes of the Act of Parliament. [368] It is quite impossible it should be for any other purpose, according to my reading of this section of the act.

It is true that in the 29th section of the act there is a reference made to certain dues and duties payable to the churchwardens of the parish; and those dues and duties which are to be received and payable to the churchwardens are set forth in the 23rd section, which enacts, "That whereas the churchwardens of the said parish have received certain accustomed dues and duties at funerals or interments of the dead, for the use of the ground in the present church or churchyard, and for tolling a funeral bell in the said church; be it further enacted that the said churchwardens shall continue to demand, take, and receive such, and the same dues and duties at funerals or interments of the dead in the said new church and churchyard, and for tolling a funeral bell in the said new church; which dues and duties, when received, shall be applied by the said churchwardens in aid of the church-rate of the said parish."

The church-rate of the said parish never can mean the rate to be raised by the trustees for the purposes before mentioned.

All I can collect to be the meaning of this 29th section is, that whereas it is possible the expenses will be greater than can be defrayed by the dues and duties which could arise by the use of the ground in funerals and interments of the dead, some other means must be devised for meeting that expense. The funds of the parish—the ordinary church-rate of the parish, which is that which would under common circumstances be resorted to for the purpose of increasing church accommodation of the parishioners, would be utterly insufficient for that [369] end. It cannot be expected, out of that common church-rate, that the ground could be purchased—the church built—the burial ground made and consecrated—and ornaments of a proper description provided—and therefore another fund is to be created; and the mode of creating that fund is by empowering the trustees to borrow money for the purposes of the act, as distinguished from that of an ordinary church-rate. And when it is said in the 24th section that the trustees may take certain rents for pews erected for the accommodation of schools in the neighbourhood, that means in consequence of the increased expenditure made necessary in order to provide extra accommodation which is to be given to these

schools, in a certain degree, to the prejudice of the general body of the parishioners; it was, but reasonable that they should contribute to defray the expense which would necessarily be incurred by the erection of these galleries for their accommodation, during such time as the debt should remain which had been incurred by the removal of the church and so on. But when that should cease, it was still reasonable that a rent should be paid for these pews, and that such rent should then be paid to the churchwardens in aid of the church-rate.

Now it is quite impossible to read the act or consider the real meaning and intention of the Legislature, in respect of this act, and not to see that the trustees would have misappropriated that money if they had applied any portion of it to purposes for which an ordinary church-rate is collected.

The purpose for which they are to raise these sums is for payment of the annuities, for the liquidation of the bonds on which the money had been [370] borrowed; therefore, if they had applied them towards the repairs of the church, in my opinion they would have misappropriated the sum raised; it was ordered to be set apart for purposes other than those to which an ordinary church-rate is applied; and the trustees had no other funds out of which they could pay for the repairs.

The view the Court had taken of this case is strongly fortified by the fact that it is nowhere alleged that at any time since 1790, when this trust was created, were the trustees applied to for the purpose of repairing the church. Nor is it any where suggested that from the year 1790, or since the time when this church was consecrated, church-rates have not been made in this parish. Indeed, I find by reference to the exhibit annexed to the allegation, which is in supply of proof by Mr. Nunn, that the churchwardens' accounts were continually exhibited before the vestry, and were examined as late as in 1840 for the purpose of seeing what sums had been received by them on the church account. That church-rates were periodically made is not denied; in point of fact a church-rate must have been made for the purpose of keeping the church open for divine service. But these dues and duties are to be paid to the churchwardens in aid of the church-rate: not to go in entire liquidation of the rates, but in aid of the rates, which the churchwardens would be legally empowered to raise.

Therefore, on this part of the case I am clearly of opinion the burthen of repairing the church was not transferred either by the transfer of the freehold to the trustees, or by the direction of the act that these dues and duties should be paid to the churchwardens.

[371] This act was, most undoubtedly, a very important act in regard to the alteration made in the parish with respect to the church itself—the churchyard and the building of the new parish church; and it seems to me that the act, when it comes to be considered in all its bearings, leaves no doubt what was the real intention of the Legislature with respect to this church. This church and churchyard were for the use of the parishioners, the trustees had a qualified interest; they were to set out pews for the vicar and churchwardens, and to construct the new chancel; all the rights of the rector were to remain as they were in the old church; in short, it was vested in these persons as trustees for the use of the parish, not for their own advantage or benefit, but as trustees. Although it may be, perhaps, somewhat difficult to assign any reason why it was thought necessary to vest this freehold, still more to vest the ornaments in them, yet the mere fact that it is so vested is not sufficient to relieve the parishioners from the burthen which is thrown on them, and which they bore while the freehold was vested in the incumbent of the parish. For the freehold is in the incumbent of the parish and not in the incumbent and parishioners; although the use of the church is for the benefit of the parishioners, who are entitled to use and occupy it.

Therefore on that part of the case the Court will say no more, except that the view which is now taken of the duties of the trustees, and of the purposes for which the money is to be applied when it has been raised by the rates, is still further confirmed by the two latter local acts; namely, by the 35 Geo. 3, s. 23, and that of 1803. The monies are to [372] be further applied in the liquidation of the debt which has been incurred under those acts, or by reason of these additional sums.

By the first act, rates to the amount of five-pence in the pound, by the second act two-pence—seven-pence in the pound in the whole—were to be raised; and it is enacted, that if any surplus shall arise of the rates and assessments to be made or assessed under and by virtue of the said act, after payment of the annuities,

it is to be applied to liquidate the debts which had been incurred under the former act. All this goes to fortify the view which the Court has taken of the construction of the act; that these sums of money so raised by the trustees were to be appropriated, solely and alone, to the redemption of the annuities; and as soon as that purpose was accomplished, then the church was to be in the minister and churchwardens for the benefit of the parishioners.

I have deferred the consideration of the application of the dues and duties mentioned in the 23rd section of the act until the subsequent part of the case, because they arise, and can be more conveniently considered, under that article of the allegation which states the amount of the rate to be excessive.

Now another question arises under a different system of law.

Between 1793 and the year 1824 two other Acts of Parliament were passed. Those are generally known as the Church Building Acts. The first of these is the 58 Geo. 3, c. 45, and the second is the 59 Geo. 3, c. 134; and the purpose of those acts [373] was to afford additional church accommodation for populous parishes.

Now these two acts have at various times received what have been called amendments; that is, acts have been passed in order to explain and to render them more effectual. Whether that end has been accomplished by these more recently passed acts is a question upon which the Court is not at present called upon to enter. I have reason to believe some effectual amendments will be soon made to these acts; that there will be an act further to amend or to render them more effectual by consolidating all their enactments; and I hope also to remove all doubts and difficulties which may arise on their construction: at least there is every reason to hope such will be the case in the hands to which it has been entrusted; (a) and that no additional difficulty will be created in the construction and in the application of these Acts of Parliament.

Now the parish of Hackney, as I have already stated, was of great extent and population; it was extremely important therefore that any provision that might be made by the Act of Parliament for the promoting the building of additional churches in populous parishes should be applied to this parish; and accordingly we find, between the passing of this act and 1824, it was deemed advisable to divide this parish of Hackney into three separate and distinct parishes; and there is authority given to the commissioners by this act of the 58 Geo. 3 to carry it into effect. Accordingly it was so divided into [374] the parish of South Hackney and West Hackney, leaving the parish of Hackney, so called, as it before stood by that name, or the parish of Saint John, or it may be described as Hackney proper.

Now the question that arises on this part of the case is whether, by the separation which has taken place, any alteration is made in the mode of assessing the church-rate. Whether, as in 1790 and up to 1824, the assessment was made upon each and every part of this parish, comprising as well South and West Hackney as Hackney proper; whether by this division any alteration has been made in this respect, and what alteration has been made (the rate now before the Court being made by the parish of Hackney, properly so called, on the inhabitants of that parish), this will depend on the consideration of several of the sections of the acts.

Now the first section to which the Court will refer is the 16th, because that is immediately applicable to the present case. It is that under which the parish of Hackney, as it originally stood, has been divided into three distinct parishes, by the separation of two portions from that of which the parish originally consisted.

Now the 16th section directs that in every case in which the commissioners should be of opinion that it will be expedient to divide any parish into two or more distinct and separate parishes for all ecclesiastical purposes whatever, "it shall be lawful for the said commissioners, with certain consents therein mentioned, to make such division."

The effect of such powers is to completely sever and separate these portions of parishes from the old parish. Two new, separate and distinct parishes [375] have been created in this case by the commissioners, under this 16th section of the Act; and the effect of that, standing simply by itself, necessarily would be to leave the

(a) The Court was understood to refer to the Judge of the Consistory Court of London.

parish of Hackney—that part of the parish of Hackney which is properly now so called—as it was before it was dismembered of certain portions which originally belonged to it, and which portions are as if they had never formed a part of the parish for all ecclesiastical purposes (I am now confining myself to the consideration of the 16th section of the act only); it was as if they had never existed as part of the parish of Hackney from 1824, when the separation of the parish was final and complete. Whether by resignation of the minister, or in what other manner it was rendered effectual, is immaterial, because it is agreed on all hands they then became separate and distinct; and, as I have already stated, those portions of the parish so severed and dismembered from the old parish were as if they had never formed a part of it.

Now, that I am right in stating this I think is quite clear by the latter section of the act, namely, with respect to the glebe lands, tithes, moduses, and endowments; they no longer form a joint fund to be appropriated to the maintenance of one minister; those portions which arise within the separated parishes are each to go to their respective ministers. Consequently, on the construction of the 16th section, the portion which arises within the part of the parish which still remains the parish of Hackney was to go to the minister of that parish.

When, in 1824, this separation took effect, the inhabitants of those portions of the parish which are now called South Hackney and West Hackney [376] were no longer at liberty to resort, and they had no right to resort, to the parish church of Hackney for the purpose of receiving divine offices; they had no claim on the minister of that parish more than on the minister of any other parish in the diocese of London; the districts were separated completely, and set apart as distinct from this parish; at least for all ecclesiastical purposes.

In construing this section of the act I take no consideration of the local acts, because this is a general act, which had no reference whatever to these or any other local acts—it was general for the whole kingdom, as to the mode in which parishes were to be separated from each other.

There may, under particular Acts of Parliament, be provision made by which under certain circumstances the parish may still be considered as part of the original parish, but not for ecclesiastical purposes; for all ecclesiastical purposes whatsoever they are separate and distinct.

Now it has not been contended, indeed it was admitted, and properly admitted, that if this 16th section stood alone, it could not be contended that the whole of the parish ought to contribute (that is, South Hackney and West Hackney) to the reparation of the church by the church-rates of the parish of Hackney. It was necessarily admitted that they would be exempt from contributing to the rates by the 16th section; but it is said, by the 31st section of the act, the hands of the Court are tied, for the 31st section has in effect explained what is meant by ecclesiastical purposes; that it has limited the general terms of the 16th section by those which are used in the 31st section; and it cannot be denied but that considerable difficulty does arise [377] by the limitation which is contained in this 31st section. For what is that 31st section? It is this: “That no divisions of any parish, or extra parochial place, whether it be divided into separate parishes with the consent of the patron and bishop of the diocese, or into distinct parishes, nor anything in this act contained in relation thereto, shall affect, or in any manner be construed to affect, any parish or extra parochial place so divided, or the persons residing therein, in any other respect than in this act particularly provided, or in any manner to apply to any poor or other parochial rates which may be raised in the parish, or extra parochial place so divided, or in any such separated parish or district parish, or to the maintenance or relief of poor persons, or to any title or claim to such relief, or to any powers relating to any such rates, or holding vestries, or appointment, or powers of parish officers, or any such relief or claim thereto, or to any Act or Acts of Parliament, or law or custom relating thereto.”

So far therefore in all these particulars the persons resident in this parish are not to be affected; they are to be liable to the parochial rates as they were before, nor are they liable to be affected in any other degree as to rates, “save,” then comes the limitation, “save and except as to church-rates.”

Supposing the act stopped here, church-rates would be excepted—they would be left to the general operation of the 16th section of the act, by which, being created separate and distinct parishes, they would be liable to the repair of their own church

as a necessary consequence ; but then, unfortunately, comes a still further limitation, "in so far as the same are regulated by the provisions of this act."

[378] Now there is a limitation upon a limitation ; an exception upon an exception ; and it is upon this second exception, engrafted upon the first, that the difficulty of the case arises ; because, as was observed by the learned judge in delivering his judgment in this case in the Court below, "it was to be expected, and it was a reasonable expectation, after stating what was the exception and what the limitation, so far as the same are regulated by the provisions of this act, that in some part of the act would be found some special enactment, by which it would be declared on whom the repairs of the churches were to fall upon a division of the parishes—whether the original parish, or those separated from the original parish into separate and distinct parishes." It was undoubtedly reasonably to be expected that such a provision would be found, and yet it is true that, on looking through the several sections of the act, and that of the 59 Geo. 3, which followed, and the other acts, there is no special provision made for this particular case ; that is, for the repairs of churches separate and distinct of one parish there is no special enactment in terms. But it is a question, and is a point which the Court is called upon to consider, whether the Legislature has not expressed all that it meant to express—whether it has not sufficiently shewn, by necessary implication, what was the intention and what was the purport of the act ; and if in words it does not contain a special provision "that separate and distinct parishes shall repair their own parish church," is there not in the Act of Parliament sufficient to shew that separate and distinct parishes, being so created by the act, were to repair their own churches, without any special words ?

[379] It is clear, and must be admitted, that there might have been a much more direct mode of doing it than by compelling the Court to put their interpretation on the act, which, in order to effect the intention of the Legislature, the Court must do ; it would be far more satisfactory to the Court, and to persons who have to act under this statute, if there had been an express provision. But is it absolutely necessary that there should be ? When once the Court has ascertained what the intention of the Legislature was with respect to the repairs of these churches, it is the duty of this Court, and of all Courts who are to construe Acts of Parliament, if it can do so without evidently distorting the words of the act, to put such a construction on them as will best effect that which it has satisfied itself was the real intention of the Legislature.

Now, then, the 70th and 71st sections of the Act of Parliament are those which bear upon this part of the case. "That the repairs of all such district churches or chapels shall be made by the districts to which they respectively belong, by rates to be raised within the district ; in like manner as in case of repairs of churches by parishes."

It assimilates the churches of district parishes, as to repairs, to the repair of churches in undivided parishes ; and not only so, but goes on to declare why they are to be so, and in what way they are to be considered as liable to the repairs. "And every such district shall be deemed in law a separate and distinct parish for that purpose ; and the repairs of all chapels, not made district churches, shall be made by the parish in or for which the chapels shall be built."

[380] Why, then, this section declares that the repairs of the district churches shall be made by the district, and for that purpose it shall be considered—What ? Why, a separate and distinct parish, as by the 16th section of the Act of Parliament separate and distinct parishes were created.

The very words used in the act are here made use of—"a separate and distinct parish." Can anything be more plain than this, that the Legislature must have considered that when a parish was created into two or more distinct and separate parishes, each parish must be liable to all the incidents of a separate and distinct parish ; and by assimilating the district churches to the separate and distinct parishes for the purpose of repairs, does it not speak as language can do (short of express terms) that they shall be repaired in the same way ; that these district churches shall be precisely on the same footing as separate and distinct parishes. And therefore district churches are to be considered as separate and distinct parishes for the purpose of repairs.

Again, the 71st section of the act, "That every such district shall remain nevertheless subject, for twenty years, to be accounted from the day upon which the district

church or chapel shall be consecrated, to the repair of the original parish church, and be deemed part of the original parish for the purposes of such repairs."

Why, here again the district church was not to be relieved altogether from contributing to the repairs of the original church. For twenty years it is to continue subject to those repairs; and for the purpose of those repairs it was to be considered as part [381] of the original parish; but at the expiration of these twenty years it is to be repaired by the district of the parish left as belonging to it, after the other divisions or districts are made; "and each district shall for ever thereafter make, raise, levy, collect, and apply separate and distinct rates for repairs of the church, or churches, or chapels of the district, as if a separate parish."

Now it is quite impossible I think for language more distinct (short of using the express words) to shew that this was the effect of creating separate and distinct parishes—that they should repair their own churches. But it is hardly necessary for this purpose to consider whether these two distinct parish churches, which were parishes created out of the parish of Hackney, were to repair their own churches; that is subsequently provided for more distinctly; but here is the old part of the parish left intact; it is not disturbed, it is dismembered of part, but it remains in esse the same parish church as theretofore; and is necessarily to be repaired by the parish of Hackney—such parish not being so extensive as it formerly was, because there are two other parishes carved out from it, but still remaining in substance the same—the same rector—the rector is to be appointed for the parish of Hackney—the churchwardens of the parish of Hackney transact the business of that part of the parish as churchwardens for all ecclesiastical purposes.

Now, upon this construction therefore of the act I am inclined to think that the Legislature has spoken in terms sufficiently clear, and that it was intended to separate these parishes into separate and distinct parishes, and that the acts have placed [382] them in the same situation with respect to each other, so far as concerns the repairs of churches.

The 3 Geo. 4, c. 72, passed in 1832, professed to remove the doubts which it was thought not improbable to arise with respect to the mode in which the repairs were to be made; but it does not affect the question in any manner whatever as it appears to me. Although it states that doubts may arise how the repairs of churches were to be effected, it only removes those doubts where churches and chapels are built in aid of existing churches and chapels, and not where separate and distinct parishes are created. The 20th section of the act declares that, "Whereas doubts may arise as to the repairs of churches or chapels required and appropriated, or built or enlarged, or improved in aid of the churches of parishes or places under the provisions of the said recited act, for remedy and prevention thereof, be it enacted that all chapels acquired and appropriated, or built or enlarged, and improved under any of the provisions of the said recited acts, or under any local acts, in cases in which no provision is made relating thereto in such local acts, in aid of the churches of the parishes or places in which they shall be situated (whether any district of any such parishes shall have been assigned or not to such chapels, as belonging thereto for ecclesiastical purposes), shall be repaired by the respective parishes or places at large to which such chapels shall belong; and rates shall be raised, levied and collected for that purpose in like manner in every respect as for the repair of the churches of such parishes and places. And all laws in force for making, raising, levying and collecting rates for [383] the repair of churches shall be applied and put in force for the raising, making, levying, and collecting such rates for the repairs of such chapels."

It is only those built in aid of district parishes.

Now I am of opinion, on this construction of the Act of Parliament, that the parish, which still remains the parish of Hackney, which is not removed or altered by any circumstance at all, so far as that part is concerned, but from which two other parishes have been severed, and created separate and distinct parishes, is liable to the repairs of the parish church, which was built under the provisions of the act of 1790—the substitution now for the parish church which was originally in the parish; and consequently that the rate has been properly made from the year 1824 (the time the separation became complete) for that part of the parish only: and that it was not necessary that these rates should extend over the whole parish, as originally proposed, but confined simply to that part of the parish which now remains the parish of Hackney.

The next question then for the consideration of the Court is with respect to the election of the churchwardens of this parish. It is said that these churchwardens are not duly elected churchwardens, because no notice has been given to the parish of South Hackney and West Hackney of the election of the churchwardens; and that under the local Act of Parliament there are very important duties which they have to discharge in the character of churchwardens; therefore the notice ought to have been given of the election of these churchwardens to South and West Hackney; and as every person [384] who is to be affected by the act of parish officers has a right to vote in their election, so these parties who are to be affected, who still remain a part of the parish for certain purposes, which these churchwardens are to carry into execution, are entitled to have had notice; and no notice has been given.

The churchwardens have undoubtedly other duties to perform, under the local acts, as churchwardens of the parish of Hackney, than those which relate to the church and churchyard, or performance of divine service; because they are trustees for carrying into effect the purposes of that Act of Parliament; and under another local act they are trustees for the relief of the poor: and it may be a question whether these persons so elected for the parish of Hackney by the inhabitants of that part of the parish of Hackney which I have called the old parish of Hackney—whether, being elected by those persons only, they are properly qualified to act as churchwardens under this local act: a question may arise whether they are legally appointed. That is a question not for this Court to determine—this Court cannot determine on the qualification to act as trustees under this act. It cannot enter into the question whether they are capable of acting under the poor law act relating to this parish—those questions are for other Courts to determine. If they so claim to act in virtue of this election, it will be for other Courts on the construction of all these statutes to decide whether they are or not qualified so to act—whether what they may do in that character under the Act of Parliament is properly done by them or not.

The only question here is one put by the Judge [385] in the Court below—Are they the churchwardens of the parish of Hackney for this purpose—for the purpose of this rate, which does not profess to bind any other person than an inhabitant of this parish?

Now I am of opinion that they are properly the churchwardens of this parish—it is provided by this act that all churches and chapels, which are erected under the provisions of this Act of Parliament, are to have power of electing churchwardens; this necessarily infers that the parish still remains with that power—it is not affected at all—it is left untouched in that respect; it forms the parish—it constitutes the parish of Hackney as it originally stood—the election of the churchwardens for the purpose of church matters and ecclesiastical matters is quite sufficient, as it appears to me, if made by the inhabitants of this part of Hackney, and enables them to act in that capacity for ecclesiastical purposes—the Court has nothing to do with the maintenance of the poor, or the provisions of the act as for making other rates—the church-rate is that which is sued for in this case, and the church-rate is that alone on which this Court can determine. It is quite sufficient that these churchwardens have been elected for this parish of Hackney, in order to enable them to sue upon this rate, which is the question now for the decision of the Court.

The section of the act to which I refer in the 58th of George the Third, the section with respect to the election of churchwardens, is the 73d. [The Court read it.]

So that for every church and chapel appropriated under the provisions of this act two fit and proper persons are to be chosen; that is, for these parts of [386] the parish of Hackney, South and West Hackney, churchwardens are to be elected—fit and proper persons are to be elected to do all things necessary for the repairs of the church; therefore they would be compellable to repair their own churches under the provision of this Act of Parliament.

But it was not necessary to provide for that part of the parish which still remained: they would not be deprived of the right of electing churchwardens for their own purposes without special enactment or necessary intendment. There is none such in this act, and therefore they continue in the same manner to elect their churchwardens—as every other parish elects its own churchwardens for its own ecclesiastical purposes—for that district which remains as part of the old parish. It has not been severed, or dismembered, or transferred in any way whatever; it continued under the same rights, the same church, and the same management as it had originally.

On this part of the case there is no doubt the churchwardens were properly elected by that part of the parish for which they were chosen, and that they are therefore qualified to sue on this rate. Whatever may be the construction put on the local act with respect to the rates for the poor or assessments for the trustees' rate, as distinguished from the church-rate, they were qualified to act as other churchwardens in the repairs of the church, for calling the vestry together for the purpose of making the rate, and for suing for the rate, as against those who might refuse to pay, supposing it to be otherwise properly made.

Well, then, this would dispose of as well the [387] third as the fourth objection, namely, that the churchwardens were not duly elected and no due notice was given of the election.

Holding that they are churchwardens of the parish, and if elected by the parishioners that they are qualified to sue, on this part of the case no notice was required to be given of the election of these churchwardens to the other parishioners for the purpose of the church-rate, whatever may be the defective qualification or want of qualification as to the other parts of their duty to be performed under the provisions of this local Act of Parliament.

The next question which arises is with respect to the necessity of the rate.

It is contended that the rate is excessive, that there are several items in the estimate which was laid before the vestry which ought not to have found their way into this estimate.

When I first read the allegation it struck me that it was very vaguely worded—that nothing was pointed out as to the items which ought not to have found their way into the church-rate—or in what degree it was considered excessive; but the explanation given of that was, that the rate was excessive because the churchwardens, if they had properly applied the dues which they were entitled to receive under the provisions of the local Act of Parliament, would have had sufficient funds to have obviated the necessity of having a rate made at all.

Now the funds which it is supposed the churchwardens had in hand were to arise out of certain dues and duties which were to be paid to them under the provisions of the local Act of Parliament [388] of 1790, namely, for interments in the new churchyard and also for tolling the bell at funerals. [The Court read the 4th, 5th, 6th and 7th articles, 2 Curt. 879.]

Now these are the three articles of the allegation which refer to this particular point, and with respect to the first of these, the 5th, the declaration of the Act of Parliament is set forth—that the churchwardens were in the habit of receiving for the old churchyard, and for that which may be called the new burial ground, certain fees for the burial of the dead, and the tolling of the bell, and at certain rates; that they were empowered to receive these, and that from time to time funds had been raised or collected—by whom, or to whom they were paid, or when they were collected, or at what time, is not stated—it is not stated in any one part of this allegation that the churchwardens ever received these rates since the year 1790, whatever they may have done before; and it is not pleaded that these churchwardens had received any such rates, or that their predecessors had ever received any such rate, carrying it back from 1824 to 1790, when the great alteration took place in the substitution of this new church for the old church; and therefore I think the Court is perfectly justified in stating that this is a loose and indefinite plea; and if anything were to arise out of it, it should have stated when, and at what time, those sums had been received, and whether by the churchwardens. Annexed to this allegation, in supply of proof, is a copy of the report that was made by the parish, or by the committee appointed by the parish to investigate the case. This is a committee appointed by the vestry on the [389] 25th July, 1840, two days after the rate sued upon in this case bears date.

The report is this: “The nature of the reference made to your committee is in a great degree suggested and controlled by the Act of Parliament, the 30 George 3, chap. 71, under which it arises; and particularly by the 20th, 21st, and 23rd sections of the act; they find but little evidence to prove what were the precise receipts of the churchwardens in respect of interments in the church and churchyard previously to passing the act of 1790; but they think it fair to presume that the scale of 1690, a copy of which forms part of the Appendix to this report, was usually, though not universally, acted upon.

"Both because they have seen no evidence of any other scale of charging, with the exception of 10s. paid to the churchwardens from time to time for the use of the ground; and because they find upon the minutes of the select vestry, under the date of Easter Tuesday, 1801, a resolution that the scale of 1690 should be registered on the minutes as a memorandum of the old usage in respect to burials, &c."

I think the committee came to a very fair conclusion that the fees authorized by that table of 1690 were those which were received in the old churchyard.

They also state they found that in 1759, "29th September, it was resolved that no stranger be for the future permitted to be buried in the churchyard without paying for the ground, as well as for the bell. That 10s. be paid for the ground in the churchyard for burying every person who shall not have a legal settlement in the parish, exclusive of [390] the fees paid for the bell. That double fees for the burial of every person who shall not be legally settled in this parish shall be paid.

"Secondly: in respect of what were these fees receivable? It appears clear that the fees for bell-tolling were received by the churchwardens; and your committee also find in the churchwardens' accounts, subsequently to 1760, numerous entries in the quarterly receipts with which they debited themselves in respect of burials, and for the ground; your committee find that the aggregate amount at that period generally averaged from 60l. to 70l. per annum. They have discovered no evidence to shew that the churchwardens received value for any place or species of burial, other than those which occurred in the church (exclusive of the high and low chancel) and the parish vault, which appears to have been in the churchyard, and for the use of the ground in the churchyard as before stated, and also for the tolling the bell. With reference to the third question, they think that the minutes of the open vestry for the year 1763 will give the vestry considerable information. It appears that, in or about the year 1763" (and this forms the groundwork of the allegation in the first instance), "it was considered expedient to enlarge the old churchyard, and accordingly a piece of land of copyhold (tenure) was purchased out of the unappropriated fund, or fund created by the receipt of fines imposed by the select vestry upon persons in lieu of their serving certain offices in the parish, and after considerable difficulty the ground was consecrated by the bishop of the diocese. And on the 26th November, 1763, it was resolved that the Rev. Mr. Cornthwaite, [391] during the pleasure of the parish, have leave to grant vaults, monuments and tombstones, to be made and erected in the new churchyard; and he being present, returned the parishioners his thanks for that liberty."

That is the additional copyhold ground which was added in 1763. "And at the same time it was resolved that no bodies be deposited in the old churchyard without the leave of the churchwardens for the time being, except persons who have family vaults or stones therein. It further appears that, after the enlargement of the churchyard, and the passing of the resolution, just quoted, to close the old one, the part so added became for most practical purposes the churchyard of the parish, and continued so to be until the passing of the act and the subsequent addition of the present churchyard. A diligent examination has been made of the books and documents relating to the burial customs of the parish about and subsequent to the period of passing the new Church Building Act, but it does not appear that there are any receipts or acknowledgments in the churchwardens' accounts in the interval between 1791, the period of passing the act, and 1801, when the resolution of vestry respecting the new scale of fees was passed, to shew what the customary charges were."

So that between 1791 and 1801—a period of ten years—it does not appear that the churchwardens of the parish had received on account of the parish, and debited themselves with, any sums of money for burials in the churchyard; there is no evidence to shew it in the churchwardens' accounts (this is the proof adverted to by the appellant himself); [392] and no evidence of any such receipts by the churchwardens during those ten years.

It then goes on to state, "Entries appear under the date of 1770 and subsequently, in the churchwardens' accounts, which shew that money was not only received for the bells, but for the ground."

When did that cease? There are no entries to shew that between 1791 and 1801 any monies were received, and the utmost extent this would shew would be that from 1770, and subsequently to 1791—that is, for a period of twenty-one years—money had been received for the bells and for the ground also; "and as this was after the

date of the consecration of the intermediate or then new churchyard, it seems to establish the fact that the churchwardens did receive value for the ground in that churchyard."

There was nothing, however, to shew that they received any fees for interments for the use of the ground between 1791 and the year 1801, and nothing afterwards appears in the report, or in any of these papers, to that effect.

Now, then, the committee conclude their report by this summing up: "The result of this investigation appears to shew that in the new portion of the old churchyard, up to the period of passing the Church Building Act, the vicar enjoyed the privilege of granting vaults, monuments, and tombstones only during the pleasure of the parish. That the bell-money was received, as now, by the churchwardens, and carried to the church-rate account; that they also received a fee of 10s. for the use of the ground from all strangers, or persons resident and not having a legal settlement in the parish; [393] but whether the payment of this fee was limited to such persons only does not appear. The fees paid for the use of the ground in the old church, and in the parish vault, which was in the churchyard, were also received by the churchwardens."

Now this only brings it up to the passing of the act of 1790; at that time certain fees were received, and authority given to the churchwardens to receive the same fees, whatever they might be.

There is nothing to shew that these fees had at any time, after the passing of the act, been received; whether by the direction of the vestry, or by any arrangement made with the vicar, in order to compensate him for loss he sustained for burials in the church and certain parts of the churchyard which were prohibited by the act of 1790, or not, may perhaps appear by subsequent consideration of the scale of fees which was sanctioned by Lord Stowell, then Sir William Scott, in 1801, when chancellor of the diocese of London.

Now, annexed to the report in the Appendix is the scale of fees in 1690, when Doctor Newton was chancellor of London; and looking through this table of fees, I find very little that applies to the churchyard in its present state, for fees for the use of the ground. In this table I find that for burials in the high and low chancels there is a fee to be paid to the churchwardens, for the great bell, of 13s. 4d., and nothing to be paid for the ground. In the north and south sides of the chancel the churchwardens are to receive the sum of 1l. for the use of the ground; and in the parish vault they are to receive 2l. for the ground; and 13s. 4d. is to be paid to them for the great bell. I do not find any-[394]-thing stated to be received by the churchwardens for the ground in the churchyard. All that I find is: "To the churchwarden, for the great bell, 13s. 4d.; for the fifth bell, to the churchwarden, 6s. 8d.; the fourth, 4s.; the third, 2s. 6d.; the second bell, 2s.:" and with the little bell nothing is to be paid to the churchwardens.

There is nothing in this table of fees which would enable the Court to see that there was any fee to be paid for the use of the ground, inasmuch as it does not appear that there was any vault called the parish vault in this new churchyard, for which alone, except in particular parts of the church, fees are to be paid; and by the act of 1790 (sec. 17) all burials within the church, unless vaults are built under it, are prohibited; and therefore no fee is to be taken; they are not to be paid for the ground there. Whether there is a vault or not under the present parish church of Hackney I do not know.

Now that continued to be the table of fees up to 1801; and looking through it I do not find it any where stated that any fee whatever is to be paid to the churchwardens for the use of the ground.

By the Local Act burials in the church are prohibited, and also within twenty feet of the walls of the church; the rights of the minister are to a certain extent curtailed by this; and therefore the parish had in 1801, as they stated, been in the habit of allowing to the minister an annual compensation for the usual dues he would receive—what that annual compensation was, and out of what it arose, the Court is not informed. It may [395] be that those fees which were usually paid to the churchwardens for the use of the ground had been paid to the ministers since 1790—it may be so, I know nothing of that. Whether the churchwardens could or might have received these fees, and ought to receive the fees in aid of the church-rates, I know not. I find, burying in a vault, the minister is to have 1l., the churchwardens are to have 13s. 4d.—for what? for the great bell, not for the ground. For the fifth bell,

6s. 8d.; for the fourth bell, 4s.; and so it goes on, decreasing with the size of the bell: there is nothing, absolutely nothing, stated here as to any sum to be received by the churchwardens for the use of the ground.

Unquestionably it is not for this Court to inquire as to the legality of the scale. It stands as a fee allowed by this table, the legality of which may be very questionable indeed—that the Court is not called on to determine.

There is nothing to shew that the churchwardens have ever since 1790 received fees for the use of the ground—nothing of the kind is alluded to in this allegation; it is said that those sums have been from time to time collected, without stating when, without stating at what time they last were so; and therefore, whether they thought themselves entitled to claim those dues and duties—the same dues and duties which were made payable under the provisions of the act which prohibited burials in the church—does not appear.

What they did receive was for the use of the ground in the church and for the parish vault; but it does not appear there is any such existing in the present churchyard.

[396] Under these circumstances I am of opinion that the churchwardens are not before the Court on any excessive rate. It does not appear they had a fund out of which these necessary repairs of the church could be paid. It is stated in the argument that this is very much the same as if there had been a rate not collected, and the Court will not hold a church-rate to be valid when the churchwardens, by collecting a rate already made and granted, can put themselves in possession of funds to defray the necessary repairs of the church. It appears to me to differ very materially from a case where the churchwardens by their own exertions—by calling on the persons who are assessed to pay the rate—can get possession of funds; in which case they shall not be permitted, by the neglect of their duty, to call on the parishioners to pay an additional rate—to call on those parishioners who gave no trouble in the collection, who are willing to pay, and willing to discharge that obligation, which the common law imposes on them without resistance. But this is not so. They must ascertain before hand what these fees are—that the fees are all receivable—whether they have been so appropriated by the order of the parish—whether they could recover them unless by involving the parish in a lawsuit; if the parish are of opinion that these fees are improperly received by other persons, they must direct the churchwardens to take, or they must take means of recovering, these fees from those persons who have unduly received them by an action at law, or otherwise as they may be advised; or they may direct the churchwardens to do so and furnish them with funds to carry on the action; because in these days we know that retrospective church-rates [397] cannot be enforced—if the churchwardens do embark in litigation they must take care to provide themselves with funds in some way or other, or to secure to themselves the repayment of the expense to which they may be put in prosecuting these suits—in this very suit to recover the sum of 3s. 4d.! how are the churchwardens to be reimbursed for the expense they have been put to, unless by the parish in some way or other?

Under these circumstances, therefore, I am of opinion that this is distinguished from the case of an unlevied rate. I am not prepared, even in the case of an uncollected rate—where the churchwardens can say they have done all they can to recover the rate, although there still remains a large sum uncollected which the parties are unable to pay in consequence of their poverty—to say that they would not be entitled to another rate to enable them to carry on their duties in providing for the due sustentation of the fabric of the church, and providing the necessary articles for the performance of divine service. I cannot say, even if such a case could be shewn, that it would be a sufficient reason why the rate should not be enforced.

Now this disposes of those objections which arise on the construction of the local acts and of the general Act of Parliament.

There then remain two other points to be considered, namely, whether the rate has been imposed and properly assessed on the proper persons. That is, whether on the 10th, 11th, and 12th articles of this allegation this rate has been properly levied.

The 10th article merely pleads the act—the local act of the 50th of George the Third, by which the [398] trustees of the poor of Saint John, Hackney, are authorized

to compound—to take smaller sums for those rates than they would otherwise obtain. It is not necessary further to consider that. The 11th article, I confess, appeared to me to be somewhat an extraordinary article to be urged against the validity of the rate. “That although the names of the tenants of the said compounded houses are inserted in the church-rate book belonging to the said parish of Hackney, and a certain assessment affixed to each of them; yet it is not such tenants, but their landlords, who are applied to for payment of the said rate.”

I am not at all aware that this is any objection to the validity of the rate—that the proper persons being assessed, other persons were applied to for the rate; if they pay the rate which is properly assessed on the tenants and occupiers, I cannot conceive that is an objection to the rate; or even if the landlord had been assessed to the rate—if the landlord paid the rate—if the rate was paid for that house which is occupied by this person, although the landlord might be assessed, and might choose to pay that rate, I do not know that would be any objection to the rate, if the whole property in the parish had been properly assessed. All that is necessary is to see what is the property of the parish, and that it is all rated—whether the tenant is rated or the landlord is nothing to the validity of the rate so far as other individuals are concerned. The particular tenant might say, “I am not to be rated; the landlord is to be rated;” but still if the premises were rated, although it should be assessed to the landlord, I do not know that would be an objection [399] to the rate, provided the rate was recovered: the money is forthcoming for the premises rated.

It is not necessary to decide that point or to consider it any further, because here in point of fact the proper persons are assessed, namely, the tenants; by their names and surnames the proper persons have been assessed—if the landlords choose to pay the rate for them, that is no ground for objecting to the validity of the rate.

It then goes on to plead “that although the said assessment in the church-rate book is in itself below the real actual and proper value of such houses, and below their estimated rental in the poor-rate book belonging to the said parish, yet that in fact the landlords of the said houses or most or many of them do not pay the said church-rates according to such assessment, but according to the reduced compounded assessment contained in the said poor-rate book, under the aforesaid Act of Parliament.”

Now nothing can be more loose and indefinite than this mode of pleading—“that the landlords of the said houses or most or many,” without specifying in any manner whatever—“are rated not according to their assessment, but according to the reduced compound sum.”

If it arose from a larger sum than otherwise necessary, it should be pointed out and specified which of the houses are so; the question here is merely whether the rate is equal or unequal?

They may be all rated according to the church-rate book, for any thing that appears in the article. If they are rated so, although it may be below the poor-rate, it is not necessary the rate should be un-[400]-equal; it may not be necessary to follow the poor-rate in every instance. The mode of rating matters not; if one is 100l., or another 20l., provided they are all rated in proportion to their value, this is the point to be considered. Still less does it matter when the latter part of the allegation comes to be considered. “That sixteen houses belonging to John Burton, a parishioner of the said parish, of the actual yearly rental of 120l. or 140l., or thereabouts, and estimated in the poor-rate book at the value of 104l., are charged in the rate of 2d. in the pound, at the sum of 16s. 8d.” What of that? Suppose they are, other houses are charged in the same proportion; that is not the objection here; the objection is this which follows:—“That although such sum is entered in the church-rate book as having been paid in respect of the said houses, yet that the said John Burton did not actually, and in truth, pay more than the sum of 7s. 2d., being the amount due from him for the said houses, upon the compounded poor-rate assessment, made under the provisions of the aforesaid Act of Parliament.”

Why, if the churchwardens have been foolish enough or liberal enough to accept the sum of 7s. instead of 16s., they must suffer the consequence themselves: it is no loss to the parish. They have charged themselves with having received the whole sum, and they are accountable to the parish for the whole sum. If they choose to receive less than is their due—if they choose to charge themselves with the whole amount and only receive a part, that is their affair: that will not make the rate invalid: they are liable to the parish: if they have charged [401] themselves with

more than they have received, the parish is no loser. There is no ground for objecting to the validity of the rate on that account.

Now the next article is the last which the Court has to consider, and that is on the real question of inequality of the rate; for it pleads "that seven houses situate in Water-lane in the said parish are estimated in the poor-rate book of the said parish at the rental of 44l., but that the same are assessed to the said church-rate at the annual rental of 28l. only."

Then it goes on to enumerate a vast number of other houses which are rated at a different sum in the church-rate book to that of the poor-rate book. If the rate is unequal and unequally assessed, I agree with the learned Judge in the Court below, that would be a ground for quashing the rate altogether: it is essential to a church-rate that each individual shall be rated equally in proportion to the property he possesses. But it does not give rise to the question of inequality by stating they are valued at a certain sum in the poor-rate book, and another in the church-rate book; because all the houses may be valued at the same rate in the church-rate book—they may be all rated at an under value. If some of them were rated at the value of them in the poor-rate book and others not, it would not follow that was the actual value. The poor-rate book may have rated some too high as well as others too low. The church-rate book may more equally have assessed them, and therefore on this article of the allegation it does not appear to me the question of inequality is properly raised, so [402] that the Court can come to a conclusion upon it. It is too much to say the church-rate book and the poor-rate book must agree.

If the question of inequality is to be raised and insisted on, it must be done in a different and distinct form, and shew that some houses are rated much below their value, and that for which Mr. Nunn is rated above its value.

Now, under these circumstances, therefore, I am clearly of opinion that the Judge of the Court below has come to a right conclusion with respect to this allegation; and I perfectly agree with him in opinion that if the facts here stated were proved, *modo et formâ*, as they are alleged, they would not form a valid defence to the demand which was made on Mr. Nunn for the sum of 3s. 4d. under this assessment which has been made on him by the churchwardens of the parish of Hackney; and consequently I am of opinion I must hold now against the appeal, and affirm the sentence of the Court below; and I must also, as a matter of course, do it with costs. What were the churchwardens to do? If Mr. Nunn will take on himself to litigate this demand which was made against him, and if, in the opinion of the Court below and of this Court, he is not borne out in the objections which he has made, I think it must be at his own expense that he does this, and not at the expense of the parish or at the expense of the churchwardens; and that I should stop short of justice if I did not affirm this sentence with costs.

[403] *MEDDOWCROFT v. HUGUENIN*. Prerogative Court, Dec. 13th, 1842; February 13th, 1843.—A sentence of a Court of exclusive jurisdiction can only be impeached in another Court by reason of fraud and collusion practised in obtaining it.—*Quære*, whether the issue of a marriage, pronounced to be null and void by the sentence of an Episcopal Consistorial Court, can impeach such sentence in the Prerogative Court.—Allegation, seeking to impeach such a sentence, rejected, on a review of the facts alleged by which fraud and collusion were proposed to be shewn.

[S. C. 2 Notes of Cases, 156: affirmed 1844, 8 Jur. 431.]

This was a business of bringing into and leaving in the registry of this Court letters of administration of the goods, chattels and credits of William Meddowcroft, deceased, and shewing cause why the same should not be revoked as having been surreptitiously and under false suggestions obtained, and why letters of administration of the said goods should not be granted according to law; it was promoted by William Meddowcroft, theretofore passing by the name of Gregory, the natural, lawful, and only child of the deceased, against Harriet Huguenin, wife of Louis Huguenin, theretofore calling herself Meddowcroft, and pretending to be the lawful relief of the deceased.

The party cited having duly appeared, an allegation was given in on behalf of William Meddowcroft, pleading that William Meddowcroft, the party deceased, on the 28th of February, 1815, duly intermarried with Mary Gregory, widow, in the

parish church of St. James's, Clerkenwell, and that an entry of such marriage was duly made in the register-book of marriages kept in and for the said parish; that the parties lived and cohabited together, and were reputed to be husband and wife. That there was issue of the said marriage one child, the party proceeding in this cause, who was born in [404] the year 1817, and, in the month of February in the same year, was baptised by the name of William, and an entry thereof made in the register-book of baptisms kept for that purpose in the parish of St. George the Martyr, in the county of Middlesex: but that in the said entry Mary Meddowcroft, the wife of William Meddowcroft, deceased, and the mother of the party proceeding, has been erroneously or fraudulently described as Mary Gregory.

The defendant, Harriet Huguenin, gave in a defensive allegation, in which it was pleaded, that soon after the marriage in fact had between William Meddowcroft, deceased, and Mary Gregory, widow, to wit, in or about the year 1816, a suit of nullity of marriage (a) by reason of minority, and the undue publication of banns, entitled *Meddowcroft v. Gregory, falsely calling herself Meddowcroft*, was instituted in the Consistorial Court of London, by William Meddowcroft, the elder, the father of William Meddowcroft, the party deceased, against the said Mary Gregory, falsely calling herself Meddowcroft; and on Friday the 12th of July, 1816, the Judge of that Court did, by his definitive sentence, or final decree in writing, pronounce that the said pretended marriage, however in fact had and solemnized, was null and void to all intents and purposes in law whatsoever, pursuant and agreeable to the statute passed in the 26th year of the reign of his late Majesty King George 2. That no appeal was had or made against the said sentence or decree, and the same is now a valid and subsisting sentence or decree.

[405] The sentence was annexed in supply of proof. This allegation was admitted without opposition.

A responsive allegation was given in on the part of William Meddowcroft, which pleaded—

First article. That he, the party in the cause, was born on the 15th of January, 1817, subsequent to the time when the said proceedings were so had, and the sentence given in the said Consistorial Court of London, and that, by reason thereof, it was res inter alios acta, and that such sentence cannot in law be holden to be binding and conclusive on the party in the cause, who was necessarily a stranger to, and had no means or power of intervening in, the suit, by the result of which he both was and is most grievously damned both in estate and reputation.

Second. That by reason of the fraudulent suppression of evidence in the said proceedings, and the erroneous evidence on which the said sentence was mainly founded, as hereinafter pleaded, such sentence is not a valid sentence, nor binding against the interest and rights of the party in this cause. That previously to the publication of the banns of marriage between the said William Meddowcroft, the deceased, and Mary his wife, then Mary Gregory, widow, in the parish church of St. James's, Clerkenwell, a paper of instructions for such publication, containing the true names of the parties, was delivered to Elizabeth Penry, the daughter of Joseph Penry, the parish clerk of the said parish; and the said Elizabeth Penry, who was in the habit of receiving notices for publication of banns of marriage at the house of the said parish clerk, entered such names in a private banns-book: that in so doing the said Elizabeth Penry wrote the [406] initial and second letters "Me" of the name Meddowcroft so as to resemble "Wi," and such were so mistaken by the said parish clerk, who, not only in entering the said name in the said banns-book, mistook such letters, but also omitted the second letter "d," and spelt the name Widowcroft: that in consequence thereof the banns of marriage of the said parties were published in the said church as between William Widowcroft, bachelor, and Mary Gregory, widow. That on the day of the said marriage the mistakes in the said banns-book, which until such time were wholly unknown to the said William Meddowcroft and the said Mary Meddowcroft, then Gregory, were first discovered; that on such occasion the said mistakes appearing to have originated, as in fact they did, solely with the said Elizabeth Penry and the said parish clerk, the same were corrected, under the directions of the Rev. J. Leese, the officiating minister of the said parish, in the said banns-book, and thereupon

(a) See the report of the case of *Meddowcroft v. Meddowcroft*, 2 Hagg. Con. 207.

the said marriage was then duly had and solemnized in pursuance of the publication of such banns.

Third. That at the time of the proceedings in the said Consistorial Court Elizabeth Penry was not examined as a witness, although living at the time, *she not having died until the month of August, 1823.*(a)¹ Nor was such paper of instructions nor the said private book produced, nor any reason pleaded or assigned for the non-production of the same. That by such suppression and withholding of evidence the true character of the case was concealed from the Court.

[407] Fourth.(a)² That after the determination of the said cause Elizabeth Penry repeatedly declared to several persons that she was much surprised that she had not been examined as a witness therein, and that she had no doubt that the names of the parties were properly and correctly written upon the paper delivered to her as notice for the publication of banns, and that the surname of Meddowcroft was, through her mode of writing the same in the private book, mistaken for Widowcroft. And that up to the period of her decease she invariably declared that the aforesaid mistake and its consequences preyed heavily upon her mind and caused her great uneasiness.

Fifth. That as well before as during the progress of the proceedings in the Consistorial Court the said Mary Meddowcroft, by false representations of the said William Meddowcroft, her husband, and others, in respect to the advantage that would result to her from not contesting the suit, and more particularly from the solemn promise of her said husband that, in the event of a sentence of nullity being pronounced, he would again marry her, and the said Mary Meddowcroft being entitled to a pension of sixty-five pounds per annum as widow to John Gregory, her husband, was induced to carry on the suit collusively, and neither to administer interrogatories to the witnesses produced on behalf of the promoter of the suit, nor to file any allegation on her own behalf, and *she the said Mary Meddowcroft, as well during the said proceedings as shortly after the termination of the same so declared or to such effect to divers persons.* That in [408] consequence of such withholding of evidence, the non-administering of interrogatories, and the omission to plead, *and the collusive conduct aforesaid,* there was no bonâ fide contestation of suit, and by reason thereof the true state of the facts was perverted or suppressed, and a surprise effected by the said William Meddowcroft, the promoter of the suit, upon the justice of the Court.

Sixth. Pleaded that James Meddowcroft, the great-uncle of William Meddowcroft, the party in the cause, by his will devised and bequeathed his real and personal estate to be accumulated for twenty-one years, and after that period to go to the eldest male lineal descendant of his nephew William Meddowcroft, the father of the party in this cause, and that such accumulations amount to 80,000l., the time of accumulation having lately expired.

Seventh. That the party in the cause was not apprised of the circumstances under which the marriage took place until the end of the year 1840, when the said Mary Meddowcroft, his mother, for the first time shewed him certain papers and documents connected with the proceedings, had as aforesaid, in the Consistorial Court, and made sundry communications relative thereto, which induced him to institute the present proceedings.

Eighth. That diligent search and inquiry has been made for the paper of instructions for the publication of the banns of marriage, and for the private book of banns; but the same cannot now be discovered. That such paper of instructions and private book were respectively in existence at the time of the proceedings in the Consistorial Court of London.

[409] The admission of this allegation was opposed by Addams and Robinson. This is an attempt to impeach indirectly a sentence, in rem, of a Court of exclusive jurisdiction. Fraud in obtaining a sentence in rem can only be examined into by the Court in which the sentence was pronounced. *Meadows v. Duchess of Kingston* (Ambl. 756-762). Admitting that a stranger to the record, who cannot be admitted to question the sentence directly in the Court where it was pronounced, may impeach it collaterally in another Court (*Prudham v. Phillips*, Ambl. 763), still the party proceeding in this cause is not a stranger to the record, but a privy, and he may question

(a)¹ This and the passages subsequently printed in italics are the amendments made in the allegation.

(a)² This article was rejected.

the sentence in the Consistorial Court. *Kenn's case* (7 Coke, 42), and *Corbett's case* (ib. cited), decided this very point.

This is a sentence in rem, *Duchess of Kingston's case* (20 St. Tr. 431), *Mayo v. Brown* (ib. cit.), *Mellicent v. Mellicent* (ib. cit.), *Blackham's case* (1 Salk. 290).

Phillimore and R. Phillimore in support of the allegation. The Court is not asked to reverse the sentence of the Consistorial Court, but to pronounce such a sentence in this suit, in so far as respects the marriage between Mr. and Mrs. Meddowcroft, as Lord Stowell would have pronounced in the Consistorial had the facts now presented to the Court been before him on that occasion.

A sentence of a Spiritual Court is not conclusive on the subject of marriage, "Sententia in causa [410] matrimoniali nunquam transit in rem judicatam" (Gail. Obs. p. 112). A sentence in the Spiritual Court is not conclusive in a question of ejectment (2 Smith's L. C. 192).

It is admitted that a party may question a sentence, affecting his interest, if pronounced in a suit to which he was not a party; the party in this cause was no party to the suit in the Consistorial Court; he could not be, for he was not born until after the date of that sentence. The issue are strangers to the record. *Brownsword v. Edwards* (2 Ves. 243).

Addams in reply. *Brownsword v. Edwards* merely affirms an undoubted proposition that, after the death of one of the parties to a marriage, no sentence of nullity can be given touching that marriage. If the issue cannot question the sentence in the Spiritual Court no person can do so; clearly the parties to the suit are precluded from doing so; what then becomes of all the learning in *Kenn's case*?

Judgment—*Sir Herbert Jenner Fust*. The present allegation is not offered in such a shape as will enable the Court to dispose of the question at once.

It must be quite manifest that if suits of nullity are to be ripped up in the manner now proposed, that the Court may be called upon to inquire into the validity of many other marriages which have been dissolved in the Spiritual Courts, the proceedings in this case should, therefore, be of the most formal and regular nature. Now it is pro-[411]-posed to establish the fact of the erroneous entry in the private banns-book having been made by mistake by the declarations of Elizabeth Penry. I am decidedly of opinion that her declarations cannot be received in evidence for such purpose. The fourth article, therefore, must be rejected.

Again, with respect to the fifth article: that article is proposed to be proved by the evidence of Mrs. Mary Meddowcroft, one of the parties in the former suit, and who would in effect be setting up her own marriage, and deposing to her own benefit: that also must be rejected.

The allegation must be reformed by omitting the fourth and fifth articles, and by pleading in the regular form the proceedings had in the Consistorial Court.

1843. Feb. 13th.—This allegation was afterwards reformed by supplying the passages (in italics) in the third and fifth articles, and by pleading two additional articles, the first of which was as follows:—

That during the proceedings in the said Consistorial Court, and for some days subsequent to their termination, William Meddowcroft, the party deceased, and the said Mary Meddowcroft continued to cohabit together as husband and wife, when the latter, suspecting, as she at that time declared, that the said William Meddowcroft did not intend to perform his promise of again marrying her, had recourse to professional advice as to the expediency of an appeal from the sentence of the said Consistorial Court; but, being informed that no fresh facts or other evidence could be introduced, and otherwise dissuaded therefrom, she returned to cohabitation with the said William Meddowcroft, in [412] the hope, as she repeatedly declared, of being able to induce him still to fulfil his promise of again marrying her, and that she continued to cohabit with him until the birth of their child, the party in this cause.

Second. Exhibited the several proceedings in the Consistorial Court of London in the cause of *Meddowcroft v. Meddowcroft*.

Before this allegation was given in as reformed, the Court called the attention of the counsel in this cause to a case of *Mellicent v. Fisher*, coram Delegates, 1718. Prerogative, 1716—and supplied the parties with the following note:—

"*Mellicent v. Fisher*, Michaelmas, 1716, Delegates, 1718—Mellicent made will, and his wife Dorothy, and three others, executors, who pray probate. Caveat entered by Alice—warned. Proctor appeared for Alice and her son—next Court proctor appeared

for son only, and prayed answer to his interest. The proctor for the executors "ad evitandum ingressum litis" alleged that the deceased in a cause of jactitation, 1680, had obtained a sentence against Alice, and that afterwards, 1687, her suit for restitution of conjugal rights was dismissed; and sentence was exhibited. The son alleges this sentence was null, being done in his absence and infancy, and that an appeal had been interposed by the guardian of him in 1687. Exhibits appeal, and prays an answer to his interest. Adverse proctor insists he is not by law obliged to answer to his interest, but consents he may be admitted as contradictor to the will. The Judge of the Prerogative ordered him to answer to his interest—affirmed by Delegates."

In this case it was insisted that the son's interest [413] was dependent on the mother's; if she had obtained sentence for marriage that might be pleaded by him and could not be controverted; the law looks upon him as the same person, the interest being the same and derivative. [In this case Alice the mother was examined as a witness, but her deposition was suppressed. She has an interest in the cause if his interest be pronounced for, and if he should set aside the will, she may come in for a share of distribution.] The civilians were of opinion that the marriage was sufficiently proved. Price and Eyre, Judges, thought otherwise. The intent in permitting him to plead was in order to shew collusion in obtaining the first sentence—none appears; it must be presumed to be good, and will bind him.

No common law Judge being with the civilians for the marriage, there was no sentence.

The allegation, as reformed, came on to be debated.

Addams and Robinson. In *Mellicent v. Fisher* the sentence was not in rem, it was a jactitation suit. The depositions and proceedings in the Consistory Court, which are now annexed to this allegation, shew that every fact which is pleaded to have been suppressed, and from which the fraud and collusion are to be inferred, was before Lord Stowell. Mr. Penry, the parish clerk, in his deposition refers to the entry in the private banns-book; he says, "that on referring to the private book he finds an entry in the handwriting of his daughter:" clearly then the private banns-book was produced in the Consistorial Court.

[414] Phillimore and R. Phillimore. This party labours under the imputation of bastardy, by reason of a sentence pronounced previous to his birth; the Court will labour to assist him in removing this stigma; *Mellicent v. Fisher* is a complete authority in support of the present allegation.

Per Curiam. According to your argument every child and every child's child may bring a suit to have the sentence reversed; they will equally be strangers; I do not see where it is to stop.

Counsel. That may be the effect, it is the consequence of the fraud and collusion by which the sentence was procured.

Judgment—*Sir Herbert Jenner Fust*. I shall reject this allegation. I think the facts stated, if proved, would not be sufficient to induce the Court to revoke the administration already granted to Mrs. Huguenin, the second wife and widow of Mr. Meddowcroft, deceased, he having, subsequently to the sentence of nullity of marriage pronounced in the Consistory Court, married again. Mr. Meddowcroft died several years ago, and administration to his estate and effects was taken by his widow, who is now by a second marriage become Mrs. Huguenin. These letters of administration, so taken out, had remained unquestioned until very lately, when they were called in at the instance of William Meddowcroft, formerly called Gregory, the party proceeding in this cause; and he seeks to have them revoked, on the ground of having been obtained on false pretences.

The first step in this cause was the usual form of [415] a citation; that was returned; an appearance was given for Mrs. Huguenin; an allegation was brought in by the party proceeding; it pleaded the marriage of William Meddowcroft, deceased, with Mary Gregory, the mother of the party proceeding, in the year 1815, and the birth of the party in the year following; and the death of his father in 1835.

That allegation was of course admissible, as pleading the interest of the party; shewing a marriage in fact between his father and mother previous to his own birth, and, as a matter of consequence, his own legitimacy and interest in distribution to the estate of his father.

This allegation was met by an allegation in answer, pleading a sentence of the Consistorial Court of London, in the year 1816, pronouncing the above marriage to

have been null and void, and exhibiting an official copy of the actual sentence. This allegation was admitted without opposition.

This plea has been followed by a third allegation, which forms the subject of the present discussion. The general tenor of it is to shew that this sentence was *res inter alios acta*, by reason that the party proceeding in this cause, who is undertaking to shew the legality of that marriage, was not living when that sentence was pronounced, and therefore cannot be bound by it; and further alleging that such sentence cannot be held binding on him, inasmuch as it was obtained by fraud and collusion; and it pleads matter in proof of that collusion. Now, without considering whether the party proceeding can plead the nullity of the sentence in this Court, I will consider the other points of the case, in order to try whether (admitting the party has a right so to plead) [416] he has shewn circumstances sufficient to establish a case of collusion. Perhaps the better way will be to see what is the collusion charged: I pass over the first article and come to the second, which pleads, "That by reason of the fraudulent suppression of evidence in the proceedings, and the erroneous evidence on which the sentence was mainly founded as hereinafter pleaded"—therefore this is not a general averment, but professing to shew particular matter in a subsequent part of the plea. "Such sentence is not a valid sentence, nor binding as against the interest and rights of the party proceeding; for he doth allege that previously to the banns of marriage between William Meddowcroft, deceased, and Mary his wife, a paper of instruction was delivered." [The Court read the second article, page 405.] Now the article concludes, "in pursuance of the publication of such banns"—how that could be, the banns having been published in the manner previously stated, was the question which Lord Stowell had to decide.

The third article pleads that Elizabeth Penry was not examined in the Consistory Court, although living at the time; then, as reformed, it pleads her death; therefore she cannot be produced to prove that the inaccurate publication of the banns was owing to her mistake. The same article pleads that the paper of instructions delivered to Elizabeth Penry is lost and not forthcoming; therefore the Court cannot have the benefit of that evidence. On what evidence then is it to be shewn that it was by mistake that the names in which the banns (which it was admitted were erroneously published) were so published? The fact that at the time of the marriage [417] a mistake was discovered and corrected by the clergyman in the banns-book will not shew this; Mr. Penry, the clerk, was alive in 1815, and was examined in the Consistory Court; his deposition shews that he was then sixty years of age, and it is scarcely to be supposed that he is now alive, or, if so, competent to give evidence. (a) How then can all these facts be established by evidence?—independent of that which will form the subject of the present consideration, the declaration of Mrs. Gregory, the mother of the party. The second and third articles only allude to the proof of the above facts, by pleading that the private banns-book was not before the Consistory Court; but that is not the case; most certainly it was produced on the examination of J. Penry; this clearly appears from the portion of his evidence which has been read: it was before the Court. The third article, therefore, is incorrect in stating that the private banns-book was not before the Court; this book is not now in existence, and cannot be produced; the Court cannot get any information as to how the mistake in copying the name arose.

The 4th article, as the allegation originally stood, was intended in supply of proof of the third. This article the Court rejected; it contained matter which could not be made evidence, and the paper of instructions referred to in it was alleged to be not forthcoming.

The 5th article pleads [the Court read it, ante, p. 407]. Now the 2nd additional article, which exhibits, in supply of proof, the proceedings in the Consistory Court, shews that the suit was promoted [418] and carried on by the father and guardian of William Meddowcroft, deceased, who was a minor at the time: it was, therefore, the suit of the guardian, not of William Meddowcroft, the husband: there might be collusion between the husband and wife, but that would be no collusion between the father carrying on a suit in his own right, as guardian of his son, and the wife. The 5th article pleads, "That Mary Gregory was induced neither to administer interrogatories to the witnesses produced on behalf of the promoter of the suit, nor to

(a) It was here admitted by the counsel that he was dead.

file any allegation on her own behalf, and she, as well during the proceedings as shortly after the termination of the same, so declared to divers persons. That in consequence of such withholding of evidence, the non-administration of interrogatories, and other collusive conduct as aforesaid, there was no bonâ fide contestation of suit, and, by reason thereof, the true state of the facts was perverted or suppressed, and a surprise effected by William Meddowcroft, deceased, the promoter of the suit, upon the justice of the Court." Why! William Meddowcroft, deceased, was not the promoter of the suit, he was the husband of Mary Gregory; his father was the promoter of the suit. Nothing that can arise on this part of the case can go to prove the fact of the mistake in the publication of the banns: can the conduct of Mary Gregory, even if acting in collusion with her husband, in any way affect the sentence obtained by the father who was no party to the collusion?—but, how is all this proposed to be proved? The Court, on a former occasion, was of opinion, without the assistance it has since had from the case of *Mellicent v. Fisher*, that Mary [419] Gregory could not be examined as a witness; because in establishing her son's legitimacy she would be establishing the validity of her own marriage; if her evidence is to be credited, she, and not Mrs. Huguenin, is the widow of the deceased; administration to the deceased has already been granted to Mrs. Huguenin as the widow, and in this suit the Court is to consider whether that administration is to be revoked, as having been obtained on undue representations. I cannot discover any principle on which a party can be let in to establish the truth of her own marriage, and so to disprove the validity of another marriage, and to bastardize the issue of that second marriage. The Court having, on the former occasion, been of this opinion, and directed the article to be struck out, the parties have now sought to substitute her declaration instead of her own evidence; so that I am to give credit to her declarations when I cannot give credit to her direct evidence: how can this possibly be done?

Phillimore. It was a declaration, made *recenti facto*.

Sir Herbert Jenner Fust. That does not carry it one step further: I am clearly of opinion that Mary Gregory's declarations cannot be received on any such ground. How can I hold any such declarations to be proof that the sentence was collusively obtained? Suppose that she was advised or induced not to administer any interrogatories, and not to file any allegation, and "that she so declared both during and shortly after the [420] proceedings in the Consistory Court"—how is that to affect the sentence of the promoter of the suit, who was no party to the advice or to the inducement? I am clearly of opinion I must reject this article; the point was expressly determined in *Mellicent v. Fisher*. It has been argued that that was a cause in which the widow was suing in *propria causâ*—she appeared by her proctor; the real ground of the rejection was that she was attempting to establish her own interest.

Then the first additional article pleads: "That during the pendency of the proceedings in the Consistorial Court, and for some days subsequently to the termination thereof"—that is, after the determination of the suit, and not during it, so that Lord Stowell could not have had the fact before him—"William Meddowcroft, deceased—who, as I have said, was no party to the suit; it was the father's suit—"and Mary Gregory continued to live and cohabit together as husband and wife, when Mary Gregory, suspecting, as she at that time declared, that William Meddowcroft, deceased, did not intend to perform his promise of again marrying her, had recourse to professional advice, the result of which is stated to be that she was induced not to appeal from that sentence." I do not know who gave her this advice: I may have done so myself, for I was one of her counsel; but, however, whether I did so or not, I will take it she was so advised, as also that "she was otherwise dissuaded from appealing." [The Court then read the conclusion of this article, ante, p. 411.] This is the article which is to prove collusion between the parties to the suit in the Consistorial Court. I am of opinion that, if proved to the fullest [421] extent, it could form no evidence whatever in this cause.

The 6th article pleads merely the death of Mr. James Meddowcroft, the great-uncle of the party in the cause, and how he has left his property by his will, namely, to accumulate for a certain number of years, and then to devolve to the eldest male lineal descendant then living of his nephew William Meddowcroft, deceased, the father of the party in this cause. [The 7th article pleads, ante, p. 408.] [The Court read it.] How are the communications here spoken of to be proved; how can the mother be

examined to these points? The 8th article pleads, "That diligent search and inquiry has been made for the paper of instructions for the publication of the banns of marriage, and for the private book of banns, but that the same cannot now be discovered; but the party doth expressly propound that such paper of instructions, and private book, were respectively in existence at the time of the proceedings before the Consistorial Court." I am of opinion that not only were they in existence, but the private banns-book was actually before the Court. The 2nd of the new additional articles exhibits, in supply of proof, the whole of the proceedings in the Consistorial Court in the usual form.

These are the whole of the circumstances pleaded to shew collusion between the parties to the cause in the Consistory Court. I have already stated that the greater portion of this consists of matter which is not evidence; what the Court wants to know is this—what was the point to which E. [422] Penry, the daughter of the parish clerk, ought to have been examined—what could she have established? That, in the paper of instructions, "Wid" was written by her for "Medd," the fullest extent of her evidence would not have gone further than this; it would not have proved that the banns were published in the name of Meddowcroft, and not of Widdowcroft: indeed the banns are admitted to have been published otherwise.

It has been argued that I am not called upon to reverse a sentence of Lord Stowell, but to pronounce such a sentence in this cause as Lord Stowell would have pronounced in the case before him if he had been apprized of all the facts. What is the evidence now before me, admitting the case now set up to the fullest extent, which was not before Lord Stowell? Suppose Mr. Penry had stated in his deposition that his daughter received the paper of instructions, in manner now pleaded, and that by her mistake the names were mis-spelt in the banns-book, would that have altered Lord Stowell's opinion? Would the fact that no interrogatories were administered, and no defensive allegation asserted, have had this effect? Lord Stowell was quite aware of all these facts.

What is there, then, on which the Court is to pronounce that this sentence was obtained by collusion? so far as I can discover the only ground alleged is the non-production of Elizabeth Penry as a witness; the absence of the paper of instructions, which is pleaded to be lost; and of the private banns-book, which is either lost or not forthcoming. It might, by possibility—I do not say that it would have been—have been a different case [423] if Elizabeth Penry was now living and capable of giving evidence; but there is positively no evidence on which the Court could proceed to say that this sentence was obtained by collusion.

Suppose the cause of *Mellicent v. Fisher* to be an authority to shew that this Court will entertain a suit, in the teeth of a sentence in the Consistory Court, where collusion in obtaining that sentence is proved; still it appears by that case that the party had been actually admitted a contradictor of the will; the Court below was of opinion, as were the Delegates, that if once a party is admitted a contradictor he cannot afterwards be called on to prove his interest: what the judges said there was this, that the admitting him to be a contradictor was binding on the other party; that he should not have been admitted to contradict the will unless his interest had been proved: the fullest extent of that case would only go to shew that when once his interest as contradictor had been admitted the other party could not estop him from proving a valid marriage between his father and mother.

I am, therefore, clearly of opinion that what is stated in this allegation is not sufficient to shew collusion; and this I think shews the propriety of the Court, in the first instance, calling on the party proceeding to exhibit the proceedings in the Consistorial Court. I think that if every fact now before the Court had been before Lord Stowell, it would not have altered his decision one iota. I am of opinion that I could not question this sentence on any ground, unless it be on the ground that it was obtained by fraud and imposition in the Consistory Court; if under any other circumstances I was to [424] hold that such a sentence was questionable, undoubtedly I could not bind any other party by my sentence, and if not, then why may not the children, grandchildren, and issue ad infinitum question the sentence at any future time: where is the matter to stop?

I feel bound to reject this allegation on all these grounds.

[The proctor for the party proceeding asserted an appeal in Court.]

BURGESS v. MARRIOTT. Prerogative Court, February 13th, 1843.—It is no part of the jurisdiction of this Court to enter into questions of construction, but the Court may incidentally be compelled to do so (e.g.) in deciding whether to compel an executor to exhibit an inventory at the suit of a party claiming to be entitled in distribution to a residue undisposed of by a will.—Inventory not ordered, the executor admitting assets.

[S. C. 2 Notes of Cases, 171 ; 7 Jur. 473.]

John Owen died in July, 1815, having made a will and codicil, whereof he appointed three executors, all of whom proved in the same year. In November, 1842, a citation issued from this Court, at the instance of William Burgess, therein described as the son and administrator of Sarah Burgess, widow, deceased, who was, whilst living, one of the sisters of John Owen, deceased, and one of the parties who, at the time of his decease, was entitled in distribution to the residue of his estate and effects undisposed of by his will: it called on Thomas Marriott, the surviving executor of John Owen, to exhibit an inventory and account; to see portions allotted, and distribution made of the estate of his testator, pursuant to the Act of Parliament.

Thomas Marriott appeared under protest, which, as extended, stated that the testator, by his will, gave to Elizabeth Phipps (one of his executors) [425] 2000l. for life, and at her death one moiety thereof to her daughter, and “the remaining 1000l. to be disposed of as I shall hereafter mention.”

That the will contained no further mention of the 1000l.; that there was no residuary bequest in the will or in the codicil; and, save as to the life interest in the 2000l. of Elizabeth Phipps, no legacies given to the executors. That the executors, being nude executors, were entitled to the undisposed of residue. That the case involved a question of construction which this Court had no jurisdiction to adjudicate upon.

In answer to the protest, it was alleged that, by the will professing an intention to make a further disposition of the 1000l., the claim of the executors was excluded, and consequently that the 1000l. became divisible among the next of kin of the deceased living at the time of his death.

Addams in support of the protest, cited Roper on Legacies, 2 vol. p. 640.

Robinson contra, in opposition to the claim of the executors, cited *Davers v. Dewes* (3 P. Wms. 40). He argued further that, both by the statute and the canon law, an executor is bound to exhibit an inventory without waiting to be called on to do so; that, in *Phillips v. Bignell* (1 Phill. 239), Sir J. Nicholl had laid it down that a mere contingent interest was sufficient to entitle a party to call for an inventory. That a party was entitled to know whether any of the estate of the testator remained undistributed before he incurred the expense of litigating the question of construction in the Court of Chancery.

[426] *Judgment*—*Sir Herbert Jenner Fust*. I think I am bound to overrule the protest, inasmuch as it seeks to avoid giving an inventory; the party is clearly entitled to an inventory or to an admission of assets.

The question arises with respect to the property of a gentleman who died so long ago as July, 1815, and whose will was proved in the same year, very shortly after his death: and now, in the year 1842, his surviving executor is called upon to exhibit an inventory and render an account; to see portions allotted, and distribution made according to the Act of Parliament. The executor has appeared under protest, denying the right of the party citing him to call for the inventory, and denying that this Court has jurisdiction in this case, as being one involving a question of construction. This Court must sometimes of necessity enter into points of construction before it can decide whether a party, who calls for an inventory, is entitled to require one. The statute (21 H. 8, c. 5, s. 4) enacts that an inventory shall be exhibited in every case without being called for; but this is not done, according to the practice of this Court, at the present time; the Court now always exercised a discretion whether or not to compel an inventory, and in cases where there has been a great lapse of time between the death of the party and the citation calling for the inventory has frequently refused to enforce the exhibition of an inventory.^(a) In this case the Court must necessarily enter into the question of construc-[427]-tion, for if it were to hold that the party is not entitled to call for an inventory, it would in effect be deciding that

(a) See *Scurrah v. Scurrah*, 2 Curt. 919.

he is not entitled to any part of the property of the deceased; I am bound to see that a party calling for an inventory has an interest to the extent of the citation. As to this part of the case, I think I am bound to require an absolute appearance by the executor; I should, however, be willing to accept an admission of assets in lieu of an inventory, or any admission which would enable the Court to exercise a discretion, and not to call for an inventory: I shall certainly pronounce that the party has not shewn a sufficient interest for calling on the executor to see portions allotted and distribution made. Both parties have lost their way in the case; the executor in protesting against appearing and exhibiting an inventory; the other party in requiring more than an inventory. The course I must take will be to overrule the protest, and to assign Mr. Marriott to appear absolutely, but, if he will admit assets to the extent of 1000l., I will not enforce the inventory.

[The party being present in Court, without revoking his proxy to his proctor, admitted assets to the amount of 1000l. The Judge directed the registrar to make a minute of such admission.]

[428] IN THE GOODS OF MARGARET NEWTON, Deceased. Prerogative Court, February 22nd, 1843.—One of two joint administrators having become imbecile and incapable of acting, ordered that the joint letters of administration (brought into the registry) be revoked, and special letters of administration granted to the sane administrator.

[S. C. 7 Jur. 219.]

Margaret Newton died in the year 1825, leaving her father surviving. Mr. Newton, the father, did not administer to the effects of Margaret Newton; he died in the year 1827, having by will appointed two executors, who both proved. In the year 1827 joint letters of administration to the effects of Margaret Newton were granted to the two executors of Mr. Newton, and her estate was duly administered. Margaret Newton was absolutely entitled to a vested interest in one-third of a sum of 786l. consols, expectant on the decease of a lady who died in the present year. Upon the determination of the life interest in the sum of 786l., it became necessary to give a release for the one-third accruing to Margaret Newton's estate, and also to pay the duty thereon. Both the administrators were alive, but one of them was paralytic, and incapable of transacting any legal or other business. On affidavits of the above facts, made by the sane administrator, by the niece, and by the medical attendant of the other administrator, the Court was moved that, on the joint letters of administration being brought into the registry they might be revoked, and special administration granted to the sane administrator.

H. I. Nicholl in support of the motion cited the case of *Phillips, Deceased*, November, 1824 (2 Add. 335), in which, in the analogous case of three administrators, one of whom had been found a lunatic, the [429] Court had at first directed upon the letters of administration being brought in by the two (sane) administrators, and by the committee of the third, that letters of administration de bonis non should issue to the two (sane) administrators. Upon reference, however, to the registrar's book, it appeared that in March, 1825, the Judge was pleased to order the letters of administration de bonis non to be revoked, and that a special administration be granted to the two administrators.

Sir Herbert Jenner Fust. I think upon the authority of that case, which appears to be precisely in point, the party is entitled to the order as prayed. I should, however, say that, but for that case, there might have been some doubt as to the precise form in which the order should go.

In answer to a question by the registrar, the Court stated that the sureties need not justify.

CHAPPELL v. CHAPPELL. Prerogative Court, February 22nd, 1843.—Administration granted to the brother of an intestate in preference to the widow.

[S. C. 7 Jur. 243.]

John Chappell died intestate, leaving a widow, a brother, and two nephews and two nieces, minors, him surviving: letters of administration to the goods, chattels, and credits of the deceased were prayed on behalf of the widow, and also of the brother of the deceased.

Addams and Bayfort for the brother.

Harding for the widow.

[430] *Judgment*—*Sir Herbert Jenner Fust*. The deceased in this case died in the month of May, 1842, leaving a widow, a brother, two nephews and two nieces, the children of a deceased sister, him surviving, being the parties entitled in distribution to his estate and effects, and in the following proportions :—the widow to a moiety, the brother to one-half of the other moiety, and the nephews and nieces, between them, to the remaining one-half moiety of the whole property. Administration to the estate of the deceased has been demanded by the widow ; this claim is opposed by the brother, and a grant of administration prayed for him.

Now the claim of the widow was at first opposed by reason of some objection arising out of a deed of separation between her and her late husband, under which he agreed to allow her 60*l.* per annum, and in respect of which she claims a sum of 300*l.* to be due to her for arrears. This objection has, and I think very properly, been abandoned, and the widow is now to be considered as legally entitled to a moiety of the whole of the property. It has, however, been proved that, after her separation from her husband, she contracted a second marriage—an invalid marriage certainly—during his lifetime with a Mr. C., and continued to cohabit with that person up to the death of her husband, that is, the intestate in this cause. The affidavits of the sexton of the church, and of other persons present at the time, prove the fact of this second marriage ; indeed, on the part of the widow it is not attempted to be denied.

[431] Now the question is, who is entitled to the grant of administration ? According to the practice of this Court, the rule is to grant it to the widow ; undoubtedly, however, it is in the discretion of the Court to grant it to the brother.

The widow alleges that the separation between her and the deceased was not owing to her fault, that it was caused by her husband persisting in cohabiting with another female. I think there is sufficient in the affidavits to shew that the husband did not impute any misconduct to her in regard to the cause which led to their separation ; I think I must take it to be so, and consider the separation, whatever was the cause of it, as not having arisen from any fault of the widow.

Now, as against the character of the brother, there is not the slightest imputation whatever.

The case then resolves itself into a question for the exercise of the discretion of the Court in the grant of letters of administration as between two parties, one a person of unblemished conduct, the other a person against whom there are circumstances of blame ; for certainly by her conduct in this second marriage, after the separation between her husband and herself, she did misconduct herself. The brother is entitled to one-fourth of the whole property, the widow to one-half ; the nephews and nieces to the remaining one-fourth : these last parties are minors of tender years, and many years must elapse before their shares can be paid over to them. The whole property is under 800*l.*, and the widow claims 300*l.* in the nature of a debt owing to her from the estate.

Looking to all the circumstances, and not laying [432] more stress on any one fact than another, I think I ought to exercise my discretion in favour of the brother ; I think I ought to do so in order to protect the interests of the children, and ought not to leave the widow in possession of their shares of the money for so long a time as must intervene between the grant and the payment to the minors—it is chiefly in reference to this circumstance that the Court so decides ; for I do not mean to say that otherwise there is sufficient reason for refusing to intrust the widow with the management of this property.

I decree administration to the brother in the exercise of that discretion which the Court is entitled to exercise.

MAJOR AND MUNDAY *v.* WILLIAMS AND ILKS. Prerogative Court, February 28th, 1843.—A testatrix duly executed a will, and subsequently thereto two other wills, in both of which was contained a clause revoking all former wills. She afterwards destroyed the two latter wills. Held, that the first will was not thereby revived ; and that parol evidence is not admissible to shew an intention to revive.

[S. C. 2 Notes of Cases, 196 ; 7 Jur. 219.]

Charlotte Barfield, deceased, made and duly executed a will on the 15th of January, 1841, whereof she appointed the plaintiffs executors. On the 2nd of February, 1841, and on the 3rd of May, 1841, she made and duly executed two other

wills, in both of which was contained a clause revoking all former wills. Upon the death of the testatrix the will of January was produced by the plaintiff Mundy, in whose custody it had been placed; but neither of the two subsequent wills could be found. The will of January was propounded by the executors in a common conditit. A defensive allegation [433] on the part of the next of kin of the testatrix pleaded the due execution of the two latter wills; that each of such wills contained a clause revoking all former wills; and that the will of January had never been revived in manner required by the 22nd section of the Wills Act. The personal answers of the executors admitted the facts to be as stated on behalf of the next of kin; but the executors in a responsive allegation pleaded, "That the testatrix had, previously to her decease, repeatedly stated to a female attendant that she had destroyed the two latter wills; that her will was in the hands of Mr. Mundy, who, with Mr. Major, were her executors."

The cause came on for hearing.

Addams in support of the first will. The 20th section of the Wills Act enacts that no will shall be revoked save by another will, or by some writing duly executed, declaring an attention to revoke the same; and the 22nd section provides that a will, once revoked, shall not be revived otherwise than by a due re-execution thereof. It must be admitted that the strict letter of the statute is against the validity of the will now propounded; but the expressions of the act are general, and may be controlled by the clear intention of the framers: the Court has already held that a literal construction of this act may be dispensed with: *Hobbs v. Knight* (1 Curt. 768), *Brooke v. Kent* (Privy Council, unreported). The leading object of the act was to exclude oral testimony in all cases. The 20th section evidently [434] means that the will or other writing, which is to revoke a prior will, shall be in existence at the death of the testator; in the second alternative mode of revocation the intention to revoke a prior will must be shewn; clearly, then, that intention requires to be evidenced, not by parol evidence of the contents of the revoking instrument, but by the language of a produced writing. Swinburne, and all the text writers, state that a will, once valid, but revoked by a subsequent will, revived on the destruction or cancellation of the revoking instrument; such cancellation might be shewn by parol evidence; the present act intended that there should be neither revocation nor revival, save by some writing, by which the intention to revive or to revoke could be safely arrived at. Look to the consequences of admitting parol evidence in this case; a door is at once opened to fraud and perjury; and that, too, with but little risk of detection; a disappointed heir-at-law or next of kin has only to procure two persons to swear that an instrument in writing, revoking a valid and forthcoming will, was executed in their presence: the most solemn will is liable to be destroyed.

Jenner and White *contra*, stopped by the Court.

Judgment—*Sir Herbert Jenner Fust*. I feel that I have no discretion to exercise in this case. There have undoubtedly been cases, decided over and over again under the Statute of Frauds, holding that parol evidence was admissible to prove the revival of a once revoked [435] instrument. It was this that led to the introduction of the 20th and 22nd sections into the present Wills Act. It is admitted in this case that the testatrix did, subsequently to the execution of the will of January, make two other wills; that both of these were duly executed, and both contained a clause expressly revoking all former wills; then the first will was revoked to all intents and purposes, and to have a re-operation it must have been revived. Then was it revived? The only mode by which it could be revived is that pointed out by the 22nd section. That section is most express; there must be a re-execution, there are no other means of shewing an intention to revive; destruction of the revoking instrument is not sufficient, it is not a re-execution of the revoked will, according to the present act. I pronounce against this paper as a will.

I think, however, that this question has been very properly brought under the consideration of the Court, and I give costs out of the estate.

CRAIGIE AND CRAIGIE *against* LEWIN AND OTHERS. Prerogative Court, July 12th, 1842; February 28th, 1843.—The executor named in a holograph will of a Scotchman by birth, but holding a commission in the military service of the East India Company, was cited in the Prerogative Court to prove the will, or shew cause why administration should not be granted of the effects of the deceased as dead

intestate; protest to appearing to such citation, by reason that confirmation had been granted of such will by a Court in Scotland, a competent forum, overruled.—The domicile of origin does not revive until an acquired domicile is finally abandoned.—A native Scotchman having, by employment in the military service of the East India Company, acquired a domicile in India, held, that by his return to Scotland *animo manendi* his original domicile did not revive, the party still holding his commission and being liable to be called upon to return to India; and intending to return if called upon to do so.

[S. C. 2 Notes of Cases, 185; 7 Jur. 519. See, as to marginal note, *Attorney-General v. Pottinger*, 1862, 6 H. & N. 741.]

John Craigue, a lieutenant-colonel in the East India Company's military service, died suddenly at [436] Hatchett's Hotel, Piccadilly, on the 23d of November, 1840, having made a paper-writing of a testamentary nature, all in his own handwriting, dated the 14th of October, 1840, but not attested by witnesses; of this paper he appointed Richard Lewin, John Larkins, and William Bell, executors. The deceased left a widow and four children, minors, him surviving.

On the 2nd of August, 1841, a decree, with intimation, issued from this Court, at the instance of E. Mackintosh, the curator or guardian of the eldest son of the deceased, alleging that it was pretended that the deceased was at the time of his death a domiciled Scotchman, and that, by reason thereof, his will, although not witnessed, was valid in law, and citing the parties named as executors to prove the same, or to shew cause why administration of the effects of the deceased, as dying intestate, should not be granted according to law.

The widow intervened in the cause. The parties cited, having been duly served, appeared under protest.

In support of the protest it was stated that the will of the deceased, who, by birth at least, was a Scotchman, being a holograph will, is valid and effectual as a Scotch will, although unattested. That the deceased had his legal domicile in Scotland at the time of his death, although actually deceased in London. That the parties cited, named as executors, had duly proved such will in the proper Court of Scotland, according to the form prescribed by Act of Parliament for the proof of wills and registration of probative wills in Scotland; that they had obtained the usual probate or confirmation [437] of will, had acted as executors, thereby becoming amenable to the Courts of Scotland, and otherwise incurring heavy responsibilities, wherefrom they cannot be released by the sentence of this Court, or by any means, other than a reduction of the probate granted by the Scotch Courts; and submitting that, under the circumstances, this Court is not the proper forum in which the domicile of the deceased ought to be tried, but that the said question ought to be raised, and tried in the Scotch Court, being a Court of equally competent jurisdiction, and from the sentence of which an appeal may be prosecuted to the House of Lords in England.

In answer to the protest, it was stated that the deceased was born in Glasgow, of Scotch parents, and at an early age went to India as a cadet in the military service of the Company, and continued in such service up to the time of his death. That in 1822 the deceased came to England on public duty, and in January, 1823, was married in England, and returned to India in 1824. That in 1837 the deceased, then become a lieutenant-colonel in the Company's service, left India, and proceeded to England, on a three years' furlough, and arrived in England in August, 1837. That in October, 1839, he obtained an extension of leave of absence for six months, and in June, 1840, a further extension for six additional months, by which his leave of absence from India would not expire before March, 1841.

That after arriving in England in 1837 the deceased and his family resided in London until the 16th of October, when he proceeded to Scotland; that he resided in Edinburgh, in ready-furnished houses, until the 9th of August, 1839, when [438] he returned to London with his family, and resided in London for four months, and about ten months previous to his decease went to reside at Plymouth, in the county of Devon, at which place his family continued to reside up to the time of the death of the deceased.

The matter of protest came on for argument.

Addams and Robertson in support of the protest.

The Queen's advocate and Jenner *contra*.

Judgment—*Sir Herbert Jenner Fust*. I am clearly of opinion that I am bound to

overrule this protest, and to require the executors to contest the validity of their asserted will in this Court. It is admitted that the deceased was a Scotchman by birth, that is not disputed; and I take the fact of his having, at an early age, gone to India, in the service of the East India Company, not to be disputed. What effect this latter circumstance had on the domicile of the deceased is a question hereafter to be determined; the question must eventually come back to this—what was the domicile of the deceased at the time of his death? for on the law of the country of domicile must depend the validity of the will. I am rather at a loss to understand how it happened; that whilst this question was undecided, and it must be obvious to all parties that sooner or later it would be agitated, the executors took probate of this paper in the Court at Scotland. The parties whose interest is affected by this being upheld as a valid will call on the [439] executors to propound the paper in solemn form in this Court; surely they have a right to do so; I cannot see how the fact of the Court of Scotland having granted probate of the paper can conclude the Court on the question of domicile. I do not understand that the question of domicile was raised in the Scotch Court; the application to that Court was to grant probate in common form. Neither do I understand the principle on which the jurisdiction of this Court is objected to; and if the Court feels that it has jurisdiction, assuredly it cannot stay its hand. Suppose a mandamus to issue from the Court of Queen's Bench to this Court, requiring it to proceed in this matter, and this Court were to make a return—that the matter had been decided by the grant of probate in common form in the Court of Scotland. Would the Court of Queen's Bench accept of such a return?

I do not consider that I am ousting the Scotch Courts of any jurisdiction to decide on the question of domicile: I do not consider that they are in possession of the question, or that it is even intended to raise the question in the Scotch Courts; neither do I think that I ought to yield up the decision of such question to those Courts.

It is obviously for the benefit of all parties that the domicile of Colonel Craigie should be determined; I therefore overrule the protest, assign the parties to appear absolutely, and reserve the question of costs.

February 28th, 1843.—The executors having appeared, an act on petition was entered into; the facts therein set forth were similar to those already stated in the protest: they are fully stated in the judgment.

[440] The matter of the petition then came on to be heard.

Addams and Robertson for the executors. We admit that up to the year 1837 the deceased must be considered a domiciled Anglo-Indian, by reason of his commission in the military employment of the East India Company, *Munroe v. Douglas* (5 Madd. 404), *Bruce v. Bruce* (2 Bos. & P. 229, n.); but on his return from India the deceased proceeded to Scotland with a fixed intention of reviving the domicile of origin: the domicile of origin is easily revived, *Somerville v. Somerville* (5 Ves. 750), *The Virginie* (5 Rob. 99). This is a case of testacy which is subject to different considerations from intestacy, *Curling v. Thornton* (2 Add. 7).

The Queen's advocate and Jenner contra. The deceased contemplated the possibility of a return to India; if so the legal requisites to complete a change of domicile are incomplete; we might even concede the factum of residence in Scotland, and rely on the contemplated return to India; if the animus manendi be wanting, the fact of residence cannot work a change, or a revival of domicile; but in this case the fact of residence in Scotland cannot be insisted on, for the deceased was quite as much domiciled in England as in Scotland. The distinction between testacy and intestacy is exploded, *Stanley v. Bernes* (3 Hagg. Ecc. 373), *De Bonneval v. De Bonneval* (1 Curt. 858).

Judgment.—*Sir Herbert Jenner Fust.* The facts of this case lie in a narrow compass, and [441] the law applicable to them is not difficult to determine.

The question relates to the domicile which is to determine on the validity of a paper purporting to be the will of Colonel J. Craigie, who died on the 23rd of November, 1840, at Hatchett's Hotel, Piccadilly. The will is dated in the month of October preceding; it is in the shape and form of a Scotch deed, a holograph, subscribed by the deceased, but not attested by any witnesses; and consequently, as it was made since 1840, if the deceased is to be considered as a domiciled British subject, the will is invalid for want of a due attestation; if, on the other hand, he is to be considered as a domiciled Scotchman, then the law of Scotland must determine on the validity or invalidity of this paper as a will.

The question in the present case is not whether the domicile of this person was Indian or English, for the law of England and India are now the same as regards the validity of wills; whether it was so at the time when the act of the 1 Viet. c. 26 passed does not matter in this case, because an act was shortly after, January, 1838, passed by the legislature in India, assimilating the law of India in respect to wills to that of England; there is no necessity, therefore, to consider whether the domicile was English or Indian, provided it was not Scotch. This leads the Court to inquire into the history of this gentleman. He was born in the year 1786, in Scotland; his parents were Scotch, and they also were of Scotch descent; he remained in Scotland, indeed was never out of that country until 1804, when he went to India in the East India Company's military service, in which he had ob-[442]-tained a commission as a lieutenant of a regiment of native infantry. By birth, descent, and genealogy, therefore, his domicile was clearly and decidedly Scotch, and he did not abandon that domicile until he became of age, when he acquired an Indian, or as one counsel has called it, an Anglo-Indian, domicile. Having entered into the service of the East India Company, and having attained his age of twenty-one whilst in that service, his domicile became Indian or Anglo-Indian; for it is the same thing. In India he remained until 1837, with two exceptions; he was in England in 1819 until 1820, and he was also at the Cape of Good Hope from February, 1824, until October in the same year; on the first of these occasions, when absent from India, he did not visit Scotland; it is said in explanation that he came to England on a special mission from the Marquis of Hastings, the duties of which fully occupied his time. On the second occasion, when at the Cape of Good Hope, his domicile was clearly Indian. During the visit of the deceased to England in 1822 he married an English lady—I do not think this fact of any importance, it merely amounts to this—that being a domiciled Indian, he married whilst being on a visit to England; he carried his wife back with him to India, he had children by her, and he lived in India from that time until the year 1837, when he came over to England on the customary leave of absence, but still retaining his commission in the East India Company's service: he came on a three years' leave of absence, though, it is stated, that such leave is renewable for two years more; so that he had every prospect of remaining in this country for five years; [443] he applied for renewal of leave of absence on two occasions, and obtained it; this would have carried his leave of absence down to March, 1841—he died in November, 1840. Now it is said this leave of absence being granted as a matter of course, the deceased had every expectation that before its expiration he should have succeeded to a commission of full colonel in the service, which would have precluded the necessity of his returning to India, to which it is admitted he had a decided aversion. If he did not return to India on the expiration of his leave of absence, or previously attain his full rank, he must have quitted the service of the East India Company [33rd Geo. 3, c. 55]. Now it appears that the deceased had no intention of abandoning his commission unless he became a full colonel; he must, therefore, at this time, 1837, have contemplated the possibility, if not the probability, of being obliged to return to India, if only for a short period. It appears that on his arrival in this country in 1837, after remaining in England a short time, the deceased proceeded direct to Scotland, and arrived there in the October of that year, and he continued in Scotland until August, 1839, living, whilst there, in furnished houses; it further appears that, during the time of his residence, he contemplated the purchase of a house in Edinburgh; he wished to take a lease of a house for seven years, and offered to take such a lease of a particular house; but it had been purchased by another party to whom he offered 100l. to give up the bargain, and not being able to succeed in effecting his wishes, in August, 1839, he quitted Scotland, and by the advice of his medical attendant came to London; from thence he went [444] to Plymouth, and lived there, or in that neighbourhood, in furnished houses, until the death of his father, in 1840, when he left Plymouth, and again went to Scotland to attend his father's funeral; he remained in Scotland until October in that year, when he returned to London, and died at Hatchett's Hotel in November, 1840, being at the time about to join his wife and children at Plymouth. This is the statement on behalf of those who desire to support the Scotch domicile; on the other side there is very little difference in the statement of the facts, the affidavits scarcely vary the case at all; they all coincide in the fact that the deceased did express an intention of taking up his abode in Scotland, in his wish to take a particular house in Edinburgh, that he offered 100l. to the purchaser of the lease to give up the bargain;

that as late as 1840 he again expressed a wish for the same house, or of purchasing some other house in the neighbourhood of Edinburgh; and that he was desirous of sending his son to study with some civil engineer in that neighbourhood. These circumstances are undoubted—from them I think the Court can come to the conclusion that if every thing had turned out according to the deceased's own wishes, he would have taken up his residence in Scotland; no one can look to his letters without seeing that he had a decided preference for the country of his birth; unfortunately his wife had a different opinion; she preferred residing in England, and she at last persuaded the deceased that such residence would be better for themselves and children. It appears to me that, having left Scotland in 1839, he did not go back until 1840, [445] and then only to attend his father's funeral, and when that ceremony was over he returned to England.

These are the facts of the case, so far as is important to the present question; but the Court will have to refer more particularly to the exhibits before coming to a conclusion on the case. Now I do think that, if all circumstances had combined to favour the deceased's wishes, he would have taken up his residence in Scotland; but still the question remains whether there was an abandonment of the Indian domicile, and if there was the *animus* and *factum* of a domicile in Scotland. It was properly asked by the counsel for Mr. Craigie—when was it that the Indian domicile was abandoned and the Scotch acquired? The answer, or the tenor of the answer, to the question was, at the time when the deceased went to Scotland in 1837; that he then went there for the purpose of remaining—in short, that he did it *animo manendi*, with the intention to preclude all question as to his domicile; that he took up his residence there *animo et facto*. The question then remains for the Court to determine—it being an admitted fact that the deceased went to Scotland in 1837, and remained there until 1839—whether he went there *animo manendi*; the solution of that question depends very much on his peculiar situation at the time; whether he was in a condition to abandon his acquired domicile in India, for if he was not in a condition to abandon his Indian domicile, the intention, even if to a certain extent complete by the fact of his having come to this country *animo manendi*, if he could possibly remain, would not be sufficient to change the [446] domicile; if the deceased was not in a condition to carry his intention into effect, that is, if his remaining in this country was dependent on circumstances which might be such as to render it incumbent on him to return to India, that is, if certain events did not give him an opportunity of finally quitting the service. In 1837, when the deceased arrived in this country, he retained his commission in the East India Company's service; he not only came on leave of absence for a distinct period—it signifies not whether there was a greater or less probability, or whether as a mere matter of course his time of absence would be extended for two years more—he was still absent on leave; he retained his commission in the Indian army, his regiment was in India, and his military establishment there; he had quitted India only for a temporary purpose, not with a fixed determination to abandon it altogether, but with the intention to return, unless on the happening of a particular event, namely, his attaining the rank of full colonel before his leave of absence expired.

The question is whether a person having a fixed domicile, and having quitted it with the proposed intention of returning, although such intention may be annulled by the happening of a particular event, can by law be said to have abandoned that domicile; this is the important part of the case; did the deceased, when in 1837 or in 1839 he went to Scotland, go there *animo manendi*, or did he merely go there to remain, so long as the rules of the service in India would permit, and no longer? Now all the correspondence and the affidavits tend to shew that he contemplated returning to India; he might [447] have continued to live in Scotland during the whole of the time of his leave of absence, but would that have been a residence *animo et facto*? the *animus* would only be whilst his absence from India permitted, for if he did return to India, his Indian domicile would revert—perhaps I should not say revert, because it would never have been divested. When the deceased came to this country, he quitted India on a temporary absence, which might be converted into a permanent quitting, by a certain event happening in the interval between the time of the commencement of his absence and the time for his return; I cannot think that the fact that he was absent from India, when he was looking to a probable return, can be said to be quitting that country *animo manendi* in another; he was indeed in another place, but for a temporary purpose only. Now, up to 1839, when he last

quitted Scotland, his domicile was India. I cannot conceive that, by having left India under the circumstances mentioned, he had divested himself of the domicile acquired by his commission in the East India Company's service; in 1839 he went to Plymouth with his wife and family; he resided there, although only in furnished lodgings. If the question was between a Scotch or an English domicile I should decide for the Scotch domicile, notwithstanding his returning to England, and living there in furnished lodgings, and although, as has been argued, he had at one time expressed a wish to purchase a house near Plymouth; and although his actual residence was so far in this country; except for a short time when he went to Scotland on his father's death; and although he died in the act of returning thence [448] to join his wife and family in this country. The important question is, what is necessary to constitute a change of domicile? There must be both *animus et factum*; that is the result of all the cases. This case must depend on its own circumstances, the principles on which it is to be determined are the same in all cases, and that principle extracted from all the cases is this, "That a domicile once acquired remains until another is acquired, or that first abandoned;" I admit all that has been said in this case, that length of time is not important, one day will be sufficient, provided the *animus* exists; if a person goes from one country to another, with the intention of remaining, that is sufficient; whatever time he may have lived there is not enough, unless there be an intention of remaining.

It is now my duty to consider the effect of the exhibits, and of the particular circumstances stated in the affidavits, for the purpose of shewing the grounds on which the Court thinks that the deceased had not abandoned his Indian domicile; he retained his establishment in India; his connection with his regiment, of which he remained lieutenant-colonel, still continued; he was bound by the rules of the service to rejoin his regiment at the expiration of his leave of absence. (a)

Now admitting the fact of actual residence in Scotland from 1837 until 1839, and the wish for a fixed and permanent residence in Scotland; admitting that the deceased had a decided preference [449] for Scotland, and that, if peculiar circumstances did not interfere to prevent him carrying that inclination into effect, he would have settled in a house in that country; still he had not at the time of his death placed himself in such a situation as to enable the Court to say that he had abandoned his Indian domicile, and acquired a permanent domicile in Scotland; the deceased had not abandoned his Indian domicile, he could not do so without resigning his commission, he did not intend to do so, unless he obtained the rank of full colonel. Although the bias of his inclination was to live in Scotland, and, even if he had remained there during all the time he was absent from India on leave, I should still have held that, by retaining his commission, which might, and probably would, have compelled him to return to India, the deceased had not abandoned his Indian domicile. If so, then can it be said that he had abandoned that domicile? his connection with that country, which originally gave him his Indian domicile, still remained in full force: it was indeed liable to be dissolved by his attaining his full rank.

Looking to all the circumstances of the case, I think it is distinguished from all those cases which counsel have most judiciously abstained from going into; they have all been considered here often and often. I think the Indian domicile was not abandoned, but that the deceased was still domiciled in India. If he had died in Scotland that would not in the slightest degree have changed my opinion; he was domiciled in India: if the question had been whether he was domiciled in England or in Scotland, if that point had been in equilibrio, the [450] place of birth and origin might have turned the scale.

I think there is quite sufficient in this case to enable the Court to determine that the Indian domicile, which the deceased had acquired, did remain at the time of his death; when I look for the *animus* and the *factum*, I do not find sufficient to enable me to say that the deceased had dissolved his connection with India; and I think, under all circumstances, that the Scotch law cannot determine on the validity or invalidity of this will.

The question is whether probate is to pass, following the prayer of the one proctor, or administration, according to the prayer of the other? The distinction, adverted

(a) The Court then examined the letters of the deceased, exhibited in the suit, and commented on the language. The result which the Court arrived at was, that the deceased evidently contemplated a permanent residence in Scotland.

to in the course of the argument, between cases of testacy and intestacy makes no difference. It has been held in the cases of *Stanley v. Bernes*, *Curling v. Thornton*, and *De Bonneval v. De Bonneval*, that a person, in order to make a valid will, must conform to the law of the country where he is domiciled; just as where he makes no will, he must be supposed to have intended distribution according to the law of that country. It appears to me that this asserted will is null and void according to the law of India, which is the place of domicile of the party, and that administration must be granted according to the law of England. I cannot, however, at this moment pronounce against the will; it has not yet been propounded; it may be propounded as a valid English will. I assign the proctor to declare next Court day whether he propounds this paper or not.

[451] *GAZE against GAZE*. Prerogative Court, March 14th, 1843.—A testator produced a will, all in his own handwriting, and having his name signed at the end thereof, to three persons, and requested them to put their names underneath his. Held, a sufficient acknowledgment of the signature, the Court being satisfied (although there was no express evidence of the fact) that the signature was of the handwriting of the testator.

[S. C. 7 Jur. 803.]

William Wiseman died on the 25th of September, 1842; shortly after his death a testamentary paper, dated the 21st of April, 1842, was propounded, as the last will and testament of the deceased, by Charles Gaze and George Gaze, the executors named therein; its admission to probate was resisted by John Gaze and other persons entitled in distribution to the personal estate of the deceased in case he should have died intestate.

The allegation propounding the will pleaded that it was all in the handwriting of the deceased, and that on the 21st of April, 1842, he duly executed the same in the presence of three witnesses, who duly subscribed the same in his presence.

William Wood, the first witness, deposed, "That on the morning of the 21st of April, 1842, the deceased, accompanied by the two other subscribing witnesses, called on him, and asked him to accommodate him with the use of the table in his parlour; that witness having assented, the deceased placed on one of the flaps of the table a paper folded up; the deceased sat down at the table, and took from his pocket a pen and a bottle of ink; he unfolded the lower part of the paper on the table, keeping the upper part folded, so that witness could not see the writing on it; the deceased wrote 'a something' on the paper, but what witness cannot say; he then lifted up the folded part of the paper to write what he so wrote, which he did on the left hand side of [452] the bottom of the paper, and which only consisted of a word or so; he then took a book, and placed it over the part folded down, so as completely to cover it, and prevent the witnesses seeing what was written on the paper; the deceased then got up and sat in another chair, at the end of the table, and asked witness 'if he would sign his name underneath his own'—witness accordingly signed his name underneath the deceased's name, which he observed prefixed on the lower part of the paper, for there was no other part visible; that this was at a different part of the paper from where he had seen the deceased write on the paper; that the two other witnesses then signed their names underneath the deceased's name and his own, the deceased having asked them to sign their names; that what the deceased then wrote on the paper he wrote in the presence of all the three witnesses, who signed their names in the presence of the deceased, and of each other; the deceased did not tell them it was his will at the time; witness did not see the deceased write any part of the writing, except the trifling word or two in the corner. That witness perfectly remembers the seal on the paper, and that the names of the deceased were written on either side of the seal at the time witness signed; that he feels satisfied they were not written on the will by him (the deceased) in his presence, for what he wrote was not near the seal, but in the left hand corner, where the date appears. That to the best of his recollection the deceased, when he asked witness to sign his name, pointed to that part of the paper where it was folded, where his name was prefixed, and asked him to put his name underneath his (de-[453]-ceased's) name, one name on one side, and the other on the other side. That witness cannot depose precisely to the exact words he used, but his meaning was, that witness should sign one of his names on one side of the seal, and the other on the other."

On cross-examination. "The deceased did not sign his name in the presence of witness, or acknowledge his name or signature as having been written or signed to the will in witness's presence; for he did not do so formally, any further than by asking witness to put his name underneath his (deceased's) name; the signature of the deceased was not placed to the will by any person for him or by his direction, in the presence of witness; the deceased did insert the date in the will in witness's presence; the deceased, during the whole of the time, was in a great state of nervousness; dreadfully so; witness verily believes that the deceased could not at that time have signed his name in the firm character of handwriting in which it appears on the will; the deceased's hand trembled greatly during the transaction."

George Marshall deposed, "That, on the 21st of April, he received a message from the deceased to go to Wood's (the first witness) house: that he went thither; that deceased, witness, and the two other witnesses went into Wood's parlour together; that the deceased, whilst alone with witness, told him he was going to sign his will, and wanted him (witness) to sign it; that the deceased produced the will, unrolled part of the paper only, and laid a book upon it, so that witness could not see the writing thereon; that the deceased asked Wood to sign his name to it; the deceased did not sign it [454] himself first; he wrote 'a something' on the paper, but witness did not see what it was; Wood signed first, then witness signed underneath Wood's name, the deceased asked him to do so, and pointed out the place where he was to sign; witness did not see the writing on the paper; he saw the deceased with a pen in his hand write something on the paper, but cannot say whether he signed it or not; witness has no recollection whatever of the deceased having acknowledged his signature; the whole transaction only occupied a few minutes, and witness did not pay much attention to it. That he recollects the deceased asking Wood to write his name underneath his, and that, before he did that, he had the pen and ink in his hand, and wrote something on the will."

On cross-examination. "That witness was too far off to see what the deceased wrote on the will, but is certain his fellow-witnesses were close enough to see it; the signature of the deceased was not placed to the will by any person for the deceased, in witness's presence; that the deceased, after writing something on the will, said he had written it very badly; that the deceased was in a state of nervousness during the whole time; his hand trembled very much."

Thomas Thompson deposed, "That on the 21st of April the deceased sent to tell him and Marshall to go to Wood's house, that they went there, joining the deceased before they got to the house; they went into the parlour together; the deceased pulled out a paper, and laid it on the table, undoing the lower part of it only, laying a book on the other part; he then said he wished them to put [455] their names at the bottom of the paper; the deceased had a pen and ink with him; he wrote on the left hand corner of the bottom of the paper the words, '21st of April;' he said, directly he had done so, 'I have done it bad;' he then told Wood to put his name underneath his (deceased's), where the seal was upon the will; after that witness and Marshall signed, the deceased putting his finger down and pointing out the exact place where they were to sign. That witness cannot swear that the deceased used the words 'my name,' or 'seal;' he said, pointing to the proper place, 'Put your name underneath here,' or 'put your name down here,' or 'put your name underneath my name here.' The place he pointed out being under his own signature."

On cross-examination. "The deceased did not sign his name, or acknowledge his signature, in the presence of the witnesses, further than by telling them to put their names underneath his; witness saw the deceased's signature on the will, the part folded down did not cover that: he supposes the deceased could not have written his name in the firm character in which his name appears, for even when he wrote the date his hand trembled all the while."

Addams for the executors.

Jenner for the next of kin. This is a case of execution of a will, by acknowledging the signature; there is no evidence that the signature is in the handwriting of the deceased, or, if made for him, that it was made in his presence, [456] and by his direction. The 9th section of the Wills Act is imperative—if a signature is made for a testator by some other person, it must be made in his presence and by his direction.

Per Curiam. Suppose a testator procures a person to sign his name for him, at a time when no one else is present, and that person dies, then, according to such a con-

struction of the Act, the will must be invalid, for there can be no evidence of the fact in such case. Surely, if a testator acknowledges a signature to be his, that is sufficient, unless the contrary be proved.

Jenner. The words of the 20th section are the same as those of the 9th; there is no attempt to account for the absence of evidence of the handwriting.

Judgment—Sir Herbert Jenner Pust. The only doubt I have felt during the discussion is, as to whether I ought not to rescind the conclusion of the cause, in order to furnish an opportunity for procuring further evidence as to the handwriting of the signature; for the circumstances of the case are so very strong to shew that the deceased meant this paper to operate as his will, that I think there can be no doubt, if the signature is in the handwriting of the deceased himself, that he did sufficiently acknowledge it.

The deceased died in the month of September, last year; he made his will in the April previous. The purport of the evidence, as to the execution, is [457] this: the deceased told two of the witnesses—there are three subscribed witnesses to this paper—that he was going to sign his will, and appointed a meeting for that purpose at the house of the third witness; the parties being assembled, he produces this paper as his will, and he adds the date; the body of the will is of considerable length; and it purports to dispose of the whole of his property. The deceased himself produces this will to the witnesses; it being ready signed and sealed, he directs them to put their names to it as witnesses; it does not exactly appear whether the words he used were “put your names below mine,” or pointed out the place where their names were to be signed: the witnesses do subscribe the will in the presence of the testator, and of each other. There can be no doubt of the intention of the deceased that this paper should operate and take effect as his will.

Then is there a sufficient acknowledgment of the signature of the deceased—assuming the signature to be of his own handwriting—to this will? I think it would be a hypercriticism to say that there has not been a sufficient compliance with the words of the Act in this respect.

It has been argued that there is no evidence that this signature is in the handwriting of the deceased; that it may have been made for him by some person, and, if this be so, that there should be some evidence that the signature was made in the presence of the deceased, and by his direction; but I see no reasonable doubt as to the signature being in the handwriting of the deceased; one witness does indeed say that the deceased's hands were in such a state that he could not have written his [458] name to the will; but it appears to me, on looking at the original will, that the whole body of the will is in the same handwriting as that of the signature, and it is admitted, in the answers of the party, that the body of the will is in the handwriting of the deceased.

I feel so convinced of this signature being in the handwriting of the deceased himself, that I am unwilling to rescind the conclusion of the cause, for the purpose of procuring direct evidence of the fact.

I pronounce for the will, but I think this is a case in which the costs should come out of the estate. I think that it was very proper to call the attention of the Court to this case.

BIDDLES against BIDDLES. Prerogative Court, February 13th, 1843.—A will was written on three sides of a sheet of paper; on the fourth side was written a codicil. Both instruments were signed in the presence of and attested by the same two witnesses, and at the same time; the witnesses were not informed of the fact that they were attesting two separate instruments. The codicil to a great extent annulled the will. Held, that this circumstance was not sufficient to discredit the will, it being proved to have been the voluntary act of a capable testatrix.

This was a business of proving, in solemn form of law, the last will, with a codicil, of Mary Biddles, spinster, deceased.

The will and codicil were written on one sheet of paper; the will, with the attestation clause, and the names of the subscribing witnesses, exactly occupying the three first sides of the sheet; and the codicil, dated the same day as the will, occupying the greater portion of the remaining or fourth side. The will of the deceased, after directing the payment of her debts, bequeathed to her nephew, [459] Thomas Biddles, 1000l., to bring up and maintain her natural child, F. Biddles; and gave and bequeathed

all the rest and residue of her estate and effects equally between her four natural children; with directions for their maintenance and advancement, and with benefit of survivorship, in case of the death of any such child or children under twenty-one; and, in case none of such children should live to attain the age of twenty-one, the deceased gave and bequeathed her property to her nephew Thomas Biddles.

Thomas Biddles, the nephew, and Thomas Biddles, a brother of the deceased, who, by a former will, was nominated as an executor of the deceased, were appointed the executors of this will.

By the codicil the deceased gave and bequeathed to her nephew, Thomas Biddles, 5000l., to be paid to him as soon as possible after her decease.

The will and codicil were signed by the deceased, and attested by the same two witnesses at one and the same time.

The will and codicil were propounded, in a common conditit, by Thomas Biddles, the nephew, and were opposed by Thomas Biddles, the brother, in the capacity of the executor of a prior will: the opposition was principally confined to the codicil.

The personal estate of the deceased was estimated by Mr. Thomas Biddles, the nephew, at 12,000l.; by Mr. Thomas Biddles, the brother, at 8000l. only. The two attesting witnesses were examined.

Mary Clewer deposed, "My husband and I witnessed Mrs. Biddles' will in July, 1841; Mr. Biddles came to our house; I [460] happened to leave the room for a short time; on my return my husband said to me, 'Mrs. Biddles wishes to know whether you have any objection to sign her will with me?' I answered, 'Certainly not, if you think right:' there was at this time a paper on a table which stood in our room, across the bow-window; Mrs. Biddles was sitting, with the table before her, in one corner of the bow-window, and Mr. Biddles, her nephew, who had come with her, on this occasion, was sitting at the other corner; Mrs. Biddles drew the will before her, and opened it; it must have been Mrs. Biddles who did that, for I do not recollect that Mr. Biddles at all interfered in respect to the will. I do not remember that he made any remark about the will, or even touched the paper, or noticed it in any way. My husband, Mr. Clewer, fetched a pen and ink, and put them before Mrs. Biddles; she took up the pen and dipped it in the ink, and she unrolled the paper before her, and wrote her name 'Mary Biddles.' Directly Mrs. Biddles had signed, she turned the paper round towards us for Mr. Clewer and me to sign; we signed the paper in her presence, and in the presence of each other, and at the same table. Mrs. Biddles signed the paper in two places; so did Mr. Clewer and I; Mrs. Biddles first signed one side, and then the other, and she then turned the paper round to us, and we signed, each of us twice. I did not read the paper, or hear it read; I do not remember any remark being made about our signing twice; I did not know that the pages we signed contained distinct documents: I did not hear anything said about what we had signed. Mrs. Biddles folded the paper up and put it in her pocket."

[461] On cross-examination. "The script (B), the codicil, is now before me; my attention is directed to the words five thousand pounds to be paid to, written in the sixth and seventh lines; the words are certainly strangely written, very different from the rest of the writing of the paper; but I cannot distinguish the remains or traces of another word written over or near the words five or thousand. I certainly can, on examining the words closely, see traces of paler ink underneath some of the letters referred to, but it does not appear to me as if the words had been painted over, or altered in any way. I cannot discover any trace, or appearance, or remains of the words six and hundred written over or near the same, or otherwise substituted in their place. I was not the least aware of the purport or contents of the codicil in question at the time of the execution thereof. I really do not know what I should have done if I had been aware of the same, or whether I should have witnessed such a document or not. I do not know that I should have witnessed it in that case without satisfying myself that the deceased well knew the full purport thereof. I know that the deceased has evinced attachment for her children, but I had no opportunity of knowing what were her wishes and intentions with regard to them. My present feeling is, that if I had been aware of the contents of the codicil, and the large portion of her property left away from the children, I should have declined witnessing it. I do think that, knowing the affection she had always shewn to her children, I should have spoken to her about what she was doing."

Richard Clewer deposed, "I witnessed Mrs. Bid-[462]-dles' will; the subject was

introduced by Mrs. Biddles and Mr. Biddles, both of them at the same moment as it were asking if Mrs. Clewer and I would be witnesses to Mrs. Biddles signing her will. Mrs. Biddles, without saying more, took the will out of her pocket; she signed it in two places, the second and third pages of the paper; she did so of her own accord, and without any help or suggestion. I do not know but what it was her will that was contained on both pages that she signed, for I do not recollect that any observations were made about why she signed twice; but when I came to sign the paper myself I saw enough of it to see that they were separate documents on the two pages; and I believe I saw enough to satisfy myself they were a will and codicil. Mrs. Clewer and I each signed the paper twice; we signed in two places. After we had done so, Mrs. Biddles took the will up, folded it, and put it in her pocket. I recollect her making some remark denoting that she was satisfied it was done, and that it was proper for every person to make a will. Mrs. Biddles did everything of her own free will and accord, without Mr. Biddles interfering in any manner that I recollect. It was evident from Mrs. Biddles' manner that she came quite prepared to transact the business of signing her will."

On cross-examination. "The deceased was extremely fond of her children; she always, as far as I witnessed, expressed herself in such a way as to lead me to believe that her children were objects of strong affection to her. I have seen with the deceased a little boy of the age of four years; I cannot of my own knowledge say that such child is the result of a cohabitation between her and the pro-[463]-ducent. I never in direct terms heard her name the child as her own, but I have heard her speak of it to her little boy under my charge as his brother, and I have heard her speak of the producent as its papa. My attention is directed to the words five thousand to be paid to, written on the sixth and seventh lines of the codicil. I cannot say I can distinguish the remains or traces of any other words written over or near the words five or thousand. The word five appears to have been written over twice, ink upon ink, and the ink being of a distinct colour; the whole of the words referred to seem to have been painted over, or retouched. I cannot discover any appearance, or trace, or remains of the words six and hundred as having been originally written in the place or near the words five and thousand. I recollect observing the word thousand on the codicil; I recollect it catching my eye from being more prominent, and my impression then was that it had been written in a different hand from the body of the document; but I did not examine it so as to be able to say whether it bore the appearance it does now. I was not in the least aware of the purport or contents of the codicil in question at the time of the execution thereof; if I had understood at the time that the effect of the codicil had been to injure the deceased's children, to have taken from them property to the large amount it does, I should certainly have hesitated about signing it without first satisfying myself that the deceased well knew and had well considered the purport thereof."

The cause came on to be heard on the *conduict* and the evidence taken thereon, no allegation having been given in by the opposing party.

[464] Addams and R. Phillimore in support of the will and codicil.

Haggard and Harding *contra*. The onus of proof cast upon the party propounding these papers is not satisfied by mere proof of execution in a case so pregnant with suspicion as the present. The will and codicil are written on the same sheet of paper, they are executed and attested on the same day, and the codicil almost entirely nullifies the will. Suppose a party to make a will of considerable length, disposing of property upon complicated trusts, and to add a clause at the conclusion, revoking his aforesaid will in all particulars, would the Court be satisfied with mere proof of execution of such a will? In this case the only erasure that can be discerned on the face of the codicil is in the place where the important words five thousand are written; both witnesses can discover that there has been some tampering with the instrument, although they are unable to trace it with any accuracy.

Judgment—*Sir Herbert Jenner Fust*. The question in this case respects the will and codicil of Mary Biddles, which are both contained in one single sheet of paper. This paper is propounded by Mr. Thomas Biddles, a nephew of the deceased, and one of the executors named in the will, and the admission to probate is opposed by Mr. Thomas Biddles, a brother of the deceased, who is also an executor named in the will, and also an executor named in a former will of the deceased; [465] and as such he opposes the grant of probate of the last will and codicil.

This will and codicil are propounded in a common condidit, and the personal answers of the opposing party have been taken; and I will here state that the answers do not admit all that is averred in the condidit; on the contrary, Mr. Biddles, the opposing party, swears "that he, the respondent, believes that the deceased was, at the time of the execution of the said will and codicil, as well as before and at all times, under the undue control and influence of her nephew, the writer (as respondent believes) of the pretended codicil, and that she was from and after the 27th of July until her death wholly confined to her bed."

The answers, therefore, admit to a qualified extent the capacity of the deceased; they admit that she did execute these papers, and was at the time cognizant of what she was doing, but allege that the deceased was at such time under the control, that is, acting under coercion of her nephew, the party propounding these papers, or paper—for both are written on one and the same sheet of paper.

Now, where coercion in procuring the execution of a paper is charged, it is necessary for the party alleging it to make his charge good by proof; for the Court cannot assume that because a party is a legatee to a large amount under a will, therefore that party has exercised coercion to obtain the will from a testatrix—a person otherwise admitted to have been of sufficient capacity to make a will. Nothing has been pleaded or has come out in the evidence by which coercion can be assumed.

Can the Court then pronounce against the legal [466] validity of a will, executed by a party, to all appearance, of perfect capacity, and executed in the presence of witnesses, merely because it is suggested—such suggestion not being in plea—that there was coercion in the procurement of the will? Two most respectable witnesses depose that the deceased herself asked them to sign her will, and herself produced this paper to them as her will. Is the Court to assume coercion from the paper itself? What was the situation of this lady? It appears that she had three natural children, to whom, by a former will, she had given her property, contingent on their attaining the age of twenty-one: the contents of this paper it is not necessary to consider more particularly; undoubtedly it was the intention of the deceased to provide for these children, and to give the bulk of her property among them. A fourth child was afterwards born, which the deceased spoke of as her child, and also as the child of Thomas Biddles, her nephew; it is, however, right to say that there is no evidence whatever in this cause to shew that this child was the child of Thomas Biddles, the nephew. In consequence of the birth of this child it became necessary that the deceased should make some provision for it, and therefore to alter the disposition of her property; the will now propounded was accordingly made, and this child is provided for by a legacy of 1000*l.*, and the residue of the deceased's property is given between this child and the three elder children, with benefit of survivorship; and, in case of the death of all the children under twenty-one years of age, the whole of her property is to go to her nephew, Thomas Biddles. Undoubtedly this is a different disposition of the residue of her property [467] from what the deceased had made by her former will, and a disposition very much in the favour of Thomas Biddles, the nephew; but I must assume that deceased had some reason for this, and that at the time of making this second will he stood in a greater degree of favour with her than at the time when she made her former will.

Then comes the codicil, by which 5000*l.* is given to Mr. Thomas Biddles, the nephew.

On this instrument the question turns.

Undoubtedly, as I have before said, where coercion in procuring a will is set up as a ground why the Court should refuse to establish a will, the Court will require the coercion to be proved by strong evidence, but, in the evidence now before the Court, there is nothing whatever on which to hang a doubt. The deceased produces this will from her pocket, she tells the witnesses she has altered her will, she asks them to attest it, and herself takes possession of it when they have attested.

It has been said in argument that the codicil is in a different handwriting from that of the will; this is rather suggested than positively stated by the answers; who prepared the will or the codicil is not a fact before the Court; the party propounding the papers was not called on to plead or prove this: all that is necessary to establish a will or codicil is to shew it to be duly executed and attested, and to be the free voluntary act of a person of sound mind, memory, and understanding. There is no reason to doubt that all these requisites concurred in this case; it cannot be said that

the deceased did not conduct herself rationally. Mr. Thomas Biddles, the nephew, is proved not to have interfered during [468] the ceremony attendant on the execution of this will.

It has been said that there are erasures on the face of this codicil—that the words “five thousand” have been substituted for “six hundred;” the witnesses have been cross-examined as to this point, and they both do pretend to discover a something odd in the writing; but they do not pretend to say that this particular substitution of one sum for another is discernible.

I must say that, looking to the paper now before me, I cannot discover anything of the sort.

I pronounce for this will; I cannot give the party opposing it his costs, but I will not condemn him in costs.

THE COUNTESS DE ZICHY FERRARIS AND J. W. CROKER *against* THE MARQUIS OF HERTFORD. Prerogative Court, March 17th, 1843.—A will is not valid unless executed in conformity with the law prevailing in the country where the testator is domiciled; and the fact of the property (personal) bequeathed by such will, being locally situate in another country, and of the will being duly executed according to the law of that country, will work no distinction.—A testator, by will, duly executed in the year 1823, directed his executors to pay legacies which he should give by any testamentary writings signed by him, whether witnessed or not. Held, that such clause could not give effect to legacies bequeathed by an unattested paper made subsequently to the 1 Vict. c. 26.—A testator, previous to the 1st of January, 1838, had made a will and several codicils; some duly executed, others only signed by the testator. Subsequently to the 1st of January, 1838, he made and signed a codicil (B), but the same was not duly attested. Subsequently to this, by a codicil (C) duly executed and attested, he ratified and confirmed his will and “codicils.” Held that the codicil (B) was not so identified with (C) as to be ratified by or incorporated with (C), the word “codicils” being more completely and properly applicable to the codicils made previously to the 1st of January, 1838.—The 1 Vict. c. 26 applies to wills made previous to the 1st of January, 1838, if any alteration is made therein after that time.

[S. C. 2 Notes of Cases, 230; 7 Jur. 262. Affirmed *nomine Croker v. Marquis of Hertford*, 1844, 4 Moore, P. C. 339; 13 E. R. 334 (with note).]

Francis Charles Seymour Conway, Marquis of Hertford, died at his residence in London on the [469] 1st of March, 1842, having made several testamentary papers, to wit:—

(A) A will dated 25th of February, 1823, duly executed and attested.

Twenty-nine codicils of various dates, but all dated prior to the 1st of January, 1838. Some signed only by the testator, others duly executed and attested.

(B) A codicil, dated 28th of October, 1838, signed by the marquis, but unattested.

(C) Ditto, dated 26th of April, 1839, duly executed and attested.

(D) Ditto, dated 13th of August, 1839, signed by the marquis, but unattested.

(E) Ditto, dated 20th of May, signed by the marquis, but unattested.

By his will the marquis appointed his son, Lord Yarmouth (the present Marquis of Hertford), Lord Lowther, Mr. J. W. Croker, Mr. Hopkinson, Mr. de Horsey, and Captain Meynell to be his executors.

In the month of June, 1842, probate of the will; of the twenty-nine codicils made previous to the 1st of January, 1838, and of the codicil of the 26th of April, 1839 (C) (the present Marquis of Hertford having renounced probate), were granted to the five other executors.

The will (A) contained (inter alia) the following clauses:—

“Whereas I have heretofore made several codicils or testamentary papers, which it is my wish shall be considered as part of my will, now I do hereby ratify and confirm all and every such codicils and testamentary writings.”

“I direct my executors to pay the several legacies given by this my will, or by such codicils or testamentary papers as aforesaid, or which I shall give by any codicils or testamentary writings under my hand, or signed by me, and whether witnessed or not.”

“I hereby ratify and confirm all codicils and testamentary writings as aforesaid which I wish to be considered as if incorporated in this my will.”

Paper (B), all in the handwriting of the testator, was as follows:—

"I hereby give and bequeath to Charlotte Countess of Zichy Ferraris, to be held by her for her own sole and separate use, the stock or shares of which I may die possessed in the United States Bank, which now, I believe, exceed three thousand, Milan, October 28th, 1838.—Hertford. And I also give and bequeath to my friend, the Right Hon. John Wilson Croker, all my stock and shares in the Virginia United States Bank, which, I think, are one hundred thousand dollars.—Hertford. October 28th, 1838, Milan."

Paper (C) was as follows:—

"I had in former codicils given as much as possible to Lady S——, now I wish to withdraw all, except 700l. a-year, which, under my old family settlement, I am entitled to bequeath to any for life. I direct this to be a first and primary charge upon all the manors in the county of Warwick to which I am absolutely entitled, and over which I have a disposing power, and I hereby ratify and confirm my said will and codicils, except as before excepted."

(Signed and duly attested.)

Paper (D)—all in the testator's handwriting.

[471] "This is a codicil to the last will and testament of Francis Charles Lord Hertford. For several years I have thought of and frequently altered my decisions about the Regent's Park, but now it becomes me to settle; so I give my leasehold house and premises, and all it contains, excepting plate and two old entailed pictures by Canaletti, to Charlotte Countess Zichy Ferraris, and to her heirs and assigns. In testimony of which I sign this codicil, this 13th August, 1839.—Hertford—."

Paper (E), all in the testator's handwriting.

"I have also one thousand pounds of long annuities, which is a stock for about thirty years longer; this I give and bequeath to Charlotte Zichy Ferraris, my ward. And I declare this a codicil, as if it formed part of my will and testament. May 20th, 1840.—Hertford—."

The Countess de Zichy Ferraris called on the executors to take probate of papers (B, D, and E). Mr. Croker called on his co-executors to join with him in taking probate of paper (B). The four other executors having declined to take probate of any of these papers, and Mr. Croker declining to take probate of any but (B), the Countess de Zichy Ferraris propounded papers (B, D, and E) in an allegation which pleaded (inter alia) 3rd article.

"That the testator, in the month of October, 1838, being resident at Milan (a city in the Austrian dominions, and subject to the laws, usages, and customs of Austria), and in which city the said testator had a house and an establishment, and having a mind and intention to make an addition to his last will and testament, and codicils thereto, and meaning such addition to form part of his said [472] will, and be incorporated therein, as expressed in his said will, did with his own hand draw up and reduce into writing the aforesaid codicil bearing date the 28th of October, 1838, and in testimony of his aforesaid intention that the same should form part of his said will, and be incorporated therein, he did on the said 28th day of October, 1838, being the day of the date thereof, execute the same, in conformity with the laws, usages, and customs of, and in the form required and observed in, the Austrian dominions, to wit, by setting and subscribing his title of honour or signature thereto, as the same now appears, as and for a further codicil or part of his will."

4th article. "That such codicil is a good and valid codicil by the laws, usages, and customs of Austria, and that the law of Austria would give effect to such a paper."

[The opinions of advocates and lawyers of that country were vouched in support of this article.]

5th article. "That the testator being of sound mind, memory, and understanding, and having an intention to make an addition to his aforesaid last will and testament, and, among other things, to ratify and confirm the same, and the codicils thereto, and, among others, the codicil of the 28th of October, 1838, did with his own hand draw up and reduce into writing a further codicil to his said will, bearing date the 26th of April, 1839; and duly executed the said codicil in the presence, &c. And the said testator in and by the said codicil ratified his said will and codicils, and, among others, the codicil bearing date the 28th of October, 1838."

Mr. J. W. Croker propounded paper (B) in a separate [473]-rate allegation, substantially the same as that on behalf of the Countess de Zichy Ferraris, but pleading in addition,

"That the whole of the stock, shares, goods, or property in and by the said codicil bequeathed (whether to Mr. Croker, or to the countess) was, at the time of the making of the said codicil, and still is, locally situated in the United States of America only, and not elsewhere."

The admission of these two allegations was opposed by the present Marquis of Hertford, the residuary legatee named in the will.

Jenner and Elphinstone for the residuary legatee.

The Queen's advocate and Haggard for the Countess de Zichy Ferraris.

Harding and R. Phillimore for Mr. Croker.

Addams for the executors, who appeared formally.

The points discussed in argument were (a)—

1st. The law, arising from the fact of paper (B) being made at Milan, at a time when the testator was resident in that city, occupying a house, and having an establishment there.

The cases cited on this point were *Stanley v. Bernes* (3 Hagg. Ecc. 373). The *Annandale Peerage case* (3 Ves. 198).

2nd. The fact of the stock and shares, be-[474]-queathed by paper (B), being locally situate in America. Cases cited. *Re Moresby* (1 Hagg. Ecc. 378), *Stanley v. Bernes* (3 Hagg. Ecc. 373), *Burge on Colonial Law* (4 vol. pt. 2, c. 12), *Story on Conflict of Laws* (pp. 78-678).

3d. The law, arising from the fact of the will (A) having reserved power to bequeath future legacies, and the legal effect on papers (B, D, E). Cases cited. *Habergham v. Vincent* (2 Ves. jun. 204; 4 B. C. C. 353), *Rose v. Cunynghame* (12 Ves. 29), *Hooper v. Goodwin* (18 Ves. 156).

4th. The law, arising from the confirmation, by paper (C), of the will and codicils, and its legal effect on paper (B). Cases cited. *Habergham v. Vincent* (2 Ves. jun. 204; 4 B. C. C. 353), *Smart v. Prujean* (6 Ves. 560), *De Bathe v. Fingal* (16 Ves. 167), *Wilkinson v. Adam* (1 Ves. & Bea. 422), *Dillon v. Harris* (4 Bligh, 321), *Utterton v. Robins* (1 Ad. & Ell. 423), *Doe v. Evans* (1 Cr. & Me. 42), *Shortrede v. Cheek* (1 Ad. & Ell. 57), *Guest v. Willasey* (2 Bing. 429; 3 Bing. 614), *Boydell v. Drummond* (11 East, 142), *Barnes v. Crowe* (1 Ves. jun. 490), *Piggot v. Waller* (7 Ves. 98), *Goodright v. Meredith* (2 Maule & Sel. 5), *Hulme v. Heygate* (1 Mer. 285), *Gordon v. Lord Reay* (5 Sim. 274), *Crosbie v. McDowal* (4 Ves. 610), *Jackson v. Hurlock* (2 Eden, 271), *Williams v. Goodtill* (10 B. & Cres. 895), *Carleton v. Griffin* (1 Burr. 555), *In re Smith* (2 Curt. 796), *Brudenell v. Boughton* (2 Atk. 272), *Moneypenny v. Bristow* (2 R. & Myl. 117), *Buckridge v. Ingram* (2 Ves. jun. 651).

5th. The application of the act of the 1st Viet. c. 26 to testamentary papers made prior to the [475] 1st of January, 1838. Cases cited. *Hobbs v. Knight* (1 Curt. 768), *Brooke v. Kent* (Priv. Coun., unreported).

Judgment—*Sir Herbert Jenner Fust*. In this case the late Marquis of Hertford is the deceased; he died on the 1st of March, in the last year, at his house in Park Lane. He left a will and a great number of codicils; the will is dated in January, 1823, and the codicils are dated at various periods between that year and his death. Some of the codicils are in the handwriting of the deceased, and signed with his title of honour; some of them are not attested by any witness, and some are duly attested, having been executed according to the law then in existence to pass real property, that is, they were executed in the presence of three subscribed witnesses. In the last year probate of the will and of all the codicils dated before the 1st of January, 1838, and of one of a later date (November, 1839), which was duly executed by the marquis and attested, was granted to the executors, who are five in number—Lord Lowther, Mr. Croker, Mr. Hopkinson, Mr. de Horsey, and Captain Meynell—and the Court reserved for future consideration the papers of a testamentary nature dated subsequently to the 1st of January, 1838, and which are not attested.

Now these codicils are three in number: one is dated at Milan in October, 1838; the second is dated in August, 1839, and the third in May, 1840. These papers are all in the handwriting of [476] the deceased marquis, and are signed by him, but

(a) Jenner objected to the counsel for the Countess de Zichy Ferraris being heard in support of paper (B); he submitted that a legatee is not entitled to be heard in support of a paper which an executor is propounding. The Court overruled the objection.

they are not attested by any witness; and it is with respect to these papers that the question has arisen. Four of the executors (Lord Lowther, Mr. Hopkinson, Mr. de Horsey, and Captain Meynell) have determined not to propound these papers, but are willing to take probate of them if the Court is of opinion that they are entitled to probate; these four gentlemen, therefore, are no parties to the present proceeding, being entirely neutral before the Court. The purport of the papers is to give legacies of considerable amount to the Countess de Zichy Ferraris and Mr. Croker (Mr. Croker being an executor under the will and the other codicils), and the present proceeding is on behalf of the countess and Mr. Croker. The present Marquis of Hertford, who is residuary legatee under the will, is a party to the suit, and opposes the grant of probate to these papers. The Countess de Zichy Ferraris and Mr. Croker have appeared by separate proctors and counsel, and each has given in a separate allegation. Mr. Croker joins in propounding the paper of the 28th of October, 1838, and the countess propounds the other two papers, their allegations being substantially the same, and having the same object, namely, to bring before the Court the circumstances under which it is considered that the papers are entitled to probate, though not executed according to the provisions of the statute 1 Vict. c. 26, which passed in July, 1837, and came into operation on the 1st of January, 1838—eight or nine months before the earliest of these papers is dated.

Prior to entering into a consideration of the con-[477]-tents of the allegation, it may not be immaterial to see how the law stood before the passing of the statute I have referred to, and to consider the alterations which are introduced into our testamentary law by that statute, so far as they apply to the present question; and I do this because a great many questions turned upon the construction of the Statute of Frauds (the 29 Car. 2, c. 3) in the different courts of law and equity. Under the present act the same provisions are applied to both description of property, real and personal.

By the 5th section of the Statute of Frauds it was enacted that “all devises and bequests of any lands or tenements devisable either by force of the Statute of Wills, or by this statute, or by the force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses.” With regard to wills of personal property, they were not required to be signed or attested; it was sufficient that a will was reduced into writing in the lifetime of the testator, and that it contained his real wishes and intentions.

Under the old law, therefore, beyond all doubt or contradiction, any testamentary paper or writing of the deceased, signed by him, would be a good disposition of his personal property to any amount; and consequently, if the law had remained unaltered, the codicils now propounded would be entitled to probate, as well as those of which probate has been already granted. But it was thought that [478] from the great increase of personal property in the country, and from the numerous suits which were the consequence of the Ecclesiastical Courts granting probate of unfinished papers, which gave rise to questions of great difficulty, some further protection was necessary to prevent fraud being practised upon persons who had property of this kind to dispose of, and accordingly it was proposed and recommended by the Ecclesiastical Commissioners and the Real Property Commissioners that certain alterations of the law were necessary to be made, and they suggested another mode of executing wills, by which the Ecclesiastical Courts and the Courts of Common Law should be governed in both cases in respect to the execution and attestation of wills. The Legislature did not adopt the whole of the commissioners suggestions, but the Act of Parliament of the 1st Victoria was founded in part upon their recommendations, and it is now necessary to consider what the law is as it at present exists.

Now the ninth section of the act, which is that which immediately relates to the question before the Court, enacts, “That no will shall be valid unless it shall be in writing, and executed in manner herein-after mentioned (that is to say); it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall subscribe the will in the presence of the testator; but no form of attestation shall be necessary.” This is what is required [479] for the execution and

attestation of wills, and under the term "wills" the Court has already held that codicils are included. It seems difficult therefore to suggest any words more plain, simple, and comprehensive than the words of this section in the Act of Parliament; and it is absolutely impossible, in the ordinary sense and meaning attached to the expressions, to raise any question with respect to the true import and construction of this section of the statute. A will, codicil, or other testamentary paper must be signed at the foot or end by the testator, or by some other person in his presence and by his direction; and not the will, but the signature, must be made or acknowledged by him in the presence of two witnesses present at the same time, who are to subscribe the will in the presence of the testator: it must not be attested by one witness at one time and by one at another; but the will must be executed in the presence of both of the witnesses, and be attested by those witnesses in the presence of the testator; and any disposition of property, real or personal, other than in the form prescribed by this Act of Parliament will not be deemed valid.

Under the Statute of Frauds, with respect to wills of real property, many questions of great intricacy and difficulty arose, and amongst other questions were these: What amounted to signing by a testator; whether it was sufficient if he made his mark, or if he executed by sealing; whether the name should be subscribed at the bottom of the will, or might be placed at any other part; whether it was necessary that the witnesses should see the testator sign, or if it was sufficient that he [480] acknowledged his signature or the will in their presence; what amounted to a sufficient acknowledgment; whether it was necessary that the acknowledgment should be made to all the witnesses at one and the same time, or if it was sufficient for him to sign in the presence of one witness, and acknowledge the will to the two other witnesses at different times: and another very important question which arose under that statute was whether an unattested codicil, clearly identified by a subsequent will duly attested, was valid. Many other nice and difficult questions arose under the Statute of Frauds, and although many of them have been set at rest by the 9th section of the late Act of Parliament, still, as every day's experience shews, quite a sufficient number remains undisposed of, to afford scope to much ingenious speculation and argument as to the real intent and meaning of the very plain and simple directions of this section of the act; and as wills of real and personal property are now under the same rules, and as the same principles apply to wills of personal estate as to wills of realty, the Court has endeavoured, in putting an interpretation upon this section of the act, to discover as well as it can the construction adopted by courts of common law and equity in cases which arose within their jurisdiction, that is, in respect to wills of real property.

A question of this kind comes now before the Court, which has to give its opinion as to the effect of these papers, *proprio vigore*, under circumstances to which the Court will advert, and these circumstances are set forth in the allegations, which have been discussed in this Court. In looking to the [481] allegations, both on behalf of the Countess de Zichy Ferraris and of Mr. Croker, the same questions necessarily arise: the cases are in substance exactly the same, though one or two points are stated in one which are not in the other.

The first of the papers in question was executed at Milan, not within the dominions of her Majesty, and it purports to dispose of property situated in the United States of America; and it is said that, by his will, which the deceased duly executed, he reserved to himself the power of disposing of property by any codicil or testamentary writing under his hand or signed by him, though not attested by witnesses, and that the unattested papers were confirmed and ratified by a codicil of subsequent date duly executed, whereby the defect of execution was supplied. With respect to the first point, as to the place where the first paper bears date, it may not be immaterial to look at the papers themselves. The first paper is dated, I said, at Milan, October 28th, 1838, and it is to this effect: "I hereby give and bequeath to Charlotte Countess of Zichy Ferraris, to be held by her for her own sole and separate use, the stock or shares of which I may die possessed in the United States Bank, which now, I believe, exceed three thousand." Then follow the signature "Hertford," and the date, "Milan, October 28th, 1838." The instrument is written on part of a small sheet of paper, apparently part of a copy book, and then follow these words: "And I also give and bequeath to my friend, Right Honourable John Wilson Croker, all my stock and shares in the Virginia United States Stock, which, I think, are one hundred thousand [482] dollars;" this is signed "Hertford," and dated "October 28th, 1838, Milan." The

second paper is dated the 13th of August, 1839, and is to this effect: "This is a codicil to the last will and testament of Francis Charles Lord Hertford. In several years, I have thought of and frequently altered my decisions about the Regent's Park; but as now my youngest ward is about forming an excellent match, and having lost my two very old four-legged friends, it becomes me to settle; so I give my leasehold house and premises and all it contains, excepting plate and two old entailed pictures by Canaletti, to Charlotte Countess Zichy Ferraris, and to her heirs and assigns. In testimony of which I sign this codicil this thirteenth August, 1839.—Hertford." At the bottom, "A second copy, similar, but not copied verbatim.—H." The third codicil is to this effect: "I have also one thousand pounds of long annuity, which is a stock for about thirty years longer; this I give and bequeath to Charlotte Zichy Ferraris, my ward; and I declare this a codicil as if it formed part of my will and testament, May 20th, 1840," and it is subscribed "Hertford."

These, therefore, are the three papers on which the opinion of the Court is to be given; and, looking at the date of the papers simply, it is clear that they are not entitled to probate, as not having been executed according to the provisions of the statute by which the Court is now to be governed.

Now it is very material to inquire with respect to the first of these papers, it having been executed out of Her Majesty's dominions, as to the rules which apply to papers so executed, and what effect [483] the Court is to give to that circumstance. Now, the allegation given in by the Countess de Zichy Ferraris, the first given in in the cause, pleads the death of the testator in the month of March, 1842, and that he made his last will February 25th, 1823, with several codicils annexed to it, and that he nominated and appointed his son, Lord Yarmouth, residuary legatee; that probate of the will and twenty-nine codicils was by this Court, in June, 1842, decreed to the executors. The second article pleads a clause in the will of the testator, to which the Court will presently refer further than is necessary at present, merely stating that by this article of the allegation it is pleaded that the testator directed by his will certain legacies to be paid which were or should be bequeathed by any codicils annexed to his will, or executed after the date of the will, and if they were merely signed by him, and not attested by witnesses. The third pleads "that the testator in the month of October, 1838, being resident at Milan (a city in the Austrian dominions, and subject to the laws, usages, and customs of Austria), and in which city the testator frequently resided, and had a house and an establishment, did with his own hand draw up and reduce into writing the codicil bearing date the 28th of October, 1838;" and it pleads that he intended that this codicil should form part of his will, and be incorporated therewith; and that he executed the same in conformity with the laws, usages, and customs of and in the form required and observed in making wills and testamentary dispositions in the Austrian dominions, by setting and subscribing his title of honour or signature [484] thereto, as and for a further codicil to his will, and that he did bequeath and dispose of his property as in the codicil is contained. The fourth article pleads that the codicil is a good and valid codicil by the laws of Austria, and that no formalities are required to give effect to the paper, and the opinions of judges, advocates, and lawyers in the Austrian dominions are adverted to. The fifth article repeats what is pleaded in other articles; namely, that the testator was of sound mind, memory, and understanding, and being so, that he made the codicil of the 26th April, 1839 (one of the papers of which probate has already been taken), and it is pleaded that, "having a mind and intention to make an addition to his will, and amongst other things to ratify and confirm the same, and the codicils thereto, and amongst others the said codicil bearing date the 28th of October, 1838, did with his own hand draw up and reduce into writing a further codicil to his will bearing date the 26th of April, 1839, now remaining in the registry of this Court (the codicil (C)), and duly executed the said codicil in the presence of divers credible witnesses, two of whom in his presence set and subscribed their names as witnesses thereto," and of which probate has been granted by this Court, and that in this codicil are the following words:—"I ratify and confirm my said will and codicils, except as before excepted in every other respect;" that is said with reference to certain of the papers in which he had made alterations in his testamentary disposition, and which he had revoked by this codicil of 26th of April, 1839; but he ratifies and confirms his will and codicils, "except as [485] before excepted in every other respect." It goes on to plead in the sixth article that in August, 1839, he executed another codicil, that is, by drawing it up with his

own hand, and setting and subscribing thereto his title of honour or signature, intending the same to form part of and to be incorporated with his last will and testament, and to dispose of his property as before pleaded. The seventh article pleads that the testator, having a mind and intention to make a further addition to his will, with his own hand wrote the codicil of the 8th November, 1839, and duly executed the same in the presence of divers credible witnesses, two of whom in his presence set and subscribed their names as witnesses thereto, of which codicil also probate has been granted by this Court. It then pleads the making and execution of the codicil of the 20th of May, 1840, which it is also pleaded the testator intended should form part of his will and be incorporated therewith. The ninth article pleads that the three codicils, and the codicil in the registry of the Court annexed to an affidavit of scripts referred to, are in the handwriting of the deceased.

These are the contents of the allegation given in by the Countess de Zichy Ferraris; and Mr. Croker's allegation does not in any material degree differ from it, except that it pleads in the fourth article "that the whole of the stock, shares, goods, or property, in and by the said codicil bequeathed (whether to the Right Honourable John Wilson Croker, party in the cause, or to the Countess de Zichy Ferraris), was at the time of the making of the said codicil, and still is, locally situated in the United States of America only, and not elsewhere."

[486] Now, the first question which the Court has to consider is: What is the effect of the fact of the paper of October, 1838, having been executed when the testator was resident at Milan? Whether that circumstance exempted him from the necessity of conforming to the law of this country, which now requires that a will of personal property as well as a will of real property should be executed in the presence of and attested by two witnesses? It is not pleaded that the late marquis was domiciled at Milan; it is only pleaded that he was resident there as a visitor, as he might have been in any other country, and therefore merely a temporary resident, having his domicile in this country, and therefore he was liable to the law of this country with respect to his testamentary disposition. The law of Austria, it is pleaded, would give effect to this codicil, as the act of a foreign resident there, and this may be perfectly true; but if the law of Austria would give effect to the paper, it does not follow that this Court could decree probate of the paper, unless it can be shewn that the domicile of the party was in those dominions, and not in the dominions of England, because the domicile of the marquis was in England; for it is too late now to contend that the succession to personal property, either in cases of testacy or intestacy, is to be governed by any other law than the law of the country in which the deceased had his domicile. In the case of succession to the personal estate of an intestate the cases are too numerous for the Court to entertain any doubt that the succession is governed by the law of the domicile; and if there had been any doubt whether the succession to personal property in a case of [487] testacy is governed by the same rule, such doubt would be removed by the decision of the Court of Delegates in the case of *Stanley v. Bernes* (3 Hagg. Ecc. 373). It was there decided that a British-born subject, who had domiciled himself in Portugal, was bound, in the disposition of his property, to conform to the law of the country in which he had become so domiciled; and although in that case he had expressed an intention of returning to this country, yet, as he died in Portugal a domiciled Portuguese subject, the Court held that his will could not be valid, unless executed according to the law of the country in which he was domiciled. Therefore that case disposes of the whole question as to succession in cases of testacy, deciding that a will, to be valid, must be executed according to the law of the country where the party was domiciled; and, following that decision, I am bound to administer the law as I find it laid down by the superior Court, as the law of the country, and I am consequently of opinion that the circumstance of the paper having been written and executed by the late marquis at Milan can give no effect to the paper, it not being executed according to the law of the country in which it is admitted that he had his domicile.

Now this goes, in some degree, to dispose of the next question, arising from the locality of the property disposed of—whether property situated in the United States of America can be disposed of by a will executed in any other manner than the law of the domicile requires? and I am of opinion that it is clearly established by all the cases, beyond all [488] doubt, that the law of the domicile governs, and not the *lex loci rei sitæ*. In the case of *Stanley v. Bernes* this question was likewise examined,

and it was determined upon the principle *mobilia sequuntur personam* that the disposition is governed by the law of the country where the party is domiciled, though the *lex loci* may regulate the grant of administration. The rule is, in cases of the wills of Scotchmen, where the property is in this country, to come to this Court for administration; but the Court always follows the law of the domicile, acquainting itself with the fact whether the testamentary disposition is valid according to the law of the domicile; and it comes to this: that the locality of the property may so far be material that it enters into the consideration of the Court in the grant of administration. If there be any difference in this respect—if it is necessary to have probate of this paper, though the property is situated in the United States, and if the courts of America do not adopt the rules which are acted upon in this Court—it is competent to the Courts in that country to grant administration; but this Court, when probate is asked in this country, must govern itself by the law of this country, and cannot grant probate of a paper not legally executed according to the law of this country.

These are the observations of the Court on two questions in this case, namely, as to the place where the paper was executed, and as to the locality in which the property is situated: neither of these circumstances, nor both together, can render the instrument effectual.

The third question is as to the clause in the will of the Marquis of Hertford in the second article of [489] the allegation, "That the testator in and by his will, amongst other things, gave and bequeathed all other his personal estate and effects whatsoever which he had not by any former codicil or codicils or testamentary writing confirmed by his will disposed of specifically, or which he had not by his will, or should not by any codicil or testamentary writing, dispose of specifically, to his executors, upon trust to dispose of the same in the following words:—'And pay, satisfy, and discharge the several legacies and annuities given and bequeathed by this my will, or such codicils or testamentary papers as aforesaid, or which I shall or may give or bequeath by any codicil or codicils hereto, or by any testamentary writing or writings under my hand or signed by me, and whether witnessed or not, and do and shall stand possessed of and interested in all the surplus or residue of the monies in trust for my son Richard Seymour Conway, Earl of Yarmouth, his executors, administrators, and assigns: Provided always, and I do hereby declare my will and mind to be, and I hereby direct, that my son shall, upon receiving from my executors hereafter named, or the survivors of them, or the executors, administrators, or assigns of such survivors, a request for such purpose in writing, within twelve calendar months from my decease, forthwith, with all convenient expedition, make, do, and execute all such acts, deeds, matters, and things as may be required of him and in his power to do, for giving full effect to every appointment, direction, devise, or bequest in this my will, or any codicil or codicils, or other testamentary writing, which I have already heretofore made, and may be now subsisting, or may now or [490] hereafter make, and for giving full effect to every bond or instrument or written promise which I have executed or signed, or may hereafter execute and sign, and which shall be subsisting at my decease for the purpose of securing any principal or annual sum of money to or in favour of any person or persons whomsoever; and in case my son shall neglect or refuse to do so, I hereby declare and direct that the bequest and trust hereinbefore made and directed, as to the surplus of my residuary personal estate, and of the surplus of the sum of forty-seven thousand pounds and interest to or in favour of my son, shall be absolutely void; and in such case I direct that the surplus of my residuary personal estate shall be paid to the commissioners for the time being appointed for the reduction of the National Debt.' And at the conclusion of the will the deceased ratified and confirmed this will and codicils in the words following:—'And hereby revoking all former wills, but ratifying and confirming all codicils and testamentary papers as aforesaid, which I wish to be considered as if incorporated in this my will, I declare this to be my last will and testament,' as in and by the will now on record in the registry of the Prerogative Court of Canterbury will appear." Now the question is, what is the effect of this clause?

The purport of the clause is to revoke all former wills, but to ratify and confirm all codicils which he may have executed, and he directs that all future codicils executed by him should be incorporated with and form part of his will. Now, the effect of the clause itself shews, without reference to any extrinsic circumstances, its meaning to be this—[491] an intimation and direction to his executors that he intended

to except from the clause of revocation in his will, which is revocatory of all former wills, but not all former codicils, certain memoranda—for he refers to papers and instruments in existence which are not codicils, and also an intimation to his executors that, if he should leave behind him any papers of a testamentary kind, dated after the date of the will, which should be merely signed by him, and not attested by witnesses, they were nevertheless to be considered as good and valid codicils—an intimation and direction that he meant to reserve to himself a power of disposition in some other form, but which was then valid by the law of this country, for it was not in any degree necessary, as the law then stood, that he should have reserved any such power, as the law itself would have given effect to any instrument in his own handwriting; and a codicil signed by him with his title of honour would have been entitled to probate, and would have been as effectual, so far as his personal property was concerned, as if it had been formally executed by him, and attested by three witnesses: and therefore there was no necessity for a reservation of any such power to himself: and therefore, looking at this clause of the will, I consider it as an intimation and direction to his executors that any codicils not attested by witnesses were meant and intended to be a good disposition of his personal property. Having executed his will in the presence of three witnesses, he might think it necessary with respect to these papers, which are not executed like his will in the presence of witnesses, to intimate to his executors that any codicils in his handwriting and [492] signed by him, though unattested by witnesses, should nevertheless form part of his will and testamentary disposition. But, taking the description of the codicils as given by the learned counsel on both sides, it would seem that the clause in the will was to give himself the power of disposing of property by an unexecuted codicil; and seeing that the law, before the date of these codicils, has been altered, and that it is no longer competent to a British subject to dispose of his property in any other manner than by a will or codicil executed according to the provisions of the 9th section of the act of Victoria—the question is, had he, or could he, reserve to himself such power—a power of disposing of his property in any other manner than such as by the law of this country a domiciled subject could be authorized to do? A great deal of ingenuity and learning was displayed in the argument which was addressed to the Court as to the law which applies to these cases, and a vast number of cases were cited which were supposed to affirm the power which the deceased would seem to have reserved to himself; and the general result of these cases appears to be this, and looking by analogy to the decisions in Courts of equity and law, as to the dispositions of real property—that, notwithstanding the Statute of Frauds has said that all devises of lands shall be invalid unless they were executed in the presence of witnesses, yet, nevertheless, it has been held by Courts of common law and equity that a codicil or paper unattested may be held sufficient under certain circumstances, that is, that a paper duly executed may so clearly and indisputably refer to an unexecuted paper, that such a paper, whether [493] of a testamentary form and character or not, may be so clearly and indisputably referred to as to be considered as identified with and to form part of the will duly executed, just in the same manner as if it had been repeated totidem verbis in the will itself. That, I think, is the general result of the cases. It would be quite useless for the Court to go through all the cases that were cited in the argument: the general result is this—that, with regard to the incorporation of papers, a paper imperfect in itself may be so identified in an instrument validly executed that it may be considered as a part of it, and consequently that the defect of authentication by the attestation of witnesses subscribed to the paper is cured.

The case of *Habergham v. Vincent* (2 Ves. jun. 204) was decided upon this principle; and it may be necessary to consider that case, and the principles upon which it was determined, and what fell from the judges—the Lord Chancellor and the learned judges by whom he was assisted on that occasion. That case was carefully considered, and a great number of cases which preceded it were cited in the report.

That case occurred in 1793, and it appears from the report that the testator, Samuel Hill, made his will on the 5th of October, 1759, whereby he devised all the copyhold estates which he had surrendered to the use of his will, and also all his freehold estates, to five persons named in the will, upon trust; “subject and liable to such charges, provisoes, and conditions as he should by any deed or instrument in writing, to be executed by him [494] and attested by two or more credible witnesses, direct, limit, or appoint.” Therefore the will devised copyhold estates surrendered to-

the uses of the will and freehold estates subject to charges made by a deed or instrument in writing executed in the presence of and attested by two or more credible witnesses. Now it appears that this will was duly executed and attested, and that by an instrument dated the following day, under the hand and seal of the testator, attested by two witnesses, stamped, and concluding like a deed, he recited his will, and that he had reserved a power of disposing of his estate further, and directed his trustees to convey his real estate as therein mentioned; and as the deed was attested only by two witnesses, the question was whether it could pass freehold property. Now the case came on first before Lord Thurlow, who, after taking some time to consider, directed a case to be made for the opinion of the Court of King's Bench whether the two instruments (the one a regularly executed will, the other drawn up as a deed) taken together were sufficient to pass any estate or interest in the freehold and copyhold premises, or either of them, not given by the first instrument, and whether, upon the death of the heir-at-law, any and what estate or interest in the freehold and copyhold premises, or either of them, passed by the two instruments to the surviving trustee, or would at his death pass to the person who should be his right heir. And it appears that when the case was sent for the opinion of the Court of King's Bench, in consequence of too short a statement of the case, the Court of King's Bench understood the second instrument merely as a deed, and reported [495] that the two instruments could not be united, and that the two instruments taken together were not sufficient to dispose of freehold or copyhold estate. It appears that the trustee afterwards proved the second instrument in the Ecclesiastical Court as testamentary, and the cause was set down for further directions, and a great deal of argument took place as to the proper mode of proceeding; and after such argument the Lord Chancellor expressed his opinion that it was right that the case should be further argued before him with the assistance of two judges of the common law, and accordingly the case was argued before him with the assistance of Mr. Justice Buller and Mr. Justice Wilson, and, after considerable discussion, the judges delivered their opinion. The opinion of Mr. Justice Wilson is to this effect: "Upon the first question, if the deed had not been made, or being made as a deed it can have no operation, there is a resulting trust for the heir, who is entitled to the whole remaining beneficial interest, and the trustee takes nothing. It was then contended for the heir of the surviving trustee that this instrument, though the testator call it a deed-poll; though it is stamped; though it contains no nomination of executors or terms of gift, but of limitation and appointment, and though it concludes like a deed, sealed and delivered, being first duly stamped, yet may be, and if it may be ought to be, considered as testamentary, so that it may be connected with the will, and both may make one testamentary disposition of the estate; and upon the best consideration my opinion is that if this instrument, connected with the former, can have a legal operation to pass any part, I think it [496] may be so considered as testamentary." It had been proved, as I understand, in the Ecclesiastical Court as testamentary. He goes on to say: "Because when the testator made his will he disposed of his estate to a certain extent, and then professes his intention to make a further disposition. It is true he at the same time conceives, and erroneously conceives, he could reserve a power by his will to limit and appoint uses out of his own estate by deed or instrument attested by two witnesses only; but he does not profess that he will do it by deed only; therefore it seems at the time he made his will, and when he wrote this instrument, his principal intention was to complete what he had left incomplete by his will, viz. the disposition of his real estate. He had made his will in part, and then professed an intention to do more to complete that will; but he could not do it by declaration of uses out of his own estate when no part was departed with by him. The law will not permit that, but it may be done by will; and the general rule is that when a man has expressed his intention to dispose of his estate, and has taken an ineffectual mode of doing it, yet if the instrument can be construed in another manner so as to effectuate his intention, the ceremony is matter of form, and the substance shall be carried into execution, if it may by law;" and therefore he considered that, under a deed, the testator's intention was to complete what he had left incomplete by his will. He goes on to say: "Though the testator has called this a deed, yet as the intention was to complete what was incomplete by the will; as it is in writing and signed, and as to some purposes, perhaps to all, it may have a legal [497] operation if testamentary, in order to sustain the intention, it is fair so to consider it; and I do not know any rule that

stands in the way." Now, so far he considered the deed had been or might be proved in the Ecclesiastical Court, or as entitled to probate, as part of the testamentary disposition of the testator, though drawn the day after the will was executed, and attested by two witnesses only. Mr. Justice Wilson then proceeded to the third question, as to the freehold. "It is contended that under the circumstances, and considering the two instruments as one instrument, the freehold estate will pass by these two taken together, though the latter is not properly executed to pass freehold. As to that, the first way in which it was considered was, that where there is a prospective sort of limitation, as in this case, a prospective reference to something to be done, the party foregoes the benefit of the statute; and therefore the subsequent instrument he has mentioned shall have the same effect, though not properly attested, as if attested by three witnesses." In this case, of the Marquis of Hertford, if there was a prospective intention of making a codicil or codicils not to be executed according to law, supposing it to be so, that is, not duly attested as by law then required, the question would be the same; and on the same principle it might be said that he had made a law for himself, and was willing to forego the benefit and protection afforded by the statute in the disposition of property, and therefore the paper ought to have the same effect as if attested by three witnesses. But Mr. Justice Wilson proceeds: "If the Statute of Frauds could be considered as that sort of law to which this maxim would apply '*quisquis renunciare* [498] *potest juri pro se introducto*,' that would apply in this case; but the statute" (that is, the Statute of Frauds) "was not made for the benefit of the testator only, but for general public purposes. By the common law a man could not devise land; then came the statute permitting him to do so by an instrument properly signed. Then, lest testators should be imposed upon, these guards were introduced by the Statute of Frauds, and that insists that a will of land shall either be executed in the manner pointed out or be void. This does not leave it at the option of the testator, but is a positive provision that a will shall be void if not executed according to that statute." So the words of the ninth section of the act of the first of her present Majesty declares that no will or codicil shall be valid unless it shall be executed in the presence of witnesses and in the manner pointed out by that section of the Act of Parliament; and that provision was made, not for the benefit of individuals, but for the greater protection and security of the public, and it was not competent to the Marquis of Hertford to reserve to himself a power of disposing of his property by a will or codicil executed in any other manner than is required by this section of the act. The power of a testator under the present act cannot be considered greater than that of a deviser under the Statute of Frauds; the argument applies in the same manner to him, and the same consequence follows. As Mr. Justice Wilson says: "This does not leave it at the option of the testator, but is a positive provision that a will shall be void if not executed according to the statute: and the testator cannot say he will make a will without the requisites prescribed, either not [499] thinking he will be imposed upon, or not caring about it. The law will not suffer that, but requires in all cases that these ceremonies, which might be considered as circumstance only, if the act had not said otherwise, shall be essential and be observed in making every will. Therefore this cannot be supported as a testamentary paper on that principle. I believe it is true, and I have found no case to the contrary, that if a testator in his will refers expressly to any paper already written, and has so described it that there can be no doubt of the identity, and the will is executed in the presence of three witnesses, that paper makes part of the will, whether executed or not." And that is the rule of law where a paper is so expressly referred to, and so described, that there can be no doubt of its identity, and the will, which so refers to such paper, is executed in the presence of witnesses, that paper forms part of the will whether executed or not; and such reference is the same as if he had incorporated it. And therefore if the Marquis of Hertford had so described any previous papers, and stated that they were intended to form part of his will, the Court would have held them to be as much a part of his will as if incorporated in the will itself, and would have given effect to all these three codicils, if so identified, as a good disposition of property, as well as to the other papers. But the object here is to give effect to papers not in existence at the time; the papers were in futuro, the codicils were to be written.

The result of Mr. Justice Wilson's opinion was, that the paper not forming a part of the will of the testator, and not being incorporated and not being [500] in exist-

ence at the time when the deceased wrote the will, and not being executed in conformity to the Statute of Frauds, had no operation upon the freehold estate, and, therefore, it was immaterial whether it was considered as a deed or as a will; because as a deed it was void, the limitations being too remote; and as a will it was void, not being properly executed. The next consideration was, what effect the paper could have upon the copyhold estate; and as the copyhold had been surrendered to the use of the will, and in such a case a man may by any testamentary paper not executed in the presence of three witnesses direct the uses, this paper, being considered testamentary, was sufficient to dispose of the copyhold estates.

Mr. Justice Buller was of the same opinion as to the effect of the deed, as affecting the freehold property: he concurred in opinion with Mr. Justice Wilson that the deed, not being executed according to the statute, not being in existence at the time the will was executed, and therefore not being expressly referred to, could not form part of the will.

The Lord Chancellor then gives his opinion upon the subject, and it may not be improper to consider part of his judgment. He was of opinion that, taking the second instrument as a deed, the opinion of the Court of King's Bench on the case submitted to them was well founded. He says, "That led me to look farther into the case, for it was set down for further directions, and I was to proceed upon the certificate, to the sequel of the cause, containing no difficulty whatever; therefore I thought it necessary to have it more fully argued. It has been argued with great industry and ability. Concurring [501] entirely with my Lords, the judges, nothing remains but to state shortly the precise points upon which my opinion takes the same direction. I am of opinion that upon the will there is clearly a resulting trust for the heir, so far as there is no disposition of the beneficial interest. That was the first question made." Then the Chancellor proceeds to the second point. "Secondly, that the last instrument, though called a deed, though in the form of a deed, is testamentary; that it is dependent upon the will, and will have all the effects that a testamentary act so executed can by law have. Thirdly, that there is no difference between law and equity in determining upon the effect of a testamentary act, and this instrument cannot pass the freehold contrary to the provisions of a public law making that act void." The distinction has been very fully stated between a will duly executed, which is a competent disposition by reference to a prior instrument, and a will which is an imperfect disposition by reserving a part, the reserved part to be afterwards disposed of by a future instrument. It was argued that the determinations in this Court had established a more favourable construction as to informal codicils, and that argument referred to cases in which the Court held that legacies given by an informal instrument would attach upon real estate charged by a will properly executed; and *Hyde v. Hyde, Masters v. Masters, Brudenell v. Boughton*, and *Lord Inchiquin v. O'Brien* were quoted. *Hyde v. Hyde* is more remarkable for the doctrine and language it contains than for the decision, because it was unnecessary for the Court distinctly to decide the question, for the assets were marshalled; and therefore the question [502] whether the legacies in the second will should be charged on the real estate did not arise. In *Masters v. Masters*, 1718, Sir Joseph Jekyll distinctly says that legacies being charged upon land, those given by an unattested codicil are included. In *Brudenell v. Boughton* Lord Hardwicke adopts that opinion, and reasons upon it, though it is true it was not necessary there to determine it. But in *Lord Inchiquin v. O'Brien* it was necessary; and *Brudenell v. Boughton* was adopted as the ground of the decision, and the Chancellor refers to his opinion in that case. These cases are said, and some inaccuracies in the reports have led to that, to have gone upon this proposition. It is supposed to be Sir Joseph Jekyll's opinion, in *Masters v. Masters*, that it may be supported as a power reserved to the testator to increase the charge by a future act. That cannot be the ground of his opinion; there is a manifest incongruity in the supposition of a power reserved by a man's own will which cannot begin to operate till all power in him ceases. Now, according to the decision in *Masters v. Masters*, Sir Joseph Jekyll said that, "legacies being charged upon land, those given by an unattested codicil are included;" it will be necessary presently to consider to what extent that doctrine goes. Then he comes to the observation of Mr. Justice Wilson, that the law is for the protection of the public. "The observation made by Mr. Justice Wilson is unanswerable: that it is not a personal privilege; that no man can reserve a power to act against the forms the law has imposed. Therefore, if it is

to pass by a testamentary act, that must have all the requisite solemnities the law has directed." [503] Therefore he agreed with him entirely as to the law, that in order to give effect to a testamentary paper informally executed, as part of a regularly executed instrument, there must be a clear and distinct reference to the paper as being then in existence. He agrees that a testator cannot reserve to himself a power to act against the law; and he refers in his judgment to cases (many of which were cited in the present argument), *Brudenell v. Boughton*, *Lord Inchiquin v. O'Brien*, with several others which are in affirmation of the doctrine; and, therefore, it was important to consider this case with reference to the question before the Court, and it follows, from this construction of the law, that if a testator expressly refers to a paper already written, and there can be no doubt or difficulty as to its identity, and the will which refers to it is executed in the presence of three witnesses, the paper referred to forms a part of the will, whether that paper be executed or not: I am ready to subscribe to the doctrine so laid down; but it must be an existing paper. According to the decision, a testator cannot reserve to himself a power of disposing of real estate by a paper not in existence at the time; and he cannot reserve to himself the power of disposing of his property contrary to law. The effect of the decision in *Habergham v. Vincent*, and of many other cases cited in the report, confirms this doctrine (which also shews the limitation with which the rule was adopted), that the paper must be an existing paper at the time the will was made. There are several other cases and authorities cited as to the limitation of the rule; and in the case of *Smart v. Prujean* (6 Vesey, 565) reference was made to the case of *Habergham v. Vincent*, as deciding that under a charge of legacies upon land, legacies given by a subsequent unattested codicil would be charged, and there is no doubt of this. In the case of *Smart v. Prujean* Lord Eldon said, "I am very strongly of opinion, thinking these two legacies would be good, if the fund was well given, that there is not sufficient legal certainty, to be collected from the instrument signed by three witnesses, that the testator has disposed of his real estate"—that is, by a will executed according to the Statute of Frauds, as it was done by a private letter of instructions. The testator in that case executed a will, duly attested, whereby he devised his real estates upon trust for such purposes as he should by a private letter or paper of instructions which he intended to leave with Mrs. Johnson, the superior of an English convent at Gravelines, direct or appoint. After his death, in his bureau, in the room in which he had resided, belonging to and adjoining the Monastery of English Nuns at Gravelines, of which Clementina Johnson was superior, two paper writings were found in the same envelope with the will, which envelope was sealed up and indorsed in the hand of the testator, "The will of Anthony Lowe." The object of the letters is not material; the letter addressed to the abbess or superior of the English monastery at Gravelines enters into details as to the mode in which the property shall be disposed of. It was contended that these papers did not form part of his testamentary disposition, and that the parties to whom the legacies were bequeathed had no right to recover them. The Lord Chancellor said, "I am strongly of opinion, thinking these two legacies would be good [505] if the fund was well given, that there is not sufficient legal certainty to be collected from the instrument signed by three witnesses that the testator has disposed of his real estate. The rule goes no further than this (I except charges for debts and legacies), that if the produce of real estate is to be disposed of, you must shew an instrument in effect executed by the testator in the presence of three witnesses, and evidencing from its own contents that it is so in a sense, even if no attestation is annexed to it. The rule of law is, that an instrument properly attested, in order to incorporate another instrument not attested, must describe it so as to be a manifestation of what the paper is which is meant to be incorporated, in such a way that the Court can be under no mistake." That is in reference to what had been decided in *Habergham v. Vincent*, that the papers must be described "so as to be a manifestation of what the paper is which is meant to be incorporated, in such a way that the Court can be under no mistake." And he proceeds to consider the circumstances of the case I have observed, that the testator at his death resided in the convent, or near the convent, of which Mrs. Johnson was the superior, and that the papers were found sealed up in an envelope with the will. The learned judge then proceeds to express himself thus: "Judging as a private individual, there can be no doubt that when he executed the will he meant that instrument and those two letters should have their

effect; but unless the rule of law allows me, I cannot establish the letters, and I am not satisfied he meant them to have their effect unless delivered to the superior, as he might mean that to be a part of the act to make the will com-[506]-plete. The intention of leaving them with her can never, under the circumstances in which he lived, be satisfied by the circumstance of finding them in the convent. He was living, and had his bureau in that room belonging to the convent, and it is impossible upon that circumstance to say that according to his intention he had left them with her. From his residence he could not avoid leaving them there. This is fortified by what follows. Mrs. Johnson lived some time, and he never left any paper with her, or delivered any to her successor. Certainly, at his death, the abbess had no notion they were left with her; for she desires the will to be brought to her, and gets possession of it. In favour of an heir-at-law, whom I must see disinherited by nothing but a clear manifestation of intention, it would not be too strong to say the testator did not mean his will to be consummate unless he should do that act of leaving it with the superior which he never did. But there is another ground: not whether the same envelope or superscription is evidence that the testator meant these should be the papers referred to; but whether I must of necessity collect from the contents of the will that they should be considered the same. The same cover is nothing with reference to the statute, and the superscription has not three witnesses. The true question is, if these papers were found in the bureau with the will, can I say from the contents of the will these two papers are the papers referred to? Suppose several other papers were found with them, could I say this will would have enabled me to select these two as the only papers referred to? The rule and my opinion are, that the will has not, by its con-[507]-tents, sufficiently identified these papers to enable me to say they are necessarily incorporated; if not, they are not attested by three witnesses, and it is admitted on all hands that this sort of disposition, unless the antecedent paper is incorporated, cannot be brought within the rule as to debts and legacies charged on real estate by an unattested paper. I cannot, therefore, give these parties their legacies, though I regret it." To be sure, a stronger case in its circumstances could not well be, leading almost to a presumption that these papers, found sealed up in an envelope with the will, should be considered as part of the will. The Lord Chancellor regretted that he could not give the parties their legacies; as a private individual, he had no doubt that the testator, when he executed his will, meant that these two papers should have effect; but they were not necessarily incorporated with or made part of his will, and being unattested they consequently had no effect as a disposition of real property.

I have cited more of these cases than might be otherwise requisite in order to save the necessity of adverting to them afterwards; and I think they clearly shew that, as Lord Eldon says, to bring an unattested paper within the rule as to legacies charged on real estate by such papers, it must be clearly identified and incorporated in the will.

Now, with respect to the extent to which real property may be charged with legacies by an unattested paper, nothing can be more clear to shew the principle than what is laid down by Sir William Grant in *Rose v. Cumynghame* (12 Ves. 29). In that case the question was whether the real estate should be charged [508] with all the legacies bequeathed by an instrument to be executed by the testator. The Master of the Rolls said, "This case is materially different from any that have been hitherto decided; for the charge is of a very peculiar nature, not of all legacies he shall afterwards give, but of all such legacies as he shall afterwards charge upon the estate, or make payable out of it." Now if the real estate and the personal estate had been charged with the legacies, the general legacies, to be given by him, one as a primary fund, the other to assist, then the charge upon the real estate would have been a good charge; but as it was only to remain liable to the charge of such legacies as he should afterwards charge on the estate or may make payable out of it, the Master of the Rolls was of opinion that it could not be a charge on the land, and he expresses himself in these words: "Suppose he had given a general legacy by his will, that would not be charged upon this estate, nor a general legacy by a codicil. For that purpose the legatee must shew that the legacy was made chargeable upon, or payable out of, the real estate. That seems in effect a reservation, by a will duly executed, of a power to charge the real estate by a will not duly attested. When a man by a will duly executed charges all legacies generally, expressing his resolution that whenever

he gives them they shall be a charge, it is determined that whenever given they shall be a charge. But according to this it is not in the duly attested will alone that you find the charge, but the intention to make it a charge may be in the unattested instrument, the codicil." Therefore he reasons in this way: "This is only an attempt to reserve by a will duly ex-[509]-ecuted a power to charge by a will not duly executed. It is the case of *Habergham v. Vincent*. It might as well have been contended in that instance that there was an adoption into the will of that future instrument; but the opinion of the Lord Chancellor and the Judges was that it was not competent to a man to give himself such a power, viz. a power to dispose of land by an unattested instrument. That is the reservation this testator attempts to make; for unless he thinks fit, when he makes his codicil, to declare his intention that his land shall be charged with the legacy or annuity, it shall not be charged." So that the distinction between these cases is this: that where landed property is charged by a will duly executed for the general payment of debts and legacies, then the moment it is shewn that there is a debt or legacy, in whatever instrument the legacy may be given the charge attaches upon the land. But why? not by virtue of the unattested instrument, but by virtue of the duly attested instrument by which the land had been charged. That is the true principle on which the cases have all along proceeded—that you may incorporate an unexecuted paper into a will that is duly executed by a sufficiently clear and distinct reference to it with respect to which there can be no mistake; and that when you have once charged legacies on land by a will duly executed, that being a general charge created by the will itself, you render the land subject to the payment of legacies, given by whatever form of instrument they may be given; the legacy is given by the instrument which gives that legacy, but the charge on the estate is made by the executed will.

Now the same doctrine is adopted and the same [510] argument is employed, as to the reservation of a power, in the case of *Hooper v. Goodwin* (18 Ves. 156), and in several other cases, in which the Master of the Rolls decided that the line has always been drawn between legacies charged upon the land, as an auxiliary fund, and a portion of the land itself, or the produce of the land when directed to be sold. He says, "The principle of these cases may be disputable;" that is, where legacies are in themselves liable to the same considerations as debts. It was uncertain what a man might owe at his death; but having charged his estates with his debts, it was thought that, that being a fund so fluctuating in itself, it was necessary to pay debts contracted after, notwithstanding the Statute of Frauds. So considering that it was uncertain what legacies might be given at the time of his death, they were considered on the same principle as debts contracted after the date of the will, and were considered to be charged by the will, that charge on the land having been created by a duly executed instrument, and he says: "The principle may perhaps be disputable; but the judges by whom they were decided did expressly declare that, with regard to a charge upon land only, and by consequence to the produce of it, a devise cannot be made or altered but by a will executed according to the statute."

All these cases go on the principle that, in order to effect a charge on land by an unexecuted instrument, the charge must be made by a legally executed will; and consequently, as the same principle is to be applied now to a will of personality as for-[511]-merly to a will of real property, the charge must be by a paper executed according to law, and no prospective power can be given to a testator to dispose of his personal property by any other will or codicil than one executed according to the provisions of the statute now in force.

Such being the effect of the cases with respect to the manner in which property can be disposed of, as the law at present stands, and being of opinion that the reservation of such power is not legal, that no man can legally claim it, the next question to be considered is as to the confirmation of these papers by the codicil of November, 1839, which applies to two of these codicils, but not as to the third, for that is not confirmed by that codicil.

Now the question upon this part of the case depends very much upon the effect which is to be attributed to the codicil of the 26th April, 1839. [The Court read it ante, p. 470. Paper (C).] The question is whether this ratification and confirmation of the "said will and codicils" is sufficient to give effect to the two other codicils, they not being entitled to probate as they stand by themselves, without a confirmation of them?

This is undoubtedly a very important point in respect to questions which are continually arising in this Court, and with respect to which at present there has been no decision given in Courts of Common Law upon the construction of the statute. I may here at once dispose of a part of the argument as to the application of the statute to codicils to a will of a date antecedent to the time the statute was to come into operation; for it is declared in one of the sections that the act should not apply to wills [512] executed before 1st January, 1838. It was argued that the will in this case having been executed previously to the 1st January, 1838, the codicils also must be supposed to have the same date themselves as the date of the will; that, therefore, it was not necessary that they should be executed according to the provisions of the statute. But I am clearly of opinion that that is not the true construction of the statute. The construction which the Court has put upon that section of the Act of Parliament is this, that wills executed between the date of the passing of the act and the day on which it came into operation would not require to be attested in the presence of two witnesses; that they would be valid, notwithstanding they should merely be signed by the deceased, as far as personal property is concerned; but that, if any alteration was made in these wills after that date, then that alteration must be authenticated in the manner required by the act: for instance, an obliteration made after 1st January, 1838, could only be effectual where it was authenticated by the subscription of the testator and of two witnesses, in the manner directed by the act; alterations must, in like manner, be attested by two witnesses, and that decision has been upheld by the Judicial Committee of the Privy Council in the case of *Brooke v. Kent*. There a will had been executed by the deceased with a certain amount of charge on real property, and there had been an alteration or obliteration, and the obliteration was so complete that it could not be made out, and the question before this Court was whether it could receive evidence dehors the will, in order to shew what the obliterated words had been, and this Court was of [513] opinion that it could not receive such evidence, notwithstanding there was upon the outside sheet of the will a writing in the testator's own hand, declaring what the words obliterated were. It will be recollected that the Act of Parliament declares that no obliteration or alteration in a will shall have any effect unless executed as a will. The Judicial Committee were of a different opinion; they held that evidence might be received; but they also held that the Act of Parliament did apply to alterations made subsequently to 1838, in a will executed prior to that date. If it applies to an alteration made in such a will, *à fortiori*, it applies to additions made to that will by a codicil or paper, subsequently to 1838. I am clearly of opinion that the Act of Parliament does apply, and that no codicil executed after the 1st of January, 1838, can be valid, unless it is executed according to the provisions of the statute.

But the question is whether this codicil, which is so executed, can give effect to these informal instruments. Now this part of the case in some measure depends on the principle in *Habergham v. Vincent*, and other cases cited in argument, *Smart v. Pruycan*, and *Dillon v. Harris* (4 Bligh, N. S. 321), which last case is much of the same description, where papers failed for want of a sufficient identification. I say that much depends upon the principle which was laid down and acted upon in those cases. These are imperfect instruments; they are invalid as codicils, consequently they are not codicils, and they can *per se* have no effect or operation. If they are to have effect and operation, it must be by a codicil [514] which ratifies and confirms all former wills and codicils. Then comes a very important question, whether these unexecuted papers are to be considered as codicils or not, and as confirmed and ratified by this instrument, and are to have effect in consequence of it. Here is the great difficulty, and the great point of the case. There is no doubt whatever, and it is not necessary to refer to authorities for that purpose, that all codicils are parts of a will, and that a codicil referring to a will, and professing to republish a will, will also be a republication of the codicils attached to that will; and numerous cases have been cited, and strong cases, to shew the manner in which that doctrine has been applied; and I entirely assent to the doctrine that if a will is republished, the codicils to that will are also republished. It has been held in a variety of cases, with respect to the construction of wills and their operation upon real property, that an unexecuted codicil may, by a properly attested instrument, be rendered valid and effectual by republication. The case of *Utterton v. Robins* (1 Ad. & Ellis, 423), which was referred to in argument, is a strong case to shew that a codicil referring to an unexecuted paper, or without even

referring to it, provided it is written on the same sheet of paper, would give effect to that codicil, though of itself it was not executed so as to pass real estate. But the great question here is as to the description given of the instruments, whether they are meant and intended to be revived by the deceased marquis and made effectual, and whether, if he so meant and intended to revive them, it was possible he should give them that effect.

[515] Now, from the cases referred to in argument, as bearing upon the subject, it is clear that where codicils have been written on the same sheet of paper with the will, the execution of these codicils is held to have been a sufficient republication of them, there being an internal annexation, with respect to which there was no doubt whatever. The case of *De Bathe v. Lord Fingal* (16 Ves. 167) was the case of an appointment of a guardian to children by a will having only one witness, whereas by the statute 12 Car. 2, c. 54, in order to render valid a testamentary appointment of guardians, two witnesses are required; it was held, however, that though the will was imperfectly attested, it was rendered perfect by a codicil duly attested, by its being declared to be a codicil to a will "hereunto annexed" on the same sheet of paper, the Master of the Rolls holding that it amounted to a re-execution and republication. Therefore, there was a reference to an instrument being on the same sheet of paper to which it referred; again, in another case cited in argument, *Doe dem. Williams v. Evans* (1 Crompt. & Mees. 42), the will, purporting to dispose of freehold property, was neither signed nor attested, but reference was made in a codicil to the "foregoing will." "I make a codicil to the foregoing will." It was held that the attestation extended to all; and Mr. Baron Bayley said, that if the codicil had not referred to the will, he should have thought that it did not set up the instrument. But in the case of *Gordon v. Reay* (5 Sim. 274) the Vice-Chancellor was of opinion that a second [516] codicil, duly attested, which recited a will which was also duly attested by date which expressly confirmed all provisions and bequests in favour of a particular individual amounted to a republication of the first codicil unattested charging freehold lands. Therefore there can be no doubt that if this paper had been written on the same sheet, and had referred to these codicils, or any of them, that would have been a good republication, and have given effect to them; that the attestation might with propriety have been applied to them. It was held by this Court, upon motion, in the case of *The Goods of Smith* (2 Curt. 796), where the attested codicil was upon the same sheet of paper with a previous unattested codicil, that it was sufficient to give effect to that codicil. But here the great difficulty arises from the description given by this paper. Is it clearly manifested upon the face of this paper that it was the intention of the testator to give effect to these unexecuted codicils by the general description "codicils?" If not, does not the case fall within the rule laid down by Lord Eldon in *Smart v. Prujean*, that he cannot conjecture, that it must be so plain and manifest that there can be no mistake? The Court is not at liberty to indulge in conjecture. He says, "Judging as a private individual, there can be no doubt that when he executed the will he meant that that instrument and those two letters should have effect; but, unless the rule of law allows me, I cannot establish the 'letters.'" He was of opinion that the rule of law did not warrant him, and he decided that there was a failure of [517] proof of identity. So in *Dillon v. Harris*, and other cases referred to in the argument.

Now how stands the case? I may feel strongly that it was the intention of Lord Hertford that the papers should have effect, notwithstanding they were not executed according to law; but I have great doubts and great difficulty in coming to the conclusion that he does by the description of "codicils" legally express that intention, so as to leave no doubt upon the mind of the Court. The difficulty arises upon these points: there are two sets of instruments to which the description may apply. It is contended that it may apply to the unattested instruments, because the testator describes them as codicils. It is clear that the description may apply to another class of papers, namely, those duly executed; because they are codicils, they are codicils to the will: and, although it was strongly urged that there was no necessity for the ratification and confirmation of an instrument duly executed according to the law, as it stood, and therefore the Court must attribute this ratification and confirmation to the codicils, which, without such ratification and confirmation, would have no effect, yet I think the force of that argument is met by the observation that there were other codicils; that this codicil confirmed and ratified what he had before done, before it became necessary to confirm and ratify them—when these codicils which were executed

according to the law as it then stood were entitled to have effect. What is done in this class of cases? Lord Eldon, in *Smart v. Prujean*, said, "Suppose there were other papers, could I select some as the papers referred to? I may conjecture, but the fact must [518] be so manifest that there can be no doubt or difficulty." So here; must not I have it clear upon the face of the papers themselves? The Marquis was not in possession of one of the papers; he delivered it to the Countess de Zichy Ferraris. But can I say upon this general description, which, it has been argued, removes all necessity for a more particular description, that the testator meant to include in the description of codicils those not entitled to that description? They were not codicils in the eye of the law.

A good deal has been said in reference to the construction to be given to technical words, and the use which is supposed to have been made of them by the testator, and many cases were adverted to, into which it is not necessary for the Court to enter particularly, to shew that *primâ facie* the construction to be given to technical words must be that which they bear in their technical sense; but that, where it appeared from the context that it was not the intention of the testator to use them in that sense, then the more popular sense might be given to them. And amongst other cases was cited that of *Wilkinson v. Adam* (1 Ves. & B. 422, 445, 462). That case was cited for another purpose in the argument—for the purpose of shewing the necessity of a distinct reference to a paper intended to be incorporated with an attested instrument. But upon a part of the case a question arose with respect to the description of "children" in the will of the testator; Lord Eldon expressed himself in these words (p. 462): "The rule cannot be stated too broadly [519] that the description 'child,' 'son,' 'issue,' every word of that species, must be taken *primâ facie* to mean 'legitimate child, son, or issue;' but the true question here is, whether it appears, by what we call sufficient description, or necessary implication, that the testator did mean these illegitimate children." And in that case it was the opinion of Lord Eldon that the term "children" meant the illegitimate children of the testator. Now the question had been before him previously, and he requested the assistance of three of the Common Law Judges, who gave their opinion in writing, upon the interpretation and construction of the will upon the word "children," which is used there; as to who were intended by that term; and the Common Law Judges seem to have been of opinion, coinciding with his Lordship in the general interpretation, that illegitimate children were intended; yet they seem to intimate an opinion that legitimate and illegitimate children might be included under the same description of "children," and take shares together. Lord Eldon thus expresses himself: "It was further argued with great force that if the testator had lived until the death of his wife, as he did, and had afterwards married Ann Lewis, and had legitimate children by her, those children must have taken; and legitimate and illegitimate children cannot both take under the same description; and it would be very difficult to persuade me that they can." Lord Eldon, therefore, expresses strongly his opinion that it would be very difficult to persuade him that legitimate and illegitimate children could take under the same description of "children." He expresses his difference of opinion from the Common Law Judges, by [520] whom he was assisted; he thought that legitimate and illegitimate cannot take under the same description of children. Now that case did not make it necessary for Lord Eldon to determine that question; but there is another case, that of *Bagley v. Mollard* (1 R. & M. 581), in which Sir John Leach, Master of the Rolls, expresses himself to this effect: "In the case of *Wilkinson v. Adam* the Common Law Judges who assisted Lord Eldon seem to have entertained an opinion that illegitimate children who were described in the will might take jointly with legitimate children under the general description of 'children;' but Lord Eldon was plainly not of that opinion; and I entirely concur with him in thinking, that whenever the general description of children will apply to legitimate children, it cannot also be extended to illegitimate children. In *Wilkinson v. Adam* the illegitimate children were described to be illegitimate in the will, which is not the case with respect to Elizabeth Mollard. But I am of opinion that this circumstance makes no difference in the case." So that he is of the same opinion as Lord Eldon, and we have the decision of Sir John Leach that legitimate children are the persons intended *primâ facie*, and that illegitimate and legitimate children cannot by possibility share under the general description.

Now what is the case here? Is that paper entitled to be described as a codicil,

which is not a codicil, and can only be made a codicil in law by the confirmation and ratification of this instrument? Can I say upon the face of this instrument, seeing what [521] the testator has done at earlier periods, confirming wills and codicils which did not at that time require ratification and confirmation, that, by using the word "codicils," he meant to include those which were not codicils? Can the law permit me to put that interpretation upon it, that, within the same term "codicils" he included that which is, legally and properly speaking, a codicil with one which is not entitled to that description? Can I understand the same term to give effect to a legal instrument and to one not legal, and which can only be a legal instrument by the confirmation? I feel great difficulty in the situation in which the Court is placed, in having to decide upon a question of such great importance. Here is a large sum of money disposed of by these codicils, 3000 shares in one bank, and 100,000 dollars in another concern; still the Court, although it be probable that the intentions of the testator may be defeated, must decide the question according to the view it entertains of the law; and my opinion is that, unless these papers are so distinctly referred to as to leave the Court in no doubt as to what the intention of the testator was, upon the authority of *Smart v. Prujean* and other cases, I cannot say that these papers are entitled to probate. I am of opinion that the Court cannot put that construction upon the word "codicils" so as to include those papers which were not executed according to the provisions of the law; and I am therefore under the necessity, however reluctantly, of coming to the conclusion that I must pronounce, as far as the present case is concerned, that these three papers which have been propounded on behalf of the Countess de Zichy Ferraris and Mr. Croker [522] are not entitled to the probate of the Court; they are not executed according to the provisions of the Act of Parliament; and the subsequent ratification by a regularly executed instrument is not sufficient to give them effect and operation. With respect to the paper of May, 1840, there is no ratification of that; the codicil ratifying and confirming the will and codicils is dated in April, 1839, and consequently it could have no prospective operation upon codicils executed afterwards; and the course I must take is to reject these two allegations.

I reject the allegations and decree the expenses to be paid out of the estate. I should be much better pleased, and it would be more satisfactory to my mind, that the case should be decided by appeal: I should then have some sure ground on which I can proceed in other cases.

DRUMMOND *against* PARISH. Prerogative Court, February 22nd, May 19th, 1843.—

Construction of the 11th section of the 1 Vict. c. 26, which enacts, "That any soldier, being in actual military service, may dispose of his personal estate as he might have done before the making of the act."

[S. C. 2 Notes of Cases, 318; 7 Jur. 539. Applied, *In the Goods of Thorne*, 1865, 4 Sw. & Tr. 39. Considered, *In the Goods of Hiscock*, [1901] P. 81. Referred to, *In the Estate of Anderson*, [1916] P. 50.]

Major-General Drummond died at Woolwich on the 1st of January, 1843. At the time of his decease he was an officer, holding a commission in Her Majesty's army, filling the office of Director-General of the Royal Artillery, and was on full-pay. A testamentary paper was found locked up in a private repository of the deceased; it was dated the 26th of June, 1842; it was signed by the deceased, and had a seal opposite to the signature; it was not attested by witnesses.

This paper was propounded as the last will and testament of the deceased; the allegation propounding the paper pleaded—

[523] 4th article. That the 11th section of the 1 Vict. c. 26 provides, "That any soldier, being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this act." 5th article. That the deceased party, at the date of his will, and at the time of his death, was a major-general in Her Majesty's army, on full-pay, and held the appointment of Director-General of the Royal Artillery, and received the full-pay and allowances of such appointment. That the duties of his office extended to the troops of the Royal Artillery abroad, as well as in England; that he was liable to be tried by court-martial, and was subject in all respects to military law; that he was, accordingly, liable to be sent abroad upon foreign service, whenever it might be required; and was as completely, to all intents and purposes, in the actual service of Her

Majesty, as if he had been in the command of, or serving with, a British regiment on foreign service.

The admission of this allegation was opposed on behalf of the next of kin of the deceased, by

The Queen's advocate. This will does not come within the exceptive section of the Wills Act. The exception only applies to a soldier in actual warfare, or so circumstanced that he cannot comply with the requisite solemnities prescribed by the 9th section; as, for instance, on a station, where he cannot obtain legal advice and assistance. The Legislature did not intend to favour the soldier more than the seaman, and the words "actual military" were used in the [524] same limited sense with respect to a soldier as the words "at sea" in the case of a seaman. A seaman on board a guard-ship, moored in harbour, is not "at sea" within the meaning of the act, *Lord Hugh Seymour's case* (2 Curt. 339), yet he may fairly be said to be as much at sea as General Drummond, living at Woolwich, can be said to be "in actual military service." If it was intended to confer this privilege on all soldiers, without reference to circumstances, the Legislature would have said "any soldier in Her Majesty's service." If any limit is to be imposed on the exception, its extent must be sought for in the civil law, from whence the exception was borrowed. The Digest, lib. 29, tit. 1; The Code, lib. 6, tit. 21; The Institutes, lib. 2, tit. 11; Domat. Civil Law, vol. 2, lib. 3, s. 15; Justinian (Dr. Harris's edition); Godolphin, cap. 5, p. 16.

Twiss (same side) cited Swinburne, part 1, c. 14; Huber's Præl. Jur. Civ. lib. 2, tit. 11; J. Voet, lib. 29, tit. 1; P. Voet, lib. 2, tit. 11; Mynsinger, lib. 2, tit. 11; Durandus, lib. 2, part 2; Hostiensis, lib. 3, tit. 26; Gail, lib. 2, obs. 113; Donellus, tit. 21; Viglius, tit. 10; Puffendorff, obs. 187, s. 3; Burge on Colonial Law, vol. 4, p. 394; Code Civil, lib. 3, tit. 2, s. 2; Pothier's Treatises, vol. 5, tit. 16; Code Civil of Sardinia, lib. 3, tit. 2; Code of the Two Sicilies, c. 5, s. 11. By the law of Spain the testaments of soldiers who are in actual service, "en guerra actual," do not require the solemnity which is enjoined for other testaments. In 1512, Maximilian I., in the Ordinatio Notoriatum, issued at the diet of Cologne, ordained that the word "expeditio" should be confined to "milites in acie seu [525] conflictu constituti." The Corpus Juris Frederici, part 2, lib. 7, tit. 2, thus states the law of Prussia—"The privilege of military testaments shall be limited to the soldiers in the field of battle, in a besieged town, on a march, in a frontier garrison, and when wounded or sick." In Mecklenburgh and Westphalia the law is the same as that of Prussia. In Bavaria the law follows strictly the ordinance of Maximilian. Holland observes the rules of the civil law.

Haggard in support of the allegation. The proper and intelligible distinction between a soldier in actual military service and a soldier not so is a soldier on full-pay, or on half-pay. A soldier on half-pay is still liable to be called upon to serve his country, but he is not in actual military service. Foreign codes and laws cannot furnish a rule whereby to construe an Act of Parliament applying to the British army; non constat that the regulations of any foreign armies are similar to those of the British. With regard to the meaning of the word "expeditio" the commentators differ. Cujacius Consult. 49, says, "Testamentum valere jure militari, etiamsi non fiat in procinctu, modo fiat in expeditione, in castris, in stativis." Therefore, according to this commentator, the exception was extended to a soldier in garrison: this is strictly the case with General Drummond; Woolwich is a garrison, the gates are closed at night, and General Drummond could not be absent without leave. He also cited *Re Phipps* (2 Curt. 338), *Re Hayes* (2 Curt. 368), *Morrell v. Morrell* (1 Hagg. Ecc. 51), *Re Ley* (2 Curt. 75), *Re Donaldson* (2 Curt. 368).

[526] Pratt (same side). The distinction between a soldier on full and half-pay is one universally recognised among military authorities, and supplies the true interpretation of the words "in actual military service." In the case of *Bowler v. Owen* (Barnes's Notes, 432) a question arose whether an out-pensioner of Chelsea College was entitled to the benefit of a clause in the Mutiny Act, whereby a soldier in Her Majesty's service was not liable to be arrested unless he owed a sum of money to a certain amount. It was there contended that a man who has once been in the army does not lose his military character by being placed on half-pay, but the Court held he was not entitled to the privilege, being under no military discipline. In *Bradley v. Arthur* (4 B. & Cres. 308; 6 Dow. & Ryl. 421) Justice Bayley takes a distinction between employed and unemployed officers, and gave it as his opinion that employed

officers in pay, although uncommissioned, came within the Mutiny Act. To the same effect is *M'Arthur on Courts-Martial*, p. 190-198.

May 19th.—*Judgment*—*Sir Herbert Jenner Fust*. This question relates to a paper which is propounded as the last will and testament of Major-General Drummond, who died in the month of January in the present year. The paper is all in the handwriting of the deceased; it is dated the 26th of June, 1842, signed by him, and sealed, but it is not attested by witnesses, so that under the general provisions of the 26th cap. of 1 Vict. this paper is not entitled to probate; I say the general provisions of the act, because the paper is pro-[527]-pounded as a good and valid disposition of property, as coming under the exception of the 11th section of the act, which enacts, "That any soldier, being in actual military service, or any mariner or seaman, being at sea, may dispose of his personal estate as he might have done before the passing of this act." Now it was contended, when the admissibility of this allegation was debated, that this privilege extended to soldiers of all degrees, and under any circumstances, with this exception, that there might be a distinction between soldiers on full-pay and on half-pay, but that otherwise all persons belonging to the British army are to be considered as being on actual military service. Assuming this to be the construction of the Act of Parliament, the effect would be to give to every soldier on full-pay, from the recruit of to-day to the oldest general in the service, a disposition over personal property, not only by a writing unattested by witnesses, but by a will made by word of mouth. The exceptive clause in the present Wills Act is the same as that in the Statute of Frauds, by which last statute it became, for the first time, necessary that all wills of personal property should be in writing; therefore, as I have said, it would give to all soldiers on full-pay, taking that to be the interpretation of the words "actual military service," the power of disposing of property in any manner, as they might have done previously to the act passing; and consequently, as before the act of Charles 2 a will made by word of mouth would have been as operative as a will executed in the most formal manner, the effect of this clause would be to give at the present day validity to the most informal will.

[528] This is indeed a most startling proposition; it seems hardly possible that it should be the intention of the Legislature to except out of the present Wills Act so large a body of persons as the British army now consists of, or indeed as in the times of Charles the 2nd it was composed of. It is to be remembered that the exception was first made when the Statute of Frauds was passed (A.D. 1676); it must therefore be considered with reference to the circumstances of that time, for the 11th section of the present act is only a continuation of the privilege granted to soldiers and mariners in the time of Charles 2nd. Prior to the Statute of Frauds a will might not only be made by word of mouth, but the most solemn will might be revoked by word of mouth—a will executed in the presence of witnesses might be revoked by parol. What would be the effect, what would be the state in which the whole of the British army would be placed, if this clause were now to have universal operation among that large body? In the present case the will is one which undoubtedly the Court would be most anxious to support, if it can; it is a holograph, and therefore is not liable to the suspicion of being a forgery, as might be the case in respect to a will in which the signature only was in the handwriting of the deceased; it is a will written with great care; it was kept by the testator in his private repository; there is no question that it is the act of the deceased; the only question is, is it a will which can be carried into effect? It also unfortunately happens that if this holograph paper can be supported, the Court must include, in such a determination, papers less formal than this, wills by parol; for it is only by shewing [529] that the exception extends to all classes of the army, and to all descriptions of testamentary disposition, that this paper can be supported. I much doubt whether, if this privilege could be maintained, it would be for the benefit of the army at large; the effect of such a decision would be to open on the British soldier all the mischief which the Statute of Frauds and the present Wills Act intended to guard against; such must be the case if the Court holds that every soldier on full or half-pay may make a will by parol, or a will in writing without witnesses. The Court must look to the principle intended to be adopted into this act, as also into the Statute of Frauds. The words are, "No soldier being in actual military service;" these words must have some meaning; it cannot be that they would be added to the word "soldier" unless it were intended to impose some limitation as to the particular class of soldier to whom they were intended to

apply ; if it were intended to comprise in the exceptive clause all classes and grades of persons in the service, there could be no necessity for the insertion of the words "actual military service." The Court must endeavour to see whether it cannot find some meaning for these words, and some reason for their insertion in the two Acts of Parliament.

In the very elaborate arguments addressed to the Court by the learned counsel on both sides the Court has not been referred to any case where a judicial decision has been come to on this point, and, with the exception of a case to which the Court itself had referred, and to which it will presently advert, the Court is not aware of any case which has occurred with respect to the will of a soldier. [530] The only decisions of which the Court is aware are with respect to the corresponding part of the clause as to the wills of mariners or seamen, as to which some few cases have occurred, and I allude in particular to the case of *Lord Hugh Seymour* (2 Curt. 339). That was a case in which the testator was Commander-in-Chief of the Naval force at Jamaica, but lived on shore at the official residence ; his family and establishment were on shore ; in that case it was held that the testator did not come within the exceptive clause relating to mariners at sea ; and consequently a nuncupative will made by him on shore was pronounced to be invalid, and the allegation propounding it was rejected. One or two other cases have occurred in which that case has been referred to, but, with these exceptions, I am not aware that the discussion on this section of the act has gone further than a question on motion ; the Court has in some few cases, where the point admitted of no doubt, acted on the certificate of the War Office. It has now become a matter of importance that this question should be solemnly determined as to the description of persons coming within the exception of the 11th section of the Wills Act. It certainly would have been a matter of some surprise that so few cases should have occurred in which it has been necessary to consider the effect of this clause, if the fact were not accounted for by the reflection of how unsafe a thing it is to trust to wills made by word of mouth when the mode of disposing of personal property, according to the law of England, is so simple, and requires so few solemnities ; and when, as is quite manifest, a will by word of mouth may lead to fraud or misapprehension ; [531] consequently, most persons, even military testators, would prefer making their wills in writing instead of trusting to so unsafe a mode of disposing of their property : this consideration may, I think, fairly account for the paucity of cases of this description.

Now with regard to the construction to be put on these words of the 11th section, how is the meaning of them to be ascertained ? It was observed in argument—and as a general proposition it is undoubtedly true—that in construing a British Act of Parliament very little assistance can be derived from ancient or modern codes of other countries, but yet cases have occurred, and do occur in Courts of Law, where in interpreting an Act of Parliament, the context of which does not furnish the necessary information or precise meaning, the assistance of foreign codes, from which the principle of that particular statute has been borrowed, has been resorted to in order to give the true interpretation of the act. In this case it cannot be denied that the principle of this section was borrowed from the civil law—indeed that is not denied, it is admitted on all hands. It appears from the preface to the life of Sir Leoline Jenkins that he claimed to himself some merit for having, during the preparation of the Statute of Frauds, obtained for the soldiers of the English army the full benefit of the testamentary privileges of the Roman army ; therefore I think it quite clear that the principle of the exception was borrowed from the civil law ; and that, in order to ascertain the extent and meaning of the exception, the civil law may be fairly resorted to. It has become necessary to recur to this, because the Court was referred to a variety of writers on the [532] text law, and to many passages from the learned commentators on the text law ; and it is well known that very subtle distinctions are to be found in the writings of the commentators. I will not enter into a long discussion on the different points on which the commentators have treated, or on the conflict of laws in this respect ; I have, however, thought it necessary to look into the commentators, to see to what extent, in respect to the "testamentum militare," they consider (at least to the extent of the text law) the strict testamentary law was dispensed with. As far as I can collect, the only distinction upon which they differ is whether the privilege extended to soldiers in quarters or in garrison "in stativis aut in hybernis." They all agree in this one particular, namely, that it was not every

soldier, under every circumstance, who was entitled to this privilege, but that it was confined to those who were "*expeditionibus occupati*;" the only difference seeming to be what constituted *expeditio*, whether a soldier *profectus* was to be considered in *expeditione* until he actually returned home, or whether the expedition was at an end when he went into garrison or winter quarters. It is true that in its origin the testamentary privilege extended to all soldiers; we have it so expressed in the 29th Book of the Digest, entitled "*De testamento militis*," which begins by stating that full and free power of making a will was first granted by Julius Cæsar—"Militibus liberam testamenti factionem primus quidem Julius Cæsar concessit"—this, according to all the commentators, was the origin of the privilege of soldiers making wills without having a certain number of witnesses to attest them, and without the [533] observance of other solemnities, and that the privilege had no existence before the time of Julius Cæsar: it goes on, "*sed ea concessio temporalis erat. Postea vero primus Titus dedit, post hoc Domitianus, postea Nerva plenissimam indulgentiam in milites contulit, eamque et Trajanus secutus est, et exinde mandatis inseri cepit caput tale: caput ex mandatis.*" Having set forth with this in order to shew how far general the privilege was in its origin, the passage proceeds, "*Cum in notitiam meam prolatum est subinde testamenta a commilitonibus relicta proferri, quæ possint in controversiam deduci, si ad diligentiam legum revocentur et observantiam: secutus animi mei integritudinem erga optimos fidelissimosque commilitones simplicitati eorum consulendum existimavi, ut quoquo modo testati fuissent, rata esset eorum voluntas. Faciant igitur testamenta quo modo volent, quo modo poterint, sufficiatque ad bonorum suorum divisionem faciendam nuda voluntas testatoris.*" Nothing can be clearer than that this privilege in its origin extended to all ranks, and to the whole of the vast body of the Roman army; the interpretation in the glosses on the word "*simplicitas*" is, want of skill in legal forms, and the term made use of by Justinian in the *Institutes* (lib. ii. tit. xi.) is "*imperitia*." In the gloss of Gothofred (*Corp. Jur. Civ.*) this is inserted, "*nisi domi sint tunc enim jure communi testari debent.*"

So stood the law at the time of the Digest: various limitations were afterwards imposed. In the 6th Book of the Code (tit. 21, law 3) "*De testamento Militis*" is this passage, "*Quanquam militum testamenta juris vinculis non subiciantur cum propter simplicitatem militarem;*" one observation in [534] the gloss is, "*Simplicitas militaris ut hic armatæ militiæ;*" another is, "*arma magis quam leges scire miles præsumitur;*" the text goes on, "*quomodo velint et quomodo possint ea facere his concedatur; tamen in Valeriani quondam centurionis testamento institutio etiam jure communi concessit auctoritatem.*" In law 17 of the same title this is to be found, the heading of the law is "*Quando miles testatur quomodo vult*"—"ne quidam putarent in omni tempore licere militibus testamenta quomodo voluerint componere Sancimus his solis qui in expeditionibus occupati sunt." In the gloss (Gothofred) is this passage, "*Idque sive sint in castris, sive in fossato, sive in hybernis, sive in præsiidiis, sive in stativis seu sedibus sedetis ac ædibus.*" Another gloss upon the word *expeditio* is, "*sufficit ergo ut fiat in expeditione licet non in procinctu.*" Reference has been made to Cujacius (49th cap.), who says, "*cum autem quæritur an non aliter valeat testamentum jure militari quam si fiat in procinctu Respondeo etiam si non fiat in procinctu testamentum valere jure militari modo fiat in expeditione in castris in stativis.*" So that it was not, according to this commentator, absolutely necessary that the soldier should be in *procinctu*, that is, called out in preparation for battle, but the privilege existed when he was in *castris* aut in *stativis*; and the reason he assigns for this is, "*alioquin nihil distaret paganus a milite, nam et a pagano in procinctu in acie in hostico quoquo modo factum testamentum valet ratione pari.*" According to Cujacius, soldiers, in quarters or in camp, might make wills, without observing the solemnities of law; but he says, "*modo fiat in expeditione.*" Whether the privilege extended to all cases, when a soldier was [535] in *castris* aut in *stativis*, might be a matter of some doubt, but it is not necessary to consider that question; it cannot be said that General Drummond was either in *castris*, or in *stativis*; then was he in *expeditione*? Now, Cujacius continues, "*Ergo qui in expeditione testatur miles in castris in fossato ut loquuntur, imo et qui in hybernis, ut meum judicium est, in stativis, in præsiidiis jure militari testamentum facere potest; ac proinde non est necesse ut adhibeat legitimum numerum testium ut est in principio tituli de militari testamento ubi et unum testem sufficere Theophilus noster scripsit. Et quidem nullum testem necessario requiro, ac satis esse opinor si aliis probationibus legitimis constare possit de voluntate militis.*"

Here again Cujacius repeats the use of the word "expeditio;" he seems to think that a soldier in castris, or in stativis, is not required to observe the solemnities of the testamentary law, but still he is of opinion that he must be in expeditione. Then arises the question, what is the meaning of the word "expeditio?" According to Calvin, in his *Lexicon Juridicum*, it is this, "Expeditio proprie profectio cum expeditis militibus." "Expediti milites vel in expeditionibus degentes dicuntur quicumque sint in ipso exercitu aut castris, id est eo loco quo reipublice causa est belli apparatus, seu in statione illi sint, seu in hybernis seu alicubi pro finibus imperii tuendis, imo quocunque loco sint militie causa, ut si Romae sint ad defensionem urbis collocati et dispositi;" then it is argued from this, "Falsum ergo est stationarios et limenarchas non recte testaturos jure militari quia non sint in expeditionibus;" then the authority of Ulpian is referred to, who says (lib. 1, s. ult. de bon. poss. ex test.), "Miles est etiamsi in nostro non est, et [536] Nauarchi ac trierarchi classium jure militari testari possunt, et in classibus omnes remiges ac nautae milites sunt." So far, then, as Calvin is an authority, here is a definition of the word "expeditio." So far, then, as I have gone, it is quite clear from these passages from the Digest, the Code, and the commentators generally, that the privilege did not extend to soldiers of every description, they must be soldiers expeditionibus occupati, or called out to defend the city; this last case was of itself an exception, for it could not strictly be said to be "expeditio." I find the words of the Code thus limited in the 2d Book of the Institutes (tit. 11), "Supradicta diligens observatio in ordinandis testamentis, militibus propter nimiam imperitiam eorum constitutionibus principalibus remissa est. Nam quamvis ii neque legitimum numerum testium adhibuerint neque aliam testamentorum solemnitatem observaverint recte nihilominus testantur, videlicet cum in expeditionibus occupati sunt: quod merito nostra constitutio introduxit." (The law referred to will be found in the Code, c. 6, tit. 21), "Quoquo enim modo voluntas ejus suprema inveniatur, sive scripta, sive sine scriptura, valet testamentum ex voluntate ejus. Illis autem temporibus per quae citra expeditionum necessitatem in aliis locis vel suis aedibus degunt, minime ad vindicandum tale privilegium adjuvantur." It is quite clear from this that the privilege of deviating from the general law was confined to those soldiers who were "expeditionibus occupati," and that if soldiers made wills at other times, they must comply with the requisites prescribed by the general Roman law to give operation to a will. The same expressions are found in the same title and Book of the Institutes (sec. 3), [537] "Sed hactenus hoc illis a principalibus constitutionibus conceditur quatenus militant et in castris degunt. Post missionem vero veterani vel extra castra alii si faciant adhuc militantes testamentum, communi omnium civium Romanorum jure id facere debent." The veterani here spoken of were not, as has been surmised, analogous to the generals of the English army, but soldiers who had served their time, and been discharged propter honestam causam; but the important bearing of the passage is, that it shews that the privilege was confined simply and entirely to soldiers expeditionibus occupati. There is a passage from Vulteius (lib. 2, c. 10) which sums up the whole of the law on this subject; the title is, "De testamentis ordinandis." He says, "Olim ante Justinianum hoc privilegium commune erat militibus omnibus sive in expeditione sive extra eam essent, sed Justinianus restrinxisse illud videtur ad milites eos qui in expeditione degent. Non igitur existimandum est si testamentum est militis testamentum illud esse militare; nam sive jus quod ante Justinianum fuit, sive jus quod Justinianus postea introduxit spectes, multi sunt milites qui tamen non militant aut in expeditione degunt." Nothing can be more clear than that, according to the Roman text law, this was not a privilege extending to all soldiers, but to those only who were circumstanced as I have mentioned.

I now come to consider the case with reference to the passages cited from Swinburne, whom undoubtedly the Court will consider a very high authority; he speaks (part 1, s. 13) of three sorts of privileged testaments, and first "Testamentum militis." Of this he says (p. 95), "After we have [538] viewed what privileges do belong to soldiers, it shall be expedient to shew what manner of soldiers they be to whom these privileges are granted; 1st, Milites armati; 2nd, Milites literarii; 3rd, Milites caelestes." He says, "Concerning the first, they be such as lie safely in some castle, or place of defence, or besieged by the enemy, only in readiness to be employed in case of invasion or rebellion, and then they do not enjoy these military privileges, or else they be such as are in expedition or actual service of wars, and such are

privileged, at least during the time of their expedition, whether they be employed by land or by water, and whether they be horsemen or footmen." Now the words used in both Acts of Parliament are as nearly as possible the same as those used by Swinburne in explaining the word "expedition;" the probability is that the words of the 23rd section of the Statute of Frauds, from which the 11th section of the present act was taken, were borrowed from Swinburne. Mr. Burge, in his work (vol. 4, p. 394), defines actual military service by the words "Qui in expeditionibus sunt." It has also been shewn in argument that the codes of all countries in Europe seem to have limited the privilege in the same way; the following writers and laws have been cited:—Donatus, Donellus, Paul and John Voet, Huber, Hostiensis, Gail, Viglius, Puffendorf, the Theodosian Code, the French Code. Pothier, who in his sixth book (tit. 16) says, "Soldiers in forts or garrisons cannot avail themselves of this law." The Sardinian Code, the law of Spain, where the expression is "en guerra actual," the ordinance of the Emperor Maximilian in 1512; the law of Bavaria, of Mecklenburgh, of Westphalia [539]—in short it appears that in all countries the privilege is accompanied with limitations; in most it would seem that a military will was only good when made on the field of battle, or marching against the enemy, and when made under these circumstances it only remained good for three months after the soldier returned home, or arrived at a place where there was a consul, or some person before whom a will might be made.

These are the authorities to which the Court has thought it necessary to refer, in order to shew what was the principle of exempting the wills of soldiers from the stricter forms of testamentary law, and to shew that the privilege was borrowed from the Roman law, and engrafted into our laws, and that it is confined to soldiers placed in the particular situations I have described. The Court has also searched to find, if possible, any case in which a Court of law has put a construction on the words "actual military service;" the Court has found none, and therefore must resort to principle to put an interpretation on words to which some meaning must be given. The Court, at the commencement of this judgment, stated that there is one case in which the question has received, in this Court, a certain degree of interpretation; it is a case of *Shearman v. Pyke* (Hil. Term, 1724). The following is the extract from Dr. Andrew's note: "James Wakeford was enlisted as a soldier in the service of the East India Company, and went with Governor Pyke to St. Helena; he was employed in his service as cook, and he gave him wages besides his pay. In 1719 the governor left St. Helena to [540] proceed to Bencoolen, but at Batavia they were informed that the factory at Bencoolen was cut off by the natives. They sailed from Batavia to Moco Moro, and thence to Madras, from thence he proceeded to Bencoolen to re-establish the factory. About October, 1720, they returned to Moco Moro. In January, 1721, James Wakeford being ill of an ague, and fever, and flux, whereof he died in the hospital at Moco Moro, being asked by J. Potter and M. Sams to make his will, replied, "I give all I have to my master, and I will give nothing from him, and I'll make no other will; he may dispose of it as he pleases." On the 22nd of January, two days after his death, the witnesses signed a schedule of the contents of the will, and made oath thereof at Moco Moro; Potter died on the passage. This will is propounded by Governor Pyke as a nuncupative will, and opposed by Shearman, one of the next of kin. The arguments are given shortly. The stat. 29 Car. 2, c. 3, s. 23, does not extend to every soldier in actual military service, or to every mariner or seaman being at sea; the exception is not restrained to an engagement, it is not from the imminence of the danger, but from their state and condition, being supposed to be ignorant and destitute of assistance. By the civil law a will made *jure militari* continued good a year; if the danger were the only reason, that ceasing, the will would become void. Instit. bk. 2, tit. 2, sec. 3. "Quatenus militans et in castris degunt." In point of fact the arguments were the same as on the present occasion: Calvin's definition of the word *expeditio* was referred to, as was also the passage in Cujacius. On the other hand, the argu-[541]-ment for the next of kin was this—"The Court, upon the plea, directed they should set forth the expedition." It seems from this that the allegation propounding the nuncupative will had been objected to, as not setting forth the expedition, and the Court had directed it to be set forth—"It must be under actual engagement, attended with danger, otherwise mounting guard at Whitehall would be sufficient; the expedition was over before he was in the hospital; refer to *Key v. Jordan*, 1712. A mariner made a nuncupative will at

and; he was going on board next day, not allowed the privilege." The words of the Court, in pronouncing sentence, are these, "It is agreed the will cannot be good unless within the privilege. A mariner on shore is not within the statute. Those who are enlisted in the service of the Company have the same privilege as those in the service of the Crown, and though he acted as cook it does not take away the privilege of the soldier. He was not only a soldier, but was upon an expedition. The proof is not clear whether the expedition was over or not; one witness swears he died on the passage; he was certainly engaged in the service." Will pronounced for. It appears doubtful on what particular grounds the decision turned, whether on the ground that the privilege extended to all persons in the service, or whether that the expedition was not over, but was returning, when he fell ill, and died in the hospital. The Court puts it thus, "One witness swears he died on the passage; he was certainly engaged in the service." This decision, so far as it goes, would have been an authority precisely in point, if the will had been pronounced for, on the ground that the [542] testator was a soldier, on an expedition, and died on the passage; unquestionably, in such case, the will was privileged; but, unfortunately, the language of the judgment renders it doubtful on what the judgment really turned. The Judge was Dr. Bettesworth; he evidently considered that the question had never received a decision; it also appears that, in the first instance, he had directed the allegation to be reformed, by setting forth the expedition on which the deceased was engaged.

Being of opinion, from the result of the investigation of the authorities, that the principle of the exemption, contained in the 11th section of the Act, was adopted from the Roman law, I think it was adopted with the limitations to which I have adverted, and that, by the insertion of the words actual military service, the privilege as respects the British soldier, is confined to those who are on an expedition. The question, then, comes to be considered, what was the situation of Major-General Drummond at the time when he made his will? that is to be found in the 5th article. [The Court read it.] The terms of the article apply to every full-pay officer and soldier—"liable to be sent abroad"—so is every soldier in the service; "subject to be tried by a court-martial"—so is every officer and soldier in the service.

On these grounds I think this will not entitled to probate; it is not attested in manner and form prescribed, as to all wills, which bear date after the 1st of January, 1838; and it is not within the exception of the 11th section of the statute, that is, it is not made by a soldier in actual military service. Therefore I am of opinion that this allegation cannot be admitted to proof; all the facts which could [543] enable the Court to form an opinion on the point are brought forward by the allegation.

I am of opinion that I must reject this allegation: in doing so I feel great pain, but I think it better to express my decided opinion in the first instance, in order that persons in the situation of the late General Drummond may be made aware how the law stands on this point, and that the families of officers in Her Majesty's service may not be placed in doubt and difficulty as to the validity of a will so made.

I am not prepared to say that the privilege is one which it would be advantageous to the army, as a body, to possess; I think it would not be unlikely to lead to fraud and misapprehension.

I reject this allegation.

DYSART against DYSART. Consistory Court of London, May 10th, 1843.—Pleading.

Answers. Every averment of a plea must be fully answered, except where the answer might criminate the party. Answers must not be redundant. Redundancy defined.

[S. C. 7 Jur. 658: see further, 1 Roberts. 106.]

In this case a libel had been given in on the part of the Earl of Dysart, seeking restitution of conjugal rights. A defensive allegation had been admitted on behalf of the Countess of Dysart, and the personal answers of the Earl of Dysart taken thereto.

The personal answers were excepted to.

The Queen's advocate and Haggard for the Countess of Dysart.

[544] Addams and Harding for Lord Dysart.

Judgment—*Dr. Lushington.* I have now to determine whether certain objections which have been taken to the answers given in by Lord Dysart to certain of the articles of the allegation, admitted in this cause on behalf of Lady Dysart, ought to be maintained.

The allegation on the part of Lady Dysart is given by way of defence to the libel of Lord Dysart, which seeks for restitution of conjugal rights. The principles which govern questions of this kind are so clear, and have been so often defined, that it is unnecessary to repeat them with any minuteness—I say clear, because, although occasionally there may be some difficulty in their application, the general rules on this branch of practice are well established: answers should be sufficient, that is, all the averments contained in the articles of the allegation to be answered should be distinctly and specifically answered, if the facts pleaded in the articles are in the knowledge of the party answering, by admission or denial, if not, by the party declaring his belief or disbelief, or stating that he cannot form a belief or disbelief on the subject. To this general rule I am not aware of any recognised exception, save one—I mean where the answers might criminate the respondent. Under this reservation I am of opinion that the decision in *Swift v. Swift* (4 Hagg. Ecc. 154) properly comes. I have read and considered that case, and I have, in my own mind, come satisfactorily to the conclusion that Sir J. Nicholl was right in holding that Mr. Swift was [545] not bound to answer the particular article to which his answers were sought to be enforced, but was privileged from doing so, and on the principle I have just adverted to, and on no other. Perhaps there are some words used by Sir J. Nicholl which might bear an extended interpretation, to a degree which would amount to great inconvenience, for he says, “My impression is, that a party is entitled to protection, not only if the answer may tend to criminate, but even to degrade him.”

The last is a question I do not propose to enter into; it is a question upon which very different opinions have been entertained in other Courts. I think that in the case of *Swift v. Swift* it was clearly the opinion of Sir J. Nicholl that to call on Mr. Swift to admit that he had made an abjuration of his religion, which abjuration was not intended to have any effect, save for a particular purpose, was in itself a criminatory inquiry; of that opinion I am also. The next rule is, that answers should not be redundant. It may not, perhaps, be easy to define the meaning of this term in a short sentence, but the true meaning I take to be this, the respondent is not to insert in his answer any matter foreign to the articles he is called upon to answer, although such matter may be admissible in plea, but he may in his answer plead matter by way of explanation pertinent to the articles, even if such matter shall be solely in his own knowledge, and to such extent incapable of proof; or he may state matter which can be substantiated by witnesses; but, in this latter instance, if such matter be introduced into the answer, and not afterwards put in plea or proved, the Court will give no [546] weight or credence to such part of the answer. I do not think that on the present occasion these rules are substantially denied, but it has been contended, on the part of Lord Dysart, first, that the objections refer to none of the important parts of Lady Dysart's allegation, and that, whether the answers are sufficient in these respects or not, the result of the case cannot be affected; secondly, that many of the objections refer to parts of the allegation, which parts are in themselves not properly admissible. It appears to me that there is very great difficulty in acceding to either of these arguments; I do not see how in justice or with confidence in my own judgment I can decide on so partial a view of a case as is afforded on a discussion on answers, whether the omission to answer any particular point would or would not be material to the ultimate result of the cause. Much might appear, *primâ facie*, in this stage of the cause to be immaterial, which, when the evidence was taken, might assume a different complexion. I think, therefore, that the general rule does not admit of this exception, although at the same time I think the rule itself ought not to be applied with pedantic or unnecessary strictness. With regard to the second part of the argument, I think there are still stronger reasons against it: when once an allegation has been admitted, either on debate or otherwise, it is too late to consider whether any parts of it are admissible or not; such a course would lead to confusion, expense and uncertainty; the Court would, on objections to an answer, have to take the whole of the pleadings into its consideration; counsel must be heard to shew that an [547] admitted allegation is admissible—a contradiction in terms; evidence might have been taken, and yet answers be denied. It may be true that arguments on pleas are sometimes inconvenient to the parties, and, therefore, some pleas are admitted without opposition; but those who take the benefit of this course must also take the chance of the countervailing inconvenience; indeed, I know not whether mischief might not arise in another and worse shape, for a discussion of an

admitted allegation, on answers, must be more partial and injurious than a discussion on the admissibility of a plea: when a plea stands for admission, the whole subject matter of it becomes open to argument; so far as any explanation can be afforded by a statement accompanying the answers, it may be given, but if objections to all the small parts of a plea are to be gone into on a discussion on the answers, it is impossible to say to what an extent injustice and prejudice may not arise.

BLAKE v. KNIGHT. Prerogative Court, May 19th, 1843.—Positive affirmative evidence by the subscribed witnesses of the fact of signing or acknowledging the signature of a testator in their presence is not absolutely essential to the validity of a will. The Court may presume due execution by a testator upon the circumstances.

[S. C. 2 Notes of Cases, 337; 7 Jur. 633. Explained, *Cooper v. Bockett*, p. 652, post. Referred to, *Wright v. Sanderson*, 1884, 9 P. D. 153.]

Edmund Blake, formerly a clerk or writer in a solicitor's office, died on the 17th day of December, 1838. The deceased had made a will, dated the [548] 6th of September, 1838, contained on one side of a sheet of paper, all in his handwriting. The attestation clause was as follows:—

"Signed, sealed, published, and declared by the said Edmund Blake, the testator, as, for, and to be his last will and testament, in the presence of us, who in his presence, at his request, and in the presence of each other, have subscribed our names as witnesses, the words 'dated twenty' in the seventeenth line having been first obliterated." This will was signed at the end thereof by the testator, and the attestation clause was subscribed by three witnesses—William Brewer. Charles Sellick. George Brewer. Probate of this will was, on the 3rd of January, 1839, granted to Mr. James Knight, the sole executor named therein. The purport of the will was to bequeath to the widow of the deceased an annuity of 150l. for life, and to give the whole of his property, amounting to about 7000l., subject to the annuity, to the executor, Mr. Knight, an intimate friend, but no relation of the deceased. Mrs. Blake, the widow of the deceased, died in the month of February, 1842.

In the month of June, 1842, a citation issued from this Court at the instance of Mr. John Blake, a brother, and sole next of kin of the deceased, and the party, who in conjunction with the widow was entitled in distribution to his personal estate and effects in case he had died intestate; it called on the executor to bring into and leave in the registry of the Court the probate of the said will, and to propound the same in solemn form of law, or to shew cause why letters of administration of the estate and effects of the deceased, as having died [549] intestate, should not be granted according to law.

To this citation Mr. Knight appeared, and brought in the probate, and propounded the will in a common condidit.

The three attesting witnesses were examined. The result of their evidence was, that the deceased did not sign the will in their presence; that he did not formally acknowledge his signature to them; that they did not see his signature on the face of the will at the time they subscribed; that there was no seal to the will at the time they subscribed. They admitted that the deceased spread the will open on the table before him; that he said "it was his will, written all on one side of the paper; that he had made a mistake, but rectified it at the bottom, and pointed out the place to them; that he read the words 'This is the last will and testament of me, Edmund Blake.'" The witnesses would not undertake to swear that the name of the deceased was not signed to the will at the time they subscribed.

Addams and Elphinstone for the executor. This is not an attempt to impeach a will by reason of incapacity in the testator, or of fraud or undue influence in obtaining it, but on the ground of defective execution.

This suit is commenced three years and a half after the death of the testator, and the witnesses are called on to speak to facts after this lapse of time. In *Chambers v. The Queen's Proctor* (2 Curt. 433) the witnesses to a will were examined three months [550] after the time of execution, and deposed confidently that the testator did not sign the will in their presence; the Court refused to trust to the memory of witnesses, even after so short an interval of time as had elapsed between the occurrence of the fact they were deposing to and the time of deposing.

The probabilities of this case are strongly in favour of a due execution; the testator

was a clerk or writer to an attorney, a situation in which he must have been daily in the habit of witnessing the execution of legal instruments; indeed, the attestation clause to this will shews the knowledge and extreme accuracy of this person in these matters. The transaction was conducted with great solemnity; the will was produced, spread open, the attention of the witnesses pointedly called to the mistake in the seventeenth line, and its correction in the attestation clause. All the witnesses admit that the testator read or spoke these words, "This is the last will and testament of me, Edmund Blake;" to what could they refer but to his signature at the end of the will; if so, there is a most formal acknowledgment—provided the Court shall be of opinion, on the circumstances, that the will was ready signed at the time.

Even assuming that the testator had not uttered the formal words of acknowledgment in reference to his signature, if the Court believes the signature to have been made before the witnesses subscribed, the production of this paper, admitted to be all in the handwriting of the testator, to the witnesses, with a request to them to sign, is a sufficient compliance with the statute.

Haggard and Harding *contra*. [551] There is no affirmative evidence whatever of the act of signing or acknowledging a signature, which distinguishes this case from *Chambers v. The Queen's Proctor*; in that case one of the three attesting witnesses deposed confidently to the will having been signed in the presence of himself and of the other two witnesses; the Court held that affirmative was better than negative evidence; but the Court has never decided that all affirmative evidence can be dispensed with. The witnesses in the present case are positive that the will was not signed in their presence, they are equally positive that there was no seal affixed to it at the time they subscribed, and they are nearly as confident that there was no signature on the paper made at the time.

This case resembles *Ilott v. Genge* (3 Curt. 160).

Reply. In *Ilott v. Genge* there was evidence that the testator had carefully concealed his signature from the witnesses at the time of attestation; and that fact standing uncontradicted, excluded the presumption of acknowledgment of an existing signature. In this case every thing was done in the most open manner; the two cases, therefore, are very distinct in their nature. *Chambers v. The Queen's Proctor* was cited, for the purpose of shewing how important an ingredient, in this case, is the lapse of time which has intervened between the execution of this will and the examination of the witnesses.

The circumstance of this suit not being brought until after the death of the widow is one not very favourable to the cause of the next of kin.

[552] *Judgment*—*Sir Herbert Jenner Fust*. The deceased in this case is a Mr. Edmund Blake, who died on the 17th of December, 1838, having made a will which bears date the 6th of September in that year, and of which probate was granted on the 3rd of January, 1839.

In June, 1842, the deceased having been dead between three and four years, this probate was called in, and the executor, who had been in possession of the probate since January, 1839, was called on to propound the will in solemn form of law.

The will has now been propounded; it is all in the handwriting of the deceased, and appearing, as it does, to have been signed by the deceased in the presence of two witnesses, who, according to the attestation clause, had subscribed in his presence, and in the presence of each other, probate of it passed in the common form.

The purport of the will is to make provision for the widow of the testator; an annuity of 150*l.* is given to her, and the bulk of his property is given to Mr. Knight, whom he appoints sole executor. The widow, therefore, had an annuity of 150*l.* out of the property, which at the time when the will was proved was sworn to be of the value of 7000*l.* The widow, if the deceased had died intestate, would have been entitled to a moiety—there were no children—and the brother, who was the only next of kin, would have been entitled to the other moiety. The interest of the widow would have been much larger under an intestacy than under the will; for she was of such an age that an annuity of 150*l.* was not equivalent to a sum of 3500*l.* sterling taking that [553] to be the amount of a moiety of the deceased's property.

Mr. John Blake, the brother, did not, on the death of the deceased, or shortly afterwards, question the validity of this will, or take any steps to call in the probate, but in February, 1842, he resorts to a step, which unquestionably he is entitled to do;

he calls in probate of this will, and puts the executor on proof of it. Now, as I have said, Mr. John Blake is entitled to do this, but considering the time at which he has chosen to do so, he is not entitled to any indulgence in this cause; he is entitled to have the law strictly administered, but to nothing beyond it; he must take the result of the case on the whole of the transaction.

The will has been propounded in the mere common conditit, except in this; it pleads, "That the whole of the will and of the attestation clause is in the handwriting of the deceased." There are three subscribing witnesses to the will, they have been examined, as have also two other persons to the fact of the handwriting; but before I proceed to consider the evidence I will look a little to the will itself.

The deceased is described as having been a lawyer, or in the service of a lawyer; the will bears the marks of having been written by a person conversant with legal business; it is written in a clear hand, evidently prepared with great care; it describes the property of which the deceased was possessed; in one part of the will some words were inserted by mistake, they are struck out, and are adverted to in the attestation clause; it is signed "Edmund Blake;" it is sealed; there are three subscribing witnesses, and the attestation clause is very special in itself. [554] [The Court read it ante, p. 548.] Nothing can be more distinct and clear than these words; with such an attestation clause as this it seems scarcely possible that any question could arise as to such a paper being executed according to the due requisites of law.

It is now necessary to consider what is the evidence of the witnesses; remembering that by the present Act of Parliament a will, to be valid, must be signed by the testator, or by some other person in his presence and by his direction, and that such signature must be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, who are to attest and subscribe the will in the presence of the testator.

The first witness is William Brewer, aged 62. He says to the first article, "I knew the deceased almost all my life; he had been writer to an attorney, but lived independent at last. I cannot say exactly what his age was, it might be seventy or more. One day, it may be three years ago, I was told that a message had been left for me by the deceased's wife; it was to the effect that Mr. Blake was wanting me, my son, and my apprentice to go up to him to sign his will, or witness his will. I do not remember what part of the year it then was, or what time of day, whether daylight or candlelight, it was in the evening. I went to the deceased's house with my son and my apprentice; when we got to the door Mrs. Blake opened it, and shewed us into a small room on the ground floor where the deceased always sat; as she shewed us in she said to the deceased, who was sitting with his back towards us, 'Here's Mr. Brewer and his son come;' the deceased turned [555] round on his chair to look at us; I sat down on one side of him near the fire, the other two a little off from him on the other side; the room was very small; there was nobody else in the room. The deceased took out a paper either from a drawer of the little table at which he was sitting, or from a portable writing desk, that stood or lay upon it; it was folded; he spread it before us, saying, 'This is my will, it is a small will written on one sheet of paper and all on one side:' turning to me he said, 'Will you sign it,' or 'Will you witness it.' I took the pen and wrote my name, most likely the deceased told me where to write it. As soon as I had wrote my name I went back to my seat. Then he asked the others to sign as I had done, and they did. When they had so done he took and put the will away again; I cannot say whether in the drawer or in the desk. Before either of us signed I remember he said, 'That he had made a mistake, but he had rectified it at the bottom. He did not sign it in my presence; he did not use pen and ink while I was with him; he did not say that he had written it himself, otherwise than as by what I have deposed. He did not say he had signed it. I cannot say that it had been signed when I saw it; I would not swear that Mr. Blake's name was not to it when I signed mine, but I did not see it, that is, I do not remember that I saw it. I have no recollection at all of having seen Mr. Blake's signature at the foot of the will when I signed my name to it: I am very sure that it was not signed by Mr. Blake, the deceased, in my presence, and that he did not say of any name to it 'that it was his or of his writing,' or anything to that effect. [The witness was shewn and identified the will.] I did not see the name [556] 'Edmund Blake' at that time, as I see it now, opposite the seal and at the end of the will; there was no seal there then, of that I am certain; I do not think that the name was there, but I do not swear that; I am sure that if it was there the deceased

did not, by anything he said, acknowledge it to be his signature; he did no more than say it was his will, and that it was a short or a little will, and he spoke also of the mistake he had made and rectified at the bottom. I think now that, when he held the paper in his hand, telling us that it was his will, he read the first words to us—'This is the last will and testament of me, Edmund Blake'—as much as that I think he read aloud."

According to this witness the deceased produced the paper from the drawer of a table or writing desk; he spread it upon the table; he called the attention of the witnesses to a correction; and mention is made of that correction in the attestation clause; he reads so much of it as, "This is the last will of me, Edmund Blake;" he asked this witness and the other witnesses to sign this, which he declares is his will; the witness however will not undertake to swear that the name of the deceased was there; he is sure the deceased did not sign it in his presence, and he is sure he did not formally acknowledge it: he attested it.

On cross-examination he says, "The deceased was sitting at a little table, not far from the fire-place; there was just room enough for me to sit, as I did, almost by the side of him, nearer the fire, rather before than behind him: his wife sat opposite me on the other side of the deceased. Each person in the room could see what any one of the others did. When I was about to sign my name I left my place, [557] and went round to the deceased; I was at his right hand when I wrote my name; the only way in which that change of my position could affect the view of the other witnesses would be, as I should suppose, that they saw almost better what I did than if I had been on the side of the deceased on which I sat."

The next witness is Charles Sellick, the apprentice; he was about seventeen years of age at the time of the transaction. After deposing to going to the house of the deceased, the size of the room, the position in which the parties sat, to the same effect as the former witness, he says, "Mr. Blake took his will from a writing desk brought to him by his wife; he took it up and said, 'Mine is a short will, it is written on one sheet of paper.' He asked the elder Mr. Brewer to put his name to it, and for that purpose to sit down at a table on Mr. Blake's right hand, on which table Mr. Blake then placed it, open as I recollect; Mr. Brewer wrote his name where Mr. Blake pointed out to him, Mr. Brewer, the younger, and I did the same, Mr. Blake pointing out the place to each of us in turn. Mr. Blake read a part of the beginning of the will, just as much as said that it was his will, and he pointed out to us a place in the middle of the will where he had made a mistake, which he said he had corrected at the bottom. I remember he made us all stand up to see where the mistake had been made, and where he had written the correction of it at the bottom. I am sure Mr. Blake did not sign the will then, or at any time in my presence; I do not remember having seen his name to the will, and I am quite positive he did not point it out to me. I do not remember that he said anything, or that anything else was [558] said or done in my presence concerning the will. [The witness was shewn and identified the will.] I will swear to the best of my belief that the name 'Edmund Blake,' appearing at the foot or end of the will, between the clause of attestation and the seal, was not written, that is, had not been written and was not upon it when I wrote my name as a witness. I was a youngster; I was unused to the form of such things; I did not think anything of it; I am quite certain that the seal was not there at the time now deposed of. I will not swear positively that the name was not there, but only that I do not remember it."

On cross-examination. "I signed my name when each of the others signed; they and I were present alike with Mr. and Mrs. Blake. It was a very small room, nothing could be done without my seeing it. I do not well know that Mr. Brewer, the elder, could see as he sat what was done by me and Mr. George Brewer; the only change in position was in the witnesses, each of us going in turn to the chair put for us at the table, on which the will was placed. The will lay on the table; I did not know the contents of the clause of attestation; I was desired to put my name, and I did."

According to this witness he went to the deceased's house, the deceased produced a will, all in his own handwriting; he pointed out to the attention of the witness an alteration in the body of the will, the attestation clause notices the alteration; the paper was spread open, there was no concealment, the attention of the witness was fully called to all the circumstances; he swears that according to his belief the name of the deceased was not then [559] signed, and that the signature of the deceased was not there.

The third witness is George Brewer; after deposing as to going to the house, and as to the seats and positions of the several parties in the room, he says, "Mrs. Blake brought a writing-desk, which she put on the table. Mr. Blake took from it the paper we were to sign; whether it was a folded paper or not I cannot say. He held it up by one corner and told us how it was his will, and something about a mistake he had made in it, and how he had rectified it at the bottom. He shewed us where the mistake had been."

Here is this gentleman pointing out the alteration or correction, and saying the will was all in his own handwriting; surely this must have a most important bearing on the case.

"He read some of it to us, some of the top part, and some of the bottom; he said there was but one side of it; it was all written on one side of a sheet. The next thing was he signed it. I do not know about Mr. Blake signing it, I cannot say whether he did or not. I did not take any notice of that. I remember Mr. Blake dipping the pen in the ink and giving it to us, but whether he wrote anything with it himself or signed his name to it I cannot say. I do not remember anything about a seal to it, or anything about Mr. Blake publishing or declaring it to be his will." [After identifying the will.] "I cannot say whether the name Edmund Blake, opposite to the seal, at the foot or end of the will, was there or not when I so wrote my name as a witness. I cannot say whether the seal was there at the time or not."

[560] On cross-examination. "The will in question was on a table by the right hand of the deceased when it was being signed by me and my fellow witnesses. I did not know the contents of the clause of attestation to it when I signed my name."

How can this be? When Mr. Blake had taken such pains to point out the alteration in the will and in the attestation clause to the witnesses; how is it possible on such evidence to believe that the testator did not sign before the witness subscribed?

"I would not swear that it is not what Mr. Blake read, but my memory will not serve me to say if it were or not. I was not paying particular attention to what was read by the deceased. I do not know that I have ever said that Mr. Blake did not sign his will in my presence. I have said as much as that I did not know whether he had so done or not. I have heard Charles Sellick say that Mr. Blake did not sign in our presence. From what I have heard my father say about it, I think he is something like myself, and cannot exactly say how it was. My memory is a very indifferent one for speaking positive. I do not remember hearing Mr. Blake make any acknowledgment of his signature in my presence. I do not think that I ever heard either my father or Sellick say anything as to that; for myself I have said that I did not think he did, but what I should say is that I do not remember how it was."

The two other witnesses swear to the handwriting of the deceased; one of them, Mr. Read, a solicitor, says, "That he deposes without the least hesitation or doubt that the whole of the paper writing, propounded as the will of the deceased, and the [561] name Edmund Blake subscribed thereto, is of the proper handwriting and subscription of the deceased."

I have already said that until the year 1842 no steps were taken to call in the probate of this will.

These are the circumstances under which this will comes into question; a will attested in the manner I have already mentioned. The witnesses will not swear positively that the deceased's name was not at the bottom of the will when they signed it as witnesses; they will not swear negatively; the last witness swears "that the testator dipped the pen into the ink and gave it to them, but whether he wrote anything with it himself or signed his name he cannot say."

The first point to consider is, is it absolutely necessary to have positive affirmative testimony by the subscribed witnesses that the will was actually signed in their presence, or actually acknowledged in their presence; is it absolutely necessary, under all circumstances, that the witnesses should concur in stating that these facts took place; or is it absolutely necessary, where the witnesses will not swear positively, that the Court should pronounce against the validity of the will? I think these are not absolute requisites to the validity of a will; I think the Court must take into its consideration all the circumstances of the case, and judge from them collectively whether there was not at least an acknowledgment of a signature, clearly existing on the face of the will at the time of attestation; I think, under all the circumstances of this case, that the Court can have no doubt that that is what has taken place here.

What are the circumstances? [562] Three years after the transaction took place the witnesses depose that they went to the deceased's house to see him sign his will; they were introduced to him; he is described as the writer for an attorney; they find him sitting in a chair near the fire-place; his wife tells him the witnesses are come to witness his will; he produces this paper from a desk; he unfolds the paper; he lays it open on a table before them so that each might see what the paper was; he is not satisfied with that, he tells them that it is his will; that it is all in his own handwriting; that it is a short will, all on one side of a sheet of paper; that he had made a mistake in the body of the will; that he had rectified the mistake; he pointed out to them where this had been done; he calls on them to come nearer and see how he had altered the mistake; he reads the attestation clause to them—everything in short is done in the most open manner by the deceased; he reads the words, "This is the last will and testament of me, Edmund Blake;" this paper appears signed "Edmund Blake;" there is a seal; the witnesses are sure there never was a seal; they are not so sure whether he did or not sign in their presence.

I cannot entertain a doubt that this paper was signed before the witnesses subscribed; I have no more doubt of the fact than if they had positively sworn to that effect; when I look to the care and caution with which the paper is prepared, the knowledge of the deceased in testamentary matters, derived from his occupation in a solicitor's office; he must have known how to give validity to a testamentary paper in the year 1838; no doubt the memory of the witnesses fails them with [563] regard to circumstances happening nearly four years ago. The Court cannot safely trust to the memory of witnesses under such circumstances; it must attend to the facts of the case, and say whether it is satisfied that the name of the deceased was written to the will when the witnesses signed it; whether it was signed in their presence, or signed beforehand, and acknowledged in their presence. The deceased saying that the will was all in his handwriting, if the Court is satisfied that his signature was then written, would be sufficient as an acknowledgment of his signature; it is not necessary that a testator should actually have pointed out to the witnesses his name, and say "that is my name, or my handwriting," if the Court is satisfied that the signature of a testator was there at the time.

The case of *Ilott v. Genge* (3 Curt. 160) has been much referred to in argument; indeed, the Court was in hopes that something might ere this have been known as to the result of that case; if the appeal to the Judicial Committee in that case had been decided, the Court would have had some information as to the view taken of the 9th section of the Wills Act in the Appeal Court. In the other case referred to in *Ilott v. Genge*, *Doe dem. Jackson v. Jackson*, I believe there is no doubt about a new trial having been granted, and that the Court of Queen's Bench, which made the rule for the new trial absolute, expressed great doubt—to put it no higher—whether, in that case, there had been a due execution of the will. *Ilott v. Genge* was, in [564] my opinion, a case under very different circumstances from the present. In that case the object of the testator was to conceal his signature—if it were there at the time—from the witnesses; the greatest pains were taken to conceal from them what the paper was; here everything was done in the most open manner.

The result to which I come is, that the Court is not bound to have the positive affirmative evidence of the subscribed witnesses. I am quite satisfied that the name of the testator was signed to the paper before the witnesses subscribed; and I think that his acknowledging this to be his will, it being all in his own handwriting, and his name, as I hold, being then signed to it, amounts to a sufficient acknowledgment of his signature. I pronounce for the validity of this paper as a will, and I direct the probate to be delivered out to the executor.

Dr. Haggard. Does the Court think my party entitled to his costs out of the estate?

Sir Herbert Jenner Fust. I much doubt, Dr. Haggard, whether I ought not to have condemned your party in the costs; I shall not do that in the present instance, but I certainly shall not give him his costs. I make no order as to the costs.

[565] THE OFFICE OF THE JUDGE PROMOTED BY SANDERS *against* HEAD.(a) Arches Court, April 26th, June 15th, 1843.—A clergyman suspended for three years for publishing in a newspaper a letter in derogation and depraving of the Book of Common Prayer.—Where an offence is cognisable by the general ecclesiastical law, articles need not specify the particular canon or constitution intended to be relied on as supporting the charges contained in them.

[S. C. 2 Notes of Cases, 355; 7 Jur. 728. Referred to, *Bishop of St. Albans v.*

Fillingham, [1906] P. 178; *Beneficed Clerk v. Lee*, [1897] A. C. 230.]

This cause having been remitted to this Court, the proctor for the promoter of the office, on the first session of Hilary Term, brought in articles, with two exhibits annexed. On the second session the proctor for Mr. Head declared he opposed their admission. On the third session the articles were admitted, the proctor for Mr. Head being present, and declaring that he did not oppose the same. On the fourth session the proctor for Mr. Head gave a negative issue to the articles; on the bye day he confessed the second and third articles to be true, as also so much of the fourth article as pleaded the writing and causing to be published the letter therein referred to; he also confessed the fifth, sixth, seventh, and eighth articles to be true. On the 14th of March the proctor for Mr. Head declared that he gave in no allegation, whereupon the cause was concluded and assigned for informations and sentence.

Addams and Robinson, as counsel for the promoter of the office, cited and referred to the 4th, 6th, 36th, 37th, and 38th canons (A.D. 1603), [566] and to the statutes 2 & 3 Edw. 6, 1 Eliz. c. 2, and 13 & 14 Car. 2, c. 4, and *Caudrey's case* (5 Coke, 1). They pressed for a sentence of deprivation against Mr. Head.

Queen's advocate for Mr. Head. The defendant has been most vexatiously treated in this case; the articles contain no intimation of the particular law or canon to be relied on in support of them; this mode of pleading is contrary to all established practice. In *Newberry v. Goodwin* (1 Phill. 282) Sir J. Nicholl says, "The two first articles plead the law upon the subject, the canons, and the statute;" clearly then, according to that learned Judge, it is incumbent on the promoter of the office to specify the statute or canon on which he relies for establishing the charge contained in the articles. In the case of *The King's Proctor v. Stone* (1 Hagg. Con. 424), in *Cox v. Goodday* (2 Hagg. Con. 138), and in *Martin v. Escott* (2 Curt. 692), the particular statute or canon said to have been infringed or violated was set forth in the articles, and the defendants were not, as in this case, compelled blindly to address themselves in defence to the charge; the particular law to be urged against them was specified at the very commencement of the proceedings.

The Book of Common Prayer, which Mr. Head is charged with having depraved, is the Book of Prayer now in use, established by the Act of Uniformity, A.D. 1662. The canons, A.D. 1603, cannot refer to the present Book of Prayer, and [567] there is no subsequent canon relating to the present Book of Prayer.

Harding (same side). Mr. Head is charged with the commission of an offence capital in the ecclesiastical law, and is entitled to have the law strictly weighed, and construed strictly in his favour. The statute of the 1 Eliz. is, as respects Mr. Head, a penal statute; he must be clearly convicted of having preached, declared, or spoken in derogation or depraving of the Book of Common Prayer; it will not be sufficient to shew that Mr. Head is within the spirit of the act; he must be brought within the spirit and the letter. In *Fletcher v. Sondes* (3 Bing. 580) Chief Justice Best says, "The rule requires that all penal laws should be construed strictly, that no cases should be holden to be reached by them but such as are within both the spirit and letter of such laws. If these rules are violated, the fate of accused persons is decided by the arbitrary discretion of Judges, and not by the express authority of the laws." Mr. Head has not preached, and he has not spoken, anything in derogation of the Book of Common Prayer; then has he declared? The word declare, from its juxtaposition with the words preach and speak, clearly means a declaration by parol; he must have declared by word of mouth. The rule *noscitur a sociis* applies in the construction of this act, the word declare, placed between the words preach and speak, shews that an oral declaration was intended to be forbidden. *Jenkinson v. Thomas* (4 T. R. 665), *Evans* [568] *v. Evans* (4 T. R. 224-459). By the act of the 14 Geo. 2, c. 1, all persons

(a) See this case, ante, pp. 32 to 49.

who should steal sheep, or any other cattle, were deprived of the benefit of clergy. The stealing of any cattle would seem to be comprehended by the general words, any other; but it was found necessary to pass the 15 Geo. 2, c. 34, in order to explain that the first act was meant to extend to all other cattle; until the Legislature specified what cattle were meant to be included, the Judges felt that they could not apply the statute to any other cattle but sheep. The statute of Elizabeth never contemplated the possibility of a clergyman publishing, by printing, anything in derogation of the Book of Prayer; that case was amply provided against in other ways; no person could print any work or letter without being subject to a kind of censorship of the press. Mr. Hallam, in his Constitutional History (vol. 1, p. 233), shews the extreme jealousy with which the diffusion of free inquiry through the press was viewed. That the trade of printing was subject to a sort of peculiar superintendence. That the Council frequently issued proclamations to restrain the importation of books, or to regulate their sale. That it was penal to utter, or to possess, even the most learned works on the Catholic side. That every printer was enjoined to certify his presses to the Stationers' Company, on pain of having them defaced, and of suffering a year's imprisonment. No printer was to print any book, matter, or thing whatsoever, until it should have been first perused and allowed by the archbishop of Canterbury or the bishop of London. Every [569] person selling books printed contrary to the intent of this ordinance, to suffer three months' imprisonment.

Can it be wondered that the Legislature, in framing the Act of 1 Eliz., should have considered that the offence of declaring by printing was amply provided against by the laws and ordinances then in force, and have contented themselves with providing against verbal heresy or schism? It is well known that, at this period, the clergy were in the habit of meeting and discussing theological subjects; these meetings were called "prophesyings," and were rigorously suppressed in those days. It was for attending one of such assemblies that Archbishop Grindal was suspended; this was probably the "declaring" intended to be forbidden by the statute. The reason why the Act of Uniformity did not impose any new penalty on publishing by printing is explained by referring to the Act of 13 & 14 Car. 2, c. 33, which by the second section provided for the case of printing; that statute is now expired, and cannot be urged against Mr. Head.

The above argument will be borne out by reference to statutes in *pari materia*, in which the word "print" is used when it was the intention of the Legislature to prohibit that mode of publishing opinions; 25 Hen. 8, c. 22, ss. 8, 9; 26 Hen. 8, c. 13, s. 2; 35 Hen. 8, c. 5; 1 Edw. 6, c. 1, s. 1—c. 12, s. 7; 2 & 3 Edw. 6, c. 1; 5 & 6 Edw. 6, c. 11, s. 2; 1 & 2 Phil. & Mary, c. 10; 1 Eliz. c. 2, s. 4; 5 Eliz. c. 1, s. 10; 13 Eliz. c. 2, s. 2; 23 Eliz. c. 2; 35 Eliz. c. 1, s. 1.

The Court will not visit Mr. Head with the [570] extreme punishment of deprivation; the statute itself makes a distinction between first and second offences.

The Court, moreover, will distinguish between an offence, by speaking in derogation of some great doctrine of universal or even of Anglican reception, and against a liturgy which may be altered, which may be termed a "thing indifferent." The preface to the Prayer-Book, itself part and parcel of the statute of Charles 2, notices this. It says, "The particular forms of divine worship, and the rites and ceremonies appointed to be used therein, being things in their own nature indifferent, and alterable, and so acknowledged; it is but reasonable that, upon weighty and important considerations, according to the various exigency of times and occasions, changes and alterations should be made therein."

June 15th.—*Judgment*—*Sir Herbert Jenner Fust*. This is a proceeding by articles against the Rev. Henry Erskine Head, a clerk in holy orders of the United Church of England and Ireland, rector of the rectory and parish church of Feniton, in the county of Devon, in the diocese of Exeter, and in the province of Canterbury. This proceeding is commenced in this Court in virtue of letters of request from the bishop of Exeter, which have been presented under the provisions of the statute passed during the 3rd and 4th years of the reign of her present Majesty (c. 86), entitled "An Act for better Enforcing Church Discipline." On these letters being presented and accepted, a decree [571] issued from this Court on the 14th of Nov., 1841, calling on Mr. Head to answer to certain articles, heads, positions, or interrogatories to be administered to him touching and concerning his soul's health, and the lawful correction and reformation of his manners and excesses; and more especially for having

offended against the laws, statutes, constitutions, and canons ecclesiastical of the realm, by having written and published, or caused to be published, in a certain newspaper called *The Western Times*, a letter, entitled "A View of the Duplicity of the present System of Episcopal Ministration, in a Letter addressed to the Parishioners of Feniton, Devon, occasioned by the Bishop of Exeter's Circular on Confirmation, by Henry Erskine Head, A.M., Rector of Feniton, Devon;" in which letter it is openly affirmed and maintained that the Catechism and the Order of Confirmation, in the Book of Common Prayer, contain erroneous and strange doctrine; and wherein are also openly affirmed and maintained other positions in derogation and depraving of the said Book of Common Prayer, contrary to the said laws, statutes, constitutions, and canons ecclesiastical of the realm, and against the peace and unity of the Church.

These are the charges contained in the decree or citation issued and founded on the letters of request. This decree was personally served, and was returned on the 1st of December, 1841; on the following Court day a proctor appeared for Mr. Head, but under protest. This protest was extended; it was discussed in this Court, and, finally, the Court was of opinion that the protest was not sustainable, and accordingly the Court overruled it, and assigned [572] Mr. Head to appear absolutely [ante, p. 49]. From this order an appeal was presented to her Majesty in Council, and after some deliberation the decree was affirmed. It seems that the Judges of the Judicial Committee of the Privy Council had considerable doubt whether the provisions of the Act of Parliament had been duly complied with; I say this, in order to shew that the appeal was not unjustifiable, for the Judges in the Appellate Court strongly intimated an opinion that the question was one very fair and proper to be brought up for the revision of a superior Court.

The cause having been remitted, articles were brought in; the admission of them was not opposed. At first, notice was given that the articles would be opposed, but it was withdrawn, and the articles were admitted without opposition; a negative issue was thereupon given, and certain admissions made on behalf of Mr. Head, in order to avoid the expense of taking evidence; in consequence, no evidence became necessary, no witnesses were examined. The principal facts being then admitted, the only question then remained—upon these admissions had an offence been committed cognizable in the Ecclesiastical Court? this was a question simply of law, and of law only.

Now, it is to be observed that, in the first place, the protest did not apply to the merits of the case; it rested on ground quite independent of the circumstances set forth in the decree or articles. It was simply a question whether the bishop of Exeter, the diocesan to whom Mr. Head is subject, had complied with the requisites of the Act of Parliament (3 & 4 Vict. c. 86); the bishop having in the [573] first instance given notice that he intended to issue a commission under the 3rd section of the Act. The letters of request were after that presented to this Court, the notice not having been withdrawn; on this the protest was founded. I have already stated that the decree of this Court, overruling the protest, has been held to be right; the cause has been remitted, and now comes on to be heard on its merits, without any prejudice on the one side or the other, by reason of what has passed in the Privy Council.

The articles are nine in number; the first pleads as follows:—

"We article and object to you, the said Rev. Henry Erskine Head, clerk, that you know, believe, or have heard that, by the laws, statutes, constitutions, and canons ecclesiastical of the realm, it is expressly forbidden to any parson, vicar, or other minister whatsoever of the United Church of England and Ireland, to say open prayer in any church or chapel, or other place of public worship, or to administer the sacraments, or other rites and ceremonies of the Church, in any other form, or after any other order than those contained in the Book of Common Prayer, and the administration of the sacraments, and other rites and ceremonies of the Church of England by law established: and that it is also expressly forbidden to any such parson, vicar, or other minister of the said United Church of England and Ireland whatsoever to preach, declare, or speak anything to the derogation or depraving of the said Book of Common Prayer, and administration of the sacraments, and other rites and ceremonies of the Church of England, or of [574] anything therein contained, or of any part thereof; and that all ordinaries are empowered to take cognizance of such offences committed within the limits of their several jurisdictions, and to punish the offenders

by admonition, or suspension, or deprivation, according to the exigency of the case. And we article and object of this, &c."

The first article, therefore, states generally the law contended to be applicable to the condition in which Mr. Head has placed himself.

The second article pleads, "That the said Rev. Henry Erskine Head hath for many years last past been, and now is, a priest or minister in holy orders of the United Church of England and Ireland; and for several years has been and now is rector of the rectory and parish church of Feniton, in the county of Devon, in the diocese of Exeter, and province of Canterbury, and has been rightly and lawfully instituted and inducted in and to the said rectory; and that for and as such, and as the lawful rector of the said rectory, has been for several years last past, and now is, commonly accounted, reputed and taken to be."

The third article exhibits in supply of proof the act of institution.

The 4th article contains the commencement of the charge against Mr. Head: it pleads, "Also we article and object to you, the said Rev. Henry Erskine Head, clerk, that you, in the month of August, in the year of our Lord 1841, wrote and published, or caused to be written and published, within the diocese of Exeter, to wit, in a certain newspaper, called *The Western Times*, dated Exeter, Saturday, August 21st, 1841, a letter, [575] entitled 'A View of the Duplicity of the present System of Episcopal Ministration, in a Letter addressed to the Parishioners of Feniton, Devon; occasioned by the Bishop of Exeter's Circular, on Confirmation, by Henry Erskine Head, A.M., Rector of Feniton, Devon;' in which letter you advisedly affirmed and maintained that the Catechism, the Order of Baptism, and the Order of Confirmation, in the Book of Common Prayer, contain erroneous and strange doctrine, and wherein you also advisedly affirmed and maintained other positions, in derogation and depraving of the said Book of Common Prayer, contrary or repugnant to the laws, statutes, constitutions, and canons ecclesiastical of the realm, and against the peace and unity of the Church."

The 5th article contains certain passages of the letter so specified, in the general charge of the 4th article, as containing erroneous and strange doctrine, and in which positions are advisedly maintained in derogation and depraving of the said Book of Common Prayer, and among them of the Catechism.

The 6th article pleads, "That Mr. Head has admitted that he published the letter to which I have already alluded."

The 7th article pleads, that by reason of his having published, or caused to be published, this letter, "there was, and is, a scandal and evil report, in the said diocese, against you, the said Henry Erskine Head, as having offended against the laws ecclesiastical: and that, by reason thereof, and of a certain act or statute, made in the Parliament holden at Westminster, in the 3d and 4th [576] years of the reign of her present Majesty, entitled 'An Act for better enforcing Church Discipline,' and of the letters of request, under the hand and seal of the bishop of the said diocese of Exeter, presented and accepted in this cause, you were, and are, subject to the jurisdiction of this Court."

The 8th is a mere formal article; as is also the 9th; it alleges "that all and singular the premises were and are true, public, and notorious," and concludes by praying, "That the Rev. Henry Erskine Head, clerk, may be duly and canonically corrected and punished, and may be condemned in the costs of the cause."

This is the substance of the charge. When the articles were admitted, a negative issue was given; that is the usual formal mode of proceeding; afterwards certain admissions were made by Mr. Head. It is necessary to refer to these admissions, in order to shew that the facts of the case were all admitted, although the law resulting from them was not admitted. Now, Mr. Head admits the truth of the 2d and 3d articles; he also admits so much of the 4th article as pleads "that he is the author and publisher, or the cause of publishing," the letter in question, but he does not admit that it contains erroneous doctrine, or doctrine depraving of the Book of Common Prayer: that is the question to be tried, by referring to the expressions made use of in the letter. Mr. Head also admits the 5th, 6th, 7th and 8th articles, admitting that so many of the passages from the letter, as are contained in the 5th article, to be true extracts from the letter published in *The Western Times*.

I have already stated that when these articles [577] were given in, an intimation was made that they would be opposed, but that was afterwards withdrawn; *prima facie*, this would seem to admit that the articles, if proved, would contain a charge,

rendering Mr. Head liable to ecclesiastical censure and punishment. In the argument, however, it was contended that Mr. Head was not bound to raise his objections to the charge on the admissibility of the articles, but that his counsel might at any time take any objections, as might seem most expedient to them for the interest of their client, and that if there be any sustainable objection, Mr. Head is not precluded from taking it by reason of having permitted the articles to be admitted without opposition: I am inclined to take that view of the case, and to hold that a party is not obliged to object to articles at the time they stand for admission, but is at liberty at any time, up to the hearing, to urge any objections to them, and to have all benefit of such objections in the decision of the cause.

It now becomes necessary to consider the nature of the objections to which the attention of the Court has been called.

It has been made a subject of complaint, on behalf of Mr. Head, that the articles do not contain any specification of the law relied on to establish them; that the first article is merely general, and that, under such general pleading, it is difficult for a defendant to know how to address himself to the question of law applicable to his case; that the canon law has been referred to generally without particular specification. Certain cases have been referred to in which, in proceedings of this nature, the specific statute or canon on which the articles [578] were founded has been particularized, and it is contended that, in this case, the same course ought to have been pursued; the cases more particularly alluded to are—*The King's Proctor v. Stone* (1 Hagg. Con. 424) *Newberry v. Goodwin* (1 Phill. 282), *Cox v. Goodday* (2 Hagg. Con. 138), *Mastin v. Escott* (2 Curt. 692). In all these cases it is contended the statute or canon on which the proceedings were founded was set forth, in some in the citation or decree, in others in the articles. With respect to some of these cases, undoubtedly this was so. In the case of *The King's Proctor v. Stone* the proceeding was against a clergyman for affirming and maintaining doctrines contrary to the articles of religion as by law established; the citation set forth the particular statute (13 Eliz. c. 12) which constituted this an offence, and prescribed a particular penalty for it, namely, deprivation. In that case, therefore, where the offence was heresy, and where a particular statute, giving a particular penalty for that offence, was intended to be relied on, the particular statute was set forth. *Newberry v. Goodwin* is not, when looked into, founded solely on the 5th & 6th Edw. 6th—the statute against brawling—but founded also on the general ecclesiastical law; it was a proceeding with a double aspect, under the general law ecclesiastical, and also under that statute, which prescribes a particular punishment for the offence, namely, suspension for a definite period. The statute of Edw. 6th was passed with the view of assisting the ecclesiastical jurisdiction in the prevention and punishment of the offence of brawling, and, according to that [579] statute, a clergyman convicted of such offence might be suspended from the ministration of his office; therefore, inasmuch as the punishment prescribed by the statute was sought to be enforced, the statute was properly pleaded, but the promoter of the suit pleaded also the canon and ecclesiastical law. *Cox v. Goodday* was a proceeding against a clergyman for brawling in church, by giving a certain admonition from the pulpit. I should, however, observe that, in that case, Lord Stowell said, "It was not absolutely necessary that the offence charged should come within the words of the statute. The statute was not absolutely necessary to found the jurisdiction of the Ecclesiastical Court, as it had undoubtedly a right to punish that offence independent of the statute." *Mastin v. Escott* was a proceeding under a particular canon for an offence, for which a particular punishment was imposed; the offence was the refusing to bury the child of a dissenter. These, then, are all cases in which a specific punishment was pointed out.

Now the objection taken in this case is not taken for the first time; it has been frequently taken in this Court, and as often overruled. The answer always given to the objection is, that where the general law ecclesiastical is relied on it is not necessary to plead specifically; that where the offence is one generally cognizable in the Ecclesiastical Court it is not necessary to point out the particular canon or statute on which the proceedings are founded. This point was very fully discussed in the case of *Wilson v. M'Math* (3 Phill. 67); perhaps it may not be un-[580]-profitable to consider the law as there laid down by my learned predecessor in this Court. Now in that case, which was a proceeding by articles against a parishioner for disturbing the incumbent of a parish in the exercise of his office as chairman of a vestry, it was

contended, on behalf of the party proceeded against, that there was no canon or constitution pointed out, but a general reference only made to the canons and constitutions; the answer for the party proceeding was that there is the unwritten as well as the written law, and that if this Court could not proceed without the authority of a canon or a constitution it would every day be exceeding its jurisdiction: that in many points the ecclesiastical jurisdiction is exercised in the administration of unwritten law, as in the power of ordinaries, and their jurisdiction over churchwardens and clerks. I have stated so much of the arguments of counsel in the case, in order that the expressions made use of by the Dean of the Arches may be perfectly intelligible, and as shewing what was the objection, and what the determination, of the Judge on it. Sir J. Nicholl said (3 Phill. 78), "There are two objections to the admissibility of these articles. 1st, that the minister, as such, has no right to preside at a vestry meeting, and, consequently, the interrupting him in so doing is no disturbance; 2nd, that, even if it be a disturbance, this Court has no jurisdiction to repress or punish it as an offence. The case is said to be a new one so far as regards any express law or any judicial decision on the subject. There is no statute, no canon, no reported judgment, either [581] expressly affirming or expressly negating the right. It nevertheless may exist as a part of the common law of the land, as a part of the *lex non scripta*, which is of binding authority, as much in the Ecclesiastical as in the Temporal Courts. Indeed the whole canon law rests for its authority in this country upon received usage; it is not binding here *proprio vigore*. Moreover, this Court upon many points is governed, in the absence of express statute or canon, by the *jus tacito et illiterato hominum consensu et moribus expressum*. It is true that generally the existence of this *jus non scriptum* is ascertained by reports of adjudged cases; but it may be proved by other means; it may be proved by public notoriety, or be deducible from principles and analogy, or be shewn by legislative recognitions. Published reports of the decisions of Ecclesiastical Courts (with one very recent exception) do not exist; and if they did, yet the particular right in dispute may never have been so much as doubted or questioned before. And some countenance is given to that notion from the general usage and practice of the kingdom; for it is pleaded in the articles, and on their admissibility must be taken as true, that the minister's presiding at vestry meetings is observed in and throughout the whole realm. The fact of such general usage for the minister so to preside is notorious, and has not been denied even in argument. Now such an usage (unless absurd or improper) I take to found a common law right. Law writers, particularly Mr. Justice Blackstone, lay it down that general customs, which are the universal rule of the whole kingdom, form the common law in its stricter and more usual signi-[582]-fication. Again, the first ground and chief corner stone of the laws of England is immemorial custom." Now, Sir J. Nicholl here affirms that the unwritten law of this Court is as much binding as is the common law binding on the Temporal Courts; and he goes on to illustrate this by reference to certain other causes of office, and he says, "It seems as much an offence of ecclesiastical jurisdiction as the erecting tombstones in a churchyard, or the pulling down tombstones, or breaking a door into a churchyard, or neglecting to repair a chancel, or setting up arms in the church, or forbidding the organ to be played when directed by the minister, or many other matters which are proceeded upon in these Courts, though there is no express canon or statute upon the particular subject. Yet in all cases of this sort the proceeding is in the Ecclesiastical Court, and in the form of articles as for an offence, which mode of proceeding is in a great degree like an indictment at common law for a misdemeanor, where no statutory sanction is provided to enforce anything enjoined, or to restrain anything prohibited."

Then he refers to certain cases of protest which have occurred in this Court, and in all of which the protests were overruled—*Cade v. Newnham*, in 1786. *Leger and Hill v. The Dean and Chapter of Christ Church*, in the Peculiars, 1787. *Burton and Edwards v. Callcott*, in the Consistory, 1788. *Maidman v. Malpas*, Consistory, 1794. *Hutchins v. Denziloe*, Consistory, 1791—in all which cases the proceedings were by articles for offences, under the general principles of ecclesiastical law, and not under any precise canon or statute.

[583] From all these cases it seems that the jurisdiction of the Ecclesiastical Court in matters ecclesiastical does not depend on any particular canon or statute, but on the general ecclesiastical law, and on the universal consent by which some matters are exclusively of ecclesiastical and not of temporal cognizance. What is the general

mode of proceeding in these matters? it is this—to plead the act of the 5 & 6 Edw. 6, c. 4, and then to plead the general law; it is not imperatively necessary to proceed under the statute, but you may proceed under the statute or under the general law; and where both the statute and general law are pleaded or called in aid of the proceedings, if there is a failure of proof in the one case, as for instance proof by two witnesses, as required by the statute, proof by one witness, and circumstances will be sufficient under the general law; and in such case, although the Court cannot, under the statute, deprive a minister from his ecclesiastical duties, he will still be liable to ecclesiastical censures under the general law. There are several instances of such proceedings against clergymen for neglect of their duty. *Saunders v. Davis* (1 Add. 291) was a proceeding against a clergyman for irregularity of conduct. No particular canon or statute was there pointed out; the articles merely pleaded that, by the general law, clerks in holy orders are liable, for offences of this nature, to be deprived of their benefices, or suspended from the exercise of their clerical functions. *Dawe v. Williams* (2 Add. 130), in which case articles were exhibited against a parishioner for brawling in church, and *Williams v. Goodyer* (2 Add. 63) are to the same effect.

[584] It appears, therefore, from these cases that unless it be the intention to proceed solely under a particular statute for a particular penalty pointed out by that statute, it is competent to plead the general ecclesiastical law, as contained in the canons and constitutions. I have no doubt that in this case the law is sufficiently pleaded; and the question, therefore, is, do these articles contain that which amounts to an ecclesiastical offence?

It has been urged by counsel, on behalf of Mr. Head, that he labours under a great degree of hardship from not knowing what was the law to be urged against him; but I scarcely think this can be pressed as a hardship. Mr. Head had ample opportunity of ascertaining this by opposing the admission of the articles. I have said that I am of opinion that Mr. Head, or his counsel, were not bound to take any objection to the articles in the first instance, and that he is entitled to all the benefit, as far as the law avails him, of this being a proceeding under the general law, and not under a particular statute.

This proceeding, under the general law, is against Mr. Head, a clerk in holy orders, of the United Church, a beneficed clergyman actually holding a benefice. Under the general ecclesiastical law the ordinary has power over all the clergy of his diocese; beyond all doubt he has the power of correcting the manners and excesses of his clergy, and for such a purpose, of proceeding against any individual in the Ecclesiastical Court, and, if it becomes necessary to proceed against a clergyman in these Courts, it must be done by articles. It is not necessary here to state more as to the power of the ordinary over the clergy of his diocese, and more [585] particularly is it unnecessary when the charge in question has reference to a violation of the liturgy or Book of Common Prayer. The present case being one of this description—a proceeding by the ordinary against a clergyman of his diocese—it becomes necessary to consider in what the charge consists. It is impossible to read the charge contained in these articles without seeing that, if proved, an offence has been committed in direct violation of the Book of Common Prayer, as established by the Act of Uniformity; neither of Mr. Head's counsel have controverted this; indeed it is due to them to say that they would not argue this part of the case.

Does, then, the letter of Mr. Head contain that which, in the charge, is alleged to be in derogation and depraving of the Book of Common Prayer, the order of baptism, and of confirmation, and containing erroneous and strange doctrine?

Now this letter I have read over more than once; it is, as I have before stated, entitled—"A View of the Duplicity of the present System of Episcopal Ministration, in a Letter, addressed to the Parishioners of Feniton, Devon, occasioned by the Bishop of Exeter's Circular on Confirmation. By Henry Erskine Head, A.M., Rector of Feniton, Devon"—therefore this is a letter avowedly occasioned by a circular letter addressed by the bishop of Exeter to the clergy of his diocese. Now the first part of this letter may be termed introductory, and I would here observe that it is no part of the province of this Court to determine whether the Book of Common Prayer does contain erroneous doctrine; it is sufficient for this Court that it is the book which is [586] to be used by the clergy as prescribed by the law of the land; the question is, Are the words used in Mr. Head's letter derogatory and in depravation of that book? Now the fourth paragraph of this letter is as follows:—

"It becomes my duty to state to you that I have received a letter (a printed circular) from the bishop of Exeter, requesting me to give notice of his lordship's intention to confirm such young persons of this parish as shall be duly prepared. In short, I am called upon to address you on the subject of confirmation—an equivocal word, pregnant with that necessary evil—controversy. Three years ago the children of this parish did attend the confirmation; on that occasion the exclusive object of episcopal inquiry was, Have these children been instructed in the sacramental parts of the Catechism? A negative reply was given; and the rector of the parish was publicly censured for having omitted to teach the erroneous and strange doctrine which the Catechism contains."

Now, to go no further than this passage, here is a distinct averment that the Catechism does contain strange and erroneous doctrine, and this letter is avowedly written by Mr. Head, in consequence of a letter addressed to him by the bishop, acquainting him of the bishop's intention to confirm the young persons in Mr. Head's parish. This letter is published, as it openly declares, in consequence of the bishop's circular letter; does it, or does it not, contain an offence for which Mr. Head is amenable in this Court? Now, part of the duty which every clergyman is called on to perform at the time of institution is found in the 61st canon, [587] by which it is prescribed, "That it is the duty of every minister that hath the cure and charge of souls to prepare children for confirmation at such time as the bishop shall give notice of his intention to confirm young persons." Mr. Head goes on in his letter: "There spake the spirit of the present system of episcopal ministration! All the bishops, it is true, may not be quite so incautious as the bishop of Exeter, but, inasmuch as they connive at and continue the use of the Catechism and baptismal and confirmation services in their present state, I do not hesitate to aver that they act upon a system by which the episcopal order is exalted under false pretences and at the expense of the doctrines of the Bible."

Surely nothing can be more offensive than this letter, addressed to parishioners, reflecting on the conduct of their bishop. Be it remembered the charge is that Mr. Head has affirmed that the Catechism contains strange and erroneous doctrines. To proceed with the letter:—

"As a renunciation of the errors contained in these services perfectly consists with a true anxiety on my part to administer all the instruction or help, in my power, to such young persons of the parish as are desirous of being really confirmed in the principles of the Christian faith, I request them to come to the rectory house every Wednesday, at four in the afternoon, during the remainder of the summer for this purpose. When the land of Egypt was wasted with lice and locusts, Pharaoh's magicians displayed their power, not by removing but by increasing them; in like manner, some of the predecessors of the bishop of Exeter, instead [588] of relieving their clergy from the errors of the baptismal service, required them to read in their churches an additional document in recommendation of them."

Here, the letter openly speaks of the "errors of the baptismal service;" it is equivalent to saying that the baptismal service contains erroneous and strange doctrine. (Reads)—

"His lordship goes on, very courteously, to intreat us, among other things, to charge the young people of our parishes to read over repeatedly and carefully in their Prayer Books the office of confirmation: these entreaties (it is fair to admit) are made in a tone of great urbanity, the letter contains some just observations, and the whole announcement would be quite unexceptionable, if those Church services, to which his lordship refers both you and myself, were free from error; but the letter covertly insinuates that these Church services contain nothing but sound doctrine; indeed, the whole communication is almost entirely founded on this assumption, which assumption is not consistent with truth. I do not mean that his lordship intends to insinuate a greater proportion of falsehood than is usually found in episcopal circulars; far be it from me to attribute a single grain of duplicity to the bishop of Exeter, which does not attach itself to all his right reverend brethren. All their lordships promise at their ordination to be ready to banish and drive away all erroneous and strange doctrine; but, on the other hand, they do not scruple to vex us with the erroneous and strange doctrine of the confirmation service."

[589] "This duplicity is not the less duplicity because it is undetected by the

parties practising it. 'Deceivers do not cease to be deceivers because they are themselves deceived.'—2 Timothy, iii. 13."

"The only plea which can shield our prelates from the charge of intentional duplicity is, that they really are not aware of the unscripturalness and mischievousness of those dogmas with which they encumber themselves and us. Ignorance of scripture is that which is to be attributed to their lordships on a principle of mere charity. Hence their unreadiness to do that which they promise to be ready to do; hence their unwillingness to reform, or (at least so far as their own ministrations are concerned) to rectify or avoid the serious error which the confirmation service contains. Hence their reckless, ruthless, and inconsistent recommendations, to the public and to the clergy, of doctrine which is erroneous, strange, and contrary to God's word. The episcopal circular which I have now received is a clear specimen of a system of duplicity by which their lordships, the bishops, have long been deceived, and are now perhaps more extensively than ever deceiving the public."

"As reformation in this respect is not hopeless, and as I also am pledged by my ordination vows, as a minister of the Church of England, to banish and drive away all erroneous doctrine, I do hereby decline and refuse to give any countenance whatever to the office of confirmation, as it is now used by their lordships, the bishops; and, instead of recommending, in compliance with the episcopal circular, the perusal and re-perusal of that service [590] to the young persons of this parish, I warn them all, young, old, and middle aged, to beware, in the name of God, of the erroneous and strange doctrine which it contains."

"It will be said that for this I deserve to be turned out of the Church; are all clergymen then to be turned out of the ministry who dissent from certain points in the Prayer Book? In this case every body will be turned out of the ministry, and then nobody will remain in the ministry; shew me the works of any churchman within the last four centuries, and I will undertake to convict him of inconsistency with the Prayer Book. It is a fact that there is no bishop or clergyman in England, in Ireland, or in the Colonies who does not sin against the Prayer Book in one point or another. It is also a fact that the Prayer Book sins against itself; some parts of it are at variance with other parts; the fourth, sixth, eighth, and thirty-sixth canons are repugnant to the first and third ordination vows. Some of the dogmas in the Catechism, confirmation and baptismal services are utterly inconsistent with the doctrines contained in the eleventh, twelfth, thirteenth and seventeenth articles."

Much follows which it may be unnecessary for the Court to read, but I am unwilling to keep back any part of this letter which may explain or qualify anything which I have before read.

"The spirit of the canons is to the first ordination vow what a drag-chain is to a coach, or what a large lump of lead would be to a balloon; it seeks to deprive me of that freedom of thought, speech, [591] inquiry, and discussion which is conceded to me at my ordination; as an impudent highwayman stops me on my road, and robs me of my money."

"This is a figurative view of the case, but the truth is that there are two sets of principles in the Prayer Book, so that he who can obey both must be a bifrons, inasmuch as our prelates administer the first ordination vow, they exhibit to the public the pledge and profession of Protestantism, inasmuch as they exact from every clergyman whom they ordain, subscription to the three articles in the thirty-sixth canon, they cherish withal the vital principles of that popery of which they would be thought opponents, and though they may be (as in charity it is to be supposed they are) unaware of the deep hypocrisy of this two-faced system of episcopal ministration, the effects of it are not the less deplorable to the nation, and, humanly speaking, to religion. Falsehood is thus effectually and most invidiously mixed up, under pretence of Protestantism, with the doctrines of scripture; the errors of the Prayer Book, ratified and enforced by prelatical lordliness, lay like lead on the consciences of the clergy, and the unsuspecting candidate for ministerial honours pledges himself unawares to the bishop to make and not to make the Bible his paramount guide."

"What sort of a proceeding would it be to say to a clergyman who takes umbrage at some points in the Prayer Book, if he should happen to have scripture on his side, Withdraw from the Church, and leave us to teach error unmolested by your remonstrances. To raise an outcry against such a clergyman with a 'mos pro lege,' that schoolboy [592] defence of ancient absurdity, is a mere evasion of the point at issue,

an excuse for hindering the progress of reform, and for hushing up such inquiries as these."

"Is it right that error should be taught in the Church establishment, by the authority of the bishops, under pretence of religion, and enforced by the same parties in Parliament, under an unjustifiable system of rigorous subscription? Is it right that bishops should be suffered to retain their seats in the House of Lords? Have they done any good in Church or State as Peers of Parliament? Have they not thereby done a great deal of evil? Is there any sanction for bishops being Lords of Parliament, except that of ancient custom; and may not this be pleaded for the continuance of any absurdity, abuse, or profanation that has ever stained the annals of the human race?"

"What sort of confirmation is to be expected from men who are utter strangers to thousands and tens of thousands of those whom they confirm? who, in the character of ministers of religion, connive at and give support to error in the Church, and who, in the character of peers of the realm, refuse all reformation of those unholy laws from whence this error derives much of its malignity? Of whom or of what are they bishops? Of whom or of what are they overseers? Why are they exalted in Parliament, and why are they exalted at all?"

"If their lordships wish to satisfy the public that their exaltation is just and right, let their lordships, instead of teaching the erroneous doctrine in the Church services, banish and drive it away, instead [593] of binding the Bible to the obliquities of the Prayer Book; let them make or endeavour to make this Prayer Book consistent with the Bible, and with itself; instead of reversing the apostolic rule, let them alter that which is evil in the Prayer Book, and cleave to that which is good."

This is the whole of the letter, and with the exception of the introductory passage, a letter of which Mr. Head openly avows himself the author and publisher; it is impossible to conceive a document more offensive in style, particularly considering the person by whom it is written, and the person to whom it is addressed.

The objection to this letter is, that it contains averments and positions in derogation and depraving of the Book of Common Prayer, the sacrament of baptism, and the rite of confirmation; that it does contain such averments is beyond all doubt. The cognizance of an offence of this nature is a matter which, beyond all doubt, under the present circumstances, belongs to the Ecclesiastical Court. It is an offence as grave and as serious as can be committed by a clergyman of the Church of England, who is bound at his ordination to subscribe to certain articles, without which subscription he cannot be admitted into the ministry of the Church. The 36th canon prescribes:

"No person shall hereafter be received into the ministry, nor either by institution or collation admitted to any ecclesiastical living, nor suffered to preach, to catechise, or to be a lecturer or reader in divinity, except he be licensed either by the archbishop, or by the bishop of the diocese; and except he shall first subscribe to these three articles [594] following, in such manner and sort as we have here appointed." The first article relates to the supremacy of the Sovereign. The second is:

"That the Book of Common Prayer, and of ordering of bishops, priests, and deacons, containeth in it nothing contrary to the Word of God, and that it may lawfully so be used; and that he himself will use the form in the said book prescribed in public prayer, and administration of the sacraments, and none other." "Third, that he alloweth the Thirty-nine Articles to be agreeable to the Word of God." The conclusion of the canon is:

"To these three articles whosoever will subscribe he shall, for the avoiding of all ambiguities, subscribe in this order and form of words, setting down both his Christian and surname, viz., I, N. N. do willingly and ex animo subscribe to these three articles above mentioned, and to all things that are contained in them."

This, then, is required by every person before he can be received into the Church, that he make this declaration and acknowledgment.

It has been observed in argument that this canon, one of the Canons of 1603, does not apply to the Book of Common Prayer as now in use, but to the Book of Common Prayer then used, and that as the canon referred to the first book, so to term it, of Common Prayer, and a new or second book having been substituted for the first, Mr. Head is not within the provisions of the canon. It must, however, be recollected that the statute 13 & 14 Car. 2, c. 4, s. 24, provides—

"That the several good laws and statutes of this realm, which have formerly been made, and are [595] now in force for the uniformity of prayer and administration of the sacraments, within the realm of England and places aforesaid, shall stand in full force and strength to all intents and purposes whatsoever, for the establishing and confirming of the said book, intituled 'The Book of Common Prayer, and Administration of the Sacraments, and other Rites and Ceremonies of the Church, according to the use of the Church of England, together with the Psalter or Psalms of David, pointed as they are to be sung or said in Churches, and the Form or Manner of Making, Ordaining, and Consecrating of Bishops, Priests, and Deacons,' hereinbefore mentioned to be joined and annexed to this Act; and shall be applied, practised and put in use for the punishing of all offences contrary to the said laws with relation to the said book and no other."

This statute, therefore, extends the laws and statutes in force and existence at that time to the Book of Common Prayer as established by that Act; all such laws as did apply to the Book of Common Prayer then or before in use are to stand in full force and strength with respect to the form of prayer as established by the Act of Uniformity. All ecclesiastical offences theretofore punishable by the Ecclesiastical Court I take to be made punishable in like manner by the new law; therefore I am clearly of opinion that Mr. Head cannot shelter himself under the plea that the Canons of 1603 refer to a Book of Common Prayer different from the one now in use. The 61st canon prescribes that—

"Every minister that hath cure and charge of souls, for the better accomplishing of the orders prescribed in the Book of Common Prayer concern-[596]-ing confirmation, shall take especial care that none shall be presented to the bishop for him to lay his hands upon but such as can render an account of their faith, according to the Catechism in the said book contained."

The 13 & 14 Car. 2, s. 2, requires every minister or spiritual person to subscribe to certain articles, one of which is—

"I, A. B., do declare my unfeigned assent and consent to all and everything contained and prescribed in and by the book intituled 'The Book of Common Prayer, and Administration of the Sacraments, and other Rites and Ceremonies of the Church according to the use of the Church of England.'" And by section 6 it is enacted—

"That every person who shall hereafter be presented or collated, or put into any ecclesiastical benefice or promotion within this realm of England, shall in the church, chapel, or place of public worship belonging to his said benefice or promotion, within two months next after that he shall be in the actual possession of the said ecclesiastical benefice or promotion, upon some Lord's Day, openly, publicly, and solemnly read the morning and evening prayers appointed to be read by and according to the said Book of Common Prayer, at the times thereby appointed, and after such reading thereof, shall openly and publicly, before the congregation there assembled, declare his unfeigned assent and consent to the use of all things therein contained and prescribed, according to the form before appointed."

It is quite clear that the law imposes this on all ministers for the prevention of schism in the Church; [597] every person taking possession of a living must conform to this; can it then be contended that a clergyman can publish any doctrine he may think fit against the liturgy or Book of Common Prayer? if so, it is, as it seems to me, a monstrous proposition.

The argument on behalf of Mr. Head has partly proceeded on the erroneous notion that this is a proceeding under the Act of Elizabeth, and, therefore, that it is necessary to bring the case within that Act before the Court can pronounce Mr. Head liable to punishment. It has been contended, on this supposition, that Mr. Head has not transgressed the 4th section of the Act, which declares—

"That if any manner of parson, vicar, or other whatsoever minister shall preach, declare, or speak anything in derogation or depraving of the Book of Common Prayer, or anything therein contained, or any part thereof, and shall be thereof lawfully convicted," &c.

I apprehend this argument to be founded on an erroneous view of the present proceeding; this is not a proceeding under that statute, but on the general ecclesiastical law, by which every clergyman is bound to conform to the Book of Prayer ordained by authority of the statute 13 & 14 Car. 2. Supposing this proceeding had been simply confined to the statute of Elizabeth, as was supposed to be the case, and

as argued on behalf of Mr. Head, then the very learned argument of Dr. Harding might have been deserving of consideration, namely, whether an ecclesiastical person publishing certain doctrines in a newspaper is within the prohibition of that statute; whether "publishing" is a "declar-[598]-ing" within the words of the Act: it is not "preaching," and it is not "speaking;" then is it "declaring?" It is argued that, by the juxta-position of the words in the section, the "declaring" must be a declaring by word of mouth, and that argument has been supported by referring to the language of several Acts of Parliament, said to be in *pari materia*: all this, as I have said, might be deserving of consideration if this proceeding was founded on the law derived from that statute alone; but that is not the case; it is founded on the general ecclesiastical law, assisted to a certain extent by the statutes of Elizabeth and Charles 2. I shall not enter into the discussion of that question; I view this as a question depending on the general law ecclesiastical, and I consider the strict interpretation of the word "declare" is not necessary for the maintenance of this suit. The words of the charge are, "openly affirming and maintaining positions in derogation and depraving of the Book of Common Prayer, contrary to the laws, statutes, constitutions and canons ecclesiastical of the realm, and against the peace and unity of the Church." Therefore I shall decline to enter into the consideration of the statute, or whether the word "declare" does or does not mean "publishing by writing," although I think it may fairly be considered as coming within the terms of that statute. The question, as it appears to me, depends on the general law, and it is only necessary to consider the case in that point of view. Can it be contended that the Ecclesiastical Court of the ordinary has power over the clergy of the diocese with respect to their general conduct and conversation, but not over the [599] doctrines they preach, or the observance of the liturgy? Can it be contended that such was the law before the Act of Uniformity?

One case has been referred to in the course of the argument, a case generally known as *Caudrey's case* (5 Coke, 1). That was a proceeding against a clergyman for preaching against, as well as declining to use, the Book of Common Prayer; so far I admit that case is materially distinguishable from the present; it was for preaching against the Book of Common Prayer, and refusing to use it in celebrating divine service. The case was cited from Rolle's Abridgment, but, as it is very important to have the real statement of the facts, I have looked into the report itself. It was a proceeding arising from a special verdict in an action of trespass. Caudrey had been deprived of his benefice for preaching against, and declining to use, the Book of Common Prayer; an action was afterwards brought by him against his successor in the rectory of North Luffenham, in the county of Rutland, for breaking off a close appurtenant to the rectory. A special verdict was given in the action, finding the statute and the other circumstances, and concluding that, if the party had been rightly deprived, the verdict was to be for the defendant; if illegally deprived, then for the plaintiff. On that question the case arose in the King's Bench, and there was a great deal of argument on it; it turned on the power of the Lord High Commissioners to deprive a clergyman on a first proceeding. It was contended that this was an offence which came particularly under the statute of Elizabeth, and that the Lords had exceeded [600] the power given to them, as in a case of the first offence, that there being no former instance, the Lords had exceeded their jurisdiction by depriving Caudrey in the first instance. A great deal of the argument turned on that question, as did the principal decision of the Court; there were several other objections urged against the power of that Court, and relating to the qualification of some of the High Commissioners to sit in that Court. The resolution of the Court of King's Bench is in these words, "As to the first and second objections, both being grounded upon the said Act of Parliament, it was resolved by the whole Court that, notwithstanding these two objections, the sentence was not to be impeached for either of them, and that for three causes: first, for that the said Act, concerning the uniformity of common prayer, being in the affirmative, doth not abrogate or take away the jurisdiction ecclesiastical, unless words in the negative had been added, as, "and not otherwise;" "in no other manner or form;" or to the like effect. And this appeareth by the general rule of all our books. The ecclesiastical law and the temporal law have several proceedings and to several ends. The one, being temporal, to inflict punishment upon the body, lands, or goods; the other, being spiritual, *pro salute animæ*. Then both these distinct and several jurisdictions consist and stand well

together and do join in this ; to have the whole man inwardly and outwardly reformed. The proviso in the Act doth make this question without question, for by it it is provided, ordained, and enacted by the authority aforesaid, "That all and singular, archbishops and bishops, and their chan-[601]-cellors, commissaries, archdeacons, and other ordinaries, having any peculiar ecclesiastical jurisdiction, should have full power and authority, by virtue of that Act, as well to inquire in their visitations, synods, and elsewhere within their jurisdiction, as at any other time and place, to take accusations and informations of all and every the things above mentioned, done, committed, or perpetrated, within the limits of their jurisdiction and authority, and to punish the same by admonition, excommunication, sequestration, or deprivation, and other censures and process, in like form as heretofore had been used in like cases by the Queen's ecclesiastical laws ; as by the said Act appeareth. So, as seeing if that Act had never inflicted any punishment for depraving or not observing the Book of Common Prayer, and the unity and peace of the Church, the ecclesiastical judge may deprive such parson, vicar, &c., as shall deprave, or not observe the said book, as well for the first offence, as he might have done by the censures of the Church and the ecclesiastical laws, as if no form of punishment had been inflicted by that Act." Then the Court goes on to consider the objection to the jurisdiction of the High Commissioners.

Here is a direct and positive recognition of the power of the Ecclesiastical Court to punish by ecclesiastical censures, or by deprivation, any person offending against the unity of the Church. There is, as has been shewn, in the Act of Elizabeth, a direct recognition or preservation of the power of the Ecclesiastical Court ; and, by the subsequent Act of the 13th & 14th Car. 2, there is also a regu-[602]-lar recognition of the power and authority of the Ecclesiastical Court, for the preservation of the peace and unity of the Church.

Can the Court, then, for one moment, doubt that Mr. Head is within the jurisdiction of this Court, and amenable to his diocesan for disobedience to his ordination vow, as also that he is punishable for such disobedience by ecclesiastical censures ? can the power of the Court to suspend Mr. Head be doubted ? I have no doubt whatever, either as to the jurisdiction of this Court, or that Mr. Head has brought himself within the jurisdiction : indeed I feel no doubt that Mr. Head is clearly within the provisions of the statute of Elizabeth ; but under the general ecclesiastical law Mr. Head is punishable for publishing this letter, of which he openly avows himself the author.

I therefore have no hesitation in pronouncing the articles proved ; the remaining question is, what is the punishment the Court shall pronounce against Mr. Head, a minister in holy orders and a beneficed clergyman ? Now I have referred to one part of the statute of Charles 2 (sec. 6), by which Mr. Head, when he took possession of his living, must, within two months, have read the morning and evening prayers, appointed to be read by and according to the said Book of Common Prayer, and openly and publicly declared his unfeigned assent and consent to the use of all things therein contained ; or, ipso facto, have been deprived of his said ecclesiastical benefice and promotion : I have also referred to the 36th canon, relating to the subscription to be made by such as are to be made ministers. This is absolutely necessary to be done [603] by every candidate for holy orders, to subscribe before he can be admitted into the ministry, or obtain possession of a living.

I therefore think Mr. Head has incurred the extreme sentence of this Court, and that the Court would be justified in pronouncing against him a sentence of deprivation. If Mr. Head could not have obtained possession of his living without assenting or consenting to the use of all things contained in the Book of Common Prayer, he cannot complain if, by the sentence of this Court, he is placed in precisely the same situation as if he had not, within two months, conformed to the provisions of the statute, and if he had not done so he would ipso facto have been deprived ; it would not, therefore, as I have before said, be a very harsh exercise of the power of the Court to impose that penalty on Mr. Head, to which he was liable, if he had not made the declaration of conformity, according to the statute. The Court, however, is not disposed to go to the full extent of its power ; not from anything that exists in extenuation of Mr. Head's offence, for nothing can be more offensive than the way in which he has expressed himself in his letter ; but the statute of Elizabeth makes a difference between a first and second offence : by it "any person preaching, declaring, or speaking against the prescribed rites and solemnities is liable, for the first offence,

to forfeit for one year the profits of all his ecclesiastical benefices, and also to be imprisoned for six months; for a second offence he is to lose or be deprived ipso facto of all spiritual promotions, and to be imprisoned during life." It seems, therefore, that although it was considered at the time [604] the statute was passed that the offence would not bear much extenuation, still that it was right and proper that the statute should make a distinction between persons guilty of one offence and guilty of the like offence a second time. I think, therefore, that the justice of the case may be satisfied by suspending Mr. Head from his living, and from the emoluments of it for three years. It will be borne in mind that Mr. Head may be proceeded against for a second offence if he shall, during the term of his suspension, publish the like doctrines.

I am, therefore, of opinion to pronounce the articles given in to be fully proved, and to decree that Mr. Head, for the offence he has committed, be suspended from his office and ministration for the term of three years; and that he be condemned in the costs of the suit; with an admonition to him to abstain from such conduct in future.

I think the Court would have been quite justified in going to the fullest extent of punishment, looking to the language in which Mr. Head has expressed his opinions in his letter.

Trinity Term, Third Session, June 15th.—The Judge pronounced the articles and exhibits thereto annexed, given in and admitted in this cause on the part and behalf of Ralph Sanders against the Rev. Henry Erskine Head, clerk, the party proceeded against in this cause, to be sufficiently proved, and that the said Rev. Henry Erskine Head had offended against the laws, statutes, constitutions, and canons ecclesiastical of this realm, and that he be suspended for the space of three years from the time of publishing the suspension for that purpose, in the parish of Feniton aforesaid, from all discharge [605] and function of his clerical offices, and the execution thereof, that is to say, from preaching the word of God and administering the sacraments and celebrating all other duties and offices in the said parish church, and elsewhere within the province of Canterbury, and from receiving any of the profits and benefits of the said rectory and benefice, and from receiving and taking the rents, fruits, tithes, profits, salaries, and other ecclesiastical dues, profits, and emoluments whatsoever, belonging and appertaining to the said rectory and benefice; and did suspend the said Rev. Henry Erskine Head accordingly, and did condemn him in the costs of this suit, and the Judge did moreover direct that a copy of this decree duly certified be transmitted to the Consistory Court of Exeter, in order that a sequestration may be there issued, and did direct the suspension to be published in the said parish of Feniton on Sunday the 25th of June.

Mich. Term, Nov. 2nd.—The taxation of costs having been proceeded with the registrar allowed to Mr. Sanders the costs occasioned by the protest (see ante, p. 49), whereupon a notice was served on the proctor for Mr. Sanders, by the proctor of Mr. Head, to the following effect:—"I beg to give you notice that it is my intention to move the Court to direct the minute of Court, dated third session of Trinity Term last, to be altered, so as to explain what costs Mr. Head is to be condemned in."

The Queen's advocate and Harding moved accordingly.

Addams and Robinson appeared for the promoters of the suit.

[606] Per Curiam. When the Court on a former occasion overruled the protest made on behalf of Mr. Head, an application was made to the Court to allow of an appeal, from its decision to the Judicial Committee of the Privy Council. The Court allowed the appeal; it was prosecuted; the Judicial Committee, after some doubt, affirmed the sentence of this Court and remitted the cause. The Court did not, in the first instance, condemn Mr. Head in the costs occasioned on the argument of the protest, and for this reason, until the articles were given in, the Court could not know the exact nature of the charge against Mr. Head; it is true the citation gave a very full specification of what was the nature of the charge, but until articles are admitted the Court cannot adjudicate on a case; it might possibly happen that the charge contained in the citation might fail to be established on the articles, and, therefore, the Court did not proceed at once to condemn Mr. Head in the costs. Now the case has been heard, the Court was of opinion that the articles were fully proved, it decreed Mr. Head to be suspended for three years, and condemned him in the costs, that is, the costs generally of the suit, including those occasioned by the protest. It is said this is a hard measure on Mr. Head, that the appellate Court gave no costs of the

appeal to that Court; but why is Mr. Sanders to pay his own costs, occasioned by Mr. Head appearing under protest. I refuse this motion, but I do not condemn Mr. Head in the costs of the motion.

[607] KEIGWIN v. KEIGWIN. Prerogative Court, July 12th, 1843. — A party shewed a paper to two persons present at the same time, and requested them to sign it; both persons observed the signature of the party affixed to the paper, and both subscribed it in her presence. This paper, being a will, held to have been duly executed. Alterations on the face of a duly executed will held, upon the circumstances, to have been made before execution.

[S. C. 7 Jur. 840. Referred to, *Wright v. Sanderson*, 1884, 9 P. D. 160.]

This was a business of proving, in form of law, the last will and testament of Elizabeth Keigwin, who died on the 9th of April, 1842, leaving a brother, a sister, a nephew, and two nieces.

The will in question was dated the 11th of December, 1839; it was signed by the deceased, and subscribed by two persons as witnesses, but there was no attestation clause: there were certain alterations on the face of the will: by it the brother was appointed sole executor.

The subscribing witnesses having, in accordance with the practice in the registry of this Court where there is no formal attestation clause, been applied to to make affidavit of the due execution of the will: the facts, as stated by them, were of such a nature that probate could not be granted in common form; the paper was accordingly propounded by Mr. Keigwin, the brother and executor, in an allegation, which pleaded, first, that the deceased gave instructions for the drawing up of her will to Mr. F. Hichens, a friend, whom she was in the habit of consulting on her affairs. That pursuant thereto the will in question was drawn up by Mr. Hichens, and was delivered to the deceased a few days prior to the 11th of December, 1839; that the last-mentioned date was inserted in the said will by the desire of the deceased, who stated to [608] Mr. Hichens, as her reason for so desiring, that she should have some carpenters at work in her house on that day, and that they could attest the execution thereof.

Second, pleaded that the deceased, after the will had been so delivered to her, and previous to the execution thereof, spoke to Mr. Hichens respecting the same; and he by her direction made certain alterations therein [these were specified]. That, having made such alterations, Mr. Hichens left the said will with the deceased, telling her to put her name or initials in the margin opposite the alterations.

Third, pleaded that the deceased set and subscribed her name at the foot of the said will on the 11th of December, 1839, and her initials opposite certain of the said alterations.

Fourth, pleaded that on the 11th of December, 1839, on which day the deceased had previously appointed two persons to come to her house to do some carpenter's work, she came into the room in which such two persons were at work, she having a pen and inkstand in her hands, and then and there produced her said will, signed by her, to the two persons, and desired them to attest the same, saying, "I want you to sign your names to this paper;" that at her request such two persons signed their names thereto in her presence, and in the presence of each other. That although the will was so folded as to conceal the contents thereof, the signature of the deceased, apparently fresh made, was plainly visible and was seen by the two witnesses.

Mr. Hichens deposed to the following effect:—"About two years before the death of the deceased [609] she produced to me a copy of a will of a relation of hers, under which she had derived some property, and requested me to prepare a similar will for her; I did so, and delivered the will I had so prepared to her. I recollect that shortly after I had given the will to the deceased she on one occasion spoke to me about it; I cannot call to my recollection whether it was then signed by her or not; I have tried to recollect this, but I cannot; my impression certainly is that the said occasion was prior to the execution of the will, but I really cannot swear that it was so; I did not observe that the will had been then signed; she asked me to make some alterations in it [the witness here identified the alterations on the face of the will as those made by him on that occasion]. I made these alterations in her presence. I believe the deceased put her initials in the margin of the will opposite the alterations."

The two subscribing witnesses deposed to the following effect:—"That they "are

carpenters, and were at work in the house of the deceased on the 11th of December, 1839; that she on that day brought a paper into the room where they both were, having also in her hands a pen and inkstand [they both identified the will propounded as the paper]; that addressing them she said, 'I want you to sign this paper,' and pointed out the place where they were to sign; that the paper was so folded that they only saw the signature; that they have no doubt whatever as to the fact of the signature of the deceased being affixed to the paper at the time when they subscribed it; that they subscribed the paper in the presence of the deceased and of each other; [610] they did not recollect whether the deceased pointed out her signature to them as being her name; but were both positive that she did not say anything in particular about her handwriting."

The cause came on for hearing.

Addams in support of the will.

Robertson contra.

Judgment—*Sir Herbert Jenner Fust*. The deceased in this case gave instructions to a gentleman named Hichens, or perhaps rather requested him, for he is not a professional man, to draw up a will for her, which accordingly he did; and by her special desire he inserted a date as of a day on which, as she stated, she intended to execute it.

Mr. Hichens states the transaction thus generally: that he prepared the will and delivered it to the deceased; that she afterwards produced it to him for a particular purpose, but he cannot recollect whether it was then signed by her or not; he has tried to recollect this, but cannot; his impression is that the occasion on which this happened was prior to the date of the execution of the will; but he cannot swear that it was so. He says the deceased asked him on that occasion to make certain alterations, and he did so in her presence. Now, looking at those alterations, and the places in the will where they are made, and that Mr. Hichens was the person who made them, it seems scarcely possible, if the deceased had in fact signed the will at this time, [611] that her signature could have escaped the observation of this witness. Mr. Hichens further says that he believes the deceased put her initials in the margin of the will opposite the alterations. Now this is the only witness who can speak to the facts on this point; and on his evidence the result, in my opinion, is, that at the time when these alterations were made the will was not signed by the deceased. The two other witnesses, the parties who attested the will, cannot speak as to these alterations. Their evidence is shortly this: they were at work in a room in the deceased's house; she brought this paper into that room, and, addressing them both, said, "I want you to sign this paper," and pointed out the place where they were to sign; they both observed her name signed thereto; they have no doubt whatever that the paper produced to them by the deceased had been signed by her; but they do not recollect that she pointed out the signature to them as being her name; they are sure she did not say anything in particular about her handwriting. The question comes to this, whether this will has been duly executed according to the requisites of the statute; the deceased did produce this paper, having her signature affixed to it at the time, to two witnesses present at the same time; and the two witnesses did attest it in her presence; was this a sufficient acknowledgment? I am clearly of opinion that it was; it is not necessary that the party should say in express terms "that is my signature;" it is sufficient if it clearly appears that the signature was existent on the will when she produced it to the witnesses, and was seen by the witnesses: when they did, at her request, subscribe the [612] will. On these circumstances, I hold that this paper has been sufficiently executed.

Then as to these alterations, I have said, I think, there is sufficient evidence to enable the Court to hold that they were made before the will was executed.

I therefore decree probate of this paper with the alterations; it is, however, a proper case for giving the costs out of the estate.

PETT *against* HAKE. Prerogative Court, July 14th, 1843.—A testamentary paper (dated 1826) signed by a testator, having an attestation clause, but not subscribed by witnesses. The presumption of law against the final character of the paper held to be rebutted, and probate granted upon the evidence and circumstances.

[S. C. 7 Jur. 779.]

William Hake died on the 4th of November, 1842, leaving a brother his only

next of kin. Upon the death of Mr. Hake three testamentary papers were produced.

Paper one. A will dated the 5th of December, 1822, signed by the deceased, and attested by two witnesses; by this paper a Doctor Samuel Pett was appointed sole executor.

Paper two. A codicil, also dated the 5th December, 1822, signed by the deceased, and attested by three witnesses; the purport of this paper was to devise a copyhold estate, at Gaywood, in the county of Norfolk, to Doctor Pett, upon trust, to sell the same, and to apply the proceeds thereof upon the trusts in the said will mentioned.

Paper three. A codicil, dated the 25th of December, 1826, signed by the testator, having an attestation clause but not subscribed by witnesses; this paper was as follows:—

[613] “Whereas, since the date and execution of my last will, Doctor Pett, whom I had therein named as my executor, has departed this life; now I do, by this codicil, appoint Samuel Pett and Francis Pett, sons of the said Doctor Pett, my executors in his stead. I hereby revoke the codicil to my will, bearing date the 22nd of December, 1822, whereby I have devised my copyhold estate to my said executor; and, in lieu thereof, I authorize and direct my executors, hereby named, to sell the same; and to stand possessed of the monies to arise from such sale upon the trusts bequeathed by my said will.”

These three papers were propounded as containing together the will of the deceased, by Mr. Samuel Pett, the surviving executor, appointed by paper number three.

By the affidavit of scripts it appeared that these papers were found enclosed and sealed up in an envelope, which envelope had formerly been in the possession of Mr. Francis Pett, and upon his death had, with other papers, come into the possession of Mr. Samuel Pett, as executor of his brother. A fourth paper was found enclosed in the same envelope; it purported to be a codicil to the will of the testator; it had the initials “W. H.” written in pencil at the foot; there was an attestation clause with the letters “A. B.,” “C. D.,” “E. F.,” written in pencil at the foot of the clause, in three separate lines, as denoting the place where witnesses were to subscribe. The purport of this paper was as follows:—

“Whereas Doctor Pett, the executor appointed by my last will, departed this life on the 1st of January, 1823; and whereas Joseph Eade, whom I by letter requested to act as my executor in lieu of [614] Doctor Pett, deceased, hath also departed this life; now I do appoint Samuel Pett, of Hackney, Middlesex, and Francis Pett, of Hitchen, Hertfordshire, sons of the said Doctor Pett, executors of my will; I give and devise to them all my real and personal estate, upon the trusts I have before directed by my will and codicil, with regard to the property thereby bequeathed and devised. In witness, I have to this codicil set my hand and seal, this , 1830.” [An attestation clause as stated above.]

In the year 1827 the deceased sold his copyhold estate and received the purchase money.

The witnesses examined in the cause, to whose testimony it is considered necessary to advert, were Mr. Joseph Dyson, Mr. Thomas Dyson, and Mr. Robinson.

The Messrs. Dyson deposed to the following effect:—

That the deceased frequently spoke to them of the Pett family as his cousins; that he spoke of Francis Pett as the lawyer; that he also spoke of his cousin, Mr. Eade, as the lawyer. That two years before his death he said “the lawyer has made his will;” about one year and a half before his death he said his will and all his writings were at Samuel Pett’s, the coal merchant. Mr. Joseph Dyson also deposed that the deceased said to him on one occasion, “Mr. Samuel Pett has just been here, and I wish you had been here to see him; if anything happens to me, that’s where my writings are; he is my sole executor. I put him in the place of the other two, the doctor and the lawyer.”

Mr. Robinson deposed to the following effect:—

That he attended the deceased, in the capacity of medical adviser, for about the six or seven last years of his life; that the deceased on one occasion told [615] him “that Doctor Pett had had his will in his possession when he was alive, but that since his death his family had it in their care.” That the deceased also told him “that he had not altered his will, and did not intend to alter it; that it was still in

the possession of the family;" that the deceased frequently told him "that Mr. Samuel Pett was his executor, and if anything happened to him to send to Mr. Alfred Pett;" that the last time the deceased mentioned this circumstance was about a year before his death.

Mr. Thomas H. Hake opposed the admission of paper two to probate; he did not give in any opposing plea.

The cause came on for hearing.

Addams and Blake asked for probate of the will and second codicil (paper three). They submitted that the presumption of law against the second codicil, by reason of there being an attestation clause without witnesses, was sufficiently rebutted by the evidence; that if the Court should be of this opinion, then the first codicil (paper two) was revoked and useless; they offered to take probate of the first codicil also, in case the Court should so direct.

Jenner *contra*. The second codicil is not entitled to probate; it is admitted that there is a legal presumption against its validity requiring to be rebutted. The parol declarations are insufficient to establish this paper; the deceased spoke of a Samuel Pett, not as his executor, but as a sole executor; he must then have referred to Doctor Samuel Pett, who was the sole executor of [616] the will and first codicil. Mr. Samuel Pett never was a sole executor, he has indeed become so by the death of his brother; but all the declarations of the deceased refer to a sole executor. The declarations spoken to by the witnesses, particularly that wherein he speaks of Mr. Samuel Pett as "put in the room of the doctor and the lawyer," are only susceptible of a rational meaning, by supposing that the deceased, subsequently to 1830, made some other testamentary paper, by which Mr. Samuel Pett was named as sole executor; no such paper is forthcoming; then the legal presumption is, that such paper was in the hands of the deceased, and was destroyed by him.

Judgment—*Sir Herbert Jenner Fust*. In this case the deceased is a Mr. William Hake, who died on the 4th of November, 1842, leaving Mr. Thomas Hake, his brother, his only next of kin, and the sole party entitled to his personal estate—in case he has died intestate; or entitled to such portion, if any, of his personal estate as has not passed by his will.

Now it appears that some years ago the deceased gave instructions to a solicitor to prepare a will for him; this was accordingly done, and such will duly executed, in December, 1822, by being signed by the deceased, in the presence of two witnesses.

On the same day, as it seems, the deceased made a codicil, whereby he directed a copyhold estate, situate at a place called Gaywood, in the county of Norfolk, to be sold; this codicil was also signed by the deceased in the presence of, and was attested by, three witnesses.

[617] Subsequently to this a codicil was prepared for the deceased—how or by whom does not appear—but evidently, as the language shews, not with the intention of revoking the trusts declared of the proceeds of the sale of the copyhold estate; but simply for the purpose of bequeathing that estate to Mr. Samuel and Mr. Francis Pett, in order that they might sell the same, and to appoint them executors of the will, in the place of Doctor Pett, their father, who had died. To that codicil the deceased signed his name; there is a full attestation clause, but no witnesses' names are subscribed to it, consequently there is a presumption of law that the deceased did intend to execute that codicil in the presence of witnesses, in order to give effect to it; and in case he should not do so, then it was not to stand; the deceased having signed his name to this paper, the presumption is lessened; still, in law, there is a presumption against the instrument, and this requires to be rebutted by evidence or by circumstances.

The mode in which it is proposed to overcome or repel this presumption is, by shewing that the deceased, after the date of the codicil, deposited it, with other papers, in the hands of Mr. Francis Pett, whom, with his brother, Mr. Samuel Pett, he had, by this very codicil, appointed executors in the room of Doctor Pett, their father, deceased; that this paper remained in Mr. Francis Pett's possession until his death, when it came into the hands of Mr. Samuel Pett, who became his brother's legal representative, and who retained possession of it until the death of the testator, Mr. Hake.

Now it appears that in the same envelope in [618] which was found the will and the two codicils, which I have just mentioned, was contained another codicil, or

intended codicil, which bears date in the year 1830, blanks being left for the month and for the day of the month. This last paper recited the death of Doctor Pett, and of a Mr. Eade, whom, it would seem, the deceased had at some time requested to act as his executor; and it then goes on to appoint the said Samuel Pett and Francis Pett, the sons of Doctor Pett, to be his executors, and gives and devises to them all the deceased's real and personal estate, upon the same trusts as directed by his will with regard to the property thereby bequeathed and devised. This last paper is found in the same envelope with the others; and having originally been in the possession of a person named as one of the executors, the probability is that some communication passed between the deceased and this person respecting it; but as to this point there is no evidence. It would seem that the deceased did intend to make a codicil of this description; and the similarity of this and the other codicil of 1826 throws some doubt as to which of the two codicils the declarations of the testator, spoken to by the witnesses, refer. The copyhold estate at Gaywood was sold in 1827, shortly after the date of the second codicil, and the testator received the purchase money for it. The two witnesses to the will were a Mr. Eade, a solicitor, and Mr. Cross, a clerk in Mr. Eade's office; these two persons are dead. The first codicil is attested by these two persons, and by a Mr. Pownall. The second codicil is signed by the testator; there is an attestation clause, but no witnesses; it simply appoints [619] new executors, with directions to sell the copyhold estate.

The declarations of the deceased, which are to repel the legal presumption against this instrument, are spoken to by the witnesses, Joseph Dyson, Thomas Dyson, and Mr. Robinson. I will take the circumstances stated by the latter first, as they seem to me the most important. He says, after stating that he attended the deceased, as his medical adviser, for the six or seven last years of his life, that the deceased told him "that Doctor Pett had his will in his possession when he was alive, but since his death his family had it in their care."

I will here remark that no other testamentary papers of the deceased, besides those I have mentioned, have been found.

That the deceased also told him "that he had not altered his will; that he did not intend to alter it; and that it was still in the possession of the family. That the deceased several times told him "that Mr. Samuel Pett was his executor, and that if anything happened to him, he was to send for Mr. Alfred Pett;" that the last time of the deceased mentioning these circumstances to the witness was about a year before his death.

The deceased, therefore, did allude to a will in existence at that time, and a will by which Mr. Samuel Pett was appointed an executor; that he referred to it as an existing and operative will. Now all the testamentary papers which have been found, and no others are suggested to be in existence, are, the will, the first codicil, the second codicil, and what I will call the draft codicil, dated 1830.

[620] To which of these papers must the deceased be taken to have referred in these declarations?

One of the papers is signed by him; the other is a mere draft signed, if by the deceased, only with pencil initials; I see no reason to doubt as to which paper was referred to. If Mr. Robinson is correct in deposing that the deceased spoke of a will, of which Mr. Samuel Pett was the executor, it could not be the first will, or the first codicil, because in neither of these is Mr. Samuel Pett named as an executor; then the deceased must refer to the second codicil, or to the draft codicil, or to some other paper not found, or not in existence. Now the two Dysons both state that the deceased, about a year and a half before his death, said "that his will and all his writings were at Samuel Pett's;" here, then, is a declaration carried down to a late period in the life of the deceased, in which he speaks of his will and writings in connexion with Mr. Samuel Pett—as being at Mr. Samuel Pett's. Joseph Dyson deposes that the deceased, on one occasion, said to him, "Mr. Samuel Pett has just been here; if anything happens to me, that's where my writings are; he is my sole executor." Now, so far the last sentence of this declaration supports the argument against the second codicil, namely, the argument that the deceased must have referred to his first will and codicil, of which Doctor Samuel Pett was appointed sole executor; but then this follows, "I put him in the place of the other two, the doctor and the lawyer." It has been argued that if these words are to be relied on as effective words, the declaration must refer to some other paper made by the deceased, destroyed or

not forth-[621]-coming, and for this reason: Mr. Samuel Pett is not, by the second codicil, a sole executor, put in the room of two other executors, but a sole executor only in this sense, as become so by the death of Francis Pett; and, consequently, that the declaration must have referred to some paper executed subsequently to the death of Mr. Francis Pett by the deceased.

I think that to accede to this argument would be going beyond all the circumstances of the case.

If, in this case, it were shewn that the deceased had actually executed some other paper, by which Mr. Samuel Pett was appointed a sole executor in the room of his father, and of his brother the lawyer, there would have been some ground for the argument, but the expression relied on is, "I put him in the place of the other two, the doctor and the lawyer;" but the deceased also spoke of Mr. Eade as "the lawyer:" however, he certainly did speak of Mr. Samuel Pett as "his sole executor;" I cannot however think that the witnesses are to be pinned down to the nicest accuracy of expression.

Mr. T. Dyson swears that the deceased, at least so far back as ten years ago, frequently spoke of his will in connexion with the Pett family. The only testamentary papers, of which the Court has any trace, are the will, the first codicil, the second codicil, and the draft codicil of 1830.

Under these circumstances, I cannot but think that the presumption against the legal validity of this paper, arising from its having an attestation clause without any witnesses—it is signed by the deceased, Mr. T. Dyson proves his handwriting—is sufficiently rebutted; I think it is impossible not [622] to come to that conclusion. When the deceased spoke of his will and writings as being in the possession of Mr. Samuel Pett, the coal merchant, I think that he must be taken to have alluded to the paper, the most complete in form, and that would be the second codicil, which was signed by him, although not subscribed by witnesses.

There is a further reason, which seems to me to render this view of the case as the most probable one: the second codicil is dated in December, 1826; in 1827 the copyhold estate was sold; having disposed of his copyhold property, the deceased may have thought that there was no longer any necessity for the codicil being witnessed; the will was executed only in the presence of two witnesses; the first codicil, which disposed of the copyhold estate, was attested by three witnesses; the deceased may not improbably have thought that a codicil disposing of copyhold property would require to be witnessed; but that, having disposed of that estate, witnesses were no longer necessary.

I think the circumstances of this case so strongly shew an adherence to this codicil that they repel the legal presumption, arising from the attestation clause, namely, that the deceased did intend to complete the execution in the presence of witnesses. I think such an intention, if ever contemplated, was sufficiently abandoned, and that the deceased did intend to give effect to this paper, although not signed before witnesses.

I pronounce for the will and second codicil; the first codicil is useless, the second amounts to a complete revocation of it. I give costs out of the estate.

[623] *WRENCH against MURRAY.* Prerogative Court, July 14th, 1843.—An inofficious will, prepared from instructions given to the drawer by the party almost solely benefited, and who was in nowise related to the testator, pronounced valid, on proof of capacity of the testator, and of the will having been read over to him.

[S. C. 7 Jur. 705.]

Sir James P. Murray, Baronet, died on the 22nd of February, 1843, leaving a widow, from whom he lived separate under a deed of arrangement; a mother, and several brothers and sisters, him surviving.

The clear residue of the personal property of the deceased amounted to about 4000l.

A testamentary paper was propounded, as the will of the deceased, by Mr. Edward Wrench, the sole executor, and the residuary legatee named therein; the only other legatee was a Miss Finch, with whom the deceased had lived since his separation from his wife; to this person jewels and other specific legacies, to the value of 500l., were given.

The history of the deceased was shortly as follows:—Early in life the deceased,

under the will of his uncle, Sir John Murray, became entitled to considerable personal property, expectant partly on the decease of his father, partly on the decease of his father and mother, and partly on the decease of a Mrs. Rose. During his father's lifetime the deceased had borrowed money on his expectant interests from the Globe Insurance Office, and also from Mr. Wrench. At the time of his father's death, in May, 1842, the deceased was in straightened and necessitous circumstances, and was living in the island of Guernsey on an annuity purchased of the Globe Office, and on monies supplied to him from time to time by Mr. Wrench. Upon the [624] death of his father the deceased returned to England to settle his affairs, and, for his assistance in this matter, was introduced by Mr. Wrench to a Mr. Newstead, a solicitor, to whom he entrusted the necessary law arrangements. On the 16th of November, 1842, a meeting, by previous arrangement, took place at Messrs. Coutts's, the bankers of the deceased, at which were present the deceased, Mr. Wrench, Mr. Newstead, Mr. Freshfield, the solicitor of the Globe Office, and Mr. Broderip, the family solicitor of the deceased, and solicitor to the trustees of the will of Sir John Murray. Mr. Broderip, at this meeting, paid, on behalf of the trustees, to the deceased 10,862l.; and the deceased paid to Mr. Freshfield 4000l., and to Mr. Wrench 2412l.; and he further paid to Mr. Wrench 1000l., in part consideration of an undertaking by Mr. Wrench to pay to the wife of the deceased an annuity of 150l. during the joint lives of herself and the deceased. The deceased also paid to Mr. Broderip a sum of 1500l., and assigned certain other property, to which he was entitled under his father's will, in order to provide for the future subsistence of his mother. Upon the termination of these several matters of business Mr. Freshfield and Mr. Broderip quitted the room; and after their departure the will propounded was signed by the deceased in the presence of Mr. Wrench, Mr. Newstead and a Mr. Goodban, a clerk of Messrs. Coutts's, who was called in for the purpose of attesting the will; the will was duly subscribed by Mr. Newstead and Mr. Goodban as witnesses.

Mr. Newstead, in his deposition, gave the following account of the preparation and execution of the will. He stated that, on an occasion during which he was transacting business with the deceased, the deceased incidentally mentioned that he shortly should have occasion to trouble him (Mr. Newstead) to make his will for him; but that the deceased did not state what was to be the purport of it. That on the 6th of November he received instructions for such a will at the conclusion of a letter written to him by Mr. Wrench on the subject of Lady Murray's annuity. That wishing for some explanation as to the meaning of the word "cash" referred to in such letter, he asked Mr. Wrench to explain what was meant, and Mr. Wrench gave him the required explanation. That he also inquired whether the deceased intended to give anything to his own family; and was told by Mr. Wrench that he did not intend to do so; that the deceased said "he had never received anything from them, and therefore he should give them nothing." He further stated that on the 12th of November he had an interview with the deceased, in order finally to settle the approaching arrangements for the 16th; that on such occasion he did not mention the subject of the will to the deceased, neither did he read over the draft to him, or inquire whether his intentions remained unaltered; that the deceased did on the 12th desire him to have the will ready by the 16th. In explanation, Mr. Newstead stated that he thought it unnecessary to say anything on the subject of the will, as it was of so plain and simple a nature it could not be misunderstood. On the subject of the execution of the will he deposed that on Mr. Fresh-[626]-field and Mr. Broderip quitting the room on the 16th, the deceased observed that he had now only to go to his (Newstead's) house to sign his will; that he then told the deceased that he had the will in his pocket, and that it could be signed at once; that the deceased having assented, he proceeded to read the will over to him, Mr. Wrench being present; that the deceased appeared to attend to it, and made an observation on the description of the residence of Miss Finch, inquiring whether it was not in "Berkshire," instead of "Buckinghamshire." That Mr. Goodban was then called in as a second witness, and the will duly signed and attested.

Mr. Goodban deposed that, by reference to his signature, he was sure that the will was signed in his presence, and duly attested by himself and Newstead; that he could give no further account of the transaction.

The Queen's advocate and Harding in support of the will.

Addams and R. Phillimore contra contended that the onus of proof cast on a

party, a stranger by blood or connection to the testator, propounding a will, prepared from his instructions, and almost entirely for his exclusive benefit, to the total disherison of the relations of the testator, was not satisfied by the evidence in the cause. *Bullin v. Barry* (1 Curt. 619), *Middleton v. Forbes* (1 Hagg. Ecc. 397).

In reply, *Tuffnell v. Constable* (4 Hagg. Ecc. 477, 485) was cited.

[627] Sir Herbert Jenner Fust. There are some circumstances in this case which are calculated to call for the vigilance and jealousy of the Court; still I do not, upon all the circumstances, feel myself able to say that this is not the will of a capable testator; whether it is the will of a prudent man, or such a will as the deceased ought to have made, is quite another question.

The deceased, Sir J. P. Murray, Baronet, succeeded to his title but a short time before his death; his father died in May, 1842, Sir J. P. Murray in February, 1843. It appears that the deceased had a wife from whom he was separated, but for whom, under the terms of a deed of separation, he had bound himself to provide, by payment of an annuity of 150l. during their joint lives; he had a mother who, it seems, is a lunatic, and several brothers and sisters, who, judging from the testimony in the cause, are in slender circumstances.

The deceased seems to have been a person of very extravagant habits, and to have lived for some time previously to the death of his father on a sum of ready money, and an annuity of 50l. procured, by some rather intricate arrangements, from the Globe Insurance Office. Upon the death of his father the deceased succeeded to an entailed family estate in Scotland, and he also became entitled, under the will of an uncle, to certain reversionary property. Whilst the deceased was living on a narrow income he obtained loans of money from Mr. Wrench, who is described as an optician and mathematical instrument maker, but who appears to be also engaged in other business, such as discounting bills; this is shewn by the evidence of [628] the principal witness, Newstead, who deposes—although he says that he does not consider him to be what is generally called a money-lender—that Wrench was in the habit of discounting bills for persons, and, among others, for Sir J. P. Murray, the deceased.

I will now proceed to consider the will in this case; it is dated the 16th of November, 1842; the purport of it is to give all his plate, linen, china, wine, books, jewellery, money in the house, and all other property that might be in and about his residence at the time of his decease, to a person named Ellen Finch, with whom the deceased was living at the time of his decease. All the rest, residue, and remainder of his estate and effects, of whatever nature or kind soever, and wheresoever, or over which he had a power of disposition, he gives to Mr. Wrench, whom he appoints sole executor.

Here is a will, made in favour of a person with whom the testator was in no way connected by ties of blood, in exclusion of those individuals to whom he was bound by the natural ties of love and affection; they are entirely excluded from all participation in the estate of this deceased. It has been said that the deceased's property is small, that it has been sworn under 6000l., and that there are debts of large amount; and, further, that the jewels and other articles given to E. Finch are valued at 500l. in that calculation: but, independent of all this, it appears that, on the same day on which the will was executed, the deceased executed a deed of assignment, prepared by Newstead, by which he secured to Mr. Wrench the payment of a sum of [629] 2800l. charged on certain reversionary property, as a consideration for his taking upon himself the payment of the annuity of 150l., payable to Lady Murray, during the joint lives of herself and Sir James; for which undertaking Mr. Wrench also received a sum of 1000l. in ready money; and, as I understand it, this 2800l. was secured on reversionary property, in which the deceased had an absolute vested interest, not a mere contingent expectancy.

This, therefore, is a case which, as I have said, calls for the attention and vigilance of the Court; particularly looking to the mode in which the will was prepared and executed. On the same day on which the will was executed a great many transactions of business took place at the banking house of Messrs. Coutts in the Strand; a sum of money was paid to the Globe Insurance Office, through Mr. Freshfield, their solicitor, and an assignment of certain reversionary property, executed by Sir J. P. Murray, to that office; a sum of 1500l. was left in the hands of Mr. Broderip, for the purpose of being invested with other sums, the produce of Sir J. P. Murray's share of his father's property, which was assigned for the like purpose, to form a fund for the

support of Sir J. P. Murray's mother. Now, the fact of Mr. Freshfield and Mr. Broderip being present on this occasion, and transacting business with the deceased, is, I think, a sufficient guarantee for the capacity of the deceased at this time; neither of these gentlemen would have sanctioned or transacted any business with the deceased unless he had been of the most perfect capacity to understand all the details.

[630] I now come to consider the evidence relating to the preparation of this will: it seems that Sir J. P. Murray had, for some time previous to the death of his father, been resident in the island of Guernsey; shortly after his father's death he returned to England, when, for the first time, he was introduced by Mr. Wrench to Newstead in the capacity of a solicitor; from that time a great many pecuniary and legal transactions took place, in which Newstead acted professionally for Sir J. P. Murray, and, as appears from Newstead's deposition, there were a great many personal communications between him and Sir J. P. Murray. Now, it appears that Newstead received instructions for the will in question, in the first instance, from Mr. Wrench, and a letter containing the instructions is annexed to his deposition: and it is proper here to state that Newstead deposes that he had previously heard the deceased declare his intention to make his will when his affairs were settled, so that this letter did not contain the first intimation of the deceased's intention to make a will, though of what purport or description it was to be does not appear. From the general import of this letter it seems that some communications or instructions had been previously made to Newstead by Wrench, either verbally or by letter, for securing the annuity to Lady Murray, for the letter is thus:—"November 6th. Your's duly received; the sum is to be 2800l. cash, not 3000l. Sir James wishes you to prepare his will; the substance is, to bequeath to Miss Finch all his plate, linen, wine, books, jewellery, cash, &c.; and he appoints me his sole executor and residuary legatee to pay his debts, and, should I survive, attend [631] to his funeral." From this letter of instructions this will was prepared; however, before it was prepared Newstead saw Mr. Wrench, and asked for an explanation as to the words "cash, &c." In answer Mr. Wrench said, "Sir James meant money in the house;" Newstead also asked "whether Sir James did intend to leave anything to his family," knowing that he had brothers and sisters. Mr. Wrench told him that he did not, that Sir James had said "he never had received anything from them, and therefore he should not leave them anything." I must say that, under these circumstances, where, with the exception of a small portion of the deceased's property, the whole residue was left to Mr. Wrench, it did behove Mr. Newstead to have been very careful as to the manner in which he prepared a will, for which he had not received instructions from the testator himself; he must have been aware of the circumstances in which the deceased was placed, in regard to his own affairs and to the state of his family; it behoved, I say, Mr. Newstead to be very cautious how he prepared a will from such instructions as these; he ought to have obtained a personal interview from Sir James, and ascertained from himself whether he did mean to leave his property to a total stranger in blood; more especially as Newstead knew of the money transactions which subsisted between Sir James and Mr. Wrench. Now it was originally intended that the settlement of the deceased's affairs should take place on the 12th of November, but the day was changed to the 16th. On the 12th Newstead had an interview with Sir James, and it is rather singular that, on this occasion, he did not enter into [632] some communication with him on the subject of his will; he says "that Sir James, on that day, desired him, Newstead, to have the will ready by the 16th." Newstead at first deposed that he was not certain whether the draft of the will was prepared at the time when he saw Sir James on the 12th, but he afterwards recollects that it was ready. Now it is very true that the will was a plain and a simple will, but still it gave nearly the whole of the property to Mr. Wrench, so that I cannot but think that, on this occasion at least, Newstead should have read over the draft will carefully to Sir J. Murray, and inquired of him whether Wrench had correctly communicated the instructions for its preparation, and whether it was his, Sir James's, intention to give the whole of his property to Wrench, in exclusion of his own family. I think he ought not to have been satisfied with the explanation of Wrench "that Sir James did not intend to provide for his own family; that because he had never received anything from them, therefore he would give them nothing." I must say I think this was incautious conduct on the part of Newstead, even although the deceased was a person of

perfect capacity, and the Court has no doubt that he was of perfect capacity; still I must think there was a want of proper caution on the part of Newstead, although I do not think that he would have lent himself to a fraud. Sir James had previously made allusion to his will, as if Newstead was the person to whom the preparation of it was to be intrusted.

Now, to revert to the meeting which took place on the 16th of November at the banking-house of Messrs. Coutts; the execution of the will was in-[633]-tended to have taken place at Newstead's office, but it took place at Coutts', at the same time which the before-mentioned transactions, viz. the arrangement with the Globe Office, the provision for Sir James's mother out of the residuary estate of Sir James's father, and otherwise the settlement of the claims under the uncle's will; all these were conducted in the presence of Mr. Broderip and Mr. Freshfield, who were present during the whole time. It has been said, with respect to the will, that these last parties had gone away as soon as they had transacted their particular business, and that Mr. Wrench, Newstead, and the deceased were left alone in the room at Coutts'; that during the previous transactions not a word had been said as to executing the will. Sir James (according to Newstead's deposition) said "that he had now to go with Newstead to sign the will, upon which Newstead produced the will, ready for execution, and incautiously, as I must repeat, considering the connexion between Mr. Wrench and the deceased, and the means by which they had become connected, proceeds to read the will over to Sir James, in the presence of Mr. Wrench." It would surely have been much more prudent and proper if he had desired Mr. Wrench to leave the room whilst he read over the will to Sir James, and ascertained from him his real intentions; this was not done; the will was read in the presence of Mr. Wrench, and, Newstead says, carefully and distinctly read, and that it was so simple a will it could not but be understood by a person of capacity. I am not prepared to say Newstead is not deposing fairly and truly when he says that the will was read over [634] carefully and distinctly; I do not see any reason to distrust his evidence. He says, "when he had read it over, he asked Sir James whether it was exactly as he wished it, that he said it was, and it was then executed in the presence of Newstead and Mr. Goodban." I am not prepared to say that a will so prepared is invalid; it is one thing to say that this is a will of which the Court cannot approve, and another thing to say that it cannot support such a will, or give it effect and operation. It is quite impossible to say the deceased was not in a state of mind sufficient for making a will; or that he was not of perfect capacity to understand the contents of a will, particularly after the transactions which had taken place on that day. His observation as to the residence of Miss Finch being in the county of Bucks shews that he paid some attention to the reading over of the will; however, notwithstanding that circumstance, he may have paid but little attention to it; probably it was a matter of perfect indifference to him how his property was disposed of, and he would have executed any paper which had been laid before him; still I think he executed this will with a full opportunity, if he chose, of knowing the contents of it.

Assuming all this to be the case, can the Court say that a person of perfect capacity, who chooses to make such a disposition of his property, is not at liberty to do so? Undoubtedly this is a case not without suspicion; increased by the transaction with regard to securing the annuity to Lady Murray—I allude to the assignment of Sir James's reversionary interest; whether that transaction would stand in the Court of Chancery is another [635] thing, but, as respects the will, it is only a circumstance which goes to increase the suspicion and degree of jealousy with which the Court will view a case such as this; but if the will is good, even if the deed be set aside, the whole property is given to Wrench as residuary legatee.

A great deal has been said as to the principles on which the Court proceeds in cases of this nature; it has been said that the Court must have some proof of knowledge by the testator of the contents of such a will—no doubt it must, and if the proof of that fact is slight, it increases the suspicion against the will; but there must be some ground to enable the Court to say that the suspicion is so heightened that it is impossible for the Court to believe the testimony of the witnesses. There is no fixed technical rule on this subject; if a capable testator, a free and voluntarily acting testator, has a will read over to him, that I take to be sufficient. The authorities referred to are cases in which there were suspicious circumstances, as against particular wills, arising not only from the testimony of witnesses on cross-examination, but from

examination in chief on allegations given in by the parties seeking to invalidate those wills. The real intentions of the deceased, and the ascertainment of them, forms the true rule and guide for the Court in all cases; if there be incapacity in the testator it must be proved; at the same time I do not say that it is absolutely necessary that the incapacity should be proved on a counter allegation or plea; it may be quite sufficient that the transaction will not bear the sifting of a cross-examination.

To return to the present case: So far as the [636] capacity of Sir James Murray is concerned, I see no reason to doubt that he was of sufficient testamentary ability; more particularly do I see no reason to doubt it when I recur to the several matters which occurred on the 16th of November. I see no want of understanding on his part, whatever may be said as to his prudence.

I think there is sufficient on the depositions to establish this will; I am not prepared to say that Newstead is unworthy of credit; although to a certain extent he has identified and mixed himself up with Mr. Wrench.

I am under the necessity of pronouncing for this paper as a valid will; it is proved to have been read over to the deceased, and there is nothing to shew that he was not capable of understanding the contents.

I pronounce this will to be sufficiently established; but I give the costs out of the estate.

UPFILL against MARSHALL. Prerogative Court, July 17th, 1843.—A will (dated February, 1837) disposed of real and personal estate. A codicil (June, 1837) partly revoked the disposition of the personalty. A memorandum (July, 1838) formally republished the will. Held, that parol evidence was admissible to shew quo animo the memorandum was made; and, upon the evidence, that the codicil was not revoked by the republication of the will.

[S. C. 2 Notes of Cases, 400; 7 Jur. 819. Referred to, *Wade v. Nazer*, 1848, 1 Roberts. 632; *Green v. Tribe*, 1878, 9 Ch. D. 238. Applied, *In the Goods of Rawlins*, 1879, 48 L. J. P. 65. Distinguished, *Ffrench v. Hoey*, [1899] 2 Ir. R. 481.]

This was a business of proving, in solemn form of law, the will of J. Smith, and a codicil thereto.

The will in question bore date the 27th of February, 1837; the codicil the 17th of June, 1837. The codicil was written on a distinct and separate piece of paper from the will.

[637] By his will the deceased disposed of his real and personal estate; by his codicil he made an alteration in respect to the disposition by will of a sum of 1000l.

On the 10th of July, 1838, the testator caused the following memorandum to be written at the end of his will:—

“This writing was republished by the said J. Smith, as and for his last will and testament, in the presence of us—(Two witnesses.)”

The testator executed this memorandum by going over the signature to the will with a dry pen.

The suit was instituted by Mrs. Upfill, one of the daughters of the deceased, against Mrs. Marshall, another daughter.

The allegation of Mrs. Upfill pleaded—

1st article. That the deceased duly made and executed his last will and testament, bearing date the 27th of February, 1837.

2nd. That the deceased, on the 17th of June, 1837, duly made and executed a codicil to his said will.

3rd. That subsequent to the making and execution of the will and codicil, but prior to the 10th of July, 1838, the deceased purchased certain freehold premises. That meaning and intending to subject such after-purchased real estate to the trusts and provisions contained in his said will, and for that purpose to republish his will, he did, on the 10th of July, 1838, produce his will and republish the same, to wit, by going over his signature with a dry pen, in the presence of two witnesses, who duly attested and subscribed the same. That such republication of the will of the deceased was solely for the purpose aforesaid, and was wholly [638] irrespective of the said codicil; and that the deceased thereby neither intended to revoke, nor in fact nor in law did revoke, the said codicil.

The two witnesses to the memorandum were examined, and deposed as follows:—The first witness deposed (after stating the circumstances of the execution), “I only

knew what was the object of the republication of the will from what Mr. Smith told me. My impression is, that he told me the object was to pass some estate purchased since the execution of the will. It was under the impression that such was the sole object of the republication, that I attested it. Nothing passed in my presence to lead me to suppose that the intention of the republication was to revoke or affect any codicil to the will. I had reason to believe that prior to the republication the deceased had executed a codicil." The second witness deposed (after stating the circumstances of the execution), "I have no recollection that anything was said by Mr. Smith as to the object of the republication of the will. I presumed it to be necessary on account of some fresh property purchased since the will had been executed, but I do not know that I was aware of the deceased having purchased any property. I had no idea that the republication was done with the intention of revoking any codicil to the will. No allusion was made to any codicil on the occasion."

Addams and Haggard appeared in support of the will and codicil.

The Queen's advocate and R. Phillimore contra. Conceding the general rule to be, that where a [639] testator, who has made a will and codicils, republishes his will, by intendment of law, he also republishes the codicils to that will, we rest our case on the equally well established exception to that rule, namely, that where the will has been wholly or in part revoked by any or either of such codicils, the republication of the will in its turn revokes the codicil and reinstates the will. The codicil, made in June, partly revoked the will of the February previous; then comes the memorandum of July, 1838, which republished or reinstated the will and revoked the codicil, in so far as this latter instrument had previously revoked the will.

Parol evidence is inadmissible to explain the intention of the memorandum of July; the intention can only be collected from the language of the memorandum; this is a mere formal or ceremonial writing annexed to a legal instrument, and having a definite and recognised legal effect; this is not even a case where parol evidence might be tendered, on the ground that it was a question of testamentary intention, and that there was ambiguity in the language. *Thorne v. Rooke* (2 Curt. 799), *Guy v. Sharp* (1 Myl. & K. 589), *Rogers v. Pittis* (1 Add. 37), *Fawcett v. Jones* (3 Phill. 434), *Powys v. Mansfield* (3 Myl. & Cr. 359), *Walpole v. Cholmondeley* (7 Term R. 138), *Matthews v. Warner* (4 Ves. 186), *Mitchell v. Mitchell* (2 Hagg. Ecc. 74), *Castell v. Tagg* (1 Curt. 298), *Draper v. Hitch* (1 Hagg. Ecc. 674).

Reply. The codicil could only be revoked by an instrument shewing an intention to revoke it. [640] Did the testator intend to revoke it? certainly not, if the language of the memorandum is to furnish the proof of intention; but, admitting it to be doubtful whether he did or did not intend to revoke the codicil, then an ambiguity arises on the face of the memorandum itself, and parol evidence is admissible to explain that ambiguity.

Judgment—*Sir Herbert Jenner Fust*. The deceased in this case made a will disposing of real and personal estate on certain trusts; afterwards, by a codicil, he made an alteration in one of the trusts declared by his will.

This codicil is on a distinct and separate piece of paper from that on which the will is written, and it is duly executed and attested.

In the month of July, 1838, the deceased caused a memorandum to be made at the foot of his will, by which he, in formal terms, declared that he republished it as and for his last will and testament. This memorandum the deceased signed by going over the signature to his will with a dry pen; two witnesses attested the ceremony of republication.

It is contended, on the one side, that by this memorandum the deceased republished his will; that he in effect made the will speak as of the day of the date of the memorandum, July, 1838, and thereby revoked so much of the codicil as had previously revoked a certain portion of the will.

On the other hand, it is contended that the codicil is not thereby revoked; and the allegation propounding the will avers that the will was republished, not from any change in the intentions [641] of the testator as regarded the alteration effected in the disposition of his personal estate by the codicil; but that a necessity had arisen for republishing the will, so far only as related to the devise of real estate, by reason of the testator having then recently purchased certain other real estate; and that the intention was to subject this real estate to the same trusts as were contained in the will respecting the real estate, and that such republication had no reference to

the codicil. Now, the fact of the purchase of this real estate, after the date of the will and codicil, is admitted, and it is a circumstance which of itself would seem to introduce an ambiguity on the face of the will; because, but for this circumstance, there seems no necessity for a republication of the will. Previously to the act of the 1 Vict. c. 26, in the instance of a will disposing of real and personal property, it was necessary to republish a will in order to pass after-purchased lands; but republication was not necessary in the case of a will purely of personalty; so that where a necessity for republishing a will existed in one state of things, and not in the other, I think the Court is bound to take it that the republication proceeded from that cause, which alone rendered it necessary. This case has been argued as if it depended on the question of the admissibility of parol evidence to explain an ambiguity in the language of a written instrument; it is not so; for there is no ambiguity in the language of the instrument; the ambiguity or question is, *quo animo*, was the will republished? In the case of *Guy v. Sharpe* (1 Myl. & K. 602) Lord Chancellor Brougham says, "I [642] may here observe generally on the reception of extrinsic evidence, with a view to aid the construction, and give explanation of a written instrument, not to alter or control the sense—a purpose for which it can never be received—that there is a manifest difference between declarations, whether verbal or written, of a testator, and the proof of facts and circumstances by the knowledge of which the Court, when called upon to construe, may be placed in the same situation with the party who made the instrument, and be thereby better able to understand his meaning."

I think that the parol evidence in this case supplies the motive for which this will was republished. It is the meaning and intention of the testator which raises the difficulty or ambiguity. I think the evidence is admissible, both with reference to the law of this Court and of the Court of Chancery.

Decree probate of the will and codicil.

PENNANT against KINGSCOTE. Prerogative Court, July 17th, 1843.—Will pronounced against. Both attesting witnesses deposing against a signature according to the requisites of the 9th section of 1 Vict. c. 26; and there being no circumstances on which the Court could found a presumption that the recollection of the witnesses was infirm on the subject.

[S. C. 2 Notes of Cases, 405, n.; 7 Jur. 754.]

This was a business of proving the last will and testament of Mrs. Louisa Pennant, deceased. The paper propounded was signed by the deceased, and subscribed by two witnesses.

The attesting witnesses were examined; the first, the Rev. F. Forde, deposed that the paper was [643] signed by the deceased after it had been subscribed by himself and his fellow witness.

The second witness deposed that the deceased did not sign the paper in his presence. (The substance of the evidence is fully stated in the judgment.)

The Queen's advocate in support of the will.

Phillimore contra.

Cases cited, *Ilott v. Genge* (3 Curt. 160), *Blake v. Knight* (ante, p. 547), *Cooper v. Bockett*.(a)

Judgment—*Sir Herbert Jenner Fust.* The deceased in this case, Mrs. Pennant, died on the 16th of March, 1843, being then of the age of sixty-seven years; she has left a grand-daughter who is her sole next of kin.

The deceased is alleged to have made a will in October, 1841; indeed this is the paper propounded in this cause; it is all in the handwriting of the deceased; it is signed by her, and professes to be duly attested.

Now the evidence relating to the execution of this paper is as follows. The Rev. F. Forde, one of the attesting witnesses, deposes:—

"I was on a visit at Colonel Kingscote's house in the October of 1841, and again in the spring, about May, of the following year. It was during one of these visits that I witnessed Mrs. Pennant's will. I am not at all positive during which of my [644] visits it was that the will was signed; my impression had been, from the recollection I have of the state of the weather at the time, that it was during the latter visit; but I have reason, from information I have since received, to doubt my correctness in that respect."

(a) See the next case.

Now I read this in order to shew that the Court cannot rely very accurately on the recollection of this witness.

"I had nothing to do with the preparation of the will. On the occasion of its execution Mrs. Kingscote, the deceased's sister, requested me to step upstairs to her morning room; I found the deceased reclining on a sofa; there was a paper lying on the table, which Mrs. Kingscote, who accompanied me into the room, stated to be Mrs. Pennant's will, and which she (Mrs. Kingscote) requested me to sign. Mrs. Pennant, the deceased, who appeared to be very much affected, sat with her handkerchief to her eyes, and did not make any remark about the will; it was Mrs. Kingscote, not Mrs. Pennant, who requested me to sign the will. The will was ready written; I did not notice the handwriting. At Mrs. Kingscote's desire I wrote at the foot of the will the words 'signed, sealed, and delivered in the presence of us.' I thereupon signed my name underneath then. I did this in the presence of the deceased, of Mrs. Kingscote, and of White, Colonel Kingscote's butler; I then gave the pen to White, and he signed his name underneath mine, in the presence of myself and the other parties. The deceased, the instant after White had signed, took the pen and signed her own name to the will; she signed under White's name, and when she had [645] signed she made some remark to the effect that now she had settled all her affairs; upon this I withdrew. I feel a very strong impression, almost tantamount to a certainty, that Mrs. Pennant, the deceased, signed the will in the presence of White as well as myself; I do not, however, like to swear to that fact unequivocally, knowing that White has expressed an impression to the contrary; had he not expressed that doubt I should have had no doubt at all upon the point, and I have still the strongest impression that it was as I have stated; at the same time I would observe that, owing to the state in which the deceased was, the thing was hurried through very quickly, and I did not note the circumstances so accurately as otherwise I should have done. I recollect, when the deceased had signed, Mrs. Kingscote observing that there was no further occasion for White, and my impression is that this was done before he had left the room. Mrs. Kingscote took upon herself the whole direction of the matter."

Now I am informed that Mrs. Kingscote does not remember anything about the transaction which could afford any further light on the subject.

The Queen's advocate. That is so, sir.

That when I am told this, and when I find Mr. Forde so inaccurate as to the time when the transaction took place, I cannot place any great reliance on his memory; indeed he says the whole matter was very hurried, and that he had not time to make any very accurate observation of it.

Now White, the other witness, has no doubt as to the time when the will was signed; he says that it [646] is true that he once stated that it took place in May, 1842, but that he said so because Mr. Forde stated that it was in May, but he has no doubt it was on the 14th of October, 1841, and he is certain of this from referring to some memoranda he made at the time. He says—

"I did not know anything of the preparation of the paper; on the occasion of it being signed the bell up stairs rung and I answered it; when I went into the room there were Mr. Forde and Mrs. Pennant, no one else."

Now Mr. Forde says that Mrs. Kingscote was present, and took upon herself the whole direction of the matter.

"Mr. Forde asked me to sign that paper for Mrs. Pennant; he did not say what the paper was; he wrote some words on the paper, and underneath them he signed his name. When Mr. Forde had signed his name, he gave me the pen and asked me to sign the paper. I wrote my name under his; when I had done so I asked Mr. Forde 'if that would do,' he said 'Yes,' and I left the room. It was Mr. Forde, not Mrs. Pennant, who requested me to sign; it was done in her presence; she was sitting on a chair or a sofa close to the table on which the paper was, but she did not take any part in the business. She sat with her handkerchief to her eyes; she did not sign the paper in my presence, neither did she speak a word while I was in the room. I am positive Mrs. Pennant did not sign her name, or put pen to paper while I was in the room. I am confident the signature 'Louisa Pennant' was not written by Mrs. Pennant, or by any other person in my presence."

[647] The Court has to decide on the evidence of these two attesting witnesses;

the one having a strong impression that the paper was signed in his presence, although signed after he and his co-witness had subscribed; the other having no doubt—being in fact quite certain—that the deceased did not sign at all in his presence. There are no circumstances of which I can give the party propounding the will the benefit, so as to pronounce for a due execution. Mrs. Kingscote does not recollect anything about the transaction, and even if she could have stated that the deceased signed in the presence of both witnesses, the Court would have been left in great difficulty in coming to a decision that the will is duly executed; because in order to do so it would be necessary to hold, according to the construction which the Court has lately put on the Wills Act, that the deceased signed before the witnesses subscribed; this would be directly contrary to the evidence of both witnesses.

There are no circumstances in this case on which the Court can rely to enable it to pronounce for this paper, and I must, therefore, refuse to decree probate of it.

I beg to state that had I felt myself enabled to do so, I would have given the parties the same benefit of any circumstances as I did in the last case.(a)

[648] COOPER against BOCKETT. Prerogative Court, July 17th, 1843.—1 Viet. c. 26, s. 9. A will must be signed by a testator before it is subscribed by witnesses.—Will held, upon the circumstances, to have been signed before the witnesses subscribed, although one witness deposed that the testator signed after he and his fellow witness had subscribed, and the other witness deposed that the part of the will, where the signature of the testator was written, was blank when she subscribed.

[S. C. 3 Notes of Cases, 391; 7 Jur. 681. Reversed, 1846, 4 Moore, P. C. 419; 1 E. R. 419 (with note). See also *Gregory v. Queen's Proctor*, 1846, 4 Notes of Cases, 630; *Simmons v. Rudall*, 1851, 1 Sim. (N. S.) 115; *Greville v. Tylee*, 1851, 7 Moore, P. C. 320; *Gwillim v. Gwillim*, 1859, 3 Sw. & Tr. 200; *In the Goods of Streaker*, 1859, 4 Sw. & Tr. 192.]

This was a business of proving in solemn form of law the will of R. H. S. Cooper, late of Pall Mall, East, deceased, promoted by H. S. Cooper, the brother and only next of kin against D. S. Bockett, one of the executors named in the will.

The deceased died on the 17th of April, 1843. The will propounded was contained on the first side of a sheet of letter paper; it was in the handwriting of the deceased; certain words in the ninth and tenth lines had been altered by other words in large text character being written over them; the twenty-first, twenty-second, and twenty-third lines were obliterated by ink marks.

The conclusion of the will was as follows:—

"I name executors to this my will, Daniel Smith Bockett, of the Law Assurance Society, to whom I will one hundred pounds sterling.

And my brother, Henry Spencer Cooper, above named

made at 9, Pall Mall, East, this seventh January, 1843.

Codicil to my man, W. Cobbett, I will fifty pounds, clear of tax.

Witnesses to the said will.

Signature.

George Crittenden.
Mary Crittenden.

R. H. S. Cooper.

9, Pall Mall, East.
Servants at house.

This will was found in an envelope, subscribed "The will of Robert Henry Spencer Cooper, 9 Pall Mall, East, 7th Jan. 1843."

This will having been propounded, the two subscribing witnesses were examined as to the factum.

The evidence of the witnesses was to the following [649] effect:—That the deceased said to the first witness, "I want you to sign your name to this paper; this is my will." That he desired the witness to fetch his wife (the second witness) up stairs first. That the two witnesses signed the paper by the direction of the

(a) The Court referred to the case of *Cooper v. Bockett*, which immediately follows this case.

deceased. That the deceased then took the pen and wrote, and when he had done, said, looking at the witnesses, "This is my name in your presence." That the first witness did not see all he wrote, but saw him make the large R of his name.

The second witness deposed in effect that she and her husband signed the will in question by the desire of the deceased, and then the deceased wrote something, but what she cannot say, but he said, "This is my will and my name in your presence."

The evidence is fully stated in the judgment.

It was proved in evidence that W. Cobbett, the legatee mentioned at the conclusion of the will, did not enter the deceased's service until the 23rd of March, 1843.

The cause came on for hearing.

Jenner in support of the will. It is not absolutely necessary that the Court should have positive affirmative evidence by the attesting witnesses that a will was signed before they subscribed; the Court will decide on the fact of due execution, by considering the evidence with reference to the probable circumstances in each case. The testator evidently knew that it was necessary for both witnesses to be present at the same time, for he stopped the first witness, when about to sign, and desired him to fetch his wife before doing so. The inference is that he also knew that he must sign [650] the will before the witnesses subscribed. The witnesses are persons unaccustomed to attest legal instruments; indeed the first witness admits that this was the first will he ever signed, and in all probability his wife was similarly circumstanced; the witnesses were flurried and confused, and in no state to observe minutely and correctly what was written on the face of the paper. Neither of the witnesses, according to their statements, observed the alterations and obliterations in the body of the will; it is hardly credible that these could have escaped notice had the witnesses given the most cursory glance at the paper; in all probability their whole attention was engrossed in writing their names.

If the Court cannot place implicit reliance on the recollection of these witnesses, the fair presumption is that the signature of the deceased was written before the witnesses subscribed; if so, the circumstances deposed to amount to a sufficient acknowledgment of the signature; *Ilott v. Genge* (3 Curt. 160); *Blake v. Knight* (ante, 547).

Supposing the Court to give credence to the witnesses, still this will is duly executed. The whole circumstances attending the execution formed one continuous transaction.

Addams contra. If witnesses to a will are ever to be credited in this Court, when deposing against a due execution, credence must be given to the witnesses in this case. Both witnesses are positive that the space on the paper now occupied by the testator's signature [651] was blank at the time they subscribed. The first witness goes further; he saw the testator commence signing his name; he saw the first initial letter of the signature actually made. The witnesses might not observe the alterations and obliterations on the face of the will, and might yet see that the surface of the paper, immediately close to where they signed their names, was blank; it is quite consistent with probability that they did not observe the body of the will, but scarcely credible that they should not observe whether there was a signature almost touching the exact spot where they signed: moreover, it is not yet proved when these alterations were made; the will was certainly altered after the alleged execution; for a legacy to W. Cobbett is added, and this person did not enter the service of the testator until after the time of execution; the argument assumes the fact that the alterations were made previously to the execution. *Blake v. Knight* was a very different case from the present; there was a most precise and formal attestation clause; the testator was a person particularly conversant with the execution of legal instruments; the witnesses were not so positive as to the circumstances attending the execution as the witnesses in this case, and they were giving their evidence three years after the transaction had occurred.

If this will was signed by the testator one instant after the witnesses subscribed, and there was no re-subscription, it is invalid.

Judgment—*Sir Herbert Jenner Fust*. This is certainly a case in which the Court finds [652] itself placed in very considerable difficulty, much increased by no decision having as yet been given in the appeal in *Ilott v. Genge* (3 Curt. 160).

The deceased in this case, Captain R. H. S. Cooper, died on the 17th of April, 1843; and the will propounded is dated on the 7th of January, 1843. This will is all in his own handwriting, and there are certain alterations and obliterations on the face of it;

some of which appear to be legible; it bequeaths certain annuities and legacies to different individuals, and it appoints his brother, Mr. H. S. Cooper, barrister-at-law, and Mr. Daniel Smith Bockett, of the Law Life Assurance Society, executors, and it gives to this latter gentleman a legacy of one hundred pounds. This will is signed by the deceased, and purports to be attested by two witnesses; and at the end of it is a codicil giving a legacy of fifty pounds to his servant; as to this codicil, however, it is clear that it can have no effect, as the servant did not come into the deceased's service until March, and the will being dated in January, it is clear that the codicil was added after the execution of the will, and not being attested, according to the requisites of the law, the codicil is void. Now, as I have said, the paper purports on the face of it to be signed by the deceased, and to be witnessed by George Crittenden and Mary Crittenden, servants, at the house No. 9 Pall Mall, East, where the deceased, a retired captain of the Engineers, lodged.

The question for the Court to determine on the evidence of Crittenden and his wife is whether the will was signed by the deceased in their presence [653] or whether the signature was acknowledged in their presence when they attested the will. On the face of the will there are certain alterations, which alterations are made in such a manner as could hardly have failed to attract the attention of any person who saw the paper lying open on a table, when they were called to attest it.

The witness, George Crittenden, states that, and it is not immaterial in considering his testimony to bear in mind that he states that, at the time of the transaction, he was in a state of confusion: he is asked as to the alterations on the face of the will, and he says with respect to them, "I cannot say whether they were or were not on the will when I signed it;" it is somewhat extraordinary, if they were then there, that he should not have observed them at the time, as they are so very plain and distinct that it is hardly possible they could have escaped the attention of persons called to attest the paper. He says, "I have something on my mind that there was something of the kind too; but I was confused and flurried at the time; for though I was but signing my name to a will, yet I had never done so before, and I did not know but that trouble might come of it; and the captain was a very sharp and severe man, and I was not so much at my ease as to observe exactly what occurred, or what appearance the will had. I do firmly believe, however, that there was some black scratching on the will when I signed it." He states, therefore, that at the time of the transaction he was in some degree of flurry and confusion, and not so much at his ease as to observe exactly what occurred, and, therefore, the testimony of such a witness must be taken with some degree of allowance.

[654] Now the evidence of this witness and his wife—the only evidence which can be taken as positive on the point—goes to establish the fact that the will was signed by the deceased after they had attested it, for both of them state their belief that there was a blank space where the signature now is when they attested the will. The witness, George Crittenden, states, "That he had been out for the deceased with a letter for Mr. Cooper, his brother, and on his return that he went to his room to tell the deceased that he had not found Mr. Cooper at home, and had put the letter into the letter-box." He says, "I found him writing at a table, and when I had delivered my message he desired me to sit down, and when I had been sitting so about five or ten minutes (and he was writing during that time) he said to me that he wished me to put my name to something; his words were, 'I want you to sign your name to this paper;' that was the paper before him, the paper now before the Court. He goes on to state, 'Will you?' I said, 'I don't know what I am going to sign, sir!' He said, 'Oh you need not be afraid, for this is my will.' I then rose up to sign, and he then said, 'You had better fetch your wife up-stairs, first.' And I said, 'Shall I do so, sir?' and he said, 'Yes.' From that I went and fetched her up, and when we went into his room we found him standing at the table which he had been writing at, with a pencil in his hand, and as he was standing he wrote my name and my wife's name in pencil. Before he had been writing with a pen. My wife asked him if he knew how to spell our names; and he said 'Yes,' and repeated it—'Crittenden,' and my wife said, 'That was right.' Then he sat himself down, and [655] called us to the table, and he put the will towards me and said, 'You sign your name there,' pointing to my name which he had written in pencil, and I took the pen and wrote my name over the pencil-mark. Then he said to my wife, 'Now you sign your name on this pencil-mark,' pointing to the one under mine. 'You'll write your

name better than he has done his.' Then my wife signed her name. Then Captain Cooper took the pen from my wife, and wrote, and when he had done he said, looking up to me, 'This is my name, in your presence;' and I understood, then, that he was writing his own name: I did not see all he wrote, but I saw him make the large R of his name, and there was a black seal at the left-hand corner quite; but there was nothing said about that, and after he had wrote his name he said, 'Now you have done some good for yourselves.' I don't know exactly if that was the expression: nothing more passed. He said, 'Mrs. Crittenden, I don't want you any more; you can go;' and my wife went down-stairs. I stopped a few minutes afterwards, when he told me that he did not want anything more with me, and I went away." Then he states "that he was perfectly competent, at the time, and perfectly sensible to the last, almost. He wrote nothing but his name; at least I believe it was his name, in our presence. As soon as he had done, he put down the pen, and wrote no more. Before he signed his name he made a mark round ours. The will, now produced to me by the examiner, is the will which I and my wife signed our names to, as I have deposed, and the large R in Captain Cooper's signature is what I saw him [656] write, after I had signed my name, and my wife had signed hers: the words '9 Pall Mall, East, servants at home,' were not written in my presence; to the best of my belief Captain Cooper wrote nothing in my presence but his name."

The second article is as to the alterations in the will, which, he says, he did not observe.

To the third interrogatory he says, "Captain Cooper did sign his will in my presence; I believe that he did, and he certainly acknowledged it in my presence, for he said, 'That is my name.' He signed, as I have stated, after I and my wife had signed our names to it. The very words he used were, 'This is my name in your presence,' and he looked up to me, as I was standing at his right-hand side at the time. My wife was present at the time, standing behind me; it was after we had signed our names." And he says to the fourth interrogatory, "I do not believe that Captain Cooper's signature was to the will when I and my wife signed it; there was a blank space where his signature now is when I signed my name." And he goes on, in answer to the fifth interrogatory, to say, "When I have been questioned about the matter I have stated, and it is the fact, that Captain Cooper had a pencil in his hand, and wrote my name and my wife's on the place where we afterwards signed our names. I have said that he was writing with a pencil when we went into the room. I have never said, and it is not the fact, that I first signed my name to the will in question at the request of Captain Cooper, and then called up my wife, who also signed. I have never said, and it is not the fact, that Captain Cooper signed his name [657] to the will in question after my wife had signed her name to it; I have never told my wife so; I will swear that I never have."

Now this is the evidence of George Crittenden, and if he is to be taken as having deposed correctly and truly, there is very little doubt that he means to represent that the deceased signed his name after the witnesses had subscribed the will.

The other witness, Mary Crittenden, states "that she was called into the room by the desire of the deceased," and she says, "And so I went, with my husband, to the captain's room; and there the captain was standing at his table with a piece of paper before him, and he took a pencil and said 'that he wanted us to sign our names, and he would pencil them first, where we were to sign,' and so I said 'I would take the liberty of asking him if he knew how to spell our names,' and he spelt it, and spelt it right, and when he had written the names he gave my husband the pen, and told him to write his name over the pencil-mark, and my husband wrote his name as he was told, and when he had written it, the captain gave me the pen and told me to write mine, and said, 'I dare say you will write it better than he has;' but I don't think I did write it better. However, I wrote my name as the captain told me, over where he had pencilled it, and then the captain took the pen, and made a kind of circle round our names, and then he wrote something, but what it was I cannot say, for my husband was standing near him, and in the way; but the captain said, 'This is my will, and my name, in your presence, and you have done some good for yourselves.' These were the words [658] he used, as well as I can recollect, and he said nothing more, except to tell me to go down-stairs, as he did not want anything more with me, and so I went, leaving my husband with him, and this is all I know or recollect about it." She identifies the paper as that which she and her husband signed.

She says, "But whether he wrote the words, '9 Pall Mall, East, servants at house,' after we had signed our names, or what he wrote, I cannot say, for I did not see. It was a blank space all to the right as well as I can recollect; the black seal was at the left hand corner; and I should have known it was a will, even if the captain had not said so, though I had never seen one before, by that seal; I remarked it so at the time."

To the second article she says "she did not notice whether there were, or were not, any of the alterations which are now upon it."

In answer to the third interrogatory she says, "I cannot say whether Captain Cooper signed his will in my presence, or not; I did not see what he wrote, but he said, 'This is my will, in your presence;' and so, I suppose, he had written his name when he said so. I do not recollect the words he used better than I have told them. My husband and I were both present at the time Captain Cooper used those words, and it was after we had signed our names to the will."

To the fourth interrogatory she says, "I cannot say that Captain Cooper's name was signed to the will when I signed it: as well as I can now recollect, it was all blank where I now see Captain Cooper's signature:" and to the sixth interrogatory she answers, "My husband had not signed Captain [659] Cooper's will before I was called into the room to sign it. I will swear that my husband signed it afterwards in my presence. My husband has never told me that Captain Cooper signed the will after I had left the room. It was after I had signed my name, and not before, that Captain Cooper made the mark round about our names."

Now, as far as she is concerned, Mrs. Crittenden states "that she did not know what the deceased wrote; that she saw him write something, but what it was she cannot say; that she did not see the name of Captain Cooper, and that where the name now is was all blank." The husband is more precise, and he says "that the will was signed by the deceased after they had signed their names, and that he saw the deceased make the large R to his name."

The question, then, for the Court to determine, under these circumstances, is whether there has been a due execution of this will. By the 9th section of the Act of Parliament it is absolutely necessary that the deceased shall have signed the will, or have acknowledged his signature in the presence of two witnesses, present at the same time, and that they should have attested it in the presence of the testator, though not of each other. The interpretation which the Court has put upon the section is, that the testator must sign or acknowledge his signature, before the witnesses attest, and that if the witnesses attest before the signature of the deceased is affixed to it, the will is not duly executed within the provisions of the Act. The words of the section are very precise, and I think it would be attended with dangerous consequences if the Court were to hold a will valid which has been signed in the presence [660] of two witnesses who have attested it before the signature of the testator was affixed to the will; for where is the Court to draw the line? Suppose the witnesses attested an hour before the testator signed, or a day, or a week, or any other time; where is the Court to stop, if it gave a latitude of construction to this section of the Act? Suppose it were one month, or six months, or a twelvemonth, after the testator had signed the will; and whether it be at the time of the transaction, or sometime before, makes no difference. The words of the Act are prospective, "such witnesses shall attest, and shall subscribe the will in the presence of the testator." It does not appear to me that the requisites of the Act would be complied with if the Court were to hold that a testator might sign, after the witnesses had subscribed, either at the same time, or two hours or two weeks afterwards. I am, therefore, of opinion that, if it appear, from the evidence of the witnesses, and the *res gestæ* of the case, clear that the will was signed by the testator, after the witnesses attested, it is not a good execution of the will. The question, therefore, is, what is the result of the evidence?

Now, as I have already read, George Crittenden was the first witness who entered the room, and was with the testator alone before the execution took place; he states that he was five minutes in the room whilst the testator was writing, before his wife was sent for, and that he desired that the wife should be fetched; and if the Court is to trust the evidence of George Crittenden, the deceased wrote the names of the witnesses in pencil; he says he marked their names in pencil, saying, [661] "You sign your name there," pointing to the name of the witness which he had written in pencil, and the witness wrote his name over the pencil-mark, and his wife did the same, and the deceased then took up the pen and wrote, and said, "This is my name, in your

presence." Here it seems as if there were an acknowledgment in the presence of two witnesses by the testator of his name being at the time to the will; and the only question is whether this was done before or after the attestation of the witnesses, and all depends upon the recollection of this one witness, as the wife does not remember the circumstances. The husband is more precise, if the Court can attend to his account of what took place, considering the state of mind he was in at the time—"a state of confusion," as he admits; and the Court has been called upon (and very properly) to pause before it trusts implicitly to the evidence of these two witnesses; and looking at the paper itself, I cannot place implicit reliance on the accuracy of these witnesses. What are the facts? The paper is all in the handwriting of the deceased. It concludes, "I name executors to this my will, D. S. Bockett, of the Law Life Assurance Society," and a wide space occurs after "will," as if there had been, and evidently there had been, the entire name, and the seal covered part of the name, and "Daniel Smith" is interlined. After "Society," there is also interlined "60 Lincoln's Inn," and written over another word "to whom," then "I will one hundred pounds sterling, and my brother Henry Spencer Cooper above named," part of this had been covered by affixing the seal. Then at the end, "at 9 Pall [662] Mall, East," with part of the word "made" and "this seventh January, 1843." Then follows in a circle, "witnesses to the said will," and below, "signature," and this seems to be in the same ink as "9 Pall Mall, East, servants at house," and this is preceded by "George Crittenden, Mary Crittenden," and "R. H. S. Cooper" is at the end of the paper.

Now, looking at the paper, I should say that "R. H. S. Cooper" was written at the same time that the latter part of the will was written; it is in the same ink and same writing as "signature" and "witnesses to the will," and would appear as if the deceased had written "witnesses to the will," and afterwards the word "signature," otherwise I do not know what is the meaning of the word "signature," unless it be the signature of the will.

I must say I can place no strong reliance on the impressions of the witnesses—from the confusion in which George Crittenden admits he was when he was required to sign the will; his mind was not sufficiently at ease to observe the transaction. Here is a bare recollection of these two witnesses, contrary to the appearance of the paper, that the signature "R. H. S. Cooper" was added after they had attested the execution; and the Court, if it so holds, must rely entirely on the accuracy of their recollection of the facts. In the case of *Blake v. Knight* (ante, p. 547) the Court pronounced against the recollection of three witnesses, in favour of the validity of the paper, and from the whole circumstances of the case held that the witnesses were [663] mistaken. There the witnesses were examined three or four years after the transaction; here they have been examined within a few months. But in this instance one of the witnesses is not positive, and speaks to her recollection and belief that the name of the deceased was not to the will when she signed it; that "as well as she can now remember," it was all blank where his signature is. Now where the *res gestæ* do not confirm the impressions of the witnesses, the Court must look at the circumstances of the case, as it is always at liberty to do. In *Blake v. Knight* I did not give implicit credence to the witnesses, not from any doubt that they intended to speak the truth, but because they did not recollect the circumstances sufficiently to speak with accuracy. George Crittenden admits that he was in a state of confusion, and though he says he saw the deceased make the large R of his name, and though he does not believe that the name was to the will when he and his wife signed it; he says he was flurried and confused at the time, and not sufficiently at his ease to observe exactly what occurred. I say, therefore, that the Court cannot give implicit credence to this witness, so as to hold that the paper was not executed according to the requisites of the Act, and that the witnesses attested before the execution of the will.

Under the circumstances, I am of opinion that the paper was duly executed by the deceased, and that though the deceased may have written on the paper in the presence of the two witnesses, the witnesses are mistaken as to what the deceased did write, which, as far as the Court can judge, may [664] have been the word "signature" on the left hand of the circle or "9 Pall Mall, East, servants at house," at the right-hand corner of the paper. I am of opinion that the Court is bound to pronounce for the validity of the paper.

With respect to the alterations, I must have some evidence of what they are, and whether the parts obliterated can be made out.

Until I have some information as to the alterations I cannot give my sentence in the cause.

On the 8th of August, on the motion of Jenner, upon the affidavit of Mr. Netherclift, an engraver, explaining what the words in the will originally were, the Court pronounced for the will, with the alterations.

FRERE against PEACOCKE. Prerogative Court, July 21st, 1843.—Quære, how far, in cases of alleged unsoundness of mind, hereditary constitutional insanity may be pleaded.

[S. C. 7 Jur. 998.]

Sir Thomas George Apreece, Baronet, died on the 30th of December, 1842. Certain papers were propounded as containing the last will and testament of the deceased. Probate of these papers was opposed by Mrs. Peacocke, the sister, and sole next of kin of the deceased; the principal ground of the opposition thereto being that the deceased was not, at the time of executing these papers, of sound mind. In the allegation in support of the case on behalf of the next of kin an article pleaded, "That the said Sir Thomas George Apreece, deceased, left him surviving Thomas Apreece and [665] William Apreece, natural sons of the late Charles Shaw Apreece (C. S. Apreece was the paternal uncle of the testator), both of whom were under confinement as lunatics; as was also the late John Apreece (another paternal uncle of the testator), and who died under such confinement."

The admission of this article was opposed by Phillimore and Jenner.

Hereditary or constitutional insanity cannot be adduced as evidence of individual or particular insanity; there is no recorded instance of a plea of this description in the reports of the decisions of this Court, and the point is one of a nature too extraordinary to have escaped observation.

If a plea of this nature be admitted, the Court must be prepared to try issues depending so intimately on questions of fact that they cannot be satisfactorily determined without the intervention of a jury; this Court cannot send a case to be tried in a Court of law, in which Courts this species of evidence has been repudiated. Supposing this article to be admitted, it follows that the executors must be permitted to counterplead it, as by shewing that the insanity was inherited *ex parte maternâ*, and not *ex parte paternâ*; and where, as in this case, it is sought to infer constitutional insanity in the individual instance of illegitimate cousins, by proving that the parties are not in fact the illegitimate offspring of C. S. Apreece, although acknowledged by him as such.

In *M'Adam v. Walker* (1 Dow. P. C. 161), a case before the [666] House of Lords, on appeal from the Court of Session of Scotland, this very point was raised; the following passage occurs in the report:—"It was attempted, on the part of the appellant, to aid his case of constitutional insanity in Mr. M'Adam, by going into evidence of the insanity of some of his relations by the mother's side; but this was resisted by the Court of Session." In the argument of the appeal at the bar of the House of Lords Sir Samuel Romilly observed, on this part of the case (p. 173), "In regard to the attempt to prove an hereditary tendency to insanity, if this were to be allowed, it might be necessary to follow out that proof through a great number of collateral relations, and to try twenty causes instead of one. Mr. Clerk (the opposite counsel), with all his knowledge of Scotch law, has not been able to produce a single authority for such a proceeding. Something of the kind was done, or attempted, in *Kinloch's case*, and not stopped; that was all. In a late case in the Common Pleas the heir-at-law offered to prove hereditary insanity against a testator, but this proof was rejected; so that, in the law of England at least, there is an authority against it." In a late case, *Doe dem. Mather v. Whitefoot* (8 Car. & Pay. 272), it was proposed, with a view to shew that a particular party was not competent to execute a deed, to ask a witness whether a sister of the party was not insane. It was objected that the Court was not trying the question of the sister's sanity. Mr. Baron Gurney held that the question could not be asked. More weight is due to this case than [667] may be commonly claimed for a decision at *nisi prius*, for it appears that in the course of the same trial Mr. Baron Gurney, feeling some doubt on a point raised before him, consulted Mr. Baron Alderson; may it not be fairly inferred that if the learned judge

had felt any doubt on the first point, he would have resorted to the same judicial assistance.

The Queen's advocate, Addams, and Harding contra. This question has received judicial consideration, and has been decided in this Court; the opinions of judges of other Courts may, therefore, be disregarded. In the case of *Tyrell v. Jenner* (2 Hagg. Ecc. 84; Printed Cases, vol. 8, p. 42) the seventh article of an allegation in the cause is thus:—"Seventh (as reformed), that the family of the said deceased was subject to mental insanity; that Sarah, one of the sisters of the said deceased, became deranged several years before her death, and continued so until she died; and that J. T. Jenner, the son of the said deceased, having also become deranged in July, 1804, a commission in the nature of a writ de lunatico inquirendo issued, under the Great Seal of Great Britain, on the petition of the deceased, and that upon the inquisition taken thereon the said J. T. Jenner was found a lunatic." This article stands as reformed, thereby shewing that the consideration of its admissibility underwent discussion and deliberation. The case afterwards went to the Delegates, and this very article must have been subjected to the criticism of common law judges and counsel; if there were any settled rule in Courts of law against the admission of such a plea, it would have been raised in the Court of Delegates.

In *M'Adam v. Walker* the Lords gave no opinion on the admissibility of the plea of constitutional insanity; Lord Eldon said, "This will dispense with the consideration of the other very delicate point, whether the evidence to shew hereditary insanity in the blood ought to have been received in a case of this nature." This shews that Lord Eldon considered that the nature of a case must govern the admissibility of such a plea; his language is inconsistent with a general fixed rule that no such plea could be offered. The question must be admitted to require a more solemn determination than could be afforded on a question occurring at nisi prius.

Judgment—*Sir Herbert Jenner Fust*. The present case involves a question which has very properly been brought under the notice and consideration of the Court.

The substance of the article objected to is, to plead hereditary or constitutional insanity existing in the family of Sir T. G. Apreece, the deceased in this cause, thereby intending, as I presume, to raise, at the hearing of this case, an inference that it is not improbable that the deceased himself should have been insane.

Now, when I first read this article, I was struck with the singularity of it, more especially as, in a [669] late case (*Turner v. Penny*, Prerog., April 21st, 1843) occurring in this Court, in which constitutional insanity was pleaded generally, the Court rejected an article of a somewhat similar nature.

The objection to this particular article has not been supported by reference to any decided case which can be insisted on as a strict precedent; for in the case of *M'Adam v. Walker* the Lord Chancellor, and the other members of the House of Lords, by whom he was assisted, gave no opinion on this point. I do not think that the other case, which occurred in a Common Law Court, can be considered a decision of this point upon principle. A case, however, has been cited, in support of this plea, and one which comes much nearer the question; a case which occurred in this very Court, before my learned predecessor in this chair; and in which he was of opinion that an article of a similar nature ought to be permitted to stand. I say he was of such opinion, because, although there is no report of what occurred on the occasion, the article must have undergone discussion and consideration, for in the printed case, prepared for the hearing of the appeal before the Delegates, the particular article stands "as reformed." That article was admitted under the circumstances of that case; and it has been argued that it conclusively decides that hereditary insanity may be pleaded in this Court. I think that argument is well founded, and that, to a certain extent, the case of *Tyrell v. Jenner* does go to shew that, under certain circumstances, such a plea is admissible; but then comes the question whether the article now before the Court is admissible. It [670] pleads that the two natural sons of Charles Shaw Apreece, an uncle of the deceased, and John Apreece, also an uncle of the deceased, were, or now are, under confinement as lunatics. I must confess I think this plea carries the case far beyond what the decision in *Tyrell v. Jenner* warrants; and I should be very unwilling to extend the principle any further. It is very remarkable that this case is the only one in which such an article can be shewn to have been admitted; however, such an observation is fairly answered by saying that there is no case produced in which such an article has been rejected. Be that

as it may, it does certainly strike me as a very remarkable thing that this is the only case counsel have been able to find on this point.

If the present plea is admitted, there must be an opportunity afforded to counter plead; evidence may be gone into, on the one hand, to shew that there is insanity on the father's side and none on the mother's; on the other, that the insanity is solely inherited from the mother; and the case may branch out into various collateral matters and issues. In *Tyrell v. Jenner* the party whose insanity was pleaded was a sister of the whole blood, immediately and inseparably connected with the testator; here, to put the case at the highest, the parties are only collateral kinsmen. Where is the Court to stop? What is the degree of relationship to which this hereditary malady is to be limited in pleading, if the Court once extends the principle to collateral relations? If, in this case, it had simply been pleaded that a brother of the deceased had been insane, so far the case of *Tyrell v. Jenner* and the present case would have been identical; except in-[671]-deed that the former case extended the principle to the son of the party. Here it is sought to enlarge the principle to the natural children of the uncle of the deceased. I think in this respect the two cases materially differ, and I will not carry the principle established by that one case further than the case itself warrants.

This article must be struck out of the allegation.

MUDWAY *against* CROFT, Committee of R. Wicks, a Lunatic. Prerogative Court, August 8th, 1843.—Criteria by which to test and ascertain whether natural or innate eccentricity has exceeded the bounds of legal testamentary capacity.

[S. C. 2 Notes of Cases, 438; 7 Jur. 979.]

This was a cause touching the disposition of the personal estate of Ann Wicks, late of Cheltenham, in the county of Gloucester, spinster, who died on the 17th of June, 1841, aged seventy-three years, possessed of personal estate of the value of nearly 80,000*l.*, in addition to real estate of the annual value of 1000*l.*, leaving Elizabeth Mudway, widow, her cousin-german, and only next of kin, and the party entitled to the whole of her personal estate, in case the deceased should have died intestate.

A testamentary paper, dated the 10th of December, 1830, was propounded, as the will of the deceased, by Sir A. D. Croft, the committee appointed by the Court of Chancery of R. Wicks, the residuary legatee named therein; its admission to probate was originally opposed by Mrs. Mudway, but she having died during the progress of the suit, her interest was subsequently represented by her executors.

[672] The allegation propounding the will pleaded that the father of the deceased died when she was seven years of age; that her mother was a person of secluded and also of penurious habits, which the deceased acquired by living with her mother; that the mother died in 1805; that the deceased, although eccentric in her manners, and although her education had been neglected, was acute in business, conducted her own affairs; was tenacious of her legal rights; received her own rents; invested her savings; and communicated with her solicitors by letter and otherwise.

That in the year 1826, in consequence of the deceased labouring under a delusion of mind, she was attended by a medical man; but that she recovered from such malady. That in November, 1829, the deceased was, on the same account, again placed under the care of the same medical man, and so remained until February, 1830, when she again recovered. That such delusion was on one subject only. That in April and in June, 1830, two tenants of the deceased paid to her personally certain rents; that in January and July, 1831, the deceased wrote to a tenant on the subject of rent due to her.

That on the 10th of December, 1830, the deceased wrote and signed the will propounded, thereby disposing of her personal estate.

That on the 8th of August, 1833, a will of her real estate, prepared for her by a solicitor, was executed by the deceased, and was duly attested. That at the time when the deceased gave instructions for this will she stated to the solicitor that she had executed a document for the disposal of her personal property.

[673] That on the 17th of December, 1839, the deceased delivered into the custody of such solicitor certain deeds and papers, and among them the will propounded, and the will of her real estate, and desired to have copies thereof made for her.

An allegation in answer, on behalf of the executors of Mrs. Mudway, pleaded—

That the deceased was generally reputed to be crazy. That from 1826 to 1829 the whole conduct of the deceased shewed her to be insane; that she entertained mental delusions on a variety of subjects, conceived herself to be pregnant by an illustrious individual; threw her money on the floors of her house; ordered her plate to be buried; accused, without any cause, persons of robbing her; walked about her house in a wild and hurried manner; was in the habit of muttering to herself, and holding converse with imaginary persons; frequently imagined her house to be full of people, and on one occasion slept at an inn, on the delusive supposition that her house was crowded with strangers. That she would order her table to be laid out for a party when no persons were coming to her; bowed from the window to, and played cards with, imaginary persons. That the deceased was careless in her dress, and otherwise generally indifferent or neglectful of the usages and decencies of society. That on the 21st of December, 1839, a commission, in the nature of a writ de lunatico inquirendo, issued, under which the deceased was found to have been a lunatic from 1st of December, 1839, without lucid intervals. That this verdict or finding was confirmed by the Lord Chancellor.

The evidence in the cause was exceedingly vo-[674]-luminous, and the case was argued during several Court days, by

The Queen's advocate and Jenner in support of the will.

Addams and Deane contra.

Judgment—*Sir Herbert Jenner Fust.* This being a case involving the consideration of the sanity or insanity of the party deceased, and consequent legal validity or invalidity of her will, the Court was bound to examine very carefully and minutely into the whole of the circumstances adduced in evidence on the one side and on the other, in order to satisfy itself whether this is or not the will of a capable testatrix.

Now, it is admitted on all hands that, during three periods of her life, Miss Wicks, the deceased, was decidedly insane in the year 1826, again from November, 1829, until February, 1830, and lastly, from December, 1839, until June, 1841, when she died. Under this state of circumstances it becomes a material inquiry what was the mental state of the deceased between these respective periods, and more particularly between February, 1830, and the 10th of December in the same year, during which interval the will in question was made? Now, the great point in this case depends on the admitted natural eccentricity of the deceased—whether it extended to unsoundness of mind in the legal acceptation of the term. This is a point as to which, in dealing with cases of this nature, the Court aways labours under [675] great difficulty, and the Court has experienced this difficulty in no slight degree in the present case, wherein it is admitted that at three periods of the deceased's life she was decidedly insane, and during one of such periods, prior to the commission of lunacy, was under personal restraint. The question arises, what were the periods, in the lifetime of the deceased, when the bounds of eccentricity were passed—when did insanity commence? again, at what times was the deceased remitted from a state of insanity to the former state of mere natural eccentricity?

Now it has frequently been attempted to furnish some general rules which might serve as guides to Courts of law in the investigation and decision of cases of this description; but all endeavours to do so have failed; every case has some distinguishing features; each case must be governed by its own peculiar circumstances. There is one well-known case on this subject in this Court which occurred in the time of my learned predecessor—I allude to the case of *Dew v. Clarke* (3 Add. 79; S. C. 1 Hagg. Ecc. 312). The most elaborate arguments on this subject were there adduced, and the question most thoroughly considered by the Court; the result was, as I understand it, this, that in all such cases it is absolutely and essentially necessary to look to the peculiar circumstances of each individual case, and to judge from the whole character of the person whose mental capacity is the subject of inquiry what was the state and condition of the mind of that individual; not only with [676] respect to the immediate time at which a will is executed, but at the intermediate stages of his life.

It is impossible, as I have said, for Courts of law to lay down any general rules, but in the investigation of such cases much assistance will often be derived from the observations and recorded experience of medical men who have devoted much time and attention to this malady, and to its attendant symptoms; and I think I cannot, in the present instance, do better than refer to some very sensible remarks which will

be found comprised in a small compass in a Treatise on Medical Jurisprudence, by Dr. Ray (published in the year 1839).

Now, in page 129, section 92, of this work, I find the following observations :—

“Mania then being a disease, and governed by the same pathological laws as other diseases, it will be incumbent to give some account of its symptoms; and, since we consider a well settled conviction of the above views as having an important bearing on the course of legal decisions, no further reason will be necessary for going more fully into this part of the subject than at first blush might seem proper for our purpose. So closely are soundness and unsoundness of mind allied that we are met at the outset by the difficulty of discriminating, in some cases, between mental functions modified by disease, and those that are peculiar, though natural, to the individual. Madness is not indicated so much by any particular extravagance of thought or feeling, as by a well marked change of character, or departure from the ordinary habits of thinking, feeling, [677] and acting, without any adequate external cause. To lay down, therefore, any particular definition of mania, founded on symptoms, and to consider every person mad who may happen to come within the range of its application, would induce the ridiculous consequence of making a large portion of mankind of unsound mind. Some men’s ordinary habits so closely resemble the behaviour of the mad that a stranger would be easily deceived; as in the opposite case, where the confirmed monomaniac, by carefully abstaining from the mention of his hallucinations, has the semblance of a perfectly rational man. Hence, when the sanity of an individual is in question, instead of comparing him with a fancied standard of mental soundness, as is too often the custom, his natural character should be diligently investigated in order to determine whether the apparent indication of madness is not merely the result of the ordinary and healthy constitution of the faculties. In a word he is to be compared with himself, not with others, and if there have been no departure from his ordinary manifestations he is to be judged sane; although it cannot be denied that striking peculiarities of character, such as amount to eccentricity, furnish strong ground of suspicion of predisposition to madness.” [Dr. Ray then refers, in confirmation of these views, to certain published observations of Dr. Gooch and Dr. Combe on this subject.] “In investigating the nature of insanity, the first caution to be observed is not to confound disorders of mental functions with natural qualities, which sometimes strongly resemble them. Many men in the full enjoyment of [678] health are remarkable for peculiarities and idiosyncrasies of thought and feeling, which contrast strongly with the general tone and usages of society; but they are not on that account to be held as insane because the singularity for which they are distinguished is with them a natural quality, and not the product of disease; and from the very unlikeliness of their manifestations to the modes of feeling and acting of other men, such persons are, in common language, said to be eccentric. It is true that, on the principle already explained, of excess in size of some organs over the rest being favourable to the production of insanity, eccentricity involves, all other things being equal, a greater than usual susceptibility to mental derangement; but still it is not mere strangeness of conduct or singularity of mind which constitutes its presence. It is the prolonged departure, without an adequate external cause, from the state of feeling and modes of thinking usual to the individual when in health that is the true feature of disorder in mind; and the degree at which this disorder ought to be held as constituting insanity is a question of another kind, on which we can scarcely hope for unanimity of sentiment and opinion. Let the disorder, however, be ascertained to be morbid in its nature, and the chief point is secured, viz., a firm basis for an accurate diagnosis; because it is impossible that such derangement can occur unless in consequence of, or in connexion with, a morbid condition of the organ of mind; and thus the abstract mental states, which are justly held to indicate lunacy in one, may, in another, speaking relatively to health, be the strongest proofs of per-[679]-fect soundness of mind. A brusque rough manner, which is natural to one person, indicates nothing but mental health in him; but if another individual, who has always been remarkable for a deferential deportment and habitual politeness, lays these qualities aside, and without provocation or other adequate cause assumes the unpolished forwardness of the former, we may justly infer that his mind is either already deranged, or on the point of becoming so. Or if a person who has been noted all his life for prudence, steadiness, regularity, and sobriety, suddenly becomes, without any adequate change in his external situation,

rash, unsettled, and dissipated in his habits, or vice versâ, every one recognises at once these changes, accompanied as they then are by bodily symptoms, as evidences of the presence of disease affecting the mind, through the instrumentality of its organs. It is, therefore, not the abstract act or feeling which constitutes a symptom; it is the departure from the natural and healthy character, temper, and habits that gives it this meaning; and in judging of a man's sanity it is consequently as essential to know what his habitual manifestations were, as what his present symptoms are."

According to this learned writer, these are tests which may be well applied in the investigation and determination of a question whether eccentricity has so exceeded its bounds as to verge into unsoundness of mind; and the result seems to be that the same acts which would constitute insanity in one eccentric individual might not do so in another; for the reason that the minds and habits of the two persons might be differently constituted.

[680] The Court then proceeded to consider the evidence in the cause, and finally arrived at the conclusion that the will should be admitted to probate. The costs of all parties to come out of the estate.

BUTT against FELLOWES. Arches Court, August 8th, 1843.—Objection to a church-rate.—1st. That a sole churchwarden was not duly elected.—2nd. That, by reason of such undue election, a notice signed by the churchwarden, calling the vestry for making the rate, was an invalid notice.—3rd. That a church-rate was excessive. Objections overruled. A church-rate is not excessive if made for defraying the expenses of and for the current year, although such expenses may have been incurred before making the rate.—Semble. Notice of a vestry meeting for making a church-rate may be given by a private parishioner.

This was a cause of subtraction of church-rate, promoted in this Court, by virtue of letters of request by Mr. Butt, as churchwarden of the parish of Sandiacre, in the county of Derby and diocese of Lichfield, against Mr. Fellowes, an inhabitant and parishioner.

The libel pleaded article one. That in the year 1839 the parish church of Sandiacre was in need of repairs; that on the 28th of June, in that year, the then sole churchwarden and the parishioners met in vestry, pursuant to a due and legal notice, being a special notice of the purposes for which the vestry was summoned; that a rate of fivepence in the pound having been moved and seconded, an adjournment was moved and seconded, and a show of hands appearing to be in favour of the amendment, a poll was demanded and taken on the 5th of July, when fifty-two votes being given in [681] favour of the rate, and no vote against it, a rate of fivepence in the pound was carried unanimously.

Article two. Exhibited a copy of the notice which specified minutely the repairs for which the rate was required, and it alleged that the notice had been duly given, pursuant to the act of 1 Vict. c. 45.

Article three. That at the time of making the rate Mr. Fellowes was an inhabitant of the parish, occupying lands of the yearly value of 63l., and was rightly and equally assessed to the rate in respect thereof.

Article four. Pleaded the entry in the rate-book.

Article five. That Mr. Fellowes had frequently been requested to pay this rate, and had refused.

Article six. That Mr. Fellowes had been summoned before two of the justices of the peace for the county of Derby, in respect of this rate; that he, on being so summoned, objected to the validity of the rate; that the justices were, by reason thereof, unable to adjudicate on the rate, and the question of its validity was adjourned to this Court.

Article seven. That Mr. Fellowes was and is subject to the jurisdiction of this Court.

Article eight. That Mr. Butt at the time of making the rate was sole churchwarden of the parish of Sandiacre.

This libel having been admitted, an allegation in answer was given in, on behalf of Mr. Fellowes, pleading—

Article one. That a Mr. Richard Salt acted as sole churchwarden of this parish during the year 1838, up to the month of July in that year. That in the said month of July a meeting of the parishioners was, in fact, held at a public-house in [682] the

said parish (but not pursuant to any legal notice), on the subject of the affairs of the parish. That, differences having arisen, the meeting prolonged its sitting from about six or seven o'clock in the evening until about two in the following morning. That, in the course thereof, the said Richard Salt threw the parish books on a table, and said "he would be churchwarden no longer; that William Butt (the party promoting the suit) might take the books and be churchwarden in his stead." That William Butt from such time assumed to be, or acted as, sole churchwarden of the parish, and ordered repairs and alterations in the church and churchyard.

Article two. That on Sunday, the 24th of March, 1839 (the same not being Easter Sunday), a notice was affixed on the door of Sandiacre Church, as follows:—

"Notice is hereby given that a public meeting will be held at Mr. Young's, on Thursday, the 28th of March, at seven o'clock in the evening, to appoint a guardian and other officers for the ensuing year. (Dated) Sandiacre, March 24th, 1839.

(Signed) "JOSEPH STEVENS, Overseer."

That such meeting was held on the 28th of March, pursuant to such notice, and to such notice only; that the said William Butt was elected (if elected at all) churchwarden of the said parish of Sandiacre for the year 1839. That guardians and churchwardens are not used in the said parish indifferently for one and the same officer, but that the offices are separate and distinct, and that, pursuant to such notice, a guardian was duly elected. That when Mr. Fellowes (party in this cause) was [683] before the magistrates, on the summons for the non-payment of the rate sued for in this cause, the said William Butt, in support of such summons, stated, upon oath, that he had been regularly appointed churchwarden at a vestry meeting held on the 28th of March, 1839; and also produced to the magistrates either the original, or a copy, of the notice pursuant whereto the vestry meeting was held.

Article three. That the pretended vestry meeting, for making the rate sued for, was not held pursuant to any due or legal notice, such notice having been signed or subscribed by the said William Butt only.

Article four. That the pretended rate was, in fact, made in order to defray expenses of which the greater part had then been already incurred (although not by the parish), many of which had in fact been incurred previous to Easter, 1839, as, amongst others, for repairs to a road leading to the church doors, and to the church wall; which were all completed before Easter, 1839. That, at the pretended vestry for the making thereof, the said W. Butt stated that he wanted 40l. to pay for alterations previously made, and 23l. to complete such alterations; and he refused to produce any bills for the work done, or to furnish any estimate for the proposed works.

Article five. That at the pretended poll, upon or in respect of the pretended rate, the said W. Butt provided a quantity of beef and ale, and openly and publicly declared that they were for those who voted for the rate, and that, rather than be beat, he would stand or furnish, at his own ex-[684]-pense, a cask of gin; and that on any poor parishioner polling for the rate, the said W. Butt, in most or many instances, gave him a ticket entitling the bearer to partake of the beef and ale. (a)

This allegation having been admitted, an allegation in reply was given in, which pleaded article one (in contradiction to the first article of the last allegation). That the meeting of the parishioners of Sandiacre, in the month of July, 1838, was a vestry meeting duly convened by the overseer sending round a person to the houses of the principal parishioners and rate-payers of the said parish, on the morning of the day on which the said meeting took place, and leaving a verbal notice "that a vestry would be held at the Red Lion public-house that evening, for the purpose of auditing and passing the churchwarden's account, and electing a new churchwarden." That such had been the mode of summoning all vestries in the said parish from time immemorial. That at such meeting Richard Salt did not throw any books on the table, nor express nor conduct himself in the way alleged; that he had served the office of churchwarden for four successive years; that he wished to resign, and did resign. That his accounts were duly audited and passed. That a parishioner proposed, and Richard Salt seconded, the nomination of Mr. Butt as churchwarden for the ensuing year. That no other person was proposed for the office, and Mr. Butt was thereupon unanimously

(a) The admission of this article was opposed, on the ground that, if proved, it could not invalidate the rate. The Court admitted it, as having a bearing on the costs of the suit at the hearing.

and duly elected churchwarden, and [685] on the following day, accompanied by Mr. Salt, went to the visitation at Derby, and was duly admitted sole churchwarden for the said parish.

Article two (in contradiction to the third article of the last allegation). That at the vestry meeting, held at the Red Lion public-house on the 28th of March, 1839, it was duly proposed and seconded that Mr. Butt should continue in the office of churchwarden for such year; that the motion was carried unanimously, no other person being proposed, and that, in the month of July, Mr. Butt was again duly admitted and sworn into the office of churchwarden.

Article three (in contradiction to the fourth article of the last allegation). That the said rate, made on the 5th of July, 1839, was made solely for purposes specified and set forth in the notice for making such rate, and for no other purpose whatsoever; and that the whole of the repairs and alterations specified in the notice had been ordered and directed to be done, and that William Butt, as churchwarden of the parish, had been monished and directed to do and make the same, by the Rev. Mr. Hey, rural dean of the deanery in which the parish of Sandiacre is situate, after a personal survey or inspection of the church and churchyard.

Article four. That although Mr. Butt had, previously to asking for the rate, caused various repairs to be made which were necessary for protecting the churchyard from desecration, and had also improved the approach thereto, yet that he wholly defrayed the expenses of all such repairs from his own pocket, and no part of the expenses hath ever been defrayed [686] out of the proceeds of any church-rate made in or upon the parish.

Article five (in contradiction to the fourth article of the last allegation). That Mr. Butt stated at the vestry meeting at which the rate was made that he should require the rate for the purpose of the repairs and alteration specified in the notice, and which repairs and alterations he then stated to have been ordered by the rural dean to be done; and also for the usual incidental expenses of the church. That Mr. Butt never did refuse to produce his bills against the parish, but he did state that he had no bills against the parish, meaning thereby that he made no demand on the church-rate for any expense previously incurred. That no estimate was demanded by any person at such vestry in relation to the rate then proposed to be made.

Article six (in contradiction to the fifth article of the last allegation). That the parish of Sandiacre is of considerable extent, and many of the parishioners had come from a distance of between two and three miles to attend the vestry, and Mr. Butt did, at his own cost, provide bread and meat and some ale at a public-house, but not with reference to particular persons, or with the view of influencing them in their votes. That many persons who partook of such refreshment were persons of wealth and consequence in the parish; that others were persons who neither resided in the parish, nor voted, nor were entitled to vote, on the question of the rate; that the total amount of the cost of such refreshment was one pound fifteen shillings.

[687] Publication having passed, the cause was argued by

Haggard and Harding for the churchwarden.

Addams for Mr. Fellowes.

Judgment—*Sir Herbert Jenner Fust*. This is a suit for subtraction of church-rate, promoted by Mr. William Butt, one of the churchwardens of the parish of Sandiacre, in the county of Derby, diocese of Lichfield, against Mr. Fellowes, a parishioner and rate-payer of that parish.

The sum in dispute between the parties is 1l. 6s. 3½d.; the rate sued on was made on the 5th of July, 1839. The proceedings in this cause commenced in the month of March, 1841, the party defendant having been summoned before two justices of the peace on the 22d of May, 1840.

[The Court then stated the proceedings in the cause.]

By the libel, which is proved by the witnesses examined upon it, it appears that a vestry meeting was held in this parish of Sandiacre, on the 29th of June, 1839, pursuant to a notice, which is annexed to this libel; that a rate was proposed; that every article of the repairs purposed to be done to this church was specifically set forth in the notice; that an amendment was proposed; the vestry adjourned, for the purpose of a poll being taken; and the rate afterwards carried by a majority of votes, taken at a poll on the 10th of July following—[688] indeed carried without any dissentient vote having been recorded against the rate.

Now the notice of holding the vestry is as follows:—

"Notice is hereby given that a vestry meeting will be held in the parish church of Sandiacre, on Friday, the 28th day of June next, at eleven o'clock in the forenoon, for the purpose of granting a church-rate, at fivepence in the pound, for defraying the necessary expenses of the church, and extending the churchyard wall round to Mr. Stanley's garden-hedge, for spouting the south side of the church, and for taking away the soil from the north and south sides, to prevent it being so damp, and also for two casements, one to be put in the south, and the other in the north windows, to ventilate the same. (Signed) William Butt, churchwarden, June 22d, 1839."

Now it is proved—indeed it never was denied—that this was the notice for holding the vestry meeting at which this rate was made; but yet this Court has been required to go into the whole of the evidence on this point, because it involves all the circumstances under which Mr. Butt became the churchwarden of this parish; the result of the evidence, as to Mr. Butt's election, is, that Mr. Fellowes, the party opposing the rate, has confused two of the meetings in this parish; he has mistaken what took place at a vestry in an early part of the year 1838 for what took place when Mr. Butt was first elected churchwarden at the meeting at the Red Lion public-house, in the month of July, 1838; Mr. Salt has completely disproved the first article of the allegation of Mr. Fellowes.

It has been admitted in argument that a great [689] portion of this case depends on what took place at that meeting in July, for from that time Mr. Butt began to act as churchwarden; and I think, also, it was admitted that Mr. Salt does disprove the account of what took place at such meeting, as stated in the first article of Mr. Fellowes's allegation; Mr. Salt deposes, "That he was sole churchwarden of this parish up to July, 1838; that in that month he gave up the office, and Mr. Butt took it for the remainder of the year; that he gave it up at a meeting, held at a public-house in the parish; that he had previously determined to give up the office, and called the meeting, in order to give it up, and pass his accounts: he says:

"I put up a notice on the church-door, calling the meeting, but not, as I best recollect, stating in the notice what the object of the meeting was. There were no differences at the meeting; according to my recollection, it is not the fact that at this meeting I threw the parish books on the table, and said, 'I would be churchwarden no longer, but that Mr. Butt, if he pleased, might take the books, and be churchwarden in my stead;' nothing of the sort took place at the meeting in question; there had been a stormy meeting in the parish, in the January before, which was kept up to a very late hour in the morning, and at which differences took place between Mr. Butt and some of the parishioners; and that meeting, I suppose, has been confounded with the meeting in July, when I gave up my office. That meeting—the one in July—was quite peaceable; it did not, I think, last later than from seven to about ten o'clock, as I best recollect. Previous to it, Mr. Butt and I had talked the matter over as to my giving up the office of churchwarden, and he had partly agreed to take it, and, at the meeting, I declared my intention of giving it up, and then it was arranged that Mr. Butt should take it; it was all done as peaceable as possible at the meeting. I did not give up the books at the meeting; I took them back home with me, and gave them up to Mr. Butt, some time after. On the day after the meeting I went over with Mr. Butt to Derby, and he was initiated as churchwarden of Sandiacre. Directly Mr. Butt became churchwarden, he commenced laying out money in repairing the church, altering the churchyard, and such like."

Now this witness is produced to prove the first article of the allegation of Mr. Fellowes; he is the party's own witness; it is quite clear that this first article of the allegation is not true; the meeting was called by a notice, which Mr. Salt himself put up on the church-door—a notice that a vestry would be held; and a meeting was accordingly held, when Mr. Salt gave up his office, on a condition or arrangement that Mr. Butt should be churchwarden for the year ensuing; that Mr. Butt was elected or admitted, without any opposition to his election, into the office of churchwarden, for the remaining part of the year 1838 and part of 1839. This meeting was regularly called, by affixing a notice on the church-door. It appears by the whole of the evidence in the cause, and by examining the books of the churchwarden's accounts, and appointment of new churchwardens, that parties once elected continue in office by tacit consent, if not actually re-elected, until they choose [691] to retire or are dismissed. [The Court read certain entries from one of the parish

books, produced in the cause, in order to shew the practice prevailing as to electing churchwardens.]

A meeting in July, 1838, is called by Mr. Salt; he wished to resign, and he resigns the office of churchwarden; his accounts are audited; and Mr. Butt was appointed churchwarden, and was on a subsequent day presented to the archdeacon, at the visitation, and sworn in to the office. Here, then, is *prima facie* evidence of Mr. Butt being churchwarden, and the first act he does is to improve the church and churchyard; he altered the road leading to the church; he put up some gates; repaired an old door, and removed it to the porch of the church, where there had been previously only a gate, and this gate in so bad a state that cattle were enabled to get into the porch of the church.

I think the appointment of Mr. Butt to be churchwarden was quite sufficient to justify him in executing such duties. Without resorting to cases or authorities, he was churchwarden *de facto*; it is for the other party to make out his case; he must shew, to the satisfaction of the Court, that Mr. Butt was not duly appointed; Mr. Butt clearly was acting as churchwarden *de facto*; there was quite sufficient an appointment to enable him to discharge such duties as these.

Thus matters remained in this parish until March, 1839, when a public meeting of the parishioners took place, at which it was proposed that Mr. Butt should be churchwarden for the ensuing year; this was seconded, and agreed to unanimously; this appears on the minutes entered in the parish book, [692] which was brought before the Court, on the motion of the proctor for Mr. Fellowes.

Now it has been said that Mr. Butt was not legally appointed to this office, inasmuch as the notice to call this meeting was signed, not by Mr. Butt as churchwarden, or by Mr. Salt as churchwarden, but by Joseph Stevens as overseer. [The Court read the notice, ante, p. 682.] It is admitted that the vestry meeting was called, and met in pursuance of this notice, and that at such vestry Mr. Butt was elected churchwarden, but it has been contended that this is not a notice for the election of a person for the office of churchwarden in this parish; that the word is guardian, and that guardian is not synonymous with churchwarden; admitting that to be so, this notice is to elect a guardian and other officers; and it has been proved that at this meeting, thus called, not only was a guardian of the poor appointed, but also overseers of the poor, a constable, and a surveyor of highways. At this meeting Mr. Butt was elected into or continued in the office of churchwarden; for, as I have before remarked, it appears, by the book produced, that having once acted in the office, he could only be dismissed from it by resignation, or election of another person; at all events, it seems he would remain three years in office.

I am of opinion that this was a legal notice; it might have been more regular if it had been to elect "a guardian, a churchwarden, and other officers;" but I must look to what has been the custom in this parish, which is, that when a party has acted in the office he is to continue, unless he resigns, or the parish elect somebody else. Now the [693] evidence of Mr. Stevens shews that the course of electing officers has been as I have stated; upon the first article of Mr. Butt's allegation he says:

"I was an inhabitant of the parish of Sandiacre from 1831 down to 1841; I was one of the overseers of the parish during the year ending Lady-day 1832, and again during two years ending Lady-day 1838 and 1839. I heard, at the time, of the parish meeting held at Sandiacre in the month of July, 1838, at the Red Lion public-house, at which meeting Mr. Butt was first appointed churchwarden, but I was not present at that meeting. I did not convene the meeting myself; I believe that the same was convened by Mr. Salt, the then churchwarden, in the mode in which meetings of the kind were usually summoned, during my knowledge of Sandiacre. Such meetings, which were considered vestry meetings, were usually so summoned and convened, during such time, by the churchwarden, after he had been in office twelve months, or longer, sending a person round to the principal rate-payers, and to the persons who were in the habit of attending the parish meetings there, to say that the meeting would be held at a certain time and place, which was frequently in the evening of the same day on which the notice was given, and usually at the Red Lion inn; and to intimate that the churchwarden would then give up his accounts, and that the rate-payers and parishioners must attend and appoint a fresh churchwarden; such notice was merely a verbal one. I believe that Mr. Salt had at that time served the office of churchwarden for several years."

Upon the second article, "I was present at the vestry meeting held on the 28th of March, 1839; it [694] was, on that occasion, proposed by Mr. John Sheets, the elder, a resident parishioner and rate-payer in the parish, that Mr. Butt should continue in the office of churchwarden for the then existing year; such motion was then carried unanimously, without one dissentient voice that I heard; I was present throughout the whole of the meeting. I am certain that no other person was proposed as churchwarden for the ensuing year at such vestry meeting: had any other person been proposed I should have heard of it. Overseers of the poor, a guardian of the poor, and a surveyor of the highways were also appointed at the said meeting, and the quarterly accounts of the said parish were then examined. I have no doubt that Mr. Butt afterwards went to the visitation at Derby for the purpose of again being duly admitted as churchwarden of Sandiacre, after his re-election to that office."

To the fourth interrogatory. "Upon my oath such had been the mode of summoning all vestries in the said parish from time immemorial, such was the mode of summoning them from long before the time when I was born. Upon my oath it is not the fact that although meetings of the parishioners had in fact been sometimes so called to consult about the highways, the relief of the poor, and other such subjects, yet that such were not meetings at which matters relative to the church were usually transacted. I will swear that churchwardens were elected at meetings of the parishioners so convened. I will swear that church-rates were usually, if not invariably, made at meetings so convened."

To the seventh interrogatory. "I know that the producent was elected churchwarden for the year [695] 1839, at a public meeting of the parishioners of that parish, in fact held at the Red Lion public-house, in the evening of Thursday the 28th of March. That meeting was convened on the previous Sabbath day. Upon my oath it was not duly convened by the overseer sending a person round to the houses of the principal parishioners and rate-payers of the said parish on the morning of the day on which the meeting took place, and leaving a verbal notice that a vestry would be held at the Red Lion public-house, and thereto adding for what purpose it would be held, although such had been the mode of summoning all vestries of the said parish from time immemorial; it was, on the contrary, convened by fixing a notice on the door of the church. I signed the notice as overseer and fixed it up myself."

It was at this meeting, so held, that the continuation of Mr. Butt in the office of churchwarden was proposed and carried unanimously.

Now upon this evidence I am not prepared to say that Mr. Butt was not legally elected churchwarden in 1839; or even in 1838; and if so, and if he continued in office until a new churchwarden was sworn in by the archdeacon, I am of opinion that his election has not been shewn to be illegal; but on the contrary, looking to all the circumstances of the election in this parish in 1838, and that he was duly admitted in 1839, and sworn in, I think this gets rid of the objection to the rate; because the objection is that Mr. Butt was not duly elected; that the notice for making the rate was not duly signed; that the parties went away because they thought Mr. Butt's election was illegal, and therefore the notice given by him was not legal; and the [696] vestry not duly summoned. If the election was not a valid election, and if the notice was signed by Mr. Butt, or by any other individual, would a rate made in vestry be therefore illegal? I am not aware that it is absolutely necessary that a vestry meeting for making a church-rate should be called by the churchwarden; that it may not be called by a parishioner who is not a churchwarden: suppose Mr. Salt had continued in office, and had died, who could in such case have called a vestry meeting? suppose Mr. Salt had been too ill to call a meeting, would a meeting called by another parishioner be illegal? I know of no law which makes it essential that a vestry meeting should be called by a churchwarden.

In the case of *Dave v. Williams* (2 Add. 130. See p. 139) it is certainly said "that vestries for church matters are regularly to be called by the churchwardens, with the consent of the minister." No doubt the churchwardens are the proper persons to call such a meeting, but that case does not establish that, if any other person calls a vestry, it is not a legal meeting. That was a case of a proceeding, by articles, against a parishioner, for reading a notice for a vestry meeting during divine service, without due authority. The criminal charge did indeed contain an averment that the defendant had, on a certain Sunday, during the time of divine service in church, he not being a churchwarden, overseer, or officer of the parish, entered the

porch of the church, and affixed on the doors of the church a written notice to this effect: "Take notice that a vestry will be [697] held in this church on Friday next, at three o'clock, to choose new churchwardens in the place of the present;" this purported to be signed with the names of the churchwardens and overseers. But this was not all—the material part of the charge follows: "That he, the said H. Williams, then entered the said church, accompanied by Adam Morton, an inhabitant of the said parish, and, having taken his seat with the said Adam Morton, in his pew, did, during the time of divine service therein, and immediately after the Rev. Charles Lacy, the minister then officiating in the said church, had concluded reading the Nicene Creed, stand up in the said pew, and, not regarding the sacredness of the place in which he then was, and without any lawful authority whatever, did, irreverently, read aloud a notice, in the words, or to the precise effect, of the said written notice so affixed as aforesaid on the door of the said church—and did, moreover, then and there, irreverently and indecently chide and brawl, in the presence and hearing of the congregation then assembled in the said church—and did thereby, and by so reading aloud the said notice as aforesaid, interrupt the performance of divine service, create a great disturbance in the said church, and give great offence to the congregation assembled therein."

Sir J. Nicholl held that a parishioner had no right, during the time of divine service, and of his own authority, to publish such a notice—or, indeed, any other notice—in the church. I am not aware that in that case the Court held that a vestry meeting called by any other person than a churchwarden would be illegal in itself: I think [698] the inference drawn from that case arises upon a misunderstanding of the law there laid down.

This was a rate carried by vote. Mr. Butt, who called the meeting, was churchwarden de facto and, as I think, de jure.

Another objection to the rate is this: That this rate was made at a time, after certain works had been done by order of Mr. Butt, before he was admitted into office, in 1839, and it has been contended that this rate was intended to cover that expense, and it has been argued, under the authority of *Chesterton v. Farlar* (1 Curt. 364; 2 Moo. P. C. C. 335), to be retrospective and excessive, because made for a larger sum than was wanted for the repairs directed to be done by the rural dean.

Now the Rev. Samuel Hey, the rural dean, has been examined; he states that he visited this church and churchyard on the 18th of June, 1839; he says, "I found them in the most wretched condition, and I saw Mr. Butt, the then churchwarden of Sandiacre, and I recommended and directed him (I have not the authority to order or monish him) to have certain repairs and alterations done and made. The roof was not waterproof, and I found the rain fell through into the interior of the church. [The rural dean specified the defects.] The notice (June 22nd, 1839) now produced to me is a correct and fair specification of what I directed Mr. Butt to have done. I strongly recommended him, as churchwarden, and urged him to have it done."

Here, therefore, the rural dean directed certain repairs to be done; and the notice, calling a [699] vestry for making a rate to defray the expense of the repairs, specified what those repairs were to be, and, therefore, what was done under those circumstances was, I think, properly done. The repairs were done after Mr. Butt had been sworn into office. The objection, however, is, that certain other expenses had then already been incurred for previous repairs; but still even these were repairs for the accommodation of the parishioners, such as appear to me to be absolutely necessary. They clearly come within the range of the duties of a churchwarden; and, therefore, the only question (all these being necessary repairs) is, supposing Mr. Butt had made a rate for such purposes, or for defraying such expenses, whether it would be a retrospective rate? and, if retrospective, whether excessive? Now, if this is to be made an objection, I think the particulars in which the excess consists should be specified. I find, on inspecting the balance of the accounts of Mr. Salt, that he had not collected the whole of a previous rate, and had been unable to collect it. Now, if there was any part of a previous rate uncollected, there might have been—I do not say there would—from that source, from that uncollected rate, sufficient to defray the expenses of the repairs made before Mr. Butt was elected churchwarden, in 1839—I am not now considering the fact that he was previously serving the office de facto. All that was done, as respects the repairs, seems to me to have been properly done, and to be the proper subject of a church-rate; but I am now considering the question as from the

time when Mr. Butt's formal election took place, namely, from March, 1839. I am not [700] quite able to make out from Mr. Salt's balance what was the amount actually collected by him, or what was paid over by him on account of the parish. It may be very true that the balance of evidence may be the other way, but if the statement on behalf of Mr. Fellowes be correct, namely, that Mr. Butt did say that he should require a sum of 40l., to pay for expenses already incurred, and 23l. for making the alterations—taking the balance of the evidence to be so, is it, on this assumption, shewn that the rate is excessive; that it is more than sufficient to defray the expenses ordered by the archdeacon? if not, surely the rate is not invalid, as being a retrospective rate.

If the rate be excessive, the excess should be shewn; the principle on which this depends was decided in *Chesterton v. Farlar*. A church-rate was objected to on the ground that it was an excessive rate; and it was held to be so. There was an appeal from this decision to the Judicial Committee of the Privy Council. The judgment of that Court was delivered by the learned Chief Judge of the Court of Bankruptcy; he says (2 Moo. P. C. 339): "Now, it is here admitted and alleged by the churchwardens that the rate in question was expressly and avowedly made for the purpose of providing, not only for the expenses of the current year—to all of which their Lordships are of opinion it might be legally applied, whether incurred before or after the making of the rate—but also for the liquidation of outstanding demands against the parish, incurred during former years, that is to say, for the repayment to the [701] guardians of the poor of the sum of 265l., borrowed from them in the year 1832, and of a further sum of between 2000l. and 3000l., being the amount of debts incurred by the parish in former years.

Their Lordships are of opinion that this allegation is not only not admissible, as presenting any answer to Mr. Farlar's defence, but that the facts alleged in it afford a complete answer to the whole suit, by establishing the illegality of the rate. It is true the rate is good upon the face of it, and it is also true that such a rate would not be vitiated, although one of its objects might have been to reimburse the churchwardens for expenses incurred by them during the current year.

This was admitted in the case of a poor-rate in *Tawney's case* (2 Salk. 531), and a similar rule has been applied to the case of church-rates. *Rex v. Chapelwardens of Haworth* (12 East, 556), *Rex v. Sillifant* (4 Ad. & Ell. 354), and *Luncheater v. Fricker* (1 Bing. 201).

But the main object of this rate is to repay money borrowed, and to pay debts incurred in former years; and though the defect does not appear upon the face of the rate as it did in the case of *Rex v. Wavell* (Douglas, 116), and *Tawney's case*, yet where a rate upon the face of it purports to be what it really ought to be—a rate for the expenses of the current year, but is made for a sum avowedly larger than is necessary for that purpose, with a view to enable the churchwardens, out of the monies levied, to pay off debts incurred in former years—the rate becomes excessive, and therefore illegal, according to the principle [702] laid down by Sir G. Lee in *Brettell v. Wilmott and King* (2 Lee, 548)."

It must be shewn that a rate is excessive. What is there to shew to me that the sum of 63l. is more than sufficient to defray the expenses of the current year between the months of March and June? If the rate is excessive, the excess must be shewn; it is not the possibility or the probability that the money collected will be misapplied which makes a rate excessive; and there is nothing here to shew what, in the sum demanded, is beyond what is required for the expenses of the current year.

I think the Court is entitled—I think Mr. Butt is entitled—to have it satisfactorily proved that the rate is excessive; and not a mere assertion that it is more than sufficient to meet the expenses of the current year, that is, between March, 1839, and March, 1840.

Under all these circumstances, I think this rate is a valid rate, and that Mr. Butt is entitled to payment of this sum, unless it be shewn to be excessive; if the rate be not excessive in itself, it does not become an illegal rate merely because a churchwarden may intend—a fact not to be presumed—to repay himself out of it expenses incurred in a previous year.

There is, however, a circumstance which I am sorry to see in any case; I allude to the account of the treating; it certainly does appear that many of the poor persons of this parish who voted in favour of the rate were refreshed; I say that this is a

circumstance which the Court is sorry to see ; but it [703] does not necessarily vitiate the rate ; but still the Court cannot see such a practice taking place in a parish without expressing its disapprobation of it.

I think this rate is a valid rate in itself, and that Mr. Fellowes is liable to pay it ; but I am not prepared to say that I shall condemn him in the whole of the costs ; in some part I necessarily must condemn him.

[On being informed that the plaintiff's costs would amount to about three hundred pounds, the Court condemned Mr. Fellowes in the sum of 75l. nomine expensarum.]

THE OFFICE OF THE JUDGE PROMOTED BY TITCHMARSH *against* CHAPMAN. Arches Court, Nov. 11th, 1843.—3 & 4 Vict. c. 86, s. 20, enacts, “That every suit against a clergyman, for any offence against the laws ecclesiastical, shall be commenced within two years from the commission of the offence.”—On the 17th of February, 1840, a clergyman refused to bury a corpse of a parishioner brought for interment ; on the 26th of May, 1841, a second request to him to do so was made, and refused. On the 20th of May, 1843, a citation issued against him from this Court. Protest to appearing, on the ground that the two years limited by the Act had expired, overruled.

[S. C. 2 Notes of Cases, 370 ; 7 Jur. 1020. See further, p. 840, post ; 1844, 1 Roberts. 175.]

On the 20th day of May, 1843, a decree, founded on letters of request from the bishop of Ely, issued from this Court, citing the Reverend William Herbert Chapman, clerk in holy orders, rector of Basingbourne, in the county of Cambridge, to appear, and answer to certain heads, positions, or interrogatories, and more especially for having within the said diocese of Ely offended against the laws ecclesiastical, by refusing a second time, to wit, on the 26th day of May, 1841, being within two years from the date of these presents, to bury the corpse or body of Jane Rumbold, spinster (an [704] infant), a parishioner of the parish of Basingbourne aforesaid, when duly applied to on that behalf, after convenient notice or warning given on both occasions (the first whereof occurred on or about the 17th day of February, 1840), without any just or sufficient cause on either occasion.

The party cited appeared under protest, by reason “that the 20th section of the 3 & 4 Vict. c. 86 provides that every suit or proceeding against any clerk in holy orders, for any offence against the laws ecclesiastical, shall be commenced within two years after the commission of the offence in respect of which the suit or proceeding shall be instituted, and not afterwards.” That by the first refusal, in February, 1840, the said offence, if any, was complete, and that the time limited by the said act for proceeding in such case expired before the service of the said citation.

The matter of protest came on to be argued.

Phillimore in support of the protest. The citation is not sufficiently clear and explicit ; precision is essential to every process of this nature ; on the face of the citation two offences appear, non constat, on which the promoter intends to found ; it may be intended to proceed on both, Digest, lib. 44, Law 3, Gail's Obs. 154.

Harding (same side). All offences against clergymen, for ecclesiastical offences, are now regulated by the 3 & 4 Vict. c. 86, the Church Discipline Act ; and the time within which such proceeding must be commenced is limited, by the 20th section, to two years. The first refusal in [705] this case was in February, 1840 ; the citation is not issued until the 20th of May, 1843 ; upon the first refusal the offence was complete, and the statute began to run ; the offence is of a nature which cannot be legally repeated with reference to the same object. A demand and refusal are evidence of conversion in trover, but if every fresh demand and fresh refusal operated as a new conversion, how could there ever be any limitation in an action of trover ? If the offence be in its nature single, repetitions of it are not fresh offences, *Cripps v. Dearden* (1 Smith's L. C. 384), *Anon.* (3 Dyer, 3236). The principle of construction applicable to this case has been decided in the analogous cases of statutes of limitation at common law. *Godin v. Ferris* (2 H. Blac. 14), *Crook v. M'Tavish* (1 Bing. 167), *Wordsworth v. Harley* (1 B. & Adol. 391), *Lloyd v. Wigney* (6 Bing. 489), *Fraser v. Swansea C. C.* (1 Ad. & Ell. 371), *Saunders v. Saunders* (2 East, 255).

The Queen's advocate and Addams *contra*. The 68th canon creates this offence, which not only by virtue of the canon, but from its own nature, is a continuing offence ; it is a public scandal existing in the parish, the wrongdoer being the minister of that

parish. If the argument on the other side be correct; if a party has committed an offence, and accidentally no proceedings have been taken against him within a limited time, he becomes *immunis* as respects that offence. In [706] a late case, *Sanders v. Head* (ante, p. 565), the Rev. Mr. Head had published a very offensive letter addressed to the bishop of Exeter; now supposing, by mere accident, no proceedings had been taken against him under this Act within two years of the first publication, why, then, if this argument is to prevail, Mr. Head might have published that same letter in infinitum, without being liable to be punished for so doing.

Harding. That would be an act of commission, not of omission.

Sir Herbert Jenner Fust. I have since the last Court day looked into all the cases and authorities, and have considered the arguments addressed to the Court, upon the principles and decisions of those cases; the result I have arrived at is this, that in the present stage of the cause there is not sufficient to stop the proceedings in limine. I am, therefore, prepared to overrule the protest; but I do not think it advisable to enter into a discussion of the principles of the several cases, because, under the peculiar circumstances of this case, I may possibly be forestalling the arguments at the hearing, either for the prosecution, or for the defence. I will, therefore, merely state the grounds on which I think I ought to require an absolute appearance by the party cited.

This is a proceeding against the Rev. W. H. Chapman, clerk in holy orders of the United Church of England and Ireland, rector of the [707] rectory and parish church of Basingbourne, in the county of Cambridge, diocese of Ely, and province of Canterbury; and the charge is for having offended against the ecclesiastical laws, by refusing a second time, to wit, on the 26th of May, 1841, to bury the corpse or body of Jane Rumbold, spinster, a parishioner of the parish of Basingbourne aforesaid, when duly applied to on that behalf, after convenient notice or warning given on both occasions, the first whereof occurred on or about the 17th of February, 1840, and without any just or sufficient cause on either occasion. This is the tenor of the offence which the citation sets forth as the charge against this gentleman.

The question comes before the Court by letters of request, which were presented to and accepted by the Court from the bishop of Ely; and a decree, founded on them, issued, which was returned on the 11th of May in the present year. The second application for the burial of the child was on the 26th of May; the citation, founded on the letters of request, called on Mr. Chapman to answer for having offended against the laws ecclesiastical. (The Court read the citation.) Therefore, the citation recites that two applications have been made to this gentleman to bury the corpse of a child of one of the parishioners of the parish of which he is rector, and it states his refusal to do so on both occasions, alleging both refusals to be without just or sufficient cause.

An appearance was given to this citation under protest; the grounds of the protest being that, according to the true intent and construction of the Act of Parliament, 3 & 4 Vict. c. 86, s. 20, [708] the offence was committed and depending on the refusal to the first application, namely, on the 17th of February, 1840; the words of protest are, "That it appears on the very face of the citation that the actual offence, if any, was committed without the period prescribed by the limitations of the statute, namely, on the 17th of February, 1840, on which day the wrongful act, if any, must be holden to have been done, according to the true intent and legal interpretation of the statute aforesaid;" this is, the statute limiting proceedings for offences of an ecclesiastical nature; it is known as the Act "for Better Enforcing Church Discipline;" by it, all proceedings of this nature must be commenced within two years after the commission of the offence; therefore the ground of protest is that the offence was committed in February, 1840; and the citation was not served until May, 1843. If the construction contended for at the bar be the true construction and interpretation of the statute, this Court has no jurisdiction to inquire into the offence: but the question for the Court to decide is whether a fresh offence was not committed by this gentleman on the 26th of May, 1841, consequently within the period limited by the Act for proceeding against clergymen, for offences against the ecclesiastical laws, in ecclesiastical Courts. There is some degree of difficulty on the first appearance of this citation; it recites the application made on the 17th of February, 1840; and it recites that such application was not attended to, namely, that the rector refused to bury the corpse on that day, without reasonable cause; on the first blush of the

case it might appear that it was intended [709] to proceed against this gentleman for an offence committed in February, 1840, as well as for the offence in May, 1841; this was the doubt and difficulty I felt in the case—not whether an offence was committed in 1841, but whether in truth and fact it was not to be inferred that it was intended to proceed for both offences. On consideration, however, of the language of the citation, I think that such is not the true construction, for, by the citation itself, the offence is “for having refused a second time, to wit, &c., being within two years.” I take this to be the true interpretation of the charge contained in the citation.

Then is this an offence which is capable of being repeated? In that lies the whole strength of the argument in support of the protest. My attention was called, and properly called, by Dr. Phillimore to the language of the citation, as being deficient in clearness, and authorities were stated and instances adduced from the Digest and other civil law authorities to shew that a citation must be clear and specific; no doubt it must; and I think, on a due consideration of this whole instrument, that the charge is sufficiently clear; and that the party is only called on to answer for the offence of having in 1841 refused to bury this child; which is an offence within the time limited by the statute. The question really is, Was this an offence on the 26th of May, 1841? The whole strength of Dr. Harding’s argument turns on this. I am clearly of opinion, as at present advised, to hold that it is so. It would be, in my opinion, wrong, certainly contrary to anything I have heard, to stop these proceedings in limine, at least without having first heard the cir-[710]-cumstances under which the application to bury this child was made a second time. Dr. Harding’s argument was founded on cases at common law, actions of trover, trespass, and on the case; I have looked into all the cases cited, and there seems to me to be this distinction: in all these instances the actions arising out of them were limited by Act of Parliament, and the question turned on this, from what time the particular limitation by statute began to run; there is no necessity to go into the cases; on principle, when once the cause of suit arises, when that is complete the statute runs from that time; the only question has been whether the cause of action was complete at an early period, or at a subsequent time. In the case cited from 2 East, 255 (*Saunders v. Saunders*), which was an action of trover for the seizure of certain goods on board a vessel, and where it was objected that the action should have been brought within three months of the actual seizure, it appeared that the vessel had been detained, and certain persons put on board her by the detaining party, although the actual seizure was not made until some days afterwards; the action was brought, not from the time of putting the men on board, but from the time when the actual seizure was said to have been made; but, inasmuch as there was an exercise of authority in taking the possession of the vessel out of the master’s hands, and putting it in those of others, it was held that the actual seizure was complete from the time when the authority was first exercised over the vessel. So in the case of *Godin v. Ferris* (2 H. Blac. 14), an action of tro-[711]-ver, it was held that the Statute of Limitations runs, not from the time of bringing an action to condemn goods as having been smuggled, but from the time of actual seizure; that being the wrongful act. So in the case of *Wordsworth v. Harley* (1 B. & Adol. 391), where, under a Road Act, a surveyor had taken part of a close into a public road, and had separated it from the remainder of the close, by digging a ditch, and doing a vast variety of other acts, and among others building a wall; in that case the building of the wall was not actually completed within the time limited for bringing an action; but the Court of King’s Bench held that, when once the wall was commenced, the separation of the property was complete, that the actual wrong doing, by building the wall, was, as one of the Judges expressed it, begun when the first course of bricks was laid; that act was a complete separation of the property; that was the wrongful act from which the time within which the action ought to be commenced began to run. There was another case cited by Her Majesty’s present Attorney-General, in arguing that cases where the action was against certain surveyors, for undermining a wall, which consequently fell down; but although the act of weakening the wall had been done more than three months before the suit was commenced, yet as the ultimate injury happened within that period, it was held that the plaintiff might recover. So in trover the action accrues from the time of conversion. So in the cases, such as those cited, of the offence of hearing mass, and offences against the game laws, [712] by which unqualified persons are prohibited from going in pursuit of

game, an offence is as complete by killing one head of game, as by killing any number, and the killing any number will not multiply the offence, or the penalty ; so in another case cited, of a baker offending against an act, by exercising his usual calling on the Lord's day, it was held that there could not be a separate penalty for every loaf he baked ; and the instances there put by Lord Mansfield—that of a tailor sewing on the Lord's-day, every fresh stitch does not constitute a new offence ; nor does a shoemaker incur a penalty on every pair of shoes he supplies to customers. In all these cases, in trover, trespass, and action on the case, it must be recollected that the question respects a claim to property between two individuals ; that when once the property has been converted the wrongful act is complete ; and that the statute runs from the period when the offence is complete. These suits regard private rights between two individuals ; here the offence is a public offence, a public scandal. It must be borne in mind that the Court knows nothing of the ground for the refusal to bury this corpse ; for all the Court can know, the child may have been baptized by a clergyman of the Church of England ; by the rector of this very parish himself ; the refusal is not for the reason that the child was unbaptized, but is a general refusal, as to the cause of which the Court can at present know nothing ; from the different dates the Court may perhaps conjecture that the cause of refusal is of the same description, which occurred in a case which occupied the time and attention of the Court for several Court days ; I allude to the [713] case of *Mastin v. Escott* (2 Curt. 692) ; if this be so, it may be a reason why proceedings were not instituted during the pendency of that suit ; for the same principle would be involved in both cases ; I say this is possible, for it is at present mere conjecture.

It seems to me at present to be too much to say that a clergyman may refuse to bury the corpse of a parishioner, and that, because proceedings are not instituted within a certain time, he is to be at liberty to persist in such refusal. The 68th canon imposes the same punishment for refusing to christen a child as for refusing to bury a corpse. "No minister shall refuse or delay to christen any child according to the form of the Book of Common Prayer, that is brought to the church to him upon Sundays or holydays to be christened ; or to bury any corpse that is brought to the church or churchyard, convenient warning being given him thereof before, in such manner and form as is prescribed in the said Book of Common Prayer ; and if he shall refuse to christen the one, or bury the other (except the party deceased were denounced, excommunicated, majori excommunicatione), he shall be suspended for three months." But can it be said that if a child be brought to be baptized, and the minister refuses on one Sunday, and it is brought a second time, that a second refusal would not be an offence ; I see at present no distinction between the two cases ; but, as before said, I will not forestall any arguments which may hereafter be offered. What is the difference between the two cases ? here is a child, for anything that appears, [714] properly baptized, over whose body the clergyman of the parish is bound to read the Church burial service : and that child, so far as appears on the citation, is unburied ; this is a public scandal ; and the wrong-doer, as appears on the citation, is the minister of the parish, whose duty it is to bury the child, and, until that is done, as it appears to me, the offence continues. Something was said as to the length of time between the first and second application ; that may be matter proper to be hereafter considered, but I do not think, because the corpse was not brought within a definite or specific time, that therefore the minister may refuse to bury it ; I do not know that there is any specific time within which a body is to be brought for interment. I well remember a case, *Gilbert and Buzzard v. Boyer* (2 Hagg. Con. 333), where the dispute was as to the fees payable for the interment of a corpse in an iron coffin ; the party died on the 2d of March, 1819 ; proceedings in this Court were not taken until July, 1820 ; and the sentence of the Judge was not given until May, 1821. Lord Stowell recommended that the body, which had, to use his own expression, "remained so long unhonoured," should be buried, without prejudice, to the right of the parish, as to the fees to be paid.

Therefore I see no reason in this respect why the rites and service of the church should not have been performed at the period of the second application.

Under these circumstances, as at present advised, on this citation and letters of request, the charge against this gentleman being for having refused to [715] bury this child in 1841, therefore, within the period of two years limited by the Act of Parliament ; although there is a recital that the party had, in the first instance, when

applied to bury the corpse, refused, I cannot, in this stage of the proceedings, hold that this is an offence which cannot be committed a second time. The party has apparently not performed a duty incumbent on him. I think the offences may be separated from each other, and that the second refusal may be an offence for which he may be proceeded against; although the first offence may have been committed in February, 1840.

I overrule the protest, assign the party to appear absolutely, and reserve the costs until the final hearing, or other disposal of the cause.

FRANKFORT *against* FRANKFORT. Arches Court, Dec. 11th, 1843.—Practice on appeals. The libel of appeal ought to agree with the inhibition.

[S. C. 2 Notes of Cases, 494.]

On the 11th of July, 1843, the Judge of the Consistory Court of London pronounced his final sentence in a cause of separation, by reason of adultery, then depending before him, promoted by Lady Frankfort against Lord Frankfort, whereby he declared that Lady Frankfort was, by law, entitled to the separation she had prayed, and allotted certain sums to her in respect of alimony pending the suit, and for permanent alimony.

From this sentence Lord Frankfort in due time appealed, and the usual inhibition and citation issued.

The præsertim of appeal, set forth in the inhi-[716]-bition, was as follows:—"And especially from the said Judge having, on or about the 11th day of July last past, read, signed, promulged, and given the sentence porrected by the proctor for Lady Frankfort, whereby he did pronounce and declare that she ought by law to be divorced and separated from bed, board, and mutual cohabitation with Lord Frankfort, her husband. And did allot the sum of 550l. alimony during the dependence of the suit, and the sum of 800l. per annum, as permanent alimony; and from every thing following or arising therefrom. And also from all other grievances, nullities, iniquities, injustices, and errors and proceedings, and other facts or acts which may or shall be collected from the pretended proceedings of the said Judge."

The libel of appeal was as follows:—

Second article. That the said Judge did unduly, on or about the 11th of July, 1843, by his decree, allot the sum of 550l. as or by way of alimony, during the dependence of the said suit, and also the sum of 800l. per annum, as or by way of permanent alimony, and did direct the same to be computed from the 11th of July in the said year, being the date of the sentence given by him in the aforesaid cause in the said Court, contrary to law and justice, and acting in all things nully and unjustly.

Third article. That the proctor for Lord Frankfort had appealed.

Fifth article prayed right and justice, and also that it might be pronounced and decreed that the Judge, from whom this cause is appealed, hath proceeded wrongfully, nully, and unjustly, from [717] his having by his decree, &c. [The præsertim of appeal, as set forth in the second article, here followed.]

The admission of this libel of appeal was opposed by the Queen's advocate and Elphinstone. The libel of appeal differs from the inhibition; the latter impugns the whole sentence, the former only that portion of the entire sentence which allots alimony. The prayer is merely that justice may be done as regards the allotment of alimony; the Court will only look to that part of the process which relates to the prayer made in the libel of appeal, but the whole process may be necessary, in order that the Court may arrive at a correct decision in this respect.

Jenner and Harding *contra*. There is no authority for the proposition that a libel of appeal must coincide with the inhibition. According to the ancient practice, the libel of appeal preceded the inhibition; the Judge of appeal first perused the libel, and then issued an inhibition or not, as seemed meet. The civil law does not require the cause of appeal to be set forth. Part of an appeal may be waived at the hearing. *Greg v. Greg* (2 Add. 276).

Sir Herbert Jenner *Fust*. This question relates to the admissibility of a libel of appeal. Certainly it is not a very usual proceeding to take an objection to the admission [718] of a libel of appeal, but still cases have occurred in which objections have been taken, and in some instances they have been upheld. The Court will therefore consider, on general principles, and on general practice, whether the objection has been rightly taken, or ought at once to be overruled.

This is an appeal from the Consistory Court of London, in a cause of divorce, by reason of adultery, promoted by Lady Frankfort against Lord Frankfort. The Judge of the Consistory Court pronounced sentence, holding the libel to be fully proved, and he signed a sentence of separation from bed and board, by reason of the adultery; at the same time he proceeded to allot 550*l.* per annum for alimony pending the suit, and 800*l.* per annum for permanent alimony. It is certainly a very inconvenient mode of proceeding to postpone allotting alimony pendente lite, until the final hearing of the cause; it seems, however, that the cause was concluded, and that alimony pendente lite was not prayed in the former stages of the suit.

The Queen's advocate. The period between the commencement of the suit, and the final hearing, was very short.

From that sentence an appeal was alleged, and an inhibition taken out, which ties up the hands of the Court below as to every part of the sentence; by the inhibition it would appear that the appeal is from the whole sentence. [The Court read the præsertim of appeal in the inhibition.] In point of fact the whole sentence is appealed from; the allegation of appeal is from the whole sentence, and by [719] the citation Lady Frankfort is cited to appear and answer to Lord Frankfort in an appeal from one entire sentence. The inhibition was granted on this allegation of appeal.

To this inhibition and citation an appearance has been given on behalf of the party cited; and a libel has been given in by the party appellant.

This libel of appeal sets forth a part only of the sentence, and that is such part whereby the Judge allotted certain sums for alimony, pending the suit, and for permanent alimony. The third article alleges, "That the proctor of Lord Frankfort, looking upon, and believing, his party to be injured and aggrieved by all and singular the nullities, iniquities, injustices," that is, by all the injustices and so forth set forth in the second article of the libel; not a single syllable is here said as to this not being the entire sentence; this is not the usual mode of proceeding in an appeal.

The præsertim of the appeal is, "Especially from the said Judge, having on the 11th day of July, 1843, by his decree, allotted the sum of 550*l.*, as or by way of alimony, during the dependence of the said suit, and also the further sum of 800*l.* per annum, as or by way of permanent alimony; and from his having directed the same to be computed from the 11th day of July in the said year." This, then, is what is alleged in the libel of appeal to be the ground of appeal; it follows that the libel and inhibition do not agree; the inhibition is, as to the whole sentence; the libel as to part only; which am I to proceed upon? why inhibit from the whole sentence, and then appeal only as to part?

It has been said there is no authority against [720] such a mode of proceeding; there may be no recorded authority, but it is every-day's practice to proceed in a contrary manner; I never before saw a libel of appeal which did not set forth the whole of a sentence; the sentence must be set forth, otherwise non constat, that there is any sentence; and then the proper course is, to state that the appeal is "from so much of the said sentence, as prays, &c."

The Judge of the Appeal Court must be informed whether the appeal is from the whole, or only from a part, of the sentence; but here I am left in the dark; the Court is to find its way between the assertion in the libel, and in the inhibition. The proper practice is, for the libel and inhibition to agree; and if the inhibition is from the whole sentence, and it is afterwards thought prudent or advisable to abandon a part, it should be so stated in the libel, or it may be done in acts of Court; but it should not be left to inference.

Under these circumstances I am of opinion that this libel of appeal is not admissible in its present form; therefore it must be reformed.

[721] *STONE against STONE.* Consistory Court of London, Dec. 16th, 1843.—The term probatory, assigned on a third plea, opens the term probatory on the previous pleas in the cause. The extension of a term probatory, being in the discretion of the Court, granted on equitable conditions.

[S. C. 3 Notes of Cases, 278; 7 Jur. 1140.]

Addams moved, pursuant to notice, to expunge the depositions of a witness examined in this cause; he stated that it was a suit of divorce brought by a wife against her husband; the wife's libel had been given in, admitted, and witnesses examined; publication thereon was stopped by the assertion of an allegation on the

part of the husband; this plea was admitted, witnesses examined, and publication prayed; whereupon the wife asserted an allegation; this third plea was admitted, and a term probatory assigned.

The proctor for the wife, pending this term probatory, examined a witness on the fourth article of the libel. Addams submitted that the granting a term probatory on the third plea did not open the term on the previous pleas.

Jenner (same side) mentioned a case of *Elwyn v. M^cQueen*, Prerog. 1838.

The Queen's advocate contra.

Dr. Lushington. This being a point of strict practice, perhaps it will be more satisfactory that I should refer to the registrar.

[722] Mr. Registrar. This is a suit brought by Mrs. Stone against Mr. Stone; there have been the following pleas—a libel; an allegation; and a second allegation, upon which latter plea a term probatory has been assigned; now, according to the practice, does this open the term probatory both on the libel and the first responsive allegation?

Mr. Shepherd. I apprehend, sir, that it does.

Dr. Lushington. In this case a motion has been made to this Court calling on the Court to expunge the evidence of a witness of the name of Fraser, who has been examined on the fourth article of the libel, the initiatory plea in this cause; and he has been so examined under the following circumstances:—After the libel and responsive allegation had been given in, another plea was offered on behalf of the wife; the Court directed that plea to be reformed, and the Court had hoped that it had given the necessary directions in sufficiently clear and intelligible terms; some doubt, however, occurred as to the precise meaning and extent of the reformation, and the matter stood over until the first session of this term, when it was brought under my consideration; I directed such reformation to be made as, I had hoped, I had originally ordered. It was understood at the time that the term probatory was extended to this session. It appears that two witnesses have been produced, as to whom it is not necessary to say anything; a third witness has been produced, not on the third plea in the cause, but on the first plea, the libel. I am now moved to expunge his evidence, [723] and the motion is rested on two grounds: first, that on an assignment of a term probatory on a third plea there can properly be no examination of witnesses on the libel; secondly, that the fourth article of the libel is of such a description that no witnesses ought to be examined upon it.

This first argument, I confess, I heard with no small astonishment, that when the Court assigned a term probatory on this third plea, it did not open the term probatory to all the pleas; I have no hesitation in saying that the contrary has been the invariable practice during the whole of the time that I have been cognizant of the practice of this Court. Beyond doubt it is competent to a Judge to say that he will admit a plea upon condition that the party shall only examine witnesses on that plea; that must have been the course in the case cited, and that is not the only instance in which a Judge of this Court has admitted a plea on terms, namely, that the party was to take the examination of witnesses on that plea, and on that plea only. There must have been some misapprehension in the note of that case, if it was supposed that the learned Judge laid it down as the general practice in these Courts that assigning a term probatory on a plea did not open the term to all the previous pleas in the cause.

On that ground, therefore, I cannot reject or expunge this evidence.

On the second ground, I am of opinion that the application is premature; I think this is an application which ought properly to be made when the cause comes on for hearing: if I then find that any witness has been examined on an article of the libel, on which no witness ought to have been examined, [724] that will be the time, and not until then, to object to such evidence; there will then be an opportunity of considering the libel, and the evidence produced on it, and whether the evidence is admissible or not. I decline, therefore, to expunge this evidence; but I leave totally untouched the question whether any witness has been examined on any article as to which he ought not to have been examined.

The Queen's advocate moved to extend the term probatory on the third plea on an affidavit that there were three material witnesses to be examined.

Addams and Jenner opposed.

Dr. Lushington. My opinion is that if I do extend the term probatory, I shall

assuredly accompany it with a condition that neither of these witnesses shall be examined on the libel. The course I shall adopt will be the following:—This is an application for an indulgence to extend a term probatory, and it is in the discretion of the Court to grant it or not; or to extend it under such conditions as may seem meet for the purposes of justice. The application itself is founded on an affidavit of Mrs. Stone, and it states, “That Eliza Price is an important witness; that Mrs. Stone had written to her in due time to be examined; that she received an answer from the party, requiring to be furnished with funds for the purpose; that the deponent immediately transmitted money to the witness.” I think it is consistent with justice that this witness should be examined upon this plea, but I conceive I ought [725] not to extend the term probatory further than as regards the third plea; at all events, not without more satisfactory evidence. An application to extend the term probatory ought never to be made for the purpose only of bringing in witnesses on the former pleas; and if, under such circumstances, the term probatory should be extended, it would lead to this highly inconvenient practice, that a third or fourth plea would be given in, containing matter of no importance whatever in the cause, or which never could be established in evidence, for the mere purpose of examining witnesses on the libel. This would be to open a door to consequences which the Court would be very sorry to see. Therefore, with respect to this witness, I will allow her to be examined, under the condition that her examination is confined to the third plea. With regard to the witness Hawkes, the statement is very unsatisfactory; it is merely “that he is travelling in France,” nobody knows where! and if any letters have been directed to him, it is not said where; and it is not even stated that they may reach him. If the application was founded solely in regard to the witness Stevens, I should most certainly not extend the term probatory at all; it is merely said “that he was resident in India, but is expected prior to the expiration of the term.”

Upon the whole, I think I shall best do justice by extending the term probatory until the first session of next term, limited to the examination of these three witnesses only, if they shall come in in time, and limited to the allegation last given in.

[726] COLLETT *against* COLLETT. Consistory Court of London, Dec. 16th, 1843.—

A citation issued from this Court, addressed to a party then residing and being within the diocese. The party quitted England before service was effected. The citation was personally served on him in parts abroad. Protest to appearing overruled.—A proctor taking out a citation for a party had not a formal proxy from his client at the time it issued. Protest to appearing overruled.

[S. C. 2 Notes of Cases, 504; 7 Jur. 1164.]

On the 22nd of September, 1843, a citation issued from this Court, at the instance of a proctor, acting on behalf of Mrs. Collett, calling on Mr. Collett, who occupied a house within the diocese, which he was inhabiting at the time, to appear and answer in a cause of separation by reason of adultery. Before service of this citation could be effected on Mr. Collett he quitted this country. Service was made on him personally at Malines, in the Netherlands, by shewing the original citation, and leaving with him a true copy.

Mr. Collett appeared under protest, assigning two grounds of protest.

First, that the said service was illegal.

Second, that at the time of the citation issued, the proctor for Mrs. Collett had no formal proxy from his client.

Haggard and Bayford in support of the protest.

Phillimore and Addams *contra*.

[The arguments of counsel are fully stated in the judgment.]

Dr. Lushington. It is necessary, in the first place, to state the facts of the case before coming to a consideration of the legal question.

[727] I consider this case to be of some importance; for there is not, within my recollection, any judgment, at least none in a suit brought by a wife against her husband, upon a question precisely similar to this.

The citation in this case purports to be taken out at the instance of the wife against her husband, and the service of that citation is stated, by the party who served it, in the following words (the citation is dated the 22nd of the month of the present September):—“I certify that on Monday, the 25th day of September last, I proceeded to the house, &c., in the parish of St. George’s, Westminster, for the

purpose of serving this citation on the within-named J. Collett, but I was informed by his agent, who was in the said house, that the said J. Collett was gone abroad. And I further certify that, having ascertained that such information was correct, I proceeded to Ostend, and on the 27th day of the said month met with the said J. Collett at Malines, in the Netherlands; and then and there produced this original citation, under seal, to him, and left with him a true copy hereof." The citation itself is in the ordinary form; the person who served it made inquiries at the house, which he understood to be the residence of the party cited, and which is within the jurisdiction of this Court; he did not leave a copy there; but, following the party out of the jurisdiction, he serves him personally, by producing the original citation, and leaving a true copy.

Mr. Collett has appeared under protest to the citation so served, and the protest consists of two points: the first, that the citation was taken out [728] before a proxy was executed by Mrs. Collett to her proctor; the other point is thus set out in these words of the act on petition:—"That the jurisdiction of the Consistorial and Episcopal Court of London, for and in respect of the said citation, is limited to, and does not extend beyond, the said diocese of London; and that a service of such citation can only be lawfully effected, in virtue of the seal, under which the citation is issued, upon the party therein named to be cited, in and within the jurisdiction of the said Court." Therefore the ground of nullity in this citation is that it was served abroad.

It appears to me to be indispensable to see what jurisdiction the Court had over the original cause. The evidence before the Court, as to the jurisdiction, consists of two affidavits, the one made by Mrs. Collett herself, stating that she resided with Mr. Collett, at, &c., in the diocese of London, up to the 14th day of June, 1836, when the deponent left the said house; and the said John Collett has continued to occupy and reside at the said house up to the month of September in the present year; when, on or about the 25th day of that month, the said John Collett left London for the Netherlands, leaving his servants in charge of the said house, and the deponent believes the said John Collett is shortly expected to return to the said house. It must be observed, there being no contradiction of this affidavit, that the facts appear to be thus: the citation issued on the 22d of September; the party quits on the 25th, two days before the period of the attempted service. The other affidavit is by a Mr. Henderson; he states "that he is the col-[729]-lector of the poor-rates, for the parish of, &c., that Mr. John Collett has, for many years, been assessed to the poor-rates, in respect of the said house, and still continues to be so assessed."

Under these circumstances, presuming Mr. Collett to have unpremeditatedly gone abroad just at the time of the proceedings, has this Court or not jurisdiction to proceed where the party is abroad? Now that the Court may so proceed, is a point not contested; but it is said that the foundation of the question, which the Court has to determine, on which the Court has jurisdiction, depends on fiction. The Court always looks, on a question of jurisdiction, to the statute of Henry 8th (c. 9), which was passed in affirmation of the common law, and by which this Court, among others, had local limits assigned to it. That statute is the document by which this Court must be governed in these proceedings; it was passed for the purpose of preventing abuses which took place, by reason of the process to appear in the Arches and other Ecclesiastical Courts being served on a party far from and out of the dioceses, where the party cited dwelt (these words are of some importance), not where the party might happen to be at the period of issuing the citation, but out of the diocese wherein he dwelt.

No doubt the word dwell means a permanent dwelling: in no other part of the statute are there any words to give a different meaning to the words I have cited, and in the enactment the words are, "That no manner of person shall be cited, or called to appear out of the diocese, wherein he shall be inhabiting at the time of the awarding or going forth of the citation. Undoubtedly the word inha-[730]-bit is here used in precisely the same sense as the word dwell in the prior part of the statute. The term inhabit is one to which many meanings have been attached by the law, and is one which can only be construed by reference to the circumstances of each individual case. This was so decided in a case where great discussion took place as to the meaning of this word (it was before an election committee for the county of

Sussex), all the authorities and all the different meanings of the word were there discussed; so it has been held in many subsequent cases.

Looking to this case with a stricter eye, it is even more clear that Mr. Collett is within the jurisdiction; no doubt he was resident in the house, in, &c., and was actually in the house, at the time of the going forth of the citation, on the 22d day of September.

Such being the words of the statute, what is the construction put upon them in other Courts? there is a case to be found in a book which I now hold in my hand (Burn's Ecclesiastical Law). I have had reference to the original reporter (2 Brownlow, 12), and I find the case most accurately quoted; it is thus: "8 James, an attorney, in the King's Bench, was sued in the Arches for a legacy; and, for that he inhabited in the diocese of Peterborough, prohibition was prayed and granted; because though he remained here in term time, he was properly inhabiting within the jurisdiction of the bishop of Peterborough;" plainly thereby shewing that, in the opinion of a Court of law, the true construction of the statute is, not the inhabiting, acci-[731]-dentally, and for a single purpose, within the jurisdiction; but means a general habitation in the place in which the jurisdiction of the Ecclesiastical Court is founded. From the nature of the case, and in a transitory action such as this, I look upon the case as an authority much in point. *Woodward v. Makepeace* (1 Salk. 164) is not so much in point, but yet, to a certain extent, it illustrates the case. It was complained that Woodward had been cited out of the diocese of Lichfield and Coventry, he having been cited in the diocese of Peterborough; but the Court of King's Bench held that this was not a citing out of the diocese within the statute 32 Hen. 8th, c. 9, for he is an inhabitant where he occupies land as well as where he personally resides.

In the present case the party cited occupies a house within the diocese, and was actually resident there before and at the time of the citation. What was the course pursued by Lord Stowell in the case of *Herbert v. Herbert*? According to that case, as reported in 2 Phillimore (p. 430), the evidence was the same (perhaps not so strong as in the present case) as to the habitation of Lord Herbert, from the time of the quasi commencement of the suit up to the serving the citation; Lord Stowell did not hesitate to pronounce Lord Herbert in contempt; there was not, in that case, any personal service, but service viis et modis, by leaving a copy of the citation at the house of the party cited. Let us consider a little further what was done in even a more important and difficult case—in the case of *Tenducci* (cited arguendo, 3 Phill. 595), for that is an authority of the Court [732] of Arches. It was a suit brought after a party, a foreigner, had quitted the country, and by reason of a residence in the Haymarket he was served by leaving a copy at that place, and pronounced in contempt; and that too in a suit for annulling a marriage, and not merely for a separation by reason of adultery. The Court of Arches stopped only just before the final determination, in order that the party might have personal notice given him in Naples; here then, in the Court of Arches, personal service was ordered to be made on an individual in the kingdom of Naples; I use this expression as an answer to the argument—that the Court has no jurisdiction to issue process out of the diocese—that here the Court of Arches issued such process, if process it be; but in fact it is a misnomer to call it so.

So stands the law on the construction of the statute. The decided cases, and the facts of this case, most clearly demonstrate that the Court had jurisdiction at the time of issuing the citation.

Now, on what has the whole argument in this case been founded? On this; that the citation has not been properly served; that is the sum total of the argument. I looked forward to hearing what would have been proper service, according to Mr. Collett's counsel; I expected to have heard that a copy ought to have been left at the house within the diocese, and then whether notice had been personally served on Mr. Collett or not; that Mrs. Collett might have pressed the Court, as in the case of *Herbert v. Herbert*, and without any of this preliminary argument, to have pronounced Mr. Collett in contempt; but I have not heard any such sug-[733]-gestion. It may be the ordinary course to leave a copy of the citation at the house where the party was resident at the time it issued, cui bono, for what purpose is the copy left at the house? Evidently and clearly for one purpose, and one purpose only; that it is most probable that by this means the party will obtain a personal knowledge of the proceedings. The law is indulgent to the party proceeding, and allows her to go on

by serving process at the house; and a serving the process on the individual, wherever he is found, in lieu of constructive service, is nothing more nor less than what the law allows. That is the real foundation of the whole objection in this case. In the case of *Warrender v. Warrender* the House of Lords treated on this very point. How far then is that case an authority? Does that case apply to this? There is only one distinction between them, and that is this—that was a case of a husband proceeding against a wife, and this is a case of a wife proceeding against a husband. In the case of *Warrender v. Warrender* it stood thus: Sir G. Warrender, being resident in Scotland, took out process from the Court of Session in Scotland (the Court on which all the jurisdiction in such matters had devolved), calling on Lady Warrender to appear in a cause of separation or divorce, by reason of adultery; the proper mode of serving the wife would have been by edictal process; and this process would properly have been served on Lady Warrender at Sir G. Warrender's own residence in Scotland; that would have been the strict ordinary mode of proceeding, the law presuming the domicile of Sir G. Warrender to be the domicile of the wife; that service [734] would have been made in Scotland. Instead of doing that, the husband caused the citation to be served, in France, on Lady Warrender personally. An objection to this service was taken in the Court below, which was the Court of Session—it was overruled there, and actually was brought up by appeal to the House of Lords in England. How did Lord Brougham deal with the objection?—with the approbation of the other law members of the House—he said, “Could there be an argument more nearly approaching to the *reductio ad absurdum*? the edictal process is admitted to be for the purpose of giving notice, and here, when in point of fact you do give notice of the proceedings in the cause, in a manner which evidently admits of no doubt, because it is personal service on the party, you come and tell me that it would be better to adopt other means of service whereby notice of the proceedings could not be known, namely, by serving it in Scotland, at a place five hundred miles off from where the party was actually resident.” So that argument was disposed of, and so, think I, it ought to be disposed of in this case.

Now, let us see whether the authority of that case is or is not applicable to this case; whether or not the circumstance that the present suit is brought by the wife against the husband makes any difference? I think it does, but that it makes strongly the other way: only look to the facts! in that case it was held to be good service, although the Court of Session of Scotland could have no more power to cause service to be made in France than this Court, or any other Court could. All Ecclesiastical Courts are, in this respect, in the same condition; [735] one Court is no better off than another; all are in the same predicament. But there, by fiction of law only, it was held that the service was sufficient and good, as against the wife, to serve it upon her when resident in France; and here, where there is no fiction at law, but the husband is actually resident, actually inhabiting within the diocese, both at law and *de facto*, then you are to say that such personal service is not good. I confess I am not able to understand the drift of that argument; I think, *à fortiori*, that the husband is bound; that it does not lie in his mouth to say, “You, the wife, shall be bound by a service good only by fiction of law, but I will not be similarly bound”—he, the husband, who is actually resident on the spot *de jure*, if not *de facto*! All rules of law depend on common sense; surely a copy of citation conveys the same information by being served on a party personally, as if it be served at his house or place of residence. I must say that, looking at all the facts and circumstances of the case, so far as this objection, which has been urged against the jurisdiction of the Court, is concerned, I see nothing whatever in it, and therefore I overrule it.

With regard to the second point, namely, that I ought to pronounce for the protest, on the ground that the proctor, at the time of issuing the citation, had no proxy from Mrs. Collett, and as to which point I have been referred to the 129th canon.(a) [736] Even if, on the language of the canon, this objection appeared to me to have

(a) “None shall procure in any cause whatsoever, unless he be thereunto constituted and appointed by the party himself, either before the Judge, and by act in Court, or unless, in the beginning of the suit, he be by a true and sufficient proxy thereunto warranted and enabled. And if any proctor shall offend herein, he shall be excluded from the service of his office for the space of two months, without hope of release or restoring.”

any foundation, I would dismiss it most summarily ; but I say nothing as to the law, or as to the canon, except this, that the latter is clearly only directory, and cannot annul these proceedings, so far as they have taken place. I cannot go beyond the canon ; and it cannot be supposed that, when a rule (a)¹ of a directory nature has been laid down by the Court for the regulation and guidance of proctors, if it accidentally or otherwise happens that the proctor may have violated a canon, that circumstance is to vitiate all the proceedings in the suit : but there is not a single syllable in this canon that tends to shew that the proceedings are vitiated, even if the canon has been disobeyed.

Under these circumstances I overrule the protest, and assign Mr. Collett to appear absolutely.

[737] IN THE GOODS OF CHARLES G. COOKE, Deceased. Prerogative Court, Jan. 16th, 1843.—Special probate of will and codicil cancelled (the former inadvertently), the latter, by the supposed assent of a testator, not competent at the time to give directions for such cancellation.

[S. C. 2 Notes of Cases, 73.]
Motion.

Charles G. Cooke died on the 26th of December, 1842, a widower, leaving an only child, a married woman, him surviving. The deceased had made and duly executed a will on the 30th of July, 1840, and a codicil on the 22nd of December, 1842 ; on this last day he re-executed his will, in consequence of certain alterations having been made therein since July, 1840. By the codicil, the deceased had made provision for his grand-children, the children of his said daughter. The daughter and her husband were appointed executors of the will.

On the morning of the day on which the deceased died, his daughter being alone with him, she proposed to him to revoke the codicil, and, understanding and believing that he assented to the proposition, she took the codicil and will, and finding that the latter had been re-executed on the same day as the codicil, she cancelled both instruments, by tearing off the seals and the signatures.

It appeared, from the opinions of the medical attendants of the deceased, that at the time when the daughter supposed that the deceased assented to the cancellation of the codicil he was in fact [738] incapable of comprehending or giving any assent to the proposition.

The Queen's advocate moved on behalf of the daughter and of her husband for probate of the will and codicil.

Sir Herbert Jenner Fust. Both papers are, to all appearance, revoked, and would be effectually cancelled if the act had been done by the deceased, or by his directions *animo revocandi*. On looking to the affidavits, however, I am clearly of opinion that the deceased was not capable, at the time when the act of cancellation took place, of giving any directions or assent for revoking a will : the act of cancellation is, therefore, a nullity. The interest of the daughter and of her husband is opposed to the grant of probate of these papers, for the daughter is the sole next of kin. I decree probate of the will, as when re-executed, and of the codicil, with an affidavit explaining the circumstances of the cancellation.

The Registrar. With the name of the deceased attached ?

Per Curiam. No ; the affidavit will explain why it is omitted.

Addams mentioned that in *Brooke v. Kent* (a)² the Judicial Committee of the Privy Council had restored a part of a will, struck out by the deceased.

[739] Per Curiam. That was in the body of the will ; I do not consider myself at liberty to restore a signature. There must be a special probate shewing the circumstances under which it is granted.

(a)¹ 10 Geo. 4, c. 52, s. 9. 13th February, 1830. 5th rule. That the proctor of a party taking out a citation, or other process, shall, on the day of its return, be prepared to exhibit his proxy, and to proceed in the cause, by taking the first step therein, according to the nature of the proceeding. See 2 Hagg. Ecc. 1.

(a)² See ante, p. 512, and *Soar v. Dolman*, ante, p. 121.

IN THE GOODS OF SUSANNAH BIOU, Deceased. THE SCHOOL FOR THE INDIGENT BLIND, AND THE WESTMINSTER HOSPITAL *against* FLACK AND OTHERS. Prerogative Court, Jan. 25th, 1843.—Administration with a will annexed granted to the joint nominees of two charitable institutions, to whom legacies, expectant on life interests, had been bequeathed but limited to a fund appropriated for payment of the legacies. The parties entitled to a general grant having been cited and not appearing.

[S. C. 2 Notes of Cases, 106.]

Motion.

Susannah Biou died in the year 1821. By her will she bequeathed to Mary Dickens the interest of 1000l. consols for life, and at her decease she bequeathed the said principal stock to the hospital for the maintenance of the blind, situate in St. George's Fields. The deceased also bequeathed the interest of 1000l. like consols to Elizabeth Keys for life, and at her decease gave the said principal stock to the Westminster Hospital. And she directed that Mary Dickens and Elizabeth Keys should enjoy their annuities free of legacy duty. The deceased appointed H. G. Flack and C. W. Hollier her executors and residuary legatees; both executors proved her will in this Court; the former survived his co-executor and died in 1830, having by will appointed three persons to be his executors, all of whom proved his will in this Court, and are since deceased, the survivor of them having died intestate.

[740] H. G. Flack and C. W. Hollier had appropriated a sum of 1800l. 3 per cent. consols, standing in the name of Susannah Biou, to answer in part the two annuities, and to satisfy the principal legacies on the determination thereof respectively; and had also purchased 200l. like consols in their own joint names for the purpose of satisfying the said two annuities in full, free from legacy duty.

The 1800l. continued to stand in the name of Susannah Biou; and the 200l. in the joint names of H. G. Flack and C. W. Hollier. The amount of the annual dividends had been regularly paid to the respective annuitants.

It being necessary to obtain representation to Susannah Biou, a decree with intimation issued from this Court on the 19th of December, 1842, at the instance of the president, vice-president, treasurer, and members of the School for the Indigent Blind, and of the president, vice-president, treasurer, and governors of the Westminster Hospital, the two institutions to whom the bequests of 1000l. consols were given in remainder; the decree cited the four residuary legatees named in the will of H. G. Flack, and the husbands of two of such residuary legatees who were married women; and also the executor of C. W. Hollier, to appear and accept or refuse administration with the will annexed of the goods of Susannah Biou left unadministered, or otherwise to shew cause why the same, limited to the sum of 1800l. consols, and the dividends to grow due thereon for the purpose of carrying into effect the trusts contained in the said will, should not be jointly granted to C. Dodd and C. J. Kempson as the respective nominees of the said two institutions.

[741] This decree was personally served on the several parties and returned into Court.

On this day, on default of appearance by any of the parties cited,

Addams moved that letters of administration with the will of Susannah Biou, deceased, should be granted to the said C. Dodd and C. J. Kempson, limited according to the tenor of the said decree.

Sir Herbert Jenner Fust. I think it is both desirable and proper that a grant should be made in the way proposed, otherwise the two annuitants will be unable to obtain the annual payments to which they are respectively entitled.

The Registrar. According to the ordinary practice there should be a general grant.

Per Curiam. It is not advisable to encumber these two hospitals with a general grant.

IN THE GOODS OF SARAH DENSTON, Deceased. Prerogative Court, February 3rd, 1843.—Will lost, motion to admit a verified copy to probate rejected, the next of kin not having been cited.

[S. C. 2 Notes of Cases, 128.]

Motion.

Sarah Denston, widow, died on the 18th of July, 1840, having, on the 6th of the June previous, made a will and appointed two executors thereof.

Shortly after the death of the testatrix this will [742] was found in a chest of drawers in her house by Mary Harrison, her sister, who delivered it to her husband, John Harrison; it remained in his custody until the latter end of 1841, when he delivered it to Mr. Gronow, one of the executors.

Mr. Gronow, by affidavit, stated that he had deposited the will in some place for safe custody, but has been unable, although he had made all diligent search, to find the same.

During the time this will was in the possession of John Harrison, his son, M. G. Harrison, made a copy thereof and carefully examined the same with the original.

Shortly after the testatrix had executed her will it was borrowed of her by a Mr. Cunningham, a trustee named in her husband's will, and he made a copy thereof in a book belonging to him.

The copy made by M. G. Harrison and the copy made by Mr. Cunningham were compared, and found to correspond.

Upon affidavits of the above facts,

Deane moved the Court to decree probate of the copy of the said will, as made by M. G. Harrison, to be granted to the two executors named therein, limited until the original will, or a more authentic copy thereof, should be brought into the registry.

Dec. 13th.—The Court rejected the motion.

The motion was now renewed on the following additional evidence. Mr. Gronow further deposed that in May, 1840, he received instructions from the testatrix to prepare her will, and, accordingly, [743] caused a draft copy to be made, which was perused and settled by him; a fair copy of this draft was made and was duly executed.

The following facts were stated in order to account for the will not having been proved by the executors immediately upon the death of the testatrix:—

William Denston, the husband of the testatrix, by his will gave and bequeathed a moiety of the clear residue of the monies to arise by a sale of his real estate to trustees, upon trust, to apply the interest thereof for the benefit of his child or children during minority, and to pay the principal to him, her, or them on attaining the respective age of twenty-one years, and in the event of the death of every such child under that age, without leaving issue, then to pay the said moiety unto his wife, or to her executors or administrators absolutely. William Denston died on the 15th of February, 1840, leaving his wife and a daughter surviving.

Sarah Denston, the testatrix, died, as before mentioned, leaving her daughter surviving; the latter died on the 15th of May, 1842, a minor, and without having been married.

The moiety bequeathed by the will of William Denston having, by the death of his daughter, devolved to the estate of Sarah Denston, it became requisite to prove her will, which otherwise would not have been necessary, she not having died possessed of any other property.

Mr. Gronow further deposed that since the date of the former motion he had made all further diligent search for the original will, but had been unable to find the same.

[744] Due execution of the will and capacity of the deceased to make a will were fully established by affidavit.

Deane in support of the renewed motion.

Sir Herbert Jenner Fust. The difficulty which the Court feels regarding this motion is that there is no party before the Court who has an interest in contesting the admission of the present authentic copy to probate.

There has been no decree citing the parties interested, in case of an intestacy. What do the next of kin say to the grant of probate? The affidavits are now very satisfactory, but the Court cannot decree probate behind the backs of the next of kin.

The next of kin may give in proxies of consent if they choose; but at present I must again reject this motion.

IN THE GOODS OF SARAH BOSWELL, Deceased. Prerogative Court, February 13th, 1843.—A married woman had power to dispose of certain stock and furniture by a will to be executed in the presence of two witnesses; and also to dispose of other effects by will generally. By a will, duly executed, she disposed of the stock and furniture; by an unsigned memorandum, at the foot of the will, in her

own handwriting (previous to the 1st of January, 1838), she disposed of the other effects. Letters of administration with the will and memorandum granted.

[S. C. 2 Notes of Cases, 154.]

Motion.

Sarah Boswell, widow, died on the 9th of January, 1843, leaving a sister her only next of kin.

[745] By a settlement made previous to and in contemplation of the marriage of the deceased, a sum of long annuities standing in the name of the deceased, and certain furniture, plate, and other effects; as also jewels, trinkets, and wearing apparel, were assigned to trustees, upon trust, as to the long annuities, furniture, and effects, after the death of the survivor of the deceased and her intended husband, as the deceased by will, to be executed by her in the presence of two witnesses, should, notwithstanding coverture, appoint; and upon further trust, as to the jewels, trinkets, and wearing apparel, of which the deceased was then possessed, or might become possessed during coverture, to stand possessed thereof for the sole use of the deceased during coverture, and to permit her to sell the same, or to dispose thereof by will or otherwise, notwithstanding the coverture.

The husband died on the 16th of August, 1837.

The deceased, on the 29th of August, 1836, by will duly executed, disposed of the long annuities and furniture. At the foot of the will, without date or signature, was a memorandum in the handwriting of the deceased, bequeathing a watch, some articles of plate, and wearing apparel.

By a codicil dated the 20th of February, 1837, signed by the deceased, but attested by one witness only, the long annuities bequeathed by the will were otherwise disposed of.

White moved for special letters of administration with the will annexed, and with the memorandum or addition at the foot thereof, upon a proxy of con-[746]-sent from the sole next of kin. He admitted that he could not ask for probate of the codicil.

Sir Herbert Jenner Fust. The long annuities and furniture are properly and duly bequeathed. The deceased had a power to dispose by will generally of certain jewels, trinkets, and wearing apparel; and, inasmuch as the additional memorandum to the will was made before 1838, I think it sufficiently complies with the general power; therefore, so far as the will with the addition is concerned, I am of opinion that there is a good execution of the powers.

The codicil cannot have operation, for the power to dispose of the long annuities was to be executed in the presence of two witnesses, and the codicil is executed in the presence of one witness only.

Administration of this will, with the addition, may be granted as prayed, it being understood that the next of kin has actually executed a proxy of consent.

IN THE GOODS OF CATHERINE SINCLAIR, Deceased. Prerogative Court, March 14th, 1843.—A will (dated 1841) revoking all former wills, referred to a clause in a former will. Probate prayed of so much of the former will as was necessary to explain the latter will. Motion refused.

[S. C. 2 Notes of Cases, 222; 7 Jur. 803.]

Motion

Catherine Sinclair died on the 18th of November, 1842; by her will, dated the 7th of June, [747] 1841, she thus bequeathed: "Whereas my son and daughter have both died since the date of my last will and testament, now I do hereby give the share of my estate and effects, which would have gone to them if they had survived me, to the respective children of my son and daughter." It appeared by an affidavit that the deceased, on executing the will of the 7th of June, delivered to a person, named as executor therein, a paper which she said contained her former will, and directed him to destroy it. The will of the 7th of June revoked all former wills. The executor had not destroyed the former will, as pursuant to the directions of the deceased.

Jenner moved for probate of the will of the 7th of June, with such part of the former will as was necessary to shew the amount of the shares of the deceased's property which the son and daughter were to have taken under that will. He submitted that, as the grand-children were to take their respective parents' shares, it was necessary to include in the probate so much of the former will as shewed the amount of those shares; that the executor could not safely act without probate passing in such form.

Sir Herbert Jenner Fust. I do not see how the Court can decree probate of any part of the former will in conjunction with the present will, containing, as the latter does, an express clause of revocation of all former wills. I can only decree probate of the latter will as it stands. If the executor cannot safely act in the matter, he must apply to the Court of Chancery.

[748] IN THE GOODS OF GILES DAVIS, Deceased. Prerogative Court, May 19th, 1843.—Will signed at the end of the first side of a sheet of paper, and attested on the second side, admitted to probate, on evidence of acknowledgment of the signature of the testator.

[S. C. 2 Notes of Cases, 350. Distinguished, *In the Goods of Dilkes*, 1874, L. R. 3 P. & D. 164. Referred to, *Phipps v. Hale*, 1874, L. R. 3 P. & D. 168.]
Motion.

Giles Davis died on the 9th of April, 1843, possessed of personal estate of the value of about 400l.

By his will, dated the 1st of April, 1840, he gave to his wife all his freehold property, for her life, and also all his household furniture, plate, books, stock in trade, and book debts, out of which she was to pay his debts, and whatsoever remained to be at her own disposal, to do with as she should think proper.

The will then disposed of the reversion of the freehold property.

This will was written on the first side of a sheet of paper, and was signed by the testator at the end.

On the second side of the same sheet was written, "I also appoint my wife, Jane Davis, executrix with my son, John Davis, and my son, Giles Davis."

This was subscribed by three witnesses, but was not signed by the testator.

By the joint affidavit of the attesting witnesses it appeared that on the 24th of March, 1843, the deceased, being ill in bed, requested the first witness to bring him his will, and to read the same to him, having done which, the witness suggested the propriety of the will being attested; that the deceased concurred, and requested him to be one of the witnesses, and to send for the two other deponents for the same purpose. That previous to the arrival of the two last witnesses, the first witness, in the presence of the deceased, subscribed his name to [749] the will. That the two other witnesses having shortly afterwards entered the room, the deceased, addressing them, and looking at his will, which lay on a table by his bedside, with the first page thereof and his signature exposed to view, said, "I want you to sign my will," whereupon the first witness said, "as witnesses." That the two deponents then subscribed their names to the will in the presence of the testator, and of each other.

The signature to the will was proved to be in the handwriting of the testator.

Elphinstone moved for probate omitting the clause on the second side of the paper, to be granted to the widow as residuary legatee, and executrix according to the tenor.

Sir Herbert Jenner Fust. This joint affidavit is sufficient to entitle this paper to probate; there is no doubt as to the signature "Giles Davis" being in the handwriting of the deceased, and, that being so, the decisions of the Court have established the sufficiency of the acknowledgment of the signature. The clause appointing executors must be omitted in the probate; and there must be the consent of the parties interested. The form must be this: Administration with the will annexed must be decreed to the widow as relict, not as residuary legatee. I do not think she is residuary legatee, nor executrix according to the tenor.

At the conclusion of this case the learned Judge said:

[750] I wish it to be understood as the general rule of this Court, that in every case where the consent of parties is required, proxies of consent must be actually in the registry before the Court is moved to make any decree in such case.

IN THE GOODS OF JOHN BULLOCK, Deceased. Prerogative Court, June 8th, 1843.

—A will, written on the lower half of the second side of a sheet of paper, was presented (the sheet being folded broadways) to the witnesses, and was signed and subscribed on the lower half of the first side (the witnesses believing the will to be contained on the upper half of the first side). Probate granted with the consent of the next of kin.

[S. C. 2 Notes of Cases, 352.]
Motion.

John Bullock died a widower, possessed of personal estate of about 600*l.*, leaving four children, namely, John Bullock, Emily Symes, wife of James Symes, Richard Bullock, and James Bullock, him surviving. The deceased left a will, which was made and executed in manner following: it was written on the lower half of the second side of a sheet of foolscap paper; the upper half of the third side had been torn off, and the lower half of that side when folded down concealed the writing on the lower half of the second side of the paper. The will was as follows:—"This is the last will and testament of me, John Bullock, of No. 9, St. James's Square, in the city of Westminster, made this 13th day of June, 1842, I give and bequeath unto James Symes all my property and effects whatever and wheresoever to and for his own absolute use and benefit, and I do hereby nominate and appoint to be the executor of this my last will and testament, John Bullock, John Bullock, James Symes, Rollisson's Cottages, Tooting, Surrey." On the lower half of the first side of the sheet—"witness my hand this present [751] 13th day of June, 1842. John Bullock. In the presence of the testator, by his desire, and in the presence of each other. Witnesses, Hudson Gurney, No. 9 St. James's Square, Thomas Young, 209 Piccadilly." Mr. Gurney, by affidavit, deposed that the deceased was his porter; that on the 12th of June, 1842, he suggested to the deceased, who was then very ill, the propriety of settling his affairs, to which he assented, and expressed a desire to make his will, which he said would be a very short one. That the deceased was always of a very close and reserved disposition, and deponent, believing that he would be averse to calling upon any one of his fellow servants to witness his will, and would wish to conceal what his property was, and what was the disposition made of it, told him that he, deponent, and Mr. Young, the surgeon, who was attending him, would be the witnesses if he wished it. That deponent took up a sheet of foolscap paper and folded it down the middle (broadways) and told the deceased he might write his will on the upper part of the side so folded, so that the witnesses subscribing their names to the lower part of the fold would not see the contents. That he left such sheet of paper with the deceased. That on the following day, Mr. Young having called to see the deceased, the latter, in the presence of Mr. Gurney, expressed a wish to execute his will, which he said he had made, and then produced the same sheet of paper which Mr. Gurney had given him on the previous day, folded down; that deponent, supposing the will had been written on the upper part of the fold, wrote, on the lower part of the first side the words "witness my hand this present 13th day of June, [752] 1842." That the deceased signed his name in the joint presence of deponent and Mr. Young, who both subscribed it in the presence of the deceased. That deponent does not remember to have seen the outer side of the paper at the time of execution, and did not notice any part of the same to have been cut off.

Jenner moved for probate of this paper to be granted to John Bullock, the son of the deceased, as executor, upon consent of the three other children and of James Symes.

Sir Herbert Jenner Fust. Perhaps, strictly and literally looking at the language of the Wills Act, this paper is not signed at the foot or end thereof; however, upon the consent of all parties interested, I think I am able to decree probate of it.

It is very unfortunate that more pains are not taken to comply duly with the provisions of this act.

IN THE GOODS OF CHARLES VENTRIS FIELD, Deceased. Prerogative Court, June 19th, 1843.—A will, prepared for a party who from paralysis had lost the use of speech, and almost of limbs, signed with a mark and duly attested, pronounced for. [S. C. 2 Notes of Cases, 384.]

Motion.

Charles Ventris Field died on the 17th of May, 1843, leaving a widow, and one child him [753] surviving. He also left an illegitimate child. Both these children were minors. For some time previous to his death the deceased had been labouring under the effects of paralysis, which had deprived him of speech, and almost of the use of his limbs.

On the 13th of May, three days before his decease, it being ascertained that the deceased wished to make a will, and also the way in which he wished to dispose of his property, his brother Francis Ventris Field, a solicitor, wrote a will for him.

The circumstances attending the execution of the will were thus stated in the affidavit of one of the attesting witnesses.

Henry Sawford, of Finchley, in the county of Middlesex, carpenter, deposed that on the 13th day of May he went into the bed-room of the deceased. That there were then in the room the wife, the mother, three brothers, and two sisters of the deceased, as also Mary Chambers, his nurse. That Robert Field, one of the brothers, then produced the will in question to the deceased, saying he had brought the paper for him to sign. That the deceased appeared to understand the nature of it, and put out his hand to take it. That the deceased was unable to sign his name to the will, or to make any declaration in respect thereof. That a pen was put into the hand of the deceased, and he made a cross or mark at the bottom of the first and second pages, and twice on the third page. That deponent and Mary Chambers, who were both present during the whole time, then, in the presence of the deceased and of each other, subscribed their names as witnesses to the execution of the will.

[754] By this will the deceased made provision for his widow and children, and appointed his widow and his brother, Francis V. Field, executors.

Jenner moved for probate.

Per Curiam. The evidence as to the deceased's capability of understanding the will is very slight; but the brother appears to have done all in his power towards the benefit of the illegitimate child. I think, under the circumstances, probate may pass.

Motion granted.

IN THE GOODS OF WILLIAM MARTIN, Deceased. Prerogative Court, July 6th, 1843.

Will prepared and executed on a printed form; motion for probate rejected.

Testator misled by printed directions.

[S. C. 2 Notes of Cases, 385.]

Motion.

William Martin died in May, 1843. Being desirous of making his will, the deceased requested W. Ponsonby (one of his executors) to prepare the same for him; which W. Ponsonby did, by writing the same on a printed form, and he afterwards read the same over to the deceased, who approved thereof. On the 3rd of May, 1843, W. Ponsonby again read this will over to the deceased, in the presence of R. Mann and J. Martin; and the deceased again expressed his approbation of it, and desired and proposed to execute it.

The will was signed and attested as follows:—

The sheet of paper on which the printed form was contained was divided into two columns or [755] divisions by ruled lines, and the left-hand column subdivided by another line. The first left-hand column contained printed directions for signing and attesting. The second of such two columns was thus headed, "Margin for signature of testator and subscription of witnesses in case of any alteration in the will." The right-hand column contained the body or dispositive part of the will; the will was written on the first and second sides of the sheet, the second side concluding with the appointment of executors, which occupied ten consecutive lines; underneath this was an attestation clause.

The testator signed the first side of the sheet within the second left-hand column, and the attesting witnesses, R. Mann and J. Martin, subscribed underneath; the deceased and the witnesses also signed the second side in like manner, his signature being opposite to the fifth line of the appointment of executors, the name of the first witness opposite the seventh, and of the second opposite the ninth line. The witnesses also subscribed at the end of the attestation clause.

Addams moved for probate. Compliance with the regulations of the printed form is sufficient; the mode in which the paper has been divided makes the portion appropriated for the signature of the testator and for the subscription of the witnesses to be in fact the end of the will. The dispositive part at least is duly signed and attested.

Sir Herbert Jenner Fust. I am afraid of putting a construction upon the act, as regards the question involved by this will, [756] on an ex parte motion. If this will had been written on a common sheet of paper, I think it would not have been properly signed. I do not say that the printed form is wrong, but the directions as to executing the will have been misunderstood. I cannot pronounce that this is a will "signed at the foot or end thereof;" it is signed at the left-hand, opposite about the middle

of the appointment of executors, in the right-hand column or division of the paper. The Court would be desirous, if possible, to decree probate of this will, but cannot do so on a mere motion.

I must reject this application.

IN THE GOODS OF ANNE ASHMORE, Deceased. Prerogative Court, Nov. 16th, 1843.

—A testatrix produced a codicil, all in her own handwriting, and with her signature made thereto, to two witnesses, present at the same time, who, at her request, made their marks thereto; the testatrix wrote the names of the witnesses opposite their respective marks, and, by mistake, a wrong surname of one of them.

Probate granted.

[S. C. 2 Notes of Cases, 465; 7 Jur. 1045. Discussed, *Charlton v. Hindmarsh*, 1859, 1 Sw. & Tr. 433.]

Motion.

Anne Ashmore died on the 19th of August, 1843, aged eighty-six years, having made a will, which was duly executed and attested, and whereof she appointed two executors.

On the 16th of June, 1843, the deceased, with her own hand, wrote a codicil, and took it into a room where two of her maidservants, Anne Cole and Elizabeth Sharpe, were employed about some household work. She requested them to make their marks to the paper, which they did, in her presence. Nothing was said on this occasion by the deceased as to her signature, or as to the paper [757] being of a testamentary nature, but one of the witnesses, Anne Cole, saw and recognised the signature of the deceased, made at the end of the last line of the paper.

After the death of the testatrix this codicil was found, with the following Christian and surnames written opposite to or against the respective marks of the two witnesses—"The mark of Anne Cole." "The mark of Elizabeth Cummins."

It appeared by the affidavits that a person named Elizabeth Cummins had, a short time previously to the day on which the codicil was executed, been on a visit to a servant of the deceased, but was living at some distance from the residence of the deceased on the day in question.

The two attesting witnesses recollected all the circumstances attending the attestation of the codicil, and recognised their marks to it.

R. Phillimore moved for probate of the will and codicil; he submitted that, upon the evidence of the attesting witnesses, the mistake, by the name Cummins being written for Sharpe, a fact virtually immaterial in itself, was fully explained, and was fairly to be accounted for, by reason of the extreme age of the testatrix. That this circumstance being cleared up, there was a sufficient acknowledgment of the signature of the testatrix within the principle of several late decisions of this Court.

Judgment—*Sir Herbert Jenner Fust*. It is quite clear upon the affidavits that the deceased must have written the name of Cummins [758] by mistake for Sharpe; I do not think this fact of any serious importance; here are two witnesses who duly attested this paper and recognise their marks. The only difficulty I have felt is whether, upon motion, I can hold that there has been a sufficient acknowledgment of her signature by the deceased to the witnesses: but there have been several late cases where, when a paper has been proved to be in the handwriting of a testator or a testatrix, and the signature was clearly and visibly apparent on the face of it, the production of that paper to two witnesses present at the same time, accompanied with a request to them to subscribe it, has been held a sufficient acknowledgment of an unquestioned signature.

I think in this case there has been a sufficient acknowledgment of the signature of the deceased, and that there is a due attestation.

Let probate pass of this will and codicil.

IN THE GOODS OF JOHN GORE, Deceased. Prerogative Court, Nov. 27th, 1843.—

Dispositive part of will written on the first side of a sheet of paper, the second side blank, an attestation clause, signature of the testator, and subscription of witnesses on the third side. Probate granted.

[S. C. 2 Notes of Cases, 479; 7 Jur. 1094.]

Motion.

John Gore died on the 2nd of August, 1843, having, in April, 1838, made and

executed a will in manner following. The body or dispositive part was written on, and occupied the entire first side of a sheet of paper; the second side of the sheet was [759] left in blank; on the third side was a full attestation clause, and at the foot or end thereof were the signature of the testator and the subscriptions of two witnesses.

The will had been duly executed as regarded the act of signing and attesting.

White moved for probate; he cited *In the Goods of Carver, Deceased* (ante, p. 29).

Judgment—*Sir Herbert Jenner Fust*. There is a material distinction between that case and the present in one respect; here the will is signed and attested on the third side of the sheet of paper; the whole body of the will is contained on the first, the second side being left entirely in blank; however, upon the circumstances I think the Act of Parliament has been sufficiently complied with. By this will the whole of the deceased's property is disposed of; it is given to the wife, and she is named sole executrix; and consequently there is no reason to apprehend that the deceased intended to make any further bequest. If the whole of the property had not been disposed of, the Court might have thought that the will was provisionally executed, and that the deceased intended to reserve to himself the power of giving other legacies from time to time. This paper is very fairly written; there is not a single alteration or erasure in it: at the conclusion of the first side are these words, "I have hereunto set my hand and seal"—here that side ends. [760] The will is not signed on this side, nor on the second side—that is left in blank; on the third side is the attestation clause, the signatures of the testator and of two witnesses. It cannot be said to be signed at the foot, but it may be said to be signed at the end.

Under these circumstances probate of this paper may pass.

[761] TOWNLEY v. WATSON. Prerogative Court, January 25th, 1844.—A testatrix obliterated, *animo revocandi*, several passages of her will, so that none of the parts obliterated could be distinguished upon the face of the will. Held that this was a complete revocation within the meaning of the 1 Viet. c. 26, s. 21.

[S. C. 3 Notes of Cases, 17; 8 Jur. 761. Referred to, *In the Goods of McCabe*, 1873, L. R. 3 P. & D. 96; *In the Goods of Horsford*, 1873, 3 P. & D. 215; *Ffinch v. Combe*, [1894] P. 191.]

Sarah Townley, spinster, died on the 20th of October, 1843. The deceased was possessed of 1500l. bank stock, being the only property which she was enabled to dispose of by will. On the 10th of March, 1837, she duly executed a will in the presence of her solicitor, who had prepared the same for her. By this will she gave several legacies; and among them legacies to Dr. Watson and to his children; and she appointed her brother, Mr. Townley, sole executor and residuary legatee. Upon her death this will was found sealed up in an envelope, but the lines or passages containing the legacies to Dr. Watson and to his children were so completely obliterated with a pen and ink as to be illegible.

These obliterations not being attested according to the forms prescribed by the 9th section of the Wills Act, a question arose whether this was a good revocation of the legacies within the intent and meaning of the 21st section of the same Act; Mr. Townley, the executor, accordingly propounded the will without the obliterated passages. His allegation, after stating to the above effect, pleaded, "That at the time when the deceased executed her will her bank stock, at the then market price, would not only have paid all the legacies, but have left [762] a residue. That some time in the year 1842 the deceased, having a mind absolutely to revoke certain of the legacies contained in her will, obliterated the same altogether with ink, so as totally to efface the same; and so that the same cannot be made out on inspection of the will. That immediately after obliterating and effacing the same she shewed the will to a female servant, and asked her whether she could make out what had been written there, at the same time holding the will up to the light to enable her to judge the better; that the said servant told her she could not make it out; whereupon the deceased boasted how effectually she had effaced the words. That the said servant having remarked that some question might arise as to the obliterations, the deceased said, "So that I have done it that you cannot make it out, that is sufficient." That the deceased at the same time stated, as the reason for making such obliterations, that it was "in order that there might be some residue for her brother, which otherwise, owing to the depreciation of bank stock, there would not be."

On behalf of the legatees a counter allegation was offered, in substance, pleading, "That the deceased gave instructions to her solicitor to prepare her will, and that, pursuant to such instructions, a draft will was prepared, and the will propounded, copied or engrossed from such draft; that the two instruments were compared together, and found to agree in all respects. That the said solicitor took the will to the deceased, who approved of it, and duly executed it. That at such time there were no obliterations whatever on the face of the will. That the draft will was now in existence and pro-[763]-duced, and, by reference to it, the obliterated passages could be faithfully and fully restored."

The two allegations came on for argument.

Addams moved the admission of the first allegation.

H. I. Nicholl, on behalf of the legatees, was proceeding to oppose the admission of this allegation, by reference to the facts contained in the second allegation, when he was stopped,

Per Curiam. The second allegation is not yet before the Court; the Court cannot travel out of the allegation now in debate.

H. I. Nicholl referred to *Brooke v. Kent* (3 Moo. P. C. C. 334), as a case closely resembling this, in which the Judicial Committee had ordered the argument on the admission of an allegation propounding a will without the obliterated words to stand over until a counter allegation, propounding it with those words, had been given in, in order that the two allegations might be debated together as one single plea.

Addams (one of the counsel in *Brooke v. Kent*) said, that what has been stated as to the course pursued by the Judicial Committee was quite correct.

Per Curiam. That may be the rule of the Judicial Committee, but it is not the rule of this Court.

[764] H. I. Nicholl then admitted that, unless he was at liberty to assume the facts stated in the counter allegation, and to argue from them, as being probable circumstances, he could not oppose the admission of the first allegation; by reason there was at present no constat that any evidence of the obliterated passages could be produced.

Sir Herbert Jenner Fust. I am of opinion that this allegation must be admitted.

The 21st section of the present Wills Act provides, "That no obliteration, interlineation, or other alteration made in any will, after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless it be re-executed as prescribed by the Act," and the construction which the Court has, in a former case, put upon that word "apparent," is, apparent on the face of the instrument itself.

In the case of *Brooke v. Kent* evidence dehors the will was admitted; but that was a question of intention, and was so treated by the Judicial Committee. There was no intention entirely to revoke a legacy; the wish was to substitute a sum of 100l. for 200l. In this case there is no intention to substitute one legacy for another; the intention is to revoke the legacies in toto. The Court, being of opinion that the proper construction of the 21st section is that to which I have just referred, considers this allegation admissible; and that if the facts pleaded be proved, this instrument will be entitled to probate without the obliterated parts.

[765] The second allegation now came on to be debated.

Addams. This allegation is inadmissible; assuming that the words obliterated can be correctly shewn by extrinsic evidence, this is not a mere alteration; it is not a simple obliteration in a will; it is a revocation by destruction of a considerable portion of an instrument. This case comes under the 20th section, which enacts, "That no will or codicil, or any part thereof, shall be revoked, otherwise as hereinbefore mentioned; or by the burning, tearing, or otherwise destroying the same, with the intention to revoke." This is a complete destruction of a part thereof with an intention to revoke; it matters not how the act of destruction takes place; if the words are not legible it is as complete as if the deceased had torn off or cut out this portion of the will, and burnt it.

H. I. Nicholl. This case comes under the 21st section; each legacy is a separate gift, and the fact that several separate gifts have been obliterated cannot be taken advantage of so as to bring the case within the 20th section; that is, by arguing that the several obliterations together form so large a portion of the entire will that they constitute a part or parts thereof, within that section. The Legislature must be taken

to have used the word "apparent" with reference to the tribunals which decide on what constitutes a will. What is the invariable mode in which matters cognizable by Courts of law are made apparent to those Courts? by proper legal evidence. A contrary construction would make revocation by obliteration depend on [766] the acuteness of vision in a Judge; the Judge of a Court is the proper person to decide a question of obscure handwriting, *Remon v. Hayward* (2 Ad. & Ell. 666).

Per Curiam. That is not the rule in this Court; this Court looks to the evidence of engravers and persons skilled in the art of decyphering, and decides upon their testimony according to the best of its judgment.

[Argument.] That could scarcely be the intention of the Legislature; such evidence, from its very nature, will almost always be conflicting; in intricate cases it must ever be doubtful; supposing, in this very case, an engraver can be found who will read these several legacies as "two hundred," instead of "one hundred pounds" each, will the Court, with this facsimile copy of the will before it, order the words "two hundred" to be inserted in the probate?

Per Curiam. If it be the only evidence that may be the effect of the construction which I have already put on this section of the Act, and which has not as yet been overruled. But you have not pleaded that the words can be made out by the evidence of engravers, so that the Court will not be embarrassed with the difficulty suggested.

[Argument.] Such a construction renders that part of the section, which provides that all alterations and obliterations shall be attended with the [767] ceremonies prescribed in the 9th section, a mere nullity; no person will care to comply with those ceremonies, if simply tearing off or cutting out three lines in a will can produce the same effect: it is contrary to the whole policy of the statute.

Sir H. Jenner Fust. The question in this case now turns on the admissibility of an allegation, offered in opposition to an allegation already admitted, and which has propounded a paper bearing date in the year 1837, having on the face of it certain alterations or obliterations. Circumstances were pleaded in that allegation which could leave no doubt in the mind of the Court that it was the intention of the deceased to revoke several of the legacies which she had, at one time, given as part of that instrument. Looking to what the deceased had done the Court was of opinion that, according to the construction which it deems the proper construction of the 21st section of the Wills Act, it was bound to give effect to those obliterations as revocations of part of the will, inasmuch as the words effaced are not apparent on the will itself. That decision is in accordance with a former expressed opinion of the Court, to which it still adheres, and to which it will continue to adhere until better advised. The allegation of Dr. Watson pleads what the words of this will, in its original or unaltered state, were; but it does not plead that these words are apparent on the face of the instrument itself, or that they can be made out by the aid of magnifying glasses, or by evidence of that nature; it simply pleads the fact that the words obliterated were such and such, and, in supply of proof, [768] adduces the draft from which this will was engrossed or copied, and tenders the evidence of the professional gentleman who prepared both draft and will, and who, I assume, can also prove that the words appearing in certain lines of this draft copy are the very same words as were inserted in and existing on that portion of the will now effaced at the time when it was executed by the deceased; and to be sure, no evidence could be stronger or more satisfactory to the Court in order to shew what really were the contents of this will before it was thus mutilated. The question, therefore, comes to this, Is any, and what, evidence admissible to prove what the words obliterated in this will were at the time when it was executed? The answer to this depends on the construction to be put on the 21st section of the Act of Parliament. What, then, is the interpretation to be put on this section, when either words in a will, or the effect of words, are so completely effaced or obliterated as not to be apparent? Now, I think the *prima facie* construction must be apparent on the face of the instrument itself, and not that suggested in argument, namely, capable of being made apparent by extrinsic evidence. What is an obliteration? Is it not by some means covering over words originally written, so as to render them no longer legible? I cannot understand, if the Legislature really intended that extrinsic evidence should be admitted, why a few more words were not added, which would have freed the section from all doubt; for

instance, why was it not thus penned, "unless the words shall be capable of being made apparent."

There may be inconsistencies and there may be inconveniences—I do not say there are—in the [769] construction I am putting on the section; but I think it is impossible to read the words and not say it was the intention of the Legislature that if a testator shall take such pains to obliterate certain passages in his will, and shall so effectually accomplish his purpose that those passages cannot be made out on the face of the instrument itself, it shall be a revocation as good and valid as if done according to the stricter forms mentioned in the Act of Parliament.

Moreover, this is not a case where, by restoring the words obliterated, the Court would be carrying out the intentions of the deceased: there can be no doubt that it was her intention to effect a complete revocation of these legacies. I confess I do not feel the force of the argument—as to the inconvenience to follow from such a construction; because the Court will not, in the first instance, take upon itself to decide whether the words obliterated can or cannot be made out; if it be asserted in an allegation that they are capable of being distinguished on the face of the will, the Court will refer such an allegation to proof, and then pronounce its judgment according to the testimony which may be offered at the hearing.

The construction which has been put upon the 21st section by the Judicial Committee is this: That, as in the prior section, the 20th, where a will is to be revoked by burning, tearing, or otherwise destroying the same, the act must be done with an intention to revoke; so, in the 21st section, the Legislature must be assumed to have meant that an obliteration, interlineation, or other alteration shall be made *animo revocandi*, with an intention to revoke, not to substitute.

[770] *Brooke v. Kent* turned entirely on the want of intention to revoke, and that intention may be made out precisely as in other cases. I really do not think I should be justified in departing from what I have over and over again repeated is my construction of this Act of Parliament. I do not enter into the question of the construction of the 20th section, or how far it refers to the destruction of the whole or of part of a will. I put the construction, I have already stated, on the 21st section, upon the ground that these words, not being apparent on the face of the instrument, are not to be supplied by extrinsic evidence. I think, however, this a very fair case upon which to take the opinion of the superior Court. I admit the allegation of the executor, and reject that of Dr. Watson.

Feb. 22nd.—On this day, upon proof of the facts pleaded in the allegation of the executor, the Court pronounced for the will without the obliterated passages. Costs out of the estate.

JAMES v. COHEN. Prerogative Court, February 26th, 1844.—A testator, in the year 1832, made a will and codicil, and, in March, 1836, a second codicil. In October, 1836, he executed a new will, prepared by his solicitor, and which was delivered into his own possession. At his death the will of 1836 could not be found. Held, that the effect of the execution of the later will was to revoke the prior will and codicils, and that the subsequent destruction of the second will by the testator (so presumed from it having been delivered into his possession and not being forthcoming) did not per se operate to revive the first will and codicils.

[S. C. 3 Notes of Cases, 30; 8 Jur. 249.]

This was a cause of proving in solemn form of law the last will and testament, with two codicils [771] thereto, of Lyon Cohen, a person of the Jewish persuasion, deceased, promoted by Thomas Hart James, one of the executors named in the second codicil, against David Cohen, the lawful brother, and one of the next of kin of the deceased.

The first article of the allegation, propounding the will and codicils, in substance pleaded that the testator, with his own hand, drew up a will, and, on the 21st day of June, 1832, signed his name twice thereto, first in English, and secondly in Hebrew characters. That, on the same day, he in like manner drew up and signed a codicil to his said will.

Second article. That on the 19th of December, 1833, the testator entered into conversation with a Mr. John Saunders on the subject of his said will and codicil, and shewed the same to him in the presence of the said Thomas Hart James. That Mr. Saunders, having looked over the same, informed the testator that they ought

to be witnessed, whereupon the testator acknowledged the several signatures to the will and codicil in the presence of Mr. Saunders and of Thomas Hart James, and he directed Thomas Hart James to write a memorandum of such fact upon the will. That Mr. Saunders then wrote at the top of the sheet of paper, containing the will and codicil, the following memorandum:—"This document acknowledged in my presence Dec. 19th, 1833," and then, in the presence of the testator, subscribed his name thereto, which, being done, the testator, in the presence of Mr. Saunders, delivered the will and codicil to Thomas Hart James, and directed him to take care of them.

Third article. That, on the 18th of March, 1836, [772] the testator, intending to make certain additions to his will and codicil, had the same brought to him by Thomas Hart James, and he then conversed with the said Mr. Saunders on the subject thereof, and in the presence of Mr. Saunders, with his own hand, drew up the second codicil, and signed it in Hebrew characters. That Mr. Saunders, in the testator's presence, attested the same by writing the following words:—"Witness, I. Saunders." That the testator then gave the will and two codicils to Thomas Hart James, and desired him to take care of them.

Fifth article. That subsequently to the times when the testator wrote the will and codicils, and down to the time of his death, he mentioned and spoke of his will and codicils as being in the custody of Thomas Hart James.

Sixth article. That Thomas Hart James is the grandson of the late wife of the testator, and was brought up and advanced by him in business. That the testator, up to his death, entertained and expressed a great regard for Thomas Hart James, and for his sister Mary Anne Cohen James, now the wife of Mr. C. Atterton. The will and codicils were as follows (Will):—

"London, June 21st, 1832.—This is my last will and testament. I bequeath to Thomas Hart James all my stock in trade, lease of my house I live in, all fixtures therein, all my furniture, plate, linen of all descriptions, wearing apparel of every sort, and everything whatsoever that is within my house, and all debts on my books due to me, and all acceptances in my possession, and my imperial bonds free from all demands.—Lyon Cohen." [Second signature in Hebrew characters.]

Codicil No. 1 (on the same sheet of paper).

[377] "All my other property to be equally divided between my brother, sister, Thomas Hart James, and Mary Ann Cohen James, and all demands on me to be paid therefrom.—Lyon Cohen." [Second signature in Hebrew.]

(Indorsement.)

"This document acknowledged in my presence, Dec. 19th, 1833.—I. Saunders."

Codicil No. 2. "I appoint my worthy friend Mr. Benjamin Ball, and my grandson, Thomas Hart James, executors and administrators, March 18th, 1836.—Lyon Cohen. [Second signature in Hebrew.] Witness, I. Saunders."

David Cohen, the brother of the testator, gave in an allegation in answer, pleading in substance as follows:—

First article. That in the month of October, 1836, the testator gave instructions to his solicitor, Mr. Morris, for the preparation of a draft will. That a draft will having been prepared, pursuant to such instructions, the testator approved thereof, and the same having been engrossed was duly executed in the same month by the testator. That he thereby expressly revoked all former wills and codicils by him theretofore made and executed.

Second article. That the said last mentioned will was left with the testator, and he repeatedly afterwards adverted to the facts both of his having made such will, and of the same being in his own possession.

Third article. That from and after the making and execution of the will, the testator made several attempts to procure from Thomas Hart James the return of his former will and codicils, but which [774] were ineffectual, inasmuch as Thomas Hart James evaded doing so, and on one occasion, when the testator formally desired him to return the will and codicils, Thomas Hart James, in the presence of two persons, stated that they were lost or mislaid, so that it was out of his power to return them.

Fourth article. That the testator for some years before his death had become much less attached to Thomas Hart James than he had previously been, and evinced towards him, and expressed himself of him in terms of coldness and disregard, partly from Thomas Hart James having set up in the testator's own line of business in his

immediate neighbourhood, of which conduct the testator highly disapproved. That Mrs. Atterton having in the year 1837 intermarried with her present husband, not only without the consent, but in defiance of the marked dissent and disapprobation of the testator, he became and was so incensed thereat that he wholly withdrew his former regard for her, and neither saw nor had any communication with her at any time after such her marriage.

Fifth article. That Rebeckah Levy, widow, sister of the deceased, one of the residuary legatees named in the will, died in the month of June, 1839, and the fact of her death was well known to the deceased.

Thomas Hart James, by his personal answers, admitted that he had been informed by James Morris, solicitor, and believed, that the testator did in the month of October, 1836, give instructions and directions to the said James Morris for the preparation of a will, and that the testator in the said month executed a will prepared by James [775] Morris, or in his office, but, whether the testator did or did not thereby expressly revoke all former wills and codicils by him previously made, the respondent was unable to answer.

That he hath been informed by the said James Morris, and believes, that the said will after its execution was taken possession of by the testator, but he disbelieves, and therefore denies, that the testator repeatedly afterwards adverted to the fact of having made such will, or of the same being in his own possession.

Witnesses were examined on the above pleas, but no witness was produced to prove the fact of execution of the will of October, 1836.

July 10, 1843.—This cause having, on this day, come on for informations and sentence, the counsel for David Cohen read the personal answers of Thomas Hart James to prove the due execution of the will of October, 1836; whereupon it was contended, by the counsel for Mr. James, that, inasmuch as those answers only admitted the factum of that will on the information of Mr. Morris, Mr. Cohen was bound to produce and examine Mr. Morris.

The Court, after adverting to the fact that the personal answers of Thomas Hart James would not bind other legatees interested under the former will and codicils, rescinded the conclusion of the cause, for the purpose of producing and examining Mr. Morris as to the due execution of the will of 1836.

Nov. 7, 1843.—On motion this day the Court was of opinion that Mr. Morris should be produced by Mr. Cohen, [776] and Mr. James be at liberty to exhibit interrogatories for his cross-examination.

Mr. Morris in substance deposed that in October, 1836, he prepared a will for the deceased; that it was duly executed by the deceased in the presence of deponent and of one of his clerks, and was duly attested by them in the presence of the testator.

The draft of this will was produced; the following is its effect:—"To his brother David Cohen all his Hebrew books; his own picture to Deborah Alexander, wife of the Rev. Alexander; his stock in trade (but not debts owing thereon), furniture, plate, linen, china, and articles, and things belonging to his dwelling-house to his nephew Thomas Hart James; his leasehold house in East Smithfield to Thomas Hart James; to his executors, except Thomas Hart James, 50*l.* each: the residue of his estate upon trust to Benjamin Ball, Esquire, Thomas Hart James, and the Rev. M. Alexander, to convert the whole into money, and after deducting all expenses to pay one fourth part of the clear residue to the said Thomas Hart James. The other three-fourths upon trust to lay out and invest upon security, and to pay the interest of one-third of such securities to his brother David Cohen for life, and after his death to be transferred to the deceased's nieces, Deborah Alexander and Evelina Levy, spinster. The interest of one other third part to be paid to his sister Rebecca Levy, widow, for life, and after her death to be transferred to said Deborah Alexander and Evelina Levy. The interest of the remaining third part to be paid unto his niece Mary Ann Atterton (wife of C. Atterton) for her own use, [777] independent of her husband, and upon her decease the said third part to be equally divided between her children, but in case of her decease without issue, or there being issue who shall die under 21, without leaving issue, then the same is to be divided equally between the said Deborah Alexander and Evelina Levy."

It was proved that all due and diligent search had been made for the original will so prepared and executed in October, 1836, but without success.

Mr. Morris further produced a memorandum in the handwriting of the deceased, dated March, 1836, which had been left in his, the witness's, possession; it was to the following effect:—"Having been informed by Mr. Saunders that I have signed some paper or papers giving some portion of my property to Thomas Hart James and his sister, beyond what I have given them by my will, I declare that they shall have no portion of the residue bequeathed to them until they have brought that into account; and when that, whatever it may be, is brought into account, they are to share in the residue."

The cause came on for hearing on the further evidence.

Haggard and Harding, on behalf of Mr. James, argued that the destruction of a later will, which itself had revoked a former will, ipso facto revives the former will, *Goodright v. Glazier* (4 Burr. 2512), *Harwood v. Goodright* (1 Cowp. 91), *Usticke v. Bawden* (2 Add. 125), *Kircud-[778]-bright v. Kircudbright* (1 Hagg. Ecc. 327), *Welch v. Phillips* (1 Moo. P. C. 299). That, even if it were necessary there should be circumstances shewing an intention to revive, it was abundantly manifest that the deceased did not mean to die intestate, because every paper shewed an intention to benefit Mr. James and his sister, and an equally clear intention not to give an absolute moiety of his property to his brother; that the intention in both these respects would be defeated by pronouncing for an intestacy.

Addams and Curteis contra.

Sir H. Jenner Fust. The deceased in this case is a Mr. Levy Cohen, who died on the 5th day of March, 1842; his property amounts to about 6000l. At the time of his death his next of kin consisted of a brother and two nieces, of whom one is now Mrs. Alexander, the wife of the bishop of Jerusalem, the other Miss Levy, spinster. These are the three persons who, if the deceased has died intestate, will take his property between them.

In the month of June, 1832, the deceased executed a will, the purport of which was to give his stock in trade, the lease of his house, his furniture, plate, linen, and so forth to a Mr. Thomas Hart James, who is the party propounding the papers in this cause. This will is in the deceased's own handwriting; and there are two signatures, the one in English, the other in Hebrew characters. By a codicil written on the same sheet of paper, and pleaded to have been drawn up on the same day as [779] the will bears date, but to which the date December 19th, 1833, is affixed, the deceased gave the residue of his property between his brother, his sister, Thomas Hart James, and Mary Anne Cohen James, sister of Thomas Hart James, now Mrs. Atterton; this is signed by Mr. I. Saunders as a witness, on the same sheet of paper. There is a further codicil, dated the 18th of March, 1836, the effect of which is to appoint a friend of the deceased, a Mr. Benjamin Ball, and Thomas Hart James, executors and administrators; this codicil is signed by the deceased and witnessed by Mr. Saunders.

Now, it appears that Thomas Hart James and his sister, Mrs. Atterton, were not, in fact, related, in the true sense of that word, to the deceased; they were the grandchildren of his wife; that Thomas Hart James had for some time lived with and assisted the deceased in his business, but had afterwards left him and set up for himself, at which the deceased was at first displeased, but afterwards became reconciled to him; and it certainly does appear, from the evidence in the cause, that he entertained great regard and affection for Thomas Hart James, although he did, at one time, express himself dissatisfied and displeased with his conduct. Mrs. Atterton, it seems, married without the consent of the deceased, at which he also expressed himself displeased; she had also lived with him, but, of course, left his house, and went to reside with her husband. I think it is sufficiently proved that the deceased did entertain great affection for her also—that he became reconciled to her, and did intend to provide for her; I think this is clear on the evidence, and by reference to the draft [780] of the will executed in October, 1836; most certainly he did not intend to leave her destitute of any provision. By the will of October, 1836, the property of the deceased was to be divided into four equal parts; one to go to his brother; one to his sister, Mrs. Levy; another to Thomas Hart James; and the fourth to Mrs. Atterton. By the first codicil the same division had been made of his residuary property, so far as concerned Thomas Hart James and Mrs. Atterton; each was to have one-fourth, and the former was to have the furniture, plate, linen, china, and articles, and things belonging to the dwelling-house, and he was also to have the stock in trade, but not

the debts owing thereon ; this is quite sufficient to shew what were the testamentary intentions of the deceased towards each of these two persons. In the month of March, 1836, the deceased executed a memorandum, having been, as the memorandum states, informed by Mr. Saunders, who had witnessed the first will and codicil, and the codicil of 1836, that he had signed some paper or papers giving some portion of his property to Thomas Hart James and his sister, beyond what he had given them by his will, and he thereby declared that they should have no portion of the residue bequeathed to them until they had brought that into account, and when that, whatever it might be, was brought into account, they were to share in the actual residue : that is the effect of the memorandum which Mr. Morris has produced. In August, 1836, the deceased gave instructions for another will to Mr. Morris, a solicitor, and a draft will has been brought into Court, and the fact of the execution of that will is pleaded, in the allega-[781]-tion given in by Mr. Cohen, the brother, and it is admitted, on the personal answers of Mr. Thomas Hart James, at least so far as his information and belief goes, that such a will was duly executed. Now, assuming that as against Thomas Hart James such admission would be sufficient proof of the execution of the will ; the answers of Mr. James would not be sufficient to bind or dispose of the interest of Mrs. Atterton, his sister ; the Court therefore suggested that the conclusion of the cause ought to be rescinded, in order to afford an opportunity of examining as to the fact of due execution of the will of 1836, Mr. Morris, the solicitor, who had prepared that will. Mr. Morris has now been examined, and has proved the execution of a will in the month of October, 1836, the draft of which was already before the Court ; the conclusion of his evidence shews that the will engrossed from this draft having been duly executed was delivered into the possession of the deceased. Upon the death of Mr. Cohen search was made for this will, and the result is, that it cannot be found ; it is not forthcoming ; and, therefore, it is admitted on all hands that it must be presumed to have been destroyed by the deceased *animo revocandi*. The question then comes to this, whether this will, having been so executed by the deceased, and being in terms, if not expressly, a revocation of all former wills, a former will revives by the mere act of destruction of this latter instrument, destroyed *animo revocandi*. It is said that, according to the law of the present day, it does revive, on the same ground as in an old case of *Goodright v. Glazier* (4 Burr. 2512. 1 Cowp. 91) ; it [782] was held that the cancellation of a will of a later date ipso facto revives a will of a former date ; I do not understand such a doctrine to be expressly laid down in the case of *Welsh v. Phillips* (1 Moo. P. C. C. 300), and, until corrected by actual decision, I shall hold the law to be, as laid down in *Usticke v. Bawden* (2 Add. 125), that there is to be no presumption either way ; that the question of revival or non-revival must depend upon intention to be gathered from the circumstances of each individual case ; that there is no legal presumption either way. That is the law laid down by my predecessor in this Court, and which has been acted upon ever since, and which I must take to be the rule existing at the present day ; namely, that the question of revival or non-revival must depend on all the circumstances of each case taken together. What, in this case, is the probable intention of disposition by the deceased at the time the second will was revoked ? At the time when the first will was executed his nearest of kin were a brother, sister, and two nieces ; for these nieces he had at that time made no provision (I am taking the will of 1832), but their mother was then living, and she was to take absolutely one-fourth part of the residue. In October, 1836, the deceased makes a different disposition of his property, for, by that paper, after giving to Thomas Hart James the several specific things, which, by his former will, he had bequeathed to him (except book-debts), he directs and appoints executors and trustees, namely, Benjamin Ball, Thomas Hart James, and the Rev. Alexander, and [783] he bequeaths to them all the residue of his property, to hold the same, and every part thereof, in trust to convert the same into money, and to apply the proceeds in the following manner : namely, to pay one-fourth of the clear residue to Thomas Hart James ; and to stand possessed of the remaining three-fourths, upon trust to lay out and invest the same upon security, and to pay the dividends of one-third thereof to his brother, David Cohen, for life ; so that the brother was to take only a life interest, he having, by the former will, had an absolute interest ; and after his death, the principal to be transferred to his two nieces. Then he gives the interest of one other third part to his sister Deborah Levy, for her life, and after her decease to his said two nieces, in equal shares and proportions—the sister only takes a life interest

—two fourth parts of the residue of his estate are given to the two nieces after the death of the deceased's brother and sister; the nieces are to take absolute interests; the remaining fourth part is to be paid to Mrs. Atterton, who is there described as the wife of C. Atterton, for her separate use, and at her death to go to her children. By the codicil of 1836 Mr. Ball and Thomas Hart James were appointed sole executors.

It does appear to me that this will of October, 1836, was a very material departure from the will and codicils of 1832 and 1836; by the will of 1836 the brother and sister have only life interests; Mrs. Atterton also has only a life interest, and there is a difference in the executors appointed. The Rev. Mr. Alexander is by the will of 1836 an executor and a trustee for the benefit of his wife, and also of [784] the other property devised over after the lives of the parties to whom it is originally given; here then is a great difference in the state of things as regards the will of 1832 and the codicils of 1832 and 1836. The will of 1836, having been executed duly, must be taken as a revocation of the will of 1832, and of the codicils. This will of 1836 is destroyed, and I presume by the deceased; but am I to conjecture that thereby it was the deceased's intention to revive the will of 1832, and the codicils? The sister, Mrs. Levy, died in 1839; suppose he destroyed his will in consequence of her death (for although the time when this last will was destroyed is not positively fixed, yet it was after 1839 that he said he must alter his will), and judging from circumstances I infer that he meant to alter the will by which his sister had one-fourth of the property for life; her death might be a reasonable ground for altering his then will, although not a reasonable ground for reverting to his former will, by which she had one-fourth absolutely. This is not a question whether the deceased meant to die testate or intestate, but whether he intended to revive the will and codicils of 1832 and 1836, by the destruction of the will of 1836; it is one thing to say he did not intend to die intestate and another thing to say that he intended to die testate as to these particular papers. There is no one circumstance from which I can collect the intention to return to these first papers; and I am clear on this point, namely, that the deceased did not intend to restore Mr. Ball and Thomas Hart James as sole executors. Although, by the cancellation of the latter will he may have revoked the appointment of Mr. Alexander [785] as executor, it by no means follows that thereby he intended to return to his former will. Again, may he not have revoked this last will, intending to make a new disposition of part of his property as regarded his nieces? The question really comes to this, whether there are not circumstances such as to leave the Court in no doubt that he did not intend to return to his earlier will. There is one fact to which I must now advert; the earlier will and codicils of the deceased remained uncanceled at the time of his death; and I will take it that he knew them to be in the possession of Thomas Hart James; but there is evidence that although he knew this, he had applied to him to give up possession of these papers, and that Thomas Hart James had declined to do so; is it not then very probable that, if these papers had been in the possession of the deceased at the time when he made the will of 1836, he would have cancelled them. Now, I have this fact proved by the witnesses; the deceased did apply to Thomas Hart James for the papers in his possession, the deceased wishing to shew them to Mr. Morris, and there can be no doubt, if Morris had seen them at the time, he would have advised of their being cancelled, by tearing off the signatures or otherwise destroying them altogether. There is no inference, because the deceased knew these papers to be in the possession of Thomas Hart James, that, therefore, he intended to revive them; if he had had them in his own possession, and they had been found uncanceled, the effect might have been different; but they were not in his own possession; he had applied to Thomas Hart James for them, and he had de-[786]-clined or evaded to give them up: I have not, therefore, any inference of law arising from the fact of the deceased having had these papers in his own possession, and having suffered them to remain uncanceled when he destroyed the later will.

The Court would have been glad, if possible, to have pronounced for these papers, because the effect of a contrary decision will be to deprive Mrs. Atterton of any provision from Mr. Cohen. Although she was no relation to the deceased, the Court does not think he would have left her unprovided for in case he had made another will. The circumstance of destruction of the later will of 1836, I consider as not enough to infer intention to revive the will of 1832; the two wills are not the same;

unfortunately, whichever way the Court may decide, the intention of the deceased will be defeated, for I cannot think it was his intention to give a moiety of his property to his brother David Cohen.

The Court is under the necessity of pronouncing, under the circumstances of the case, against the validity of the papers now propounded; the effect will be to hold that the deceased is dead intestate.

The Court on a former occasion, looking to all the facts of the case, rescinded the conclusion of the cause to enable the parties to examine Mr. Morris, in order to have full proof of the execution of the later will; certainly with a strong impression at the time that, if the fact of execution was sufficiently proved, the destruction of the later will would not revive the former instruments. The Court, having now gone into the evidence of the cause, pronounces [787] against these papers; consequently, the deceased is dead intestate; but it is a case for giving costs out of the estate.

It is a very hard case, but, upon the circumstances, the Court thinks it right and fit to do as it has just done.

COVENTRY against WILLIAMS. Prerogative Court, February 28th, 1844.—Paper, propounded as a codicil, rejected, as not being per se of a testamentary character, and the internal defect of the instrument not being supplied by evidence.

[S. C. 3 Notes of Cases, 164; 8 Jur. 699.]

The Right Honorable George William Earl of Coventry died on the 15th of May, 1843. The deceased had made a will and the several other papers hereinafter propounded as codicils. The surviving executor having renounced probate, administration, with the will and one codicil, dated respectively the 25th and 26th days of May, 1835, was prayed by the Hon. William James Coventry, the brother of the deceased.

Other parties appeared, claiming to be interested as legatees named in the other codicils or testamentary papers which bore date respectively the 27th of September, 1836, the 1st of August, 1840, and the 18th of November, 1840. The several papers were propounded in separate allegations.

On the 19th of July, 1843, letters of administration, with the will and first codicil, were granted, under the usual security, to the Hon. William James Coventry, the other parties consenting thereto; the consideration as to the validity of the remaining scripts being reserved.

The three causes relating to the remaining scripts [788] having come on for hearing, the Court pronounced for the force and validity of the papers of September, 1836, and of August, 1840, as codicils to the will of the deceased.

The remaining paper, propounded as a codicil on behalf of a Mrs. Chase, was as follows:—

“Severn Bank, Worcester, Nov. 18th, 1840.

“In consequence of a late introduction to Mrs. Chase, finding her talents and virtues were unrepaid either by her profession (to which she is an ornament) or by her husband, who since that acquaintance has been proved to be already married, I have determined to offer her as a tribute to her talents and virtues the following small pittance, that poverty may never overtake her. I shall immediately order Mr. Morland, who has made my will, to make the following codicil to it. That whereas in consideration of my sincere affection for her irreproachable character, and her other virtues, she shall enjoy from me the small but welcome allowance of fifty pounds per annum, to be paid by Messrs. Coutts and Co., Bankers, Strand, half-yearly, quarterly, or annually, as she shall will it. And after her death (which I cannot contemplate without feelings of the deepest regret) to her son. Given under my hand and seal this 18th of November, 1840.—Coventry. Witness, Thomas Marchant, Richard Chambers, M.D.”

Admission of this paper to probate was opposed on two grounds: first, that it was not of a testamentary character; secondly, on account of alleged defect in its execution.(a)

[789] The Queen's advocate and R. Phillimore on behalf of Mr. Coventry. This paper is not testamentary either in form or language; it does not purport to dispose

(a) The Court having decided the case upon the first ground, the facts and argument on the second point are omitted.

of property after the death of the party. There are no words denoting future gift; it is a mere security or promise to make another instrument of a testamentary character, as distinguished from the character of this instrument. If this paper was intended to be a valid codicil there could be no occasion for a further instrument; if a further instrument of a different character and nature was requisite, this is no testamentary paper. The parties who are to provide the funds to pay this annuity are the testator's bankers, not his executors or administrators; after the death of Lord Coventry, his account with Messrs. Coutts would be wound up and closed. They cited *K. Proctor v. Daines* (3 Hagg. Ecc. 218), *Griffin v. Ferard* (1 Curt. 98).

Addams in support of the paper. This is a valid codicil to all intents and purposes. The deceased may have intended in the first instance to make this as a provisional instrument; but still he considered it as capable of being made a valid codicil; the presence of one witness, Dr. Chambers, suggested to the mind of the deceased that it would be better at once to execute the paper in the strict legal testamentary form, in case of his death before a more formal instrument was prepared; it was to [790] stand good if he did not execute another codicil in conformity with this paper. Where was the necessity for taking so much trouble to comply with the complex requisites of the Wills Act, if this paper was to have no operation; if it was to be nothing more than a mere voluntary promise: a bare acknowledgment of what the deceased proposed to do; what was the necessity for signing a bare memorandum in the presence of two witnesses present at the same time, and causing them to subscribe it in his presence?

Sir H. Jenner Fust. The only question remaining to be determined in these causes relating to the testamentary papers of the late Earl of Coventry is with regard to a paper, dated the 18th of November, 1840, propounded as a codicil by Mrs. Chase. The purport or contents of this paper are as follows. [The Court read it.] Two objections are raised to this paper, first, as to the character of the instrument itself; secondly, as to its due execution.

The first question to be considered is, what is the legal character of the paper? Now upon the face of it, it does not purport to be testamentary; it does not purport to be the paper under which this lady is to take an annuity of 50l.; it clearly does not speak of an act done, but of an act to be done, and that, not by the deceased, but by Mr. Morland, who had drawn his will.

Now, I apprehend it to be incumbent on a party setting up a paper as testamentary to shew, by the contents of the paper itself, or by extrinsic evidence, that it is of that character and nature; that by the [791] very identical paper the party deceased has given, or intended to give, or supposed himself to have given, the particular legacy or bounty claimed. If the paper purports of itself to be testamentary, the party who opposes its admission to probate must, in order to get rid of it, shew to this Court that it was not made *animo testandi*; if the purport be equivocal, it must be shewn, by the party setting it up, that it was made *animo testandi*. I am clearly of opinion that this paper is not testamentary in itself; it is only to have operation and effect by the instrumentality of some other document; the deceased is to give orders to Mr. Morland to make that which is to be the effective instrument. I am the more inclined to this opinion by this circumstance; the codicil of 1840 commences in these words: "This is another codicil to my will"—a special and direct declaration that that very instrument is a codicil to his will: this also is the expression made use of in another paper, dated in the year 1836—"This is a codicil to my will." These two papers are therefore both very differently described from that now under consideration, which purports not to be an act done at the moment, but indicates an intention to give instructions to a solicitor to prepare a codicil to such and such effect: upon the face of this instrument there is nothing testamentary.

Then is there any extrinsic evidence that the deceased did intend this paper to operate as a codicil? I can find none; indeed there is one striking circumstance to the contrary appearing on the evidence of the attesting witnesses, namely, neither of them, at the time of attesting, had any notion that they were witnessing a codicil. The [792] whole evidence of Marchant shews that at the time of witnessing this paper he did not know it was a codicil; he so states at nearly the commencement of his disposition; again, to the twelfth interrogatory, "I had no knowledge at the time of the contents or purport of the said paper, nor that it was a codicil." The evidence does not supply what is deficient on the face of the paper itself. The other witness, Dr. Chambers,

says, in his examination in chief, that he was in attendance on Mrs. Chase, then staying at Lord Coventry's house; that, agreeably to a request from his lordship, he called at the house, and found Mrs. Chase and his lordship sitting in the dining-room. That after conversing with them for some time, Lord Coventry said, speaking to Mrs. Chase, "As Chambers is here, I may as well get him to sign this paper," and he thereupon got up and went to his writing-table, and took from a drawer a paper, and read its contents; the purport of it was to bequeath—bequeath is the expression the witness uses—an annuity of 50*l.* a-year to Mrs. Chase. He says, "I further recollect that his lordship said the annuity was to be continued to her little boy." Then he goes on to state that Marchant was called in, the deceased having signed the paper before Marchant came into the room; and then he says, "Upon Marchant coming in Lord Coventry desired him to sign his name to the paper, which Marchant did in the presence of Lord Coventry and of me; Mrs. Chase being also present. Marchant, having signed it, withdrew. My present belief is, that I did not sign the paper until after Marchant left the room, because I have some recollection of having [793] mentioned to Marchant as I was leaving the house that I also had signed the paper."

In answer to the first additional interrogatory the same witness says, "Whilst Lord Coventry was in the act of signing his name to the codicil in question, he mentioned to me the purport of its contents." In answer to the second interrogatory, he states the manner in which the paper was executed and attested. To the third he says, "I have before stated the manner in which I was asked to witness the said codicil; my signing was, in part, at my own suggestion, on account of Lord Coventry having, in the first instance, said that he might as well sign the codicil whilst I was there. I have no recollection of Lord Coventry having, in exact terms, called the paper in question a codicil to his will; he did not ask me to sign it as being a codicil: I did not (being unacquainted with the legal operation of similar papers) know that such paper would take effect as a codicil to his will. I had no doubt of the validity of the paper to effect whatever might be thereby intended by Lord Coventry."

In answer to the twelfth interrogatory, "It was the impression on my mind, at the time of signing and witnessing the said paper, that it was not more than a memorandum or security to Mrs. Chase that his lordship would make her the allowance therein mentioned. I considered the annuity mentioned was already in course of payment, and not postponed until his lordship's death. After I had witnessed the paper, Lord Coventry handed it to Mrs. Chase, saying, 'That is a sufficient security to you,' and she then folded it up, and placed it in [794] her bosom. Lord Coventry also said to Mrs. Chase, 'I will speak to Morland about it.'" Here then is the same intention deposed to as is manifested on the paper itself, namely, that the deceased was to speak to Morland respecting it. Dr. Chambers says, to the same interrogatory, "Had I supposed that my signature to the said paper would have given it validity as a codicil, I should not for a moment have hesitated to sign it, on being requested by Lord Coventry to do so."

This is the evidence of the two witnesses, the only persons present at this transaction; they cannot say that the deceased signed this paper as a codicil to his will; the impression on the mind of Dr. Chambers is, that it was a mere security to Mrs. Chase that Lord Coventry would make such a codicil; that he would speak to Morland about it. There is nothing, as it appears to me, to supply the deficiency in the character of the paper; the evidence in that respect decidedly fails.

Then the question arises whether the delivery of this paper to Mrs. Chase is sufficient to supply what is wanting in its internal character; I am of opinion it is not; I do not think it was, as suggested in argument, a provisional paper, intended to operate in case the deceased did not make one of a more formal nature.

It has been said that the impression of the witnesses, as to its character, could not affect the nature of the paper, and that it may, notwithstanding their impression, be a codicil. Undoubtedly it may; but where there is no internal evidence, from the paper itself, that it was intended to be testamentary, it is essential that the extrinsic [795] evidence should supply that which is necessary to give it a testamentary character.

Addams. The attention of the legal advisers of Mrs. Chase was never called to this point. This paper was pleaded as a codicil; no objection as to its testamentary character was taken; issue was joined as to whether it was duly executed. I never

recollect an objection of this kind taken at this stage of the cause; if the paper was not testamentary the allegation propounding it ought to have been opposed; then there would have been an opportunity to have pleaded any special circumstances.

Per Curiam. You plead this paper, first, as a codicil, next as duly executed; must not the Court be satisfied that it is a codicil before admitting it to probate?

Addams. I should wish to have an opportunity of considering the point: it has come rather by surprise on Mrs. Chase's legal advisers.

Per Curiam. Let the case stand over for that purpose.

June 19th.—This cause came on to be spoken to.

The Court, after hearing Addams, remained of its former opinion, and rejected the paper.

[796] PHILLIPS *against* PHILLIPS. Consistory Court of London, April 30th, 1844.

—A libel in a suit of divorce pleaded a report of the result of an investigation into the conduct of the wife, as if made verbally to the husband. At the hearing of the cause it appeared that the communication was in writing; the Court thereupon rescinded the conclusion of the cause, in order that this document might be properly pleaded; this was done, and publication passed a second time.

—Held, that it was not competent to the wife to give in an allegation pleading certain facts connected with the written report; first, because the necessity for such plea was equally apparent whether the report was verbal or in writing; secondly, because such plea should have been asserted before publication passed the second time.

[S. C. 3 Notes of Cases, 444; 8 Jur. 409. See further, 1 Roberts. 144.]

This was a suit of divorce, by reason of adultery, promoted by the husband against his wife.

A libel was given in, and, after debate, admitted; witnesses were examined; the proctor for the wife declared that he gave no defensive allegation, whereupon publication passed, and the cause was assigned for sentence.

The libel, *inter alia*, pleaded that the husband, some time before the commission of the adultery imputed against the wife, had had his suspicions roused as to the infidelity of his wife, and had caused an inquiry to be made into her conduct by two confidential friends, who (as pleaded in the libel) "reported to him that she was innocent." At the hearing of the cause it appeared upon the evidence that the result of this inquiry was made known to the husband in the form of a written report. The Court thereupon rescinded the conclusion of the cause, in order that this written report might be pleaded and annexed in additional articles. This having been done, publication passed at the prayer of the proctor of the husband; the proctor of the wife being present, and not opposing.

On behalf of the wife an allegation was now [797] offered, counterpleading some of the statements of the libel as connected with the result of the investigation.

The admission of this allegation was opposed by

Haggard and R. Phillimore.

Addams and Robinson in support.

Dr. Lushington. The Court has now to determine on the admissibility of an allegation offered at a very late period of this cause; I apprehend, independent of the technical objection as to the precise time at which the allegation is offered, it being after the Court has rescinded the conclusion of the cause—that the first and substantial objection to its admission is, that it contains matter which might and ought to have been pleaded in answer to the ninth article of the libel, the initiatory plea in the cause.

I think I must consider the question in two points of view: first, whether this allegation might not with equal propriety have been presented to the Court in answer to the ninth article; secondly, whether circumstances have occurred at the hearing of the cause or since affording any justification for offering the allegation at this late period, when by the ordinary rules of the Court there would be no opportunity of doing so.

Now, the ninth article pleads, "That the cause of the wife quitting her husband's house on or before the 1st day of January, 1840, having become known to their relations and friends, a reference was made, through their interposition and advice, [798] to two of their friends, confidentially to inquire into the grounds of the charge made against the wife who, upon an investigation of the circumstances relating to the

same, reported to the said husband on or about the 28th of January, 1840, their conviction that she was innocent of any criminal conduct, and they advised him to receive her back again: that the husband believing the result of such investigation to be true, on or about the 29th of January, 1840, received his wife back again.⁵

Dismissing for a moment all consideration of the defect or omission in the form of this plea, in substance it is as follows:—The husband, having his suspicions roused, caused an investigation into the conduct of his wife to be made by two of his friends, and received from them the result of that investigation; and, on faith of their judgment, took his wife back. The allegation now under consideration pleads as follows:—“That the wife accompanied by her sister went to the residence of her mother, and returned therefrom, accompanied by her said sister and mother; and, in the morning of Saturday the 25th of the month of January, went to the residence of, and saw and conversed with, her husband, and together with her mother stayed with him several hours; and, on the morning of the following day, to wit, Sunday the 26th, her husband, as it had been arranged that he should do so on the day preceding, went to the lodgings of the wife, and remained with her there for several hours; and on the next day, to wit, Monday the 27th, the wife, with her husband’s perfect approbation and concurrence, returned home to his house, and she and her husband slept together at his house on the night of the said Monday, and [799] thenceforth lived and cohabited together until their separation in the month of October, 1842.” What is the effect of this plea? In substance it assumes to contradict the ninth article of the libel, by shewing that, previously to the receipt of the report, the husband received back his wife, and the cohabitation between them was renewed; in other words, that it was not on the faith of the investigation, or on reliance of the report of her innocence, that the wife was taken back; because this had already taken place before the investigation was concluded, or the result made known. I am clearly of opinion that this allegation is substantially neither more nor less than an answer to the ninth article of the libel, and would have been admissible in answer to it; and I am not at present able to see why it was not offered at the proper time, and in the proper shape of an allegation responsive to that ninth article; I cannot myself see any such want of explicitness or of definite statement in the libel as that the wife had not ample opportunity of alleging these facts before the first publication in the cause; the dates are sufficiently explicit, indeed more so than often happens in these cases; they are as explicit as possible—“on or about the 28th,” “on or about the 29th.” Surely, if the wife had any intention of alleging that the report was not the foundation of her being taken back, she has had ample opportunity of doing so. For the reasons I have now stated, as to the first point in the case, my mind is entirely made up to this result, that the allegation now offered might with the same facility have been offered at an earlier period.

The second question is whether anything which [800] occurred at the hearing, or was then done by the Court, can give to the wife the opportunity of bringing in this plea, the right to do which she had forfeited by previous omission? Now what occurred at the hearing of the cause was shortly this: looking to the ninth article of the libel, I found it there stated that the friends to whom the reference had been made had reported so and so—here arose the whole difficulty; the term was ambiguous—“reported”—of course, so far as the wife was concerned, originally it mattered not whether that report was made verbally or in writing, but when the cause came on to be heard, and it appeared that the report was in writing—was not a mere verbal report—the Court, according to all established rules of evidence, could not receive the oral testimony of witnesses as evidence of the contents of a written document, in the power of the party, and which was neither alleged to have been lost nor destroyed; the Court had no alternative but to reject the evidence or rescind the conclusion of the cause. It is greatly to be lamented that the libel was so originally drawn, the party having the document in his pocket; because the counsel of the wife were misled, and did not take an objection, which must have prevailed, if the report had been pleaded to be in writing, and had not been annexed, or a statement made that it had been lost or mislaid; the article would clearly have been objectionable, and must have been reformed. But the misleading occasioned by the ninth article does not go to justify the present plea, for the report, whether it were in writing or verbal, equally required contradiction. Under the above circumstances I followed the rule which has been usually adopted in this Court; of course I did not admit the evidence, but I rescinded the conclusion of the cause for the purpose of bringing in the document,

which was admitted to be in existence. Does that circumstance in the slightest degree make any alteration in favour of the wife? I apprehend none whatever. The rescinding the conclusion of the cause was a mere matter of form, in order to keep the proceedings regular, and to get at the real truth and justice of the case.

Upon these grounds I feel no hesitation in saying that it is my duty to reject this allegation; nothing could be more inconvenient than when witnesses have been examined to certain facts, and the whole evidence in the cause is known; where witnesses have been re-examined merely to prove handwriting, to permit of additional facts and evidence. If this course were allowed there never would be an end to the proceedings in a cause, and instead of tending to elucidate the truth it would tend to choke it.

This allegation is offered too late; if it was intended to give in any allegation at all, it should have been tendered before publication, as responsive to the additional articles of the libel, instead of waiting until publication has passed; it is impossible to admit this allegation, and I reject it.

[802] *MERRYWEATHER against TURNER*. Prerogative Court, May 14th, 1844.—

Next of kin are not barred by mere lapse of time, by acquiescence, or by the receipt of legacies, from requiring executors to prove a will in solemn form.—But where a will had been declared well proved in the Court of Chancery, after an order for an issue *dev. vel non* had been discharged on the petition of the heiress-at-law (also sole next of kin) and her husband, and an annuity bequeathed to her regularly received during fourteen years, this Court refused, at the prayer of the heiress-at-law and her husband, to call on the executors to prove that will in solemn form.

[S. C. 3 Notes of Cases, 55; 8 Jur. 295.]

This was a question of calling in the probate of the will with one codicil of William Turner, deceased, and requiring the executors to prove them in solemn form of law.

The testator died on the 19th of September, 1829, a widower, leaving a Mrs. Merryweather, his only daughter, his heiress-at-law, and the only person entitled to his entire real and personal estate in case he should have died intestate. The will of the deceased was dated the 16th of May, 1829, and the codicil the 11th of August in the same year. By the will, Mr. John Turner, Mr. John Hornblower Turner, Mr. William Wood, and Mr. William Taylor Abud were appointed executors and residuary legatees in trust.

The testator bequeathed to Mrs. Merryweather a legacy of 500*l.* and an annuity of 500*l.* during the joint lives of herself and her husband; and, in case she should survive him, an additional annuity of 500*l.* The residue of his estate and effects, with the exception of a few small legacies, he bequeathed to his executors, upon trust for his grandchildren.

Shortly after the death of Mr. Turner, and in Trinity Term, 1829, a caveat was entered in this Court, on behalf of Mrs. Merryweather and her [803] husband, against probate passing of this will and codicil; an appearance was given for the parties named as executors, and probate of the will and codicil prayed by them. Upon the caveat being warned, a proctor appeared and prayed time to set forth his client's name and interest; and he was assigned to do so within three days; otherwise the probate was to issue to the executors.

Upon the second session of Michaelmas Term, 1829, an appearance was entered for Mrs. Merryweather; her interest was admitted; and an affidavit of scripts was exhibited by the proctor for the executors.

Upon the third session of Michaelmas Term the proctor of Mrs. Merryweather declared that he opposed the will and codicil; and he was assigned to give in an affidavit of scripts, and in default of his complying with the assignation within three days, probate of the will and codicil was to pass to the executors. The last assignation not having been complied with, probate of the will and codicil issued to the executors on the 3rd of December, 1829.

Upon the same day that the probate issued from this Court a bill was filed in the Court of Chancery, on behalf of the infant children of Mr. and Mrs. Merryweather, by their next friend, against their father and mother and the executors, praying that the will and codicil might be established, and the trusts thereof carried into execution by and under the decree and direction of that Court; that proper persons

might be appointed to be trustees thereof; for a receiver; and that the executors [804] might be restrained from receiving the deceased's real and personal estate.

Upon the 6th of March, 1830, an answer was put in to this bill by the executors; and, in the month of June, 1830, the joint answer of the father and mother. By this last answer the will and codicil were admitted to be duly executed. In the same month Mr. and Mrs. Merryweather applied for payment of the legacy of 500*l.* which was paid by the executors. In the month of December, 1830, Mr. and Mrs. Merryweather presented their petition to the Lord Chancellor, praying directions for payment of her annuity of 500*l.*, and an order was made according to the prayer, and had been acted upon from that time, and payment of this annuity had been received up to Christmas, 1842. In Trinity Term, 1831, the will was declared to be well proved in the Court of Chancery without opposition. The cause came on for hearing in Hilary Term, 1832, when counsel on behalf of Mrs. Merryweather, the heiress-at-law, asked for and obtained, as of course, an order for an issue *devisavit vel non*.

The issue having been settled was set down for hearing in Trinity Term, 1832, before a special jury; the executors delivered briefs to counsel, and the necessary witnesses were in attendance, when the plaintiffs withdrew the record.

In Michaelmas Term, 1832, the executors made an application to the Court of Chancery on the subject of the withdrawal of this issue; and applied for and obtained leave to have the conduct of it, and to be plaintiffs therein; and they were directed to proceed to trial thereof forthwith. Notice of trial [805] was given for Hilary Term, 1833, and the cause was appointed for trial. Mr. and Mrs. Merryweather thereupon presented a petition to the Court of Chancery, praying that the order for the trial of the issue might be discharged, they undertaking to admit the validity of the will and codicil, and submitting to have the trusts thereof performed and carried into execution under the direction of the Court. On the 14th February, 1833, this petition came on to be heard with the cause, when the Master of the Rolls discharged the order for the trial of the issue which had been obtained by the executors, and, on the application of Mr. and Mrs. Merryweather, and on their admissions to that effect, declared the will and codicil to be well proved; and that the same ought to be established and carried into effect.

This last decree had been acted upon from that time; and between 6000*l.* and 7000*l.* had been paid to Mrs. Merryweather on account of the annuity.

In Hilary Term, 1830, an action of ejectment was brought by Mr. and Mrs. Merryweather, as the plaintiffs therein; in effect impeaching the validity of the will; the action was defended; and was set down for trial before a special jury, but was discontinued by the plaintiffs, who were thereupon ordered to pay the costs consequent on the discontinuance.

On the day of a decree was extracted from this Court, calling upon the executors of Mr. William Turner, deceased, to bring in the probate of this will and codicil and to prove the same in solemn form of law; or otherwise to shew cause why such probate should not be revoked, and [806] declared null and void; and the deceased be pronounced to have died intestate.

This decree having been duly served, an appearance was given on behalf of the executors, and their proctor prayed to be heard, on his act on petition, against the enforcement of the tenor of that decree. An act on petition was entered into, which, on the part of the executors, stated the above facts, and relied upon them as the grounds on which the Court ought not to enforce the decree. The act was written to by the proctor for Mr. and Mrs. Merryweather, stating the grounds and reasons why the parties should not be debarred from disputing the validity of this will and codicil in this Court. [The facts are fully stated in the judgment.]

Addams and Harding, on behalf of the executors, cited *Sheffield v. The Duchess of Bucks* (1 Atk. 628), *Newell v. Weeks* (2 Phill. 224).

Haggard and Jenner contrâ. *Brown v. Hayward* (1 Hare, 432), *Hoffman v. White* (2 Phill. 230), *Bell v. Armstrong* (1 Add. 372).

Sir Herbert Jenner Fust. [After stating the facts of the case.] In reply to the facts alleged and proved by the executors, it is pleaded, on behalf of Mr. and Mrs. Merryweather, that, admitting all this to be true; conceding that Mr. and Mrs. Merryweather did by [807] their answer admit the due execution of the will and codicil, and did not oppose the proof thereof in the Court of Chancery; that they did prevent

the trial of the first issue by causing the withdrawal of the record; and did also prevent the trial of the second issue by presenting their petition; and did also discontinue the action of ejectment: in fact, admitting all that is stated, on behalf of the executors, as to their conduct during the proceedings in equity; that nevertheless there were reasons justifying them in so doing, namely, that the witnesses, on whom they chiefly relied for disputing the validity of the said will and codicil, were servants of the deceased, and were, until very recently, in the pay and under the control of the executors, and refused to give any information as to the will and codicil; which will and codicil are alleged to have been made under the eye and in the presence of the executors, and at a time when the deceased was wholly incapable of making or executing the same: so the allegation is that for the last fourteen years the parties could not obtain any information on which to oppose the will, with any chance of success, by reason that the servants of the deceased were continued in the employ of the executors, and have only lately left their service, having been, until very recently, in the pay and under the control of the executors. Now, if this is not true, if these servants were not continued in the service of the executors longer than fifteen months after the death of the testator, surely the parties could have obtained information sufficient to enable them to contest the will at an earlier period. The statement proceeds, that by the codicil one of the executors procured a [808] legacy of 400l. for himself, in addition to 100l. given to him by the will; a legacy of 200l. for his mother, and 20l. a piece for two of his aunts; and, for the sister of the deceased's late wife, 150l., in addition to a legacy of 50l. by the will; and for the brother of another of the executors, 50l. But all these facts, at least, were apparent on the face of the will and codicil themselves; the instruments themselves would furnish this information; how, then, can this be a ground on which the executors can now be called on to contest the validity of this will, and not at an earlier period?

A second reason is, that the parties were placed under circumstances of great disadvantage by the conduct of the issue having been given to the executors; no doubt they were not in so advantageous a position as if the children had been the plaintiffs; but it was on this very ground that the application was made to the Master of the Rolls to allow the executors to attend the trial; it is very probable that they wished the trial to come on between themselves and their children; but surely it was a very reasonable precaution to take where an issue was directed to be tried between infant children and their parents. The statement goes on to allege that before Mr. and Mrs. Merryweather consented to make the admission as to the will, they were advised that their so consenting would in no way debar them from disputing the validity of the will and codicil in this Court, if at any future period they should discover new evidence tending to invalidate them; and in proof of this they refer to a letter dated 1829, written by the proctor to their solicitors; but this letter only refers to what [809] would be the consequences of withdrawing the caveat, or not complying with the assignation of this Court; no doubt this was sound and good advice; but still it has nothing to do with a consent to make the admission in the Court of Chancery on which the will was declared to be well proved.

A fourth reason is, that it is only within the last four months that the parties have obtained from some of the servants, who are no longer in the pay and under the control of the executors, such new evidence as will prove the will and codicil to have been obtained by fraud, at a time when the deceased was wholly incapable of performing any rational act whatever. Surely, with due diligence, they might have informed themselves of this at an earlier period; none of these servants continued in the service of the executors for more than fifteen months after the decease of the testator!

The fifth reason amounts to a point of law, namely, that Mrs. Merryweather was not examined, nor was her answer taken separately and apart from her husband; and therefore it is contended she is not precluded from now disputing the validity of the will in that Court, notwithstanding the admission contained in that answer—why this is a question as to the practice of the Court of Chancery, on which this Court can form no opinion whatever.

Now these are the reasons assigned in the answer to the act on petition, for calling in this probate, and why the parties are not now barred from taking this step. The executors state in reply what took place with respect to the servants, and it seems that one of them only was taken into the service of one of the executors, and she only

remained there for [810] twelve months; she has made an affidavit, but she does not state when exactly she left the service. I must say the statement in the answer to the act is very disingenuous in this respect, for it merely states these servants to have been in the service of the executors, without specifying the length of time they remained, or when they quitted or were discharged; the executors say that the servant Jupp was discharged twelve months after she was hired, and that all the other servants were merely retained until the sale of the household furniture and effects, and were then discharged, excepting the gardener, who was retained until the year 1832, when the deceased's house was let or sold; so that the whole of this statement amounts to this—that one servant did remain in the service of Mr. Joseph Turner, one of the executors, for a period of about twelve months.

The rejoinder to the act asserts in positive terms that all the servants of the deceased were bought over by the executors by the promise of legacies; that Mr. and Mrs. Merryweather were compelled to quit the deceased's house after the funeral; that the servants conducted themselves in so violent and abusive a manner towards them that they could not venture to approach these parties, and were thus unable to obtain that information which was solely within their knowledge; and without which the said will and codicil could not be opposed with success. I must say I cannot look on this as a reason why the will and codicil should not have been opposed in the first instance.

These are the circumstances stated in the several stages of the act on petition; but the affidavit of [811] Mr. and Mrs. Merryweather goes further than the act, and states some additional circumstances; these could not be known to the executors until the affidavits were exchanged; otherwise the Court would have expected, indeed would have thought it necessary, that the executors should have given a denial or some explanation of them; for instance, as to the charge of Mr. and Mrs. Merryweather not having access to the house and ground.

It is very improper that such allegations should be made in affidavits; when they are not to be found in the act on petition, the other parties could not be expected to answer that which was not in the act on petition; had these facts been pleaded, I should have wished to have had a denial from the executors, to the effect, at least, that they had not given orders for such conduct: still this can have no weight whatever in determining whether the Court is to call in the probate of this will and codicil, and to put the parties on solemn proof of them. Now I fully admit that executors are bound to prove a will by solemn form of law, where they are called on to do so by those entitled in case of an intestacy; and that under common and general circumstances neither lapse of time, nor the receipt of a legacy, nor acquiescence in the will, will be sufficient to debar them that right; but after so great a lapse of time as in this case—fourteen years after the transaction in question, and ten years after the will has been declared to be well proved in Chancery—may parties not be barred of their remedy if there be no reasonable ground accounting for the delay?

Now cases have been referred to; *Newell v. [812] Weeks* (2 Phill. 224), and *Hoffman v. White* (ib. 230, n.). In both cases the question was as to the right of parties to call upon executors to prove a will in solemn form of law, that is, whether the right to do so was barred under the particular circumstances. That first case was somewhat of a different description from the present; it was, whether a party cognizant of proceedings to prove a will, although not formally made a party thereto, was at liberty to contest that will at a subsequent time; the Court held that he was not so entitled; that, although not a formal party, he knew of all the proceedings, he having had consultations with the legal advisers of the party actually contesting it; the Court held that it was not competent to that party by a new suit to call upon executors to propound the will.

The other case (*Hoffman v. White*), annexed in a note to the former case, approaches much nearer to the circumstances of the present case. A testator died in 1795, his will was proved in March, 1795, a suit was instituted in Chancery to obtain an account; the validity of the will was admitted in that suit. In 1796 a decree was made for an account; the brother of the deceased, in the course of the proceedings, claimed a legacy as having lapsed; the Court declared, that the legacy was lapsed, and the brother entitled to one-third of a moiety thereof. In 1804 a decree was taken out in this Court by the brother against the executor of the deceased; in giving judgment on the case Sir W. Wynne said, "There can be no doubt, as a brother, he is entitled to

controvert the will ; and if probate has been obtained in common form, he [813] can call it in, and put the executor on proof. I do not know that there is any specific time which limits a party. The will had been proved in 1795 ; this decree was taken out in 1804 ; so there has been a quiet possession for nine years. I think I know instances in which the Court has allowed the probate to be called in after a longer time ; that may be done with cause shewn ; that it may be done under any circumstances is what I cannot admit ; it would be contrary to reason and every principle of justice. Where the opposing party has been in a situation which rendered it impossible or difficult for him to have proceeded earlier ; if he has been absent from the country, a minor, or labouring under imbecility ; he may be admitted. But without reason, and where there are such strong reasons as there are here to shew that he was not in such a state of incapacity as to have prevented him, and, further, that he could not be ignorant of all the circumstances relating to the deceased, from the suit in Chancery, soon after the probate was taken out, the case is different. By his answers he admitted both the will and probate ; a decree was made operating upon the lapsed legacy ; and he acted under that decree, not upon an intestacy, and continued to receive the interest for five years together." The ground or principle on which the Court proceeded in that case was, that the party was not barred by the lapse of time, if he could shew good reason why he had not proceeded at an earlier period ; it affirms this principle, that if he does not shew good cause, this Court, unless pressed by superior authority, will not allow him to call in a will after such a lapse of time.

In that case the objection was taken by protest ; [814] in the present instance it is submitted in act on petition ; the latter is I think the proper course. No doubt the Court has jurisdiction in such matter, and may exercise its discretion. There is another case, *Bell v. Armstrong* (1 Add. 365), that turned upon the right of a next of kin to call upon executors to prove a will in solemn form of law. There were peculiar circumstances in that case ; two codicils to the will had been opposed by the executor named in the will, and he had succeeded in obtaining a decree against both of them, by reason of the deceased's incapacity. Now, if these codicils, or either of them, had been established, there would have been an end of any possible interest that the next of kin could have had to impugn the will ; the next of kin had therefore no interest at an earlier period in questioning the will which he had acquiesced in, by allowing it to be taken in common form, and receiving a legacy bequeathed by it. Sir J. Nicholl was of opinion that, under these circumstances, the next of kin had a right to put the executor on proof of the will in solemn form of law ; and he distinctly laid it down that the right will not be barred by acquiescence, by the receipt of a legacy, nor by lapse of time. The doctrine established in this case was very recently affirmed by the Judicial Committee of the Privy Council, in a case brought up on appeal from the Archi-episcopal Court of York (*Bell v. Raisbeck*, 20th of February, ult.) ; the question was raised on the admission of an allegation, and the Judicial Committee was of opinion that the right to call for solemn proof of a will was not barred by lapse of time. The circumstances of that case were very peculiar ; the [815] will in question was dated in the month of November, 1823 ; the brother of the deceased was appointed the sole executor—indeed he was almost the universal legatee, for there were only one or two trifling legacies to servants. The will was proved in the Court of York on the 15th of January, 1834, by the brother, the sole executor ; he died in December, 1839, having made his will and appointed three executors, who proved his will in the same Court in June, 1840. A decree was taken out in July, 1842, calling in probate of the will of November, 1823, and the decree was directed to the executors of the brother of the original deceased ; there had been no proceedings against the brother in his lifetime. The circumstances were such as not to create a very favourable impression, but the allegation was admitted, and the proceedings are now going on. The principle whether the next of kin had a right to call on the executors of the brother to prove the will of his testator in solemn form, after this lapse of time, was argued ; the admission of the allegation confirmed the right of the next of kin to call upon the executors so to prove.

But then, in the present case, this circumstance is to be taken into consideration, namely, the will was decreed to be well proved upon the answer of the parties admitting it as a fact ; the averment, however, in the act on petition, is, that notwithstanding this admission, if the answer of the heiress-at-law was not taken separate and apart from her

husband, she is not debarred from now contesting the will: the words are these—"That inasmuch as the said Mary Ann Merryweather [816] was not examined, nor her answer taken separately and apart from her husband in the Court of Chancery, she is not precluded from again disputing the validity of the will in the said Court, notwithstanding the admissions contained in the said answer." A case was cited in which this point is said to have been decided to this effect by Sir J. Wigram, *Brown v. Hayward* (1 Hare, 432).

Then it is the practice of the Court of Chancery which is here stated; well, if that be so, let the parties go to the Court of Chancery, and obtain another issue.

It may be that such is the practice of the Court of Chancery; but I have this fact, the will has been declared to be well proved, upon the undertaking of the parties to make such admission; it was not an admission simply in an answer, but after the answer of the parties had been given in; after an issue had been ordered to try the validity of the will; after the carriage of the issue had been taken out of the hands of the plaintiffs, under whose management the record had been on a former occasion withdrawn, and the trial lost. All this is nowhere denied; I find no complaint as to the conduct of the issue being given to the executors; it cannot, I think, be denied it was a wise precaution to prevent the possibility of the will being collusively pronounced against. Under the terms of the last order the trial was about to proceed, when the parties prayed that the order might be discharged, and this is done upon their own undertaking to admit the will to be well proved.

It seems to me, that if the facts be so, the parties [817] may go to the Court of Chancery and try the question whether they are now precluded from disputing the validity of this will as to the real estate; or the executors may apply for a perpetual injunction, and so try the question.

Then let these parties proceed in Chancery or at common law, and if they succeed in either of those Courts, they can come again to this Court; but I do not think it is for this Court to authorize any step tending to such a proceeding.

I do not wish it to be understood that in this case I am at all trenching upon the principle of the full right of next of kin to call upon executors to prove a will in solemn form, notwithstanding there shall have been lapse of time—notwithstanding acquiescence—notwithstanding the receipt of a legacy; but that the Court proceeds on this ground, that in this case the Court of Chancery, on the express petition of the parties, and not on a mere admission in answer, has declared this will to be well proved: I am asked to undo all that has been done by the Court of Chancery.

I am of opinion that this case is fully distinguished from the cases cited, in which the parties were allowed to proceed after lapse of time, to call upon executors to prove in solemn form of law. Being of this opinion, I shall pronounce for the prayer of the executors, which objects to the enforcement of this decree against them, and shall dismiss them from its effect.

I shall make no order as to costs; the executors were fully aware that this will was impugned; a caveat was entered in this Court, and much litigation took place in the Court of Chancery respecting the [818] will. The executors might have proceeded to prove the will in this Court in solemn form of law. Executors have always a remedy against such a proceeding as this in their own hands.

Addams. Will the Court order the executors their costs out of the estate? I apprehend the Court can make such an order.

Sir H. Jenner Fust. Yes. I have no objection to make that order.

WHITE v. REPTON. Prerogative Court, May 25th, 1844.—Will of a soldier made when quartered with his regiment in barracks at New Brunswick, and who died there, not admitted to probate, not being executed according to the 9th section of the 1 Vict. c. 26, and not being within the exception contained in the 11th section.

[S. C. 3 Notes of Cases, 97; 8 Jur. 562.]

The Honourable I. H. Pery died at St. John's, New Brunswick, on the 6th of August, 1842. The deceased at that time held a commission in her Majesty's army, and was quartered in barracks with his regiment. A will, made by the deceased, signed by him, but attested by only one witness, was propounded in an allegation which pleaded (fifth article), "That the deceased, at the time he made and executed his said will, and at the time of his death, was a captain in her Majesty's 30th Regiment

of Foot, and had the command of a company of the said regiment, and was quartered in barracks at St. John's, in New Brunswick; and therefore, and by reason of the premises, he the said deceased was a soldier in actual military service, according to the true intent and meaning of the 1 Viet. c. 26, s. 11."

[819] The admission of the allegation was opposed by

Haggard and R. Phillimore. This question was settled in *Drummond v. Parish* (ante, 522), in which the Court considered all the principal authorities which could be brought to bear on this subject. In addition to those then cited the following may be added in confirmation of the decision of the Court. Godolphin, in the *Orphan's Legacy*, c. 5, p. 16, says, "Let it not here escape our observation that these privileges belong only to such soldiers as are in expedition, or actual service of war, and not to such as lie safely and securely in some castle, garrison, or other like place of defence." Gaill, in his *Pract. Obs. lib. ii. Obs. 118*, p. 563, says, "Itaque, ut ad propositum revertar, ad otiosos milites hoc privilegium non pertinet, sed ad eos, qui sunt in castris, et in presenti periculo hostium; utrobique adversus præscriptionem succurritur militibus in expeditione degentibus, non otiosis, et domi existentibus. Atque ita in terminis, quoad limitaneos et stationarios milites, concludit Zasius, jure communi testari debere, cum sint extra periculum belli, et peritiores consulere, pluresque testes adhibere possint." To the same effect will be found Hotomanus (p. 108); Mynsinger, *Rep. Jur. 46*, s. 8, p. 415; Denisart, *Test. Mil. vol. 4th*, p. 716; Pothier, *Des Test. vol. 5th*, p. 485.

Heineccius, *De Milit. Test. lib. ii. tit. xi. sec. 56*. "Deinde ex eadem privilegii causa patet, quando eo privilegio uti possint homines. Glossa distinguit, sintne milites in acie constituti, an in castris, an in [820] præidiis. Primo casu nullis testibus opus esse, ait, secundo duobus, tertio omnes solemnitates observandas. Milites enim sive in expeditione sint, sive in castris, possunt hoc privilegio uti. In præidiis autem et hybernis merito jure ordinario testantur, quid tunc extra periculum sunt." It may perhaps be here allowed to observe that the same privilege was granted in time of plague. Gaill, *Obs. 118*, p. 536. "Præterea et illud hic memoria obiter tenendum, quod ad imitationem militiæ humanæ, testamentum tempore pestis coram duobus vel tribus testibus conditum, valeat: nam tempus belli et pestis æquiparantur, cum tunc censeatur esse bellum inter Deum et homines." So also Pothier, *vol. 5*, p. 485.

The Queen's advocate and Twiss, in support of the allegation, referred to the following authorities:—Cujacius, *lib. 19, Quæst. Papin, vol. 1, pt. 2*, p. 525; Julius Clarus, *lib. 3, tit. "Testamentum;" Quæst. 15*. "In expeditione autem milites occupati, degere dicuntur, non solum cum sunt in procinctu, in acie, in hostico, id est, in ipso armorum strepitu, et summo vitæ discrimine; verum etiam, cum sunt in castris, sive (quod idem est) in fossatis, in stativis, in hybernis, in custodiis, in præidiis. Alioquin nihil distaret paganus a milite. Præterea, hic addendum: milites limitaneos, qui nimirum in hostium finitimis locis, ad repentinas illorum incursiones intenti sunt, et præidiarios sive stationarios, qui ad provinciæ alicujus quietem aluntur, privilegiis militum merito quoque gaudere, ita ut jure militari, omissis juris solemnibus, testari possint."

Per Curiam. You must make out a distinction [821] between a soldier in Woolwich barracks and a soldier in barracks at New Brunswick.

[Argument]. The one is at home, the other abroad.

Per Curiam. What do you say as to the present Wills Act extending to New Brunswick.

[Argument]. That is a question not yet decided, but it is apprehended that a soldier, wherever quartered, is considered as domiciled in this country.

The authorities recognise a distinction between wills made in the mother country and in a colony. Bocerus, *De Bello*, p. 211; Enenkelius *De Priv. Milit.*, p. 127. Puffendorf, in his *Obs. Jur. Univ.*, vol. 3, p. 499, states the following case:—"A general in the Dutch army made his will when setting out for Surinam, without due formalities; he died two years afterwards in the colony; will held to be valid."

The statutes 13 & 14 Car. 2, c. 3, s. 7; 1 Geo. 4, c. 19, s. 115, and 6 & 7 Wm. 4, c. 93, s. 5, distinguish between soldiers in active service and those in training or exercise.

Sir Herbert Jenner Fust. The single question is this. Is there any distinction between this case and that of General Drummond? The only difference I can see, is, the one was in a colony, the other at Woolwich. I do not think this difference creates a distinction. Allegation rejected.

[822] THE OFFICE OF THE JUDGE PROMOTED BY BURDER v. ———. Arches Court, May 31st, 1844.—An Ecclesiastical Court may entertain a suit against a clergyman for the purpose of deprivation or suspension from his ecclesiastical preferment, by reason of a public scandal existing against him; although the scandal originates from a charge which, if true, would constitute a criminal offence cognizable solely in a common law Court; and although no conviction by the common law is pleaded.

[S. C. 8 Jur. 520. Followed, *Borough v. Collins*, 1890, 15 P. D. 83. Referred to, *Bowman v. Lax*, [1910] P. 314.]

On the 9th of December, 1843, a decree, founded on letters of request from the bishop of _____, issued from this Court, directed to the Reverend _____, to appear and answer to certain articles, heads, positions, or interrogatories, touching and concerning the deprivation or suspension of him from his ecclesiastical offices and preferments, of priest, vicar, or minor canon of the cathedral church of _____ in the city and diocese of _____, and within the province of Canterbury, and also from all his ecclesiastical offices and preferments, in and throughout the said province, by reason of his immoralities, lewdness, incontinence, _____ practices, habits, and propensities, causing great scandal to the church, to be administered to him by virtue of office, at the voluntary promotion of the said John Burder.

The party cited having appeared, articles were brought in and were opposed.

Addams and Elphinstone in objection to the articles. This Court is incompetent to try the charge on which this suit is founded, and is therefore prohibited from entertaining the suit. Temporal [823] offences, of whatever nature they be, are not examinable in the spiritual Courts, which decide on written evidence; if this Court has jurisdiction in a case of this nature, so has every archdeacon. The law is this: as regards a temporal crime committed by a layman, this Court can take no cognizance whatever, either for examining into a charge, or punishing a party if convicted in a temporal Court; as regards a clergyman, the Court has no jurisdiction to examine into a temporal crime of this nature, in the first instance, but if the party be convicted in a temporal Court, there arises, out of that conviction, a fame or scandal, which the Ecclesiastical Court may take cognizance of in order to found a suit for punishing the party by ecclesiastical censures, by suspension, or by deprivation. The scandal in this latter case arises out of the conviction, not out of the charge; the law considers every party charged to be innocent until he be proved guilty, and the only legal proof of guilt is a conviction by oral evidence in a temporal Court. *Nash v. Nash* (1 Hagg. Con. 140), *Searle's case* (Hobart, 121; 1 Hagg. Con. 141, n.), *Bromley v. Bromley* (1 Hagg. Con. 141, n.), *Slader v. Smallbrooke* (1 Lev. 138; 1 Sid. 217), *Carr v. Marsh* (5 Ad. & Ell. 602), *Pawlett v. Head* (2 R. t. Lee, 565), *Townsend v. Thorpe* (2 Ld. Raym. 1507), *Mogg v. Mogg* (2 Add. 292), *Price v. Clark* (3 Hagg. Ecc. 271), *Galizard v. Rigault* (2 Salk. 552).

Haggard and R. Phillimore in support of the articles. All ecclesiastical jurisdiction may be comprised under three heads: 1st, *ratione privilegii* [824] or *personæ*; 2nd, *ratione causæ*; 3rd, *ratione loci*. As a general proposition the amotion or expulsion of a member is incident to a corporation aggregate, *Newcombe v. Higges* (Fitzg. 169); such privilege is incident to the Established Church, and is exercised by the Ecclesiastical Courts. This may be proved, first, by practice, *Lyndwood*, lib. ii., tit. 2, pp. 92, 96; lib. iii., tit. 28, p. 260; tit. 29, p. 268; lib. v., tit. 5, p. 292; tit. 9, p. 308; tit. 14, p. 313; tit. 15, p. 315; second, by the statutes passed from Edward 1st to Henry 8th, relating to the Purgation of Clerks Convict which will be found collected in *Gibson*, p. 1120 to 1132.

Searle's case is a solitary case which occurred at a time when the Ecclesiastical Courts were struggling for their very existence; see the conference between Archbishop Bancroft and Lord Coke, 2 Instit. 598. *Slader v. Smallbrooke* (1 Lev. 138; 1 Sid. 217) occurred after the Restoration; in that case the Ecclesiastical Court was proceeding to try a forgery, and yet a prohibition was denied. *Higgon v. Coppinger* (W. Jones, 320) illustrates the principle, so does *Lucey v. Dr. Watson*, *Bishop of St. David's* (Ld. Raym. 447; 14 St. Trials, 447), which shews that the bishop may punish his clergy by deprivation or ecclesiastical censures for offences contrary to their ecclesiastical duties and vows. An indictment at law for an offence of this nature will not lie if framed in the mode used in these articles, *Regina v. Rowed* (3 Q. B. 180). *The Bishop of Clogher's case* (Annual Register for the year 1822), both modern cases, and *Free v. Burgoyne*

(5 Barn. & Cress. 404; 1 Dow. & Cl. 115; 2 Bligh, N. S. 65), have completely esta-^[825]blished the jurisdiction of the Ecclesiastical Courts to proceed, in a case of this nature, for the purposes of deprivation or suspension from clerical functions or offices. The proceedings are not for punishment, but are brought *diverso intuitu et diversis rationibus*.

Addams in reply. The case in Levinz's Reports was a proceeding as to which the Ecclesiastical Courts had undoubted jurisdiction; the question of forgery was incidental to the inquiry; therefore a prohibition was well denied; it might with equal reason be contended that the Ecclesiastical Court could not take cognizance of a question of granting probate, because a will is opposed on the ground of forgery.

The Court has no jurisdiction in this matter, *Price v. Clark* (3 Hagg. Ecc. 270).

Sir H. Jenner Fust. This is a cause of office, and is a proceeding under the act of her present Majesty, generally known as the Church Discipline Act [3 & 4 Vict. c. 86], and it is brought into this Court by letters of request from the bishop of

By the decree, which has issued in pursuance and on acceptance of these letters, the reverend gentleman therein named is called on to answer to certain articles, heads, positions, or interrogatories touching or concerning his deprivation or suspension from his ecclesiastical offices and preferment. The purport of the proceeding it is unnecessary to state in detail, the object sought is not *pro salute animæ*, or *pro reformatione morum*, but the Court is asked ^[826]to pronounce a sentence of suspension or deprivation of his clerical functions as against this gentleman.

The articles in this case were given in and stood for admission; the party cited then undertook to shew cause why he should not be suspended or deprived from the exercise of his ecclesiastical offices and preferments, and so the matter came before this Court. The articles are eighteen in number; in the first place, they set forth that by the general laws ecclesiastical, all clerks and ministers in holy orders are enjoined to abstain from all immorality, obscenity, and indecency whatever. The second article pleads that the party cited is a priest or minister in holy orders; and was, in the year, &c., duly elected one of the perpetual priests, vicar's choral, or minor canons of the said cathedral church. The third article exhibits the proper instruments of appointment to these offices. The fourth article pleads that this same party was in the year licensed by the bishop of to perform the office of lecturer in the parish church of, &c.; that he entered upon the duties of such lectureship, and has ever since continued to act, and now acts as lecturer to the said church. The fifth article exhibits the episcopal license. The sixth pleads that the party was, on, &c., duly admitted and instituted to the vicarage of . The seventh exhibits the usual document in supply of proof. The eighth, that the party was, on, &c., duly appointed chaplain to the county jail. The remaining articles set forth the charges brought against this gentleman, and detail the facts and particular circumstances, which are, when proved, to subject him to deprivation or suspension.

^[827] These articles are objected to: and the principal ground of objection is, that they contain charges for which the party is liable to be proceeded against by common law, and, if proved guilty, to be convicted and punished in the temporal or criminal Courts of this country; and, therefore, it is argued, the party is not liable to be proceeded against for such offence in this Court, the Ecclesiastical Courts having no jurisdiction in such matters.

In support of this objection, the Court has been referred to several cases, recording instances where it has been held that this Court is not at liberty to proceed, for the punishment of offenders, for charges for which they are liable to be proceeded against and convicted in criminal Courts; several of these instances being cases against clergymen or persons holding spiritual or ecclesiastical offices. As a general proposition this doctrine must be acceded to; the question is whether, for the purpose for which this suit is brought, this Court has not jurisdiction where the party proceeded against is a clergyman? As against laymen, whatever may be the nature of the charge, undoubtedly the Court has no jurisdiction to entertain a criminal suit; but it is by no means so clear that, for the purpose of suspension from clerical offices, the Court cannot proceed against a clergyman. The distinction arises from the different object of the proceedings against a layman and a clergyman; and, admitting the general rule that the Ecclesiastical Court cannot proceed against either a layman or a clerk in orders for the purpose of punishment, the question is whether, as against the latter

person, it may not proceed to try the charge for the purpose of sus-[828]-pending or depriving the offender from clerical duties and preferment.

Now, as I have before said, several cases have been adverted to in support of this objection, and, among them, that which is usually denominated *Searle's case*, which will be found in the note appended to the judgment in the case of *Nash v. Nash* (1 Hagg. Con. 140).

The case of *Nash v. Nash* was a proceeding by a husband against his wife in a cause of divorce by reason of adultery. The libel charged the woman with cohabiting in an adulterous intercourse; and it also pleaded a marriage with the adulterer, and exhibited in proof a copy of the entry in the church register of such marriage. It was objected that this marriage, being bigamy, was a felonious act, and could not be pleaded in the Ecclesiastical Courts. Lord Stowell said, "Certainly this Court cannot inquire into a felony directly, even where a clergyman is sued for the purpose of deprivation." Now any opinion coming from Lord Stowell is to be attended to with the greatest deference, but the present case was not before him; the immediate question was not whether a suit for deprivation could be maintained against a clergyman; but that point was put by him simply by way of trying the argument in favour of the admission of a plea setting forth a second marriage, which was clearly a felonious act. *Searle's case*, in the note, which occurred in the 12th year of the reign of James I, was as follows:—"Searle had been tried at common law and found guilty of manslaughter, whereupon he was questioned to deprivation before Dr. Bird, [829] Judge of the Court of Audience; he desired to be admitted to his defence that he was not guilty, contrary to the verdict"—this is from Hobart (p. 121), who says—Dr. Bird came to me for direction, and we agreed "that felony or other capital crimes were not examinable in the Ecclesiastical Courts; no, not for purposes that were examinable there, as in this case of deprivation; and therefore they may not originally examine such a crime to prove a man criminous, much less, when he is so proved in the proper Court, impeach the sentence." Clearly these Courts cannot, but this does not appear to me to have been a decision upon the present point; Dr. Bird and Chief Justice Hobart seem to have consulted together, and to have come to the conclusion that the Ecclesiastical Court would not examine into a capital crime, even for the purpose of deprivation; but that, if the party had been convicted in the proper Court, they might build a sentence of deprivation upon the conviction; therefore they thought that Searle could not be allowed to give evidence to shew that the verdict had been improperly obtained. *Bromley v. Bromley* was also cited; that was a proceeding for divorce by reason of improper practices in the husband; in that case there had been a verdict at law, and the conviction was pleaded and admitted. So, also, in *Mogg v. Mogg* (2 Add. 292) there had been a conviction, and it was pleaded.

I have always understood it to be a settled point that no proceedings in this Court can be taken for the purpose of punishing a party for an offence, such as that imputed to the party here cited; or such as [830] felony, or a crime triable at common law. A distinction, and an important distinction, was taken in the case of *Burgoyne v. Free*, although, perhaps, that case is not quite strictly applicable to the present question, namely, whether proceedings can be taken against a clergyman by his bishop or ordinary for the purpose of suspending or depriving him from his ecclesiastical offices; such a suit stands on a very different footing from a proceeding for the purpose of punishing the party; and the question is whether, for the purpose of suspension and deprivation, this Court is not at liberty to entertain a suit of this description. If there had been a conviction at common law, and that conviction pleaded, this Court need not, indeed could not, enter into any inquiry, but would proceed upon the conviction; but, where there have been no proceedings at law, and none stated to be in progress, the question is, Is not the case within the principle of *Burgoyne v. Free*, and is not the bishop at liberty to proceed for the purpose of suspension or deprivation? That was a case of proceeding against a clergyman—a beneficed clergyman—and no doubt the Ecclesiastical Court had cognizance of the particular crime charged against the party; the only question was whether the statute 27 Geo. 3, c. 44, did apply to a proceeding by a bishop against a clergyman of his diocese; the statute having introduced a limitation of time within which such a suit must be brought. The title of the Act is, "An Act to Prevent Frivolous and Vexatious Suits in Ecclesiastical Courts," and it enacts, "That no suit shall be commenced in any Ecclesiastical Court for incontinence, after the expiration of eight calendar [831] months from the

time when such offence shall have been committed ; nor shall any prosecution be commenced or carried on for fornication, at any time after the parties offending shall have lawfully intermarried." Lord Chief Justice Tenterden, at that time Chief Justice Abbott, stated the case thus [5 B. & Cres. 404]: "It has been contended before us that this statute extends to the clergy as well as the laity, and we think it does, as far as they and laymen are on the same footing ; that is, where the object of the suit is reformation of manners or the soul's health ; but that it was not intended to limit the time for proceeding against a clerk as such for deprivation." Here, then, is a distinction drawn in this particular case between a suit for deprivation and a suit for punishment: he proceeds, "Such a suit is not frivolous or vexatious ; it is not within the mischief or object of the statute. Reformation of manners is not the object, or at all events not the only object of this suit. The articles shew that one at least of the objects of the suit was to procure the deprivation or suspension of the plaintiff, a species of jurisdiction which the Ecclesiastical Court has no opportunity of exercising over laymen. Now, in other temporal matters, such as forgery of orders, there cannot be any proceeding against a layman as such ; but if he has obtained a benefice he may be sued in the Ecclesiastical Court in order to his deprivation, according to *Slader v. Smallbrooke* (1 Lev. 138 ; 1 Sid. 217). We think, therefore, that as to the charge of incontinence the Ecclesiastical Court may proceed for the purpose of deprivation, and our judgment will be that the prohibition stand as to proceeding upon the charge of forni-[832]-cation, with a view to reformation or the soul's health, but that there must be a consultation as to proceeding upon that charge for deprivation or any other punishment. This course was adopted in the case of *Townsend v. Thorpe* (2 Lord Raym. 1507), which was a proceeding against a parish clerk who was charged with several offences punishable in the temporal and not the spiritual Courts, yet it was held that there might be proceedings against him in the spiritual Court in order to deprive him of his office, and as to that a consultation was granted. Objection has since been made to that case, on the ground that the Ecclesiastical Court had no authority to suspend or deprive a parish clerk. Perhaps that objection is well founded, but the rest of the case has never been questioned, and is an authority for our present decision."

Therefore the Court of King's Bench held that, whether the spiritual Court had or had not power to deprive the parish clerk, that is, whether his was or was not a spiritual office, still, in principle, that was a decision governing the case before them. The case of *Free v. Burgoyne* was afterwards appealed to the House of Lords, and the present Lord Chancellor held at the time the high office which he now holds, and gave the decision of that House, affirming the judgment of the Court of King's Bench. The case is set forth at length in the first volume of Dow. & Clark (p. 115) and in 2 Bligh, N. S. (p. 65). Lord Lyndhurst gave judgment to the following effect:—"This was originally a suit in the spiritual Court against the Reverend Doctor Free, upon various charges of fornication and other offences. In looking at the [833] articles I think it was perfectly competent to the spiritual Court to proceed in the ordinary way, both pro salute animæ, and for deprivation. In the spiritual Court it was contended for Doctor Free that the statute 27 Geo. 3 was a bar to the proceeding, but the objection was overruled, and then he applied to the Court of King's Bench for a writ of prohibition, and was ordered by that Court to declare in prohibition. The Court of King's Bench was of opinion that the proceeding, so far as it was pro salute animæ, and reformation of manners, was barred by the act, even in the case of a clergyman, after the expiration of the eight months. But a much more important question arose, and that was whether the statute applied to a proceeding in the spiritual Court for the purpose of deprivation ; and, looking at the title, the preamble, and the provisions and enactments of the statute, I concur with the Judge of the Court of King's Bench that the limitation of eight months does not apply to the proceeding in the Ecclesiastical Court for the purpose of deprivation." In that case, therefore, both Chief Justice Abbott and Lord Lyndhurst thought that the ecclesiastical tribunals could not inquire into the case for the purpose of punishing the party, but might do so with a view to his deprivation—Lord Lyndhurst proceeds, after stating the effect of the judgment of the Court of King's Bench, "I think the Court was warranted in this judgment both on principle and authority. The case of *Slader v. Smallbrooke* was one in which proceedings were instituted against a clergyman who had forged his orders ; and, on application for a prohibition, the Court of King's

Bench held that [834] the spiritual Court had no power to proceed against the accused with any view to a judgment against him for the crime of forgery, but that the spiritual Court might inquire into the charge of forgery with a view to deprivation. So, although the ecclesiastical tribunal cannot punish for forgery, it may inquire into the question of forgery with a view to deprivation only. That case applies directly to the present. The spiritual Court cannot proceed against Doctor Free pro salute animæ et reformatione morum, yet it may inquire into the question of incontinence with a view to a sentence of deprivation." Then the Lord Chancellor refers to that case of *Townsend v. Thorpe*, and concludes thus, "Both cases are similar in principle to the present. The Spiritual Court may proceed for deprivation only, and for that purpose it may proceed in the manner and with the forms and ceremony necessary to a sentence of deprivation. I think, therefore, that the judgment ought to be affirmed."

This case of *Free v. Burgoyne* then, both in the King's Bench and the House of Lords, proceeded on this ground—that the spiritual Court had no cognizance of a crime punishable in the temporal Courts, except for the purpose of deprivation from ecclesiastical offices; I confess it appears to me to go a great length in support of the proceedings in the present case, which are instituted against this gentleman, not for punishing him for a temporal offence, but to prevent him retaining possession of the ecclesiastical preferment which he now holds.

I was referred, in the course of the argument, to the case of *The Bishop of Clogher*; I have not a [835] copy of the proceedings in that case, nor have I been able to obtain them; the bishop certainly was outlawed, but still it was held that as bishop he was liable to be proceeded against and deprived of his see for the offence imputed to him; the outlawry might have been equivalent to a conviction, and so far this would be a different case. Reference was also made to another case; it was not described by any title, but as a case before the Judicial Committee, on an appeal from the Island of Jersey.^(a) A writ, in the nature of a writ of prohibition, issued from the Royal Court in that island to the Ecclesiastical Court, whereby that former Court annulled certain proceedings in the Ecclesiastical Court, and ordered that all the acts which referred thereto should be erased from the records of the Court. From this last sentence there was an appeal to Her Majesty in Council; and I may here say that the Royal Court in Jersey corresponds, to some extent, with the Court of Queen's Bench in this country. The Judicial Committee came to the opinion that the writ had issued wrongfully, and they reversed it; in the result it was held that the Ecclesiastical Court in Jersey was at liberty to institute that particular proceeding. When that case was before the Judicial Committee I sat as one of the Judges, and I pronounced the judgment of their Lordships; the case turned on the construction of the canons by which the ecclesiastical law in the Island of Jersey is governed, and on one canon in particular, the [836] 17th.^(a) It provides, "That every one of the ministers shall be careful to observe that decency and gravity of apparel which becomes his profession, and may preserve due respect to his person; and they shall be very circumspect in the whole course of their lives, to keep themselves from such company, actions, and haunts as may bring any blame or blemish upon them. Nor shall they dishonour their calling by games, taverns, usuries, trades or occupations not befitting their functions, but shall study to excel all others in purity of life, gravity, and virtue." The 22nd canon is directed against particular offences, and, amongst them, fornication, and applies equally to the clergy as to the laity. It was held by the Court Royal that, under this general canon, the Ecclesiastical Court had no power to take cognizance of offences triable in the temporal Courts; but the Judicial Committee held that, under the 17th canon, and another (the 46th) the Ecclesiastical Court had power to proceed against members of the Church, and clerks in holy orders; for the purpose of restraining them in such habits of life. The result of the judgment of the Privy Council was to relax the prohibition, and to allow the Ecclesiastical Court in Jersey to proceed.

^(a) Since reported, nom. *The Dean of Jersey v. The Rector of ———*, 3 Moore, P. C. 229.

^(a) These canons were compiled by order of James I, A.D. 1623, by Abbott, Archbishop of Canterbury; Williams, Bishop of London, then Lord Keeper; and Andrews, Bishop of Winchester.

That case is somewhat of a similar description with the present, for it was there alleged "That rumours of a most serious nature had for some time past been publicly circulated touching the conduct [837] of ; accusing him of leading a most scandalous life, and of having committed indecent as well as criminal acts; to the great scandal of religion, and especially of the Established Church, of which he is a minister."

That case does seem to me to go the length of declaring that the Ecclesiastical Court has jurisdiction over clerks in holy orders, for the purpose of deprivation and suspension; although, to a certain extent, that may be punishment; but still punishment is not the object of the proceeding; the object is to remove the party from the office in relation to which he has so misconducted himself. I am of course now considering that the facts charged in these articles may be established in proof; and the Court does not mean to go in detail through these articles; I do not understand them to charge an actual offence, but a series of acts obscene and indecent in themselves. This person was the chaplain of a jail, and in the course of that duty a person was committed to his care and superintendence; and the charge is that of vicious propensities existing, and to be proved by overt acts. In the case from Jersey it was argued that as the offence was laid, evidence of actual guilt might be given; but that objection was disallowed, and it was said it was a proceeding to remove a scandal, and that the possibility of such evidence being given was no ground for issuing the prohibition. Surely! No clergyman can be suffered to remain in the cure or possession of an ecclesiastical benefice whilst labouring under such an imputation as these articles charge; it may be mere report, but still it is a scandalous report, and it arises out of con-[838]duct. I should like to know how parishioners can receive the communion, hear the prayers of the Church read, or receive consolation in their dying moments, from a person labouring under such imputations as are here charged. Are his parishioners to receive advice or consolation at the hour of death from this party? Must not the effect, if the Ecclesiastical Court has no jurisdiction to interfere in such a case, be, that the parishioners, from the actual disgust which must arise even from the imputation whilst unrefuted, will abstain from any communication with the party; and, if he be allowed to remain in his benefice, will not the effect be virtually to deprive the parishioners of any of those spiritual offices and benefits which they are entitled to expect and require at the hands of their minister.

I am, therefore, of opinion, both upon principle and the authority of the cases to which I have referred, that there is no ground whatever for concluding the jurisdiction of this Court; and I consider that this Court has jurisdiction to examine into this case for the purpose of deprivation and suspension; and not only to entertain the suit, but to pronounce a sentence either of suspension or deprivation, as may seem meet to this Court, and according to the magnitude of the offence, to be shewn by the evidence to be produced against the clergyman against whom these charges are made; provided the charges be substantiated in evidence. I am therefore of opinion that these articles are admissible, and accordingly I admit them to proof.

I think, however, that there is one of the concluding articles which is not admissible. This [839] reverend person appears, in addition to his other preferment, to hold the office of chaplain of a jail, and it is against him in the discharge of his duties of that office that this offence is imputed. The article is the seventeenth, and it refers to inquiries made privately by the visiting justices of the jail; and the conclusion to which they came, namely, that the party should be suspended from his office, whereupon he resigned his appointment; and the article has annexed a paper purporting to be a true copy of the minutes of the resolution of the visiting justices, as entered upon the journals of the jail. I cannot see how this can be made evidence in any way; I cannot see how, because these justices take upon themselves to inquire into a certain report, and upon the evidence they receive in the course of that investigation feel bound to exercise the discretionary power reposed in them, and to suspend this party from his office of chaplain, that can be evidence against the party in this cause. With respect to the evidence to be adduced, this is not the time to enter upon a discussion of, or to give any opinion upon, that point; the parties by whom these charges are to be proved may, as has been said, be persons whose testimony will not be entitled to receive any credit; it may prove so, but the Court cannot determine, a priori, whether they are or are not competent to give evidence; or whether their testimony will or will not be sufficient.

Therefore, at the present moment, I content myself with rejecting the seventeenth article; admitting the rest of the articles to proof; and reserving all questions until hearing of the cause.

[A rule nisi for a prohibition has been granted in this case.]

[840] THE OFFICE OF THE JUDGE PROMOTED BY TITCHMARSH v. CHAPMAN. Arches Court, May 31st, 1844.—A child, baptized with water in the name of the Holy Trinity by a person alleged to be in heresy or schism with the Church of England, is not unbaptized within the meaning of the rubric for the burial service, in the Book of Common Prayer.—Excommunication, ipso facto, must be preceded by a declaratory sentence of a competent Court.

[S. C. 3 Notes of Cases, 377.]

[See the facts of this case reported ante, p. 703.]

The Reverend Mr. Chapman having appeared absolutely, an allegation was offered on his part, and was opposed by

The Queen's advocate and Addams.

Phillimore and Harding in support.

Sir Herbert Jenner Fust. The question before the Court in the present case respects the admissibility of an allegation, which is offered on behalf of the Rev. W. H. Chapman, the party cited in this cause, which is a cause of office for refusing to bury the corpse of a child brought to the churchyard, of which he is the vicar, and of whose interment due notice is alleged to have been given.

The question comes before this Court by virtue of letters of request from the bishop of the diocese of Ely, within whose diocese the party cited holds preferment. The citation in the cause was returned on the fourth session of Easter Term in the last year, and an appearance was given to that citation, but under protest; that protest was extended in acts of Court, for the reasons therein set forth, and pressed in argument; the Court was of opinion that the protest could not be sustained, and [841] accordingly overruled it; a prohibition was then applied for and refused, upon which an absolute appearance was given for the party cited; a libel, setting forth the charge against the party cited, was brought in and admitted; a negative issue was given to the articles; witnesses were examined, and publication prayed; and this allegation is now offered by way of defence to the charge brought against this reverend gentleman.

The substance of the defence is that this child was unbaptized within the true meaning of that term, as used in the rubric for the burial service, it being alleged in the articles, and not denied, that the child was baptized by a minister of that class of Protestant dissenters termed Independents, according to the form used by them, that is, with water, in the name of the Father, the Son, and the Holy Ghost; and it is pleaded, on behalf of the Rev. Mr. Chapman, that such baptism is schismatical and heretical, and such as not to entitle the corpse of this child to have the burial service read over it.

I had hoped that after the late case of *Mastin v. Escott*,^(a) after the sentence in this Court, and the affirmance of that sentence in the superior Court, this question was set at rest, and that no further resistance would have been offered to what was declared, both by this Court and by the Court above, to be the law on this question. This Court is bound, upon proper application made, to enforce the law; this Court has no discretion whether or not it will entertain a suit of this description, which [842] is clearly within its jurisdiction, neither can it refuse to proceed to pronounce sentence when the suit is before it.

It is now contended that this question is not concluded by what took place in *Mastin v. Escott*; and it is said that it was only decided in that case that an infant who had been baptized by a Wesleyan minister, in the name of the Trinity, was not unbaptized; and that the rubric which declares that the burial service shall not be read over persons who die unbaptized did not apply to such case. Certainly, in *Mastin v. Escott*, nothing did turn on the suggestion of heresy or schism; the defect in the baptism, as there alleged, was the want of holy orders in the person who had performed that ceremony. In the present case this question has been directly raised; it is distinctly averred that this baptism was, and is, heretical, having been

(a) 2 Curt. 692, affirmed by the Judicial Committee, 4 Moore, P. C. 104.

performed by a person not qualified to administer the rite of baptism. The Court may here say that in *Mastin v. Escott*, both in this Court and in the superior Court, the question was stated to be confined to this point, whether baptism could be duly administered by a Wesleyan minister; nothing turned on the question of heresy or schism; the case was so stated by the learned Lord who delivered the judgment of the Court above. The distinction does arise in the present case, and the question is directly raised whether or no baptism of this description, pleaded to be heretical and schismatical, is invalid baptism, so as to take this case out of that decision in *Mastin v. Escott*. Now, although it is perfectly true there has been no absolute decision on the point, for it has not as [843] yet been distinctly raised, and Courts of law never determine more than the question raised before them; yet undoubtedly the greater part of the argument in *Mastin v. Escott* turned on the question whether schismatical or heretical baptism was or was not valid; it was part of the object, of the party there cited, to shew that the baptism in that case was heretical and schismatical, and not simply lay baptism, and the arguments were founded principally on its being heretical and schismatical; and although, as I have said, it was not necessary in that case to decide whether schismatical and heretical baptism was valid, or invalid, the arguments were principally directed to that point. It is not, however, necessary to enter into the arguments which were so elaborately urged on the Court in that case; I have stated that they principally turned on this point; reference was made to the different opinions entertained in the primitive Church as to the validity of such baptism: the authority of Tertullian was cited in support of that baptism, and the opinions of St. Cyprian, Firmilian, and writers in the second and third centuries in opposition to it. Again, reference was made to the Council of Arles, to the opinion of St. Austin, and to the general opinion in favour of that proposition; also to the opinions of the Eastern and Western Churches, and to the practice down to the time of the Reformation, and thence to the present time.

The strength of the arguments certainly turned on the point whether schismatical or heretical baptism was or was not valid. It does appear to me, therefore, that this present question is reduced to a narrow compass, and I say so at the present [844] time, because I find, in the 7th article of this allegation, that the validity of lay baptism seems hardly to be brought in question. Now, the 7th article is to this effect, "That by the practice and usage of the primitive Church, and the laws, canons, and constitutions of the Church of England, any persons, whether infants or adults, baptized in the name of the Father, and the Son, and the Holy Ghost, by heretics, could not be admitted into the Church, or allowed to partake of her privileges until they had by themselves, or by their sponsors, sought for such admission, according to the form directed by the Church, although it might not be essential to reiterate the sacrament of baptism." This article does appear to me to admit the whole question of the validity of lay baptism; all that it says is this, that by the canons and constitutions of the Church of England, persons so baptized could not be admitted into the Church, until by themselves or their sponsors they had sought for such admission, according to the form prescribed by the Church. It therefore seems to me that it would be utterly superfluous to enter into a discussion of the authorities, cited on the one side and on the other, for the sole purpose of determining whether this baptism is valid or not, when it is not contended that this baptism is invalid in itself. It is not said that such baptism is null and void, so that the question is whether baptism, so conferred, entitles the party recipient to have the burial service of the Church read over his corpse, when it is duly brought to the churchyard for interment. The Court, therefore, is relieved from the necessity of entering into that first discussion. Now, although this case has [845] remained long undetermined, that has arisen from inevitable circumstances, (a) and not from any doubt which the Court has entertained with respect to the law of this case; and it being not now questioned, that baptism, by heretics or laymen, is a valid baptism, and need not to be reiterated (indeed one of the authorities, cited by the learned counsel who support this allegation, went to shew that such baptism need not be repeated); and this surely was acknowledging it to be valid in itself; and if so, even although received at the hands of persons who disbelieve in the doctrine of the Trinity, the recipient cannot be said to die unbaptized.

There cannot then be any doubt in the mind of the Court as to what must be the

fate of this case, when, as I have shewn, the baptism itself is admitted to be valid ; and the only doubt I feel is whether this allegation ought not to be admitted for the purpose of allowing the question to go up to the Privy Council, in order to be discussed before the highest tribunal. This Court would be very much inclined to pursue the course which it adopted in the case of *Mustin v. Escott*, namely, to admit the allegation, for the purpose of enabling the parties, if so inclined, to take the opinion of the superior Court. But if the parties wish to take a higher opinion upon the admissibility of this allegation, they can apply for leave to appeal from its rejection ; for that it must be rejected is the opinion to which the Court has arrived. The Court would be unwilling to exercise the discretion reposed in it by the Act of the 3 & 4 Vict. (c. 86, s. 13), by refusing [846] leave to appeal, because I apprehend, if the Court were to reject this allegation, and refuse leave to appeal, the rejection would be final.

In a case, which is supposed to involve a most important question between Protestant dissenters and members of the Established Church, the Court would be unwilling to exercise that discretion by refusing leave to appeal.

I will now state the grounds upon which I have come to the determination to reject this allegation : The whole question seems to me to have been determined, in *Mustin v. Escott*, in favour of the validity of this baptism ; because, if baptism conferred by a heretic is so far a valid baptism that it need not be repeated, then the whole case seems to come to this, that being a valid baptism the child cannot be said to have died unbaptized. It is clear that a child baptized by a layman is not unbaptized within the meaning of the rubric for the burial service, and if so, I cannot understand what is the distinction between the two cases. If once it be admitted that this baptism is so far valid that it need not be repeated, I confess I cannot see the reason why, in the one case, the child is to receive the offices of the Church, and to have the burial service read over it, and in the other case should not be so entitled. Neither child can be said to die unbaptized, and it is only where the person is unbaptized that the service for the dead is not to be read over the body. Both lay and heretical baptism are contrary to the orders of the Church, but both are valid, and if valid, entitle the recipients, in either case, to the privileges conferred by valid baptism, whatever those privileges may be. In [847] both cases the child would seem to be, in the words of the rubric, sufficiently baptized—and I use the word “sufficiently” advisedly, and in the sense in which it is used in the rubric. It was not a word for the first time introduced in the former case by this Court ; the word will be found in the first rubric (Edward VI., A.D. 1549), and the word has been continued and used in the rubric for the present form of baptism. In both instances it is declared that a child so baptized (in the case of a layman it has been already decided, and, as I consider, by a heretic also) is sufficiently baptized, according to the use made of that word in the rubric, to which meaning the Court is confined in this case.

To what extent such baptism goes is not for this Court to determine ; whether it does or does not confer spiritual grace, the Court does not offer any opinion upon ; all which the Court declares is, that the child was not unbaptized, need not be baptized again, and, if not unbaptized, that the minister was not justified in refusing to read the burial service over it. It has been contended that there are other means besides baptism by which this child must be qualified to be admitted into the body of the Church, and admitted to partake of the privileges of the Church. What these other means are I have not yet heard ; I suppose the imposition of hands by the bishop at confirmation. I inquired during the argument, and I could not find that there were any means by which this child could be admitted into the Church of England except by confirmation by the bishop after it had arrived at years of discretion ; and I now assume that this [848] is the ceremony which is requisite to entitle it to that right. How, then, does this baptism differ from the most solemn and formal mode of baptism ? No child can be admitted to partake of the Holy Communion until it has been confirmed ; no child can be presented to the bishop to be confirmed until he or she has arrived at years of discretion, and is able to say the Creed, the Ten Commandments, and answer the questions of the catechism of the Church ; it is not until a child can do this that the bishop is to confirm it. No recipient of the most regular baptism is admitted to partake of the Holy Communion until confirmed, or desirous of being confirmed. Then, this baptism being so far valid that it need not to be

repeated, this very child, if it had arrived at years of discretion, would have been entitled to claim to partake of that rite, qualified by conforming to the orders of the Church. It is also quite clear that no person is entitled to have the order of confirmation administered to him unless previously baptized; the mere imposition of hands will avail nothing without a previous baptism. There is nothing to be confirmed unless there has been a valid preceding baptism. It seems to me, therefore, that the case of this child is precisely the same, so far as the rites of the Church are concerned, as in the case of the most solemn form of baptism, because it is quite clear that a party is admitted into the Church by baptism, and not by imposition of hands. There may be deficiencies in that admission which may be afterwards supplied, but those deficiencies do not arise from the inward defect of that baptism, either in the case of the most regular or irregular baptism.

[849] Therefore, it does appear to me, upon these grounds, unless there be something in the allegation which can be said to constitute a valid defence for refusing to bury this child—I mean refusing the offices of the Church, and the benefits conferred by the offices of the Church, whatever they be—that this question has been determined by what took place in *Mustin v. Escott*, and by the admission of the principle that this is so far a valid baptism that it need not be repeated. It is quite impossible that this child, by sins of commission or omission, can have forfeited the right to these offices, for the child died shortly after its birth; at least, so far as this child is concerned, it could not be by any fault of its own that it did not obtain the ulterior rite of imposition of hands, for that can only be obtained by an adult having knowledge of the Creed, the Ten Commandments, and the Church Catechism. The question, as it appears to me, is not whether this child was admitted into the Church of England, but whether it was admitted into the Church of Christ?—"God forbid," said Dr. Phillimore, in arguing this case, "that I should say this child was not a Christian," having received the rite of baptism.

Unless, therefore, there be something in the articles of this allegation which can in form or substance constitute a defence to this charge, or prevent the party being condemned in costs, the Court will reject the allegation.

Now the first article of this allegation recites the fourth article of the libel given in by the promoter of this suit, pleading the law with respect to the office of burial, and setting out the sixty-eighth [850] canon, and then it alleges, "That all the rights and privileges conferred by this canon and constitution ecclesiastical, and of the other canons and constitutions promulgated A.D. 1603, of which the 68th canon forms a component part, were limited, by the letters patent of King James 1st, to all persons being within this realm as far as lawfully being members of the Church they might be concerned in them." Now, so far as I have gone, it is not material to the party cited that this part of the allegation should be admitted, for this objection which it sets up was open to the party on the admissibility of the libel: then it goes on to plead "that by the 110th of the canons and constitutions aforesaid, means were pointed out for bringing all schismatics and hinderers of the word to be sincerely preached, to ecclesiastical censure and punishment." What then are the means pointed out for bringing the parties to censure and punishment? "They shall be presented to the bishop to be censured and punished according to such ecclesiastical laws as are prescribed in that behalf;" if these are the means, let them be adopted in this case; but I confess I do not understand the meaning of this part of the article. It is said that it is offered by way of illustration or explanation; I confess I do not see how it illustrates or explains this case; and it appears to me to be of no importance whatever to the party cited; although the Court might have been inclined to have admitted it if the other parts had been admissible.

The second article recites the fifth article of the libel, which pleads the refusal to bury the corpse of this child, and the object of this part of the allegation [851]-tion is to shew that the party did not refuse to bury the corpse, but to bury it according to the rites and ceremonies of the Church of England, which he is ordered to do by the canon law, and for refusing to do which he is punishable, unless the corpse be that of a party unbaptized, or excommunicate *majori excommunicatione*. This appears to me to be altogether immaterial; his duty is to be an active duty; he is not simply to allow the body to be buried, but he is to bury it according to the rites and ceremonies of the Church of England. Then it goes on to plead "that by such refusal the party cited did not act in contempt of the laws, canons, and constitutions ecclesi-

astical, but on the contrary he acted in conformity therewith, as well as in obedience to and in conformity with the obligations by which he bound himself when he became an ordained minister of the Church of England." This is the whole question in the suit! Was it or was it not his duty? Surely it is not necessary to plead this. I remember it was so pleaded in *Martin v. Escott*, and the Court then pronounced it to be unnecessary and inadmissible, and only allowed it to be retained in order that the whole question might go up to the Appeal Court, as being then a new question, notwithstanding the decision of Sir J. Nicholl in *Kemp v. Wickes*. I may here observe what I intended to have before observed, that, in the first article of the allegation, it is pleaded "that the rights and privileges conferred by the 68th canon were confined to members of the Church of England." I do not understand what are the rights and privileges which were conferred by this canon; the [852] canon does not profess to confer any rights or privileges; it only declares that if a minister refuse to inter a body, brought to him at a convenient time, according to the ceremony of the Church of England, he shall be liable to be punished; I do not understand that the right to the Church burial service is conferred by the canon; therefore I think this article ought to be rejected; it merely contains a verbal criticism on the fifth article of the libel, which contains the charge, and it is quite unnecessary to the defence of the party cited.

The third article recites the sixth article of the libel, "That the said infant died within the said parish of Basingbourne. That such infant was the daughter of John Rumbold and Jane his wife, who are Protestant dissenters of the class known as Independents, and during the first five months in the year 1841, and for some time previous thereto, had been in the habit of frequenting or resorting to a chapel or place of religious worship, established by or for the use of a congregation of the said class of people, situate within the said parish. That the said infant had been, on the 8th of February, 1840, baptized according to the rite or form of baptism generally received and observed among the said class of people, that is to say, with water, and in the name of the Father, and of the Son, and of the Holy Ghost, by the Rev. C. Moase, a minister, preacher, or teacher of the said class of people. That of the aforesaid fact of baptism the said W. H. Chapman was informed on the 26th of May, 1841, when urged and entreated to bury the said infant, and by means of such information was, at [853] the time of his refusal to bury the said corpse, well and sufficiently apprized and aware of the fact of such baptism, and he made or assigned the aforesaid fact of such baptism expressly as the pretext or ground of refusing to comply with such entreaties and application"—this is the charge; what is the answer? "That the aforesaid baptism of the said infant, as set forth in the said sixth article, by the said C. Moase was heretical:" here the article stops. The Court must look to the other articles, to see whether this baptism was a valid baptism, or whether the party was excluded from the rites of the Church of England.

The fourth article pleads, "That by the ecclesiastical laws of the whole Catholic Church, more especially as they are expounded and laid down in the canons and decrees of the two first general councils, which canons and decrees have been adopted by the Church of England, and on divers occasions recognised to be of binding authority by the statutes of the realm applicable to questions of heresy and schism, more especially by statutes 1 Eliz. c. 1, s. 36; 29 Car. 2, c. 9, s. 2, the said C. Moase having collected a congregation in opposition to the canonical bishop, is guilty of heresy, and any baptism performed by him is heretical."

A former article had alleged that the baptism set forth in the sixth of the promoter's articles was heretical; here it is pleaded that the person who performed the service of baptism had collected a congregation in opposition to the bishop, and was therefore at the time a heretic, and it is to be inferred accordingly, at least so I suppose, that any baptism performed by him is heretical.

[854] The fifth article pleads, "That by the first canon, made and agreed upon at the second general council, which was holden at Constantinople in the year of our Lord 381 (being the first of the general councils holden in that metropolis) it was ordained and decreed as follows (a):—Trecentorum decem et octo patrum qui Nicææ convenerunt fidem non abrogari, sed firmam ac stabilem manere oportere, et omnem hæresim anathematizari. And that by the sixth canon made and agreed upon at the

(a) See Sacrosancta, Concil. vol. 2, pp. 945-949.

council aforesaid, it was ordained and decreed as follows :—*Si autem sit crimen ecclesiasticum quod episcopo intenditur ; tunc oportet examinari personas accusatorum, ut primum quidem hæreticis non liceat orthodoxos episcopos pro rebus ecclesiasticis accusare. Hæreticos autem dicimus, et qui olim ab ecclesia abdicati sunt, et qui sunt postea a nobis anathematizati ad hæc autem et eos qui se sanam quidem fidem confiteri præ se ferunt, avulsi autem sunt et abscissi, et adversus canonicos nostros episcopos congregationem faciunt. Præterea autem et si aliqui eorum ab ecclesia ob aliquas causas prius condemnati et ejecti vel excommunicati fuerint, sive ex clero, sive ex laicorum ordine, nec iis licere episcopum accusare priusquam proprium crimen absterserint. Similiter autem et eos qui prius rei facti accusatique sunt non prius ad episcopi vel aliorum clericorum accusationem admitti quam se objectorum sibi criminum insontes ostenderint.*"

The purport of these two canons I take to be, that persons accused of heresy are not to be permitted to accuse the clergy unless they first shew themselves to be innocent ; and the object of the article is, I presume, to shew that the party promoting the office [855] of the Judge is not a party who can be permitted to accuse the party cited.

The sixth article pleads, "That by the twenty-first canon of the fourth general council holden at Chalcedon in the year of our Lord 451, it was decreed and ordained—*Clericos vel laicos episcopos aut clericos accusantes non indiscriminatum, nec citra inquisitionem ad accusationem, nisi eorum existimatio prius examinata fuerit.*" This merely goes to the same point, that the party promoting the office is not legally competent to do so as against a clergyman.

The seventh article I have already referred to (ante, p. 844) ; it contains the sum and substance of the charge that the baptism of this infant was heretical.

This, as I have already stated, is the whole question before the Court—Is this a valid or an invalid baptism ? It is not averred, nor is it even attempted to be said, that this is an invalid baptism, null, void, and of no effect whatever ; all that is pleaded is, that the recipient thereof is not entitled to partake of the privileges of the Church until he or she has complied with certain forms. What is the particular form, as I before observed, is not stated ; it was only during the argument that I collected, it is to be by the bishop by the imposition of hands ; and therefore the form which is to entitle the recipients of this heretical baptism to be admitted into the Church is precisely the same as is requisite to entitle the recipients of the most regular baptism to that privilege.

Now I think, in rejecting this article, I am [856] injuring the cause of the promoter rather than that of the party cited.

What is the eighth article ? "That long previous to, and on the 17th day of February, 1840, there had been, and was, and still is, within the said parish, a burying ground or chapel yard attached or annexed to the Independent chapel, which was, and is, commonly used and resorted to for the interment of corpses of all persons calling themselves Independents dying in the said parish." What is the use of this article ? what is it if there be a burial ground annexed to a chapel used by the parents of this child ? if the parents have a right to require that their child be buried in the church yard of the parish church, they may insist on that right ; it may be, as said in argument, a vexatious proceeding ; but, if the right exists, how can the Court say it is not to be enforced : I cannot really see what is the use of admitting an article of this description ; it cannot have any effect on the costs of the suit.

The ninth article pleads, "That by a statute 3 & 4 Vict. c. 92, courts of justice are enabled to admit non-parochial registers as evidence of deaths ;" how can this article be material ?

The tenth article is the next [this set forth the thirty-third of the Thirty-nine Articles]. This is rather the introductory part to that which, as I have before said, is the whole substance of the allegation, namely, that this was the corpse of an heretic, or person excommunicate ipso facto. I may be mistaken, but, as I understand it, the effect of this article is to shew that this was a person [857] who, by open denunciation of the Church, was rightly cut off from the unity of the Church, and to be considered as a publican or an heathen. *Primâ facie*, this can hardly be said to apply to this child, dying in its infancy, before it could have committed any heresy.

The next, the eleventh article, is one of a most extraordinary description. It sets

forth the 3rd, 4th, 5th, 6th, 7th, 9th, and 12th Canons of 1603.(a) [858] These canons are pleaded to shew that persons guilty of the offences there mentioned are excommunicate ipso facto; the substance of these canons is pleaded in the twelfth article; "That the said J. Rumbold, C. Moase, and T. Titchmarsh, the promoter of this suit, are persons who have severally affirmed, and do severally affirm;" then it ascribes to each of these persons offences against the seven [859] canons pleaded in the eleventh article, and concludes by pleading, "That they were and are severally persons rightly cut off from the unity of the Church, and excommunicated according to the true intent and meaning of the 33rd of the Thirty-nine Articles pleaded and referred to in the tenth article of the allegation." I confess that when I read these two articles the question did occur to me, "How, by what means, and in what manner, are all these things to be proved? Here are three persons alleged to have offended against no less than seven distinct canons, or some, or one of them, or some parts or part thereof," upon which witnesses are to be examined, to prove such and such things there stated, by which it is to be shewn that these parties have incurred the penalty of excommunication. Who are to be the witnesses, what number of witnesses are to be examined on such a charge? The parties themselves cannot be compelled to answer to such charges, because if the charge be valid, any answers to such charge might be made use of against them as a confession in a cause of heresy. No person is bound to answer criminatory charges; no witness is bound to answer questions which may criminate or tend to criminate him. Then Mr. Chapman must bring satisfactory legal proof of these charges, not mere confession, but legal proof by witnesses.

The great question argued is that thrown out in the superior Court, namely, whether excommunication ipso facto is or is not incurred without a declaratory sentence; upon that point the learned Lord who delivered the judgment of the Judicial Committee in the case of *Mastin v. Escott* ex-[860]-pressed himself in these words, "An objection was, in opening this case, taken, and for the first time taken, to three of the witnesses, who, it was contended, were rendered incompetent by the 12th canon, which ordains that, whosoever shall hereafter affirm that it is lawful for any sort of ministers and lay persons, or of either of them, to join together and make rules, orders, or constitutions, in causes ecclesiastical, without the King's authority, and shall submit themselves to be ruled and governed by them, let them be excommunicated ipso facto." This objection ought clearly to have been made in the Court below; however, it is unavailing wheresoever made. First, it would not dispose of the cause if it were allowed; and next, it is unfounded and cannot be allowed.

"That it would leave the case unaffected if allowed is plain both from the pleadings

(a) 3. The Church of England, a True and Apostolical Church.

Whosoever shall hereafter affirm that the Church of England, by law established under the King's Majesty, is not a true and Apostolical Church, teaching and maintaining the doctrine of the Apostles; let him be excommunicated ipso facto, and not restored, but only by the archbishop, after his repentance and public revocation of this his wicked error.

4. Impugners of the Public Worship of God, established in the Church of England, censured.

Whosoever shall hereafter affirm that the form of God's worship in the Church of England, established by law, and contained in the Book of Common Prayer and Administration of Sacraments, is a corrupt, superstitious, or unlawful worship of God, or containeth any thing in it that is repugnant to the Scriptures; let him be excommunicated ipso facto, and not restored, but by the bishop of the place, or archbishop, after his repentance and public revocation of such his wicked errors.

5. Impugners of the Articles of Religion, established in the Church of England, censured.

Whosoever shall hereafter affirm that any of the Nine and Thirty Articles agreed upon by the archbishops and bishops of both provinces, and the whole clergy, in the convocation holden at London, in the year of our Lord God one thousand five hundred and sixty-two, for avoiding diversities of opinion, and for the establishing of consent touching true religion, are in any part superstitious or erroneous, or such as he may not with a good conscience subscribe unto; let him be excommunicated ipso facto, and not restored, but only by the archbishop, after his repentance and public revocation of such his wicked errors.

and the evidence; from the pleadings, because the first article of the responsive allegation admits the appellant's refusal to read the burial service"—this led me, in a former part of my judgment, to observe that, by rejecting the whole of this allegation, I should be injuring the cause of the promoter, because this responsive allegation contains an admission of a similar refusal. "So that the refusal to read the service being admitted, the ground of that refusal is pleaded, namely, that if the child had been baptized at all, it was by a person unauthorized, and that, therefore, there was no valid baptism; and thus the only material facts of the case are admitted by the pleadings, and the whole question is raised on the pleadings without any evidence being required. But suppose the [861] objection to prevail, it has no application to two of the witnesses, who prove the whole of the case." Then Lord Brougham goes on to shew that the objection has no foundation; he says, "Suppose (what is not, however, admitted) that the so affirming and so submitting would operate as excommunication without sentence, such effect would only follow from the individuals, as individuals, doing that which has incurred this penalty." It becomes, from these considerations, unnecessary to inquire how far the dictum of the learned judge in *Grant v. Grant* (1 Rep. t. Lee, 593) bears out the decision contended for, but it is fit that we add our opinion that the words in *Lyndwood* (p. 276), *incurrit sententiam excommunicationis ipso facto*, compared with those of the canon and the statute 5 & 6 Edw. 6, would make it very difficult to maintain this position; whilst the Toleration Act (1 Wm. & M. c. 18), and still more the 53 Geo. 3, c. 137, passed long after the date of *Grant v. Grant*, appear to leave no doubt that the incapacity, if it ever existed, is now removed. That was the judgment given in accordance with the unanimous opinion of the Judicial Committee of the Privy Council.

It is impossible to read the act, 53 Geo. 3, c. 127, and not perceive that all incapacity arising from excommunication is removed. The 2nd section does indeed provide "that nothing in this act shall prevent any Ecclesiastical Court from pronouncing or declaring persons to be excommunicated in definitive sentences, or in interlocutory decrees having the force and effect of definitive sentences." It has been said that this reserves to [862] the Ecclesiastical Court the same power of pronouncing

6. Impugners of the Rites and Ceremonies, established in the Church of England, censured.

Whosoever shall hereafter affirm that the rites and ceremonies of the Church of England by law established are wicked, antichristian or superstitious, or such as, being commanded by lawful authority, men who are zealously and godly affected may not with any good conscience approve them, use them, or as occasion requireth, subscribe unto them; let him be excommunicated *ipso facto*, and not restored until he repent, and publicly revoke such his wicked errors.

7. Impugners of the Government of the Church of England by Archbishops, Bishops, &c., censured.

Whosoever hereafter shall affirm that the government of the Church of England under his Majesty by archbishops, bishops, deans, archdeacons, and the rest that bear office in the same, is antichristian, and repugnant to the word of God; let him be excommunicated *ipso facto*, and so continue until he repent, and publicly revoke such his wicked errors.

9. Authors of Schism in the Church of England censured.

Whosoever shall hereafter separate themselves from the Communion of Saints, as it is approved by the Apostles' Rules, in the Church of England, and combine themselves together in a new brotherhood, accounting the Christians, who are conformable to the doctrine, government, rites and ceremonies of the Church of England, to be profane, and unmeet for them to join with in Christian profession; let them be excommunicated *ipso facto*, and not restored but by the archbishop, after their repentance and public revocation of such their wicked errors.

12. Maintainers of Constitutions made in Conventicles censured.

Whosoever shall hereafter affirm that it is lawful for any sort of ministers and lay-persons, or of either of them, to join together, and make rules, orders or constitutions, in causes ecclesiastical, without the King's authority, and shall submit themselves to be ruled and governed by them; let them be excommunicated *ipso facto*, and not be restored until they repent, and publicly revoke those their wicked and Anabaptistical errors.

a definitive sentence of excommunication, as before the passing of the act; but what are the consequences of a sentence of excommunication?"—(sec. 3), "Be it enacted that no person who shall be so pronounced or declared excommunicate shall incur any civil penalty or incapacity whatever, in consequence of such excommunication, save imprisonment, not exceeding six months."

This is, then, the substance of this part of the allegation; if these persons are excommunicate, they are liable to imprisonment for six months, but no civil penalty attaches on them; there is no incapacity whatever arising in consequence of such excommunication. Then, could it be contended, at least with any chance of assent in a court of law, that a party is disqualified from promoting the office of judge, or from being a witness, on the ground that he has been declared excommunicate, when it has been enacted by Parliament that no civil incapacity whatever shall flow from excommunication.

I am of opinion, upon the Act of Parliament, that a party is not prevented either from promoting the office of judge or being a witness in a cause of office; even supposing such party to be excommunicate, he may be imprisoned for six months, and that is all. I am further of opinion that if any such incapacity formerly existed as would have prevented these parties either promoting the office or being witnesses, it has been removed by the Act of Parliament.

What is the meaning of excommunicatio ipso facto?—in the case of a person declared to be ex-[863]-communicate ipso facto, for having been present at a clandestine marriage, it has been held in *Scrimshire v. Scrimshire* (2 Hagg. Con. 399) that if produced as a witness in a suit he must be first absolved, not generally absolved, but merely for the purpose of giving evidence, and that, after giving evidence, he falls back to his status before absolution; and that the effect of such ipso facto excommunication must be taken notice of in an Ecclesiastical Court; indeed, it was taken notice of in that very case. I asked counsel whether there was any instance of a party, merely accused, being excommunicate ipso facto, except in the case of being present at a clandestine marriage; no other case has been pointed out.

It is impossible to consult the authorities, and not see that *sententia declaratoria* is requisite; that there is no case in which excommunication can be incurred without a declaratory sentence. To turn to Lyndwood, in every passage in which excommunicatio ipso facto is said to be incurred, the expression used is *sententia declaratoria*, lib. 1, tit. 2, pp. 11 to 15, at page 13 (B). "*Et sic hæc est poena sententiæ latæ, quam incurrit inobediens ipso jure. Executio tamen hujus poenæ fieri non debet, nisi prius per ipsum, ad quem pertinet sententia declaratoria, super hoc fuerit promulgata.*" Page 15 (P), the gloss on the words excommunicatio ipso facto. "*Et sic est constitutio latæ sententiæ. Requiritur tamen sententia declaratoria.*"

It is useless to quote passages in which it is laid down that a declaratory sentence is necessary before a party can be visited with the consequences of excommunication: he must be pronounced guilty [864] of the offence by which he incurs this penalty, and when the declaratory sentence has been pronounced, the law has already defined the particular penalty, namely, excommunication; but the consequences of this penalty never can attach on any person who has had no opportunity of defending himself.

What is the fact here? Three persons are included in this article, not one of them could be proceeded against in this matter; again, what is the evidence to be produced against them? Are all these three persons to be declared heretics and incompetent witnesses without any charge brought against them personally, and without having any opportunity of defending themselves? I am of opinion the law is not so; cases of this description are fortunately not very frequent; there is, however, one case to which the Court has had an opportunity of looking. *Arthur v. Arthur* (coram Delegates, 1717), before the case of *Colli v. Colli*, mentioned in *Grant v. Grant*. There the question was raised whether a declaratory sentence was necessary, and it was held to be necessary. The passages from Lyndwood were cited, and, among other authorities, Farinacius (*De Testibus* Quæst. 56, 264).

Under these circumstances can it be contended that this article of the allegation, which pleads that these parties are ipso facto excommunicate, there being no declaratory sentence, is admissible? I am of opinion it cannot; and I am further of opinion that the Act of Parliament to which I have referred has removed the incapacity, if ever it existed; and I am bound to take judicial notice of this Act of Parliament.

This brings me to the consideration of the other [865] parts of this allegation. The thirteenth article pleads, "That by the rubric of the Book of Common Prayer prefixed to the order for the burial of the dead, and in and by the statute 14 Car. II. c. 4, it is declared 'that the office ensuing is not to be used for any that die unbaptized or excommunicate, or have laid violent hands on themselves.' And the party proponent doth allege that the said infant died unbaptized and excommunicate according to the true intent and meaning of the rubric and statute, and of the articles, canons, and constitutions of the Church of England." I am of opinion, both on the argument in this case and on principle, that this child was not unbaptized; indeed, this was the whole case of *Mastin v. Escott*; there is, consequently, no use in admitting this article, and I reject it.

The fourteenth article pleads the 20th section of the Church Discipline Act (3 & 4 Vict. c. 86), limiting the time of proceeding in this Court to two years from the time of committing the offence; this question was before the Court on protest (*ante*, p. 703); and the Court then decided the point, holding that the offence was a continuing offence; and that the second application and refusal to bury being within the two years, the case came within the statute.

The fifteenth article pleads the 3rd section of the same act; which empowers the bishop of the diocese, if he shall think fit, to issue a commission directed to certain persons, to inquire into the grounds of any charge or complaint against any clerk in holy orders charged with any offence [866] against the laws ecclesiastical. I really am at a loss to conceive what is the meaning of this article; grant that the bishop has the power of issuing such a commission, he may also (sect. 13th) send letters of request instead thereof; I confess I do not understand the reason why this article was introduced.

The sixteenth article pleads. [This article in substance pleaded that, on Mr. Chapman informing the father of the infant that he could not conscientiously read the burial service over the corpse, and inquiring of him why he did not have the child interred in the burial ground of the chapel, the father replied that it was on account of the very high fees demanded for a burial in the chapel-yard; upon which Mr. Chapman offered to pay the fees for him.]

The seventeenth article pleads that on the 17th of February, 1840, the said C. Moase complained to the bishop of Ely of the refusal to bury the child.

The eighteenth article, that on the 26th of March, 1840, Mr. Chapman received a notice in writing, signed by the secretary of the committee for the protection of the rights of dissenters, informing him that these proceedings would be taken against him.

The nineteenth article exhibits this letter. How is this letter to be made evidence against the party promoting the office in this case; the writer of this letter is not the promoter of this suit: how then, by possibility, can this letter affect the case of Mr. Titchmarsh?

The twentieth article pleads, "That from and after the 17th day of February, 1840, until the [867] 26th day of May, 1841, the said corpse was never on any occasion brought to the church-yard of the parish, nor was, during such period, any warning given to Mr. Chapman, according to the 68th canon." Now in the citation, and in the articles of the libel, two distinct applications are stated to have been made, the one in the year 1840, the other in 1841; if these are not proved the party cited will have all the benefit he can possibly have by admitting this article.

These are all the articles given in in the first instance; certain additional articles have since been brought in, in supply of proof of the matters contained in the twelfth former article, pleading a certain document purporting to be written by Mr. Moase, the minister of the dissenting chapel in this parish. No doubt this document is most intemperate and improper, shewing a most indecent and intolerant spirit against the Established Church; but the fact of Mr. Moase having written this letter cannot have the effect of preventing another person, an infant of a few days old, having the benefit of the offices of the Established Church. No doubt the most bitter spirit of intolerance against the Established Church is evinced in this letter, which is a printed letter, probably meant for circulation, but still this cannot be permitted to have any effect in this cause.

The Court has now gone through the different articles of this allegation; and is of opinion that no advantage could accrue to the party cited by admitting them, or any

part of them ; they do not appear to the Court to constitute any defence to, or any extenuation of, the offence charged to have [868] been committed by this gentleman against the law which makes it imperative on him to perform the burial service over a parishioner who dies not unbaptized.

It has been held that a person not a member of the Church may administer valid baptism, and if the baptism be valid, this child was not unbaptized. This child had no opportunity of supplying any defect in that baptism ; for, by its death before arriving at years of discretion, it could not have desired or received the benefit to be derived by imposition of hands. No crime can be imputed to this child as not having sought to supply this deficiency ; and the fair presumption is, that had it arrived at years of discretion, any deficiency would have been supplied.

I am of opinion that, even if I admitted this allegation, I should not in any manner benefit the party proceeded against ; indeed I think I am doing good to the party by arriving at the conclusion to reject it. I am saving him from great expense and interminable delay. I therefore reject this allegation, but, as it is stated that no case has occurred precisely of this description, if the party shall be advised to apply for leave to appeal, I shall not refuse leave.

The case will stand over until next Court-day, to ascertain whether the party shall wish, or shall be advised, to appeal.

[The rejection of the allegation has not been appealed from, and the cause has been concluded, and stands for sentence.]

[i] APPENDIX.

The reporter having been favoured by J. B. Greenwood, Esquire, with Mr. Gurney's shorthand note of the trial in an action of ejectment in the case of *Greenwood v. Greenwood*, before Lord Kenyon and a special jury, on the 13th of May, 1790, has thought that he should render an acceptable service to the profession by printing the summing up of the case, and the remarks and directions to the jury made by the learned Judge on that occasion, as containing a clear and lucid exposition of legal principles applicable to cases of partial insanity or monomania.

The defendant in this cause, Wm. Greenwood, the brother of the deceased, had previously brought an ejectment in the Court of Common Pleas, and obtained a verdict against the will ; the defendant in that action being then in America, having heard of the verdict, immediately returned to this country and commenced this action of ejectment in the Court of King's Bench. The case on his behalf was conducted by Lord Erskine, then Mr. Erskine, and by Serjeant Adair for the defendant.

It is remarkable that a case so important in itself, and which has been so often referred to as a leading case, should have never been reported. See *The Attorney-General v. Parnther*, 3 B. C. C. 444. *White v. Wilson*, 13 Ves. 89. The trial of James Hadfield for high treason, 27 How. St. Tr. p. 1311. *Dew v. Clark*, 1 Add. 283 ; 3 Add. pp. 95, 96, 97, 98. *Dew v. Clark*, by Dr. Haggard, p. 16.

[ii] Lord Kenyon—Gentlemen of the Jury. This is an action of ejectment brought to try the title to several houses, &c., in the parish of Hillingdon in this county, and the character of the persons who contest it, as they stand in near relation to each other, although competitors upon this record, are Abram Greenwood, the plaintiff, who appears to be the cousin, and William Greenwood, the defendant, the brother and heir-at-law of the testator.

At the outset of the cause things necessary to have been proved, if they had not been admitted, were admitted, namely, that the estate in question belonged to Mr. Greenwood, the deceased. The will was produced, and there is no sort of dispute, but that all the formalities required by law were complied with.

Mr. Owen proved the will, which entitled the party who claimed under it to read the will, and as far as I can judge from the texture of the will itself (which is proved to be in the handwriting of the testator) there is nothing that can possibly lead one to suspect that he was not in full possession of his understanding at the time the will was made ; there is not a mistake, nor trip, nor expression that betrays want of understanding in it.

And the account that has been given of the persons to whom legacies are given shews that his mind extended to a considerable compass, and that those legacies were given upon such fair grounds as might reasonably influence the judgment of a sound mind in making a disposition of his property.

But though all this be so, yet if in further canvassing the business it should appear to you that there was something about this testator which put him in a situation in which the law of this country, and the law of reason too, says that he should not dispose of his property, the will, however formally made upon the face of it, however fairly made at the time, ought not, and, therefore, will not by, your verdict, prevail; but before I state more minutely what the question is, let me do that which I know is unnecessary to be done, considering the rank you hold in this country, [iii] yet I should not discharge my duty to my own feelings, and the public expectation too, if I did not say something about it.

There is nothing that is more apt to seduce one than one's wishes respecting the propriety of a measure, and, therefore, there is nothing upon earth that one ought to be more careful to get rid of, when one applies one's mind to judge of a question, than all these circumstances which might lead one's wishes, and, therefore, debauch and seduce our judgment.

In this case, considering the relation and the happy harmony that has existed between them for many years, it is impossible that a man should not at the first blush of the business wish that the property of the deceased brother had devolved on the defendant, but that ought not to weigh a feather in the scale, it ought to have no influence upon your judgment. We ought not to look to the right hand or the left, but to see what the disposition is, provided we are convinced that the disposition was correctly made; and it would be of the most dangerous consequence upon earth if every man was to look at the disposition made, and form his own ideas of the propriety or impropriety of it, whether it suited what his wishes were that the testator should have done, and thence judge whether the testator should have done it or not.

Mankind are as capricious as they are many in number, and every body knows that there is hardly a will made but goes some way to vary the succession appointed by the law of the land. Many great estates held by the first characters in the country, the first in virtue, have come to them through a disinherison of the heirs-at-law. If no fraud was committed, but the faculties of the testator were in a situation in which they could exert themselves, the will is not to be tripped up because you or I or other persons would not have made the like disposition in the like circumstances.

On the one hand, we are to take care that a will made by a person not competent to make it shall not be obtruded to the disinherison of the heir-at-law. And on the other hand, to take equal care, and be equally anxious, that if the will is properly made it shall prevail, however hard it may bear upon [iv] those who would be our favourites in equal circumstances, and how hard soever it may bear upon the interest of those whom the feelings of man and almost the ordinances of God require should be provided for. We must see only whether the will is the will or not of the testator.

It is expedient upon this case, as upon all other cases, to state the question accurately before one applies oneself to decide it; and I am not sure that it was stated with perfect accuracy, though at the first blush of it, not much receding from accuracy by the learned serjeant, but with not perfect accuracy; I think, in some view of it, there is a possible fallacy.

He stated that the question was whether the disposition was the effect of madness or of sound mind; I am rather inclined to believe that some persons, in judging of it, would look first to the act done, and argue up from that to the sanity or insanity of the mind, instead of looking at that which is the real question, and which the law ever considers to be the question, namely, whether the testator was of sound and disposing mind and understanding when he made his will? That is the question which the wisdom of ages has framed, and which as often as the question arises in Courts of justice, and is put into form, in those words it is put into form.

Having therefore stated to you the question which I am sure your own good sense had presented full to your minds before, I will, with your leave, bring back to your memory that evidence which was given so many hours ago, that, perhaps, some mention of it, though not the main parts, may have slipped out of your minds.

The first witness called is a very respectable gentleman that sits under me; he says he knew Mr. Greenwood four or five years from his leaving school and going to

college; that in the summer of 1786 he dined frequently with him, sometimes at the house of Mr. Benton, the witness; sometimes at the house of the deceased Mr. Greenwood; he frequently conversed with him; he always appeared to him to be a man of remarkable good understanding; he sat at his table as master of his family; appeared to conduct the affairs of his family, and to have the supreme management of his family. [v] As far as it appeared to him there was no sort of derangement of mind, and he never suspected it from any part of his conduct or behaviour; that since this question arose he has taxed his own memory to recollect all that ever has passed, and upon reviewing all that he recollects, he cannot think of any single circumstance in his life that has appeared to him like derangement. He says that he frequently observed with concern the coolness between the two brothers; that there was no conversation between them when they sat together at dinner; that they lived together, but appeared, though under the same roof, to live at great distance in point of communication with each other. The deceased was at his house the day before he went to Lisbon; he came there to take leave of him; he had dined there two or three days before; that at that time—which is the very important time in this cause, there was not the least appearance of any derangement.

Mr. Greenwood was a steward of the Assembly at Uxbridge; he conducted himself in a sober and discreet way, and there was nothing odd in any part of his behaviour.

Now to be sure that may seem en passant a very important circumstance, his being Master of the Assembly; but, however, it brought him into a mixed company; attentions were to be paid to various people, and a mind that was not in an exceeding good situation at the time might have betrayed the want of it in some circumstance that at a public assembly would hardly have passed unnoticed. Upon his cross-examination he says Mr. Greenwood appeared to him a remarkably acute, sensible man; that it appeared to him they were a most cordial family during the father's lifetime.

Dr. Reynolds is the next witness; he says on the 24th of November, 1787, Mr. Greenwood consulted him; he consulted him again on the 4th of December; he conversed with him on his illness, which was a consumptive case; that at that time, in his opinion, there was not any appearance of derangement of intellect; that he conversed as a sane man perfectly well, and described his disorder with accuracy to him. Upon his cross-examination, he says it is common for men, sensible on general subjects, to be insane on particular subjects; that persons of acute, quick parts, and weak [vi] nerves, are more apt to go towards a state of insanity, and when they are attacked by a disorder of that kind their recovery is more difficult.

Mr. Pope is the next witness; he knew Mr. Greenwood from his infancy. He saw him in July or August, after the death of his father; he had heard he had been extremely ill after his father's death, though he had not heard what the nature of his disorder was; he was at two assemblies which Mr. Greenwood conducted at Uxbridge; that he remembers dining with him, his brother and sister, and two or three families in the neighbourhood; that he saw him occasionally with his family in the spring and summer of 1787; it was evident there was a difference between him and his family, but the witness could not guess what it was. That he has often seen him with his family, and never saw the least act that induced him to suspect insanity; that there was nothing like it, either in his conversation or appearance; that he went with him to Dr. Warren to consult him; he saw him most days in October; he thought him very ill, and advised him to take advice; in consequence of that, Dr. Reynolds was called in; he pressed him to go to Lisbon. This was at the latter end of November; he called upon Mr. Greenwood at his chambers one evening; there were several gentlemen there; they all pressed him very much to set off immediately for Lisbon; he said he could not go till he had settled his affairs. Mr. Pope suggested to him that there would be no great difficulty in getting somebody to manage his affairs, and offered himself for that purpose.

The next morning he called on him, again pressed him more on the subject, and made an offer of himself to take care of his affairs that he might go to Lisbon, but did not choose to undertake that trust by himself—he wished somebody joined with him, and then, in order to feel his pulse with respect to his brother, proposed his brother; but that he said in a determined way, "He shall have nothing to do with my affairs." Nothing like insanity appeared. He then proposed Mr. Hilliard. The testator said, "Do you think Mr. Hilliard will take it?" He promised to go and ask Mr. Hilliard; he applied to him; he consented to take the trust; [vii] he pursued

his conversation upon this business very sensibly. Some days afterwards, Mr. Greenwood drew up an account of his affairs, in order to leave with him when he went abroad; he had almost daily meetings with him about the business; he found him remarkably exact in the state of his affairs, nothing marked him as insane. He then produces the paper, which is in the testator's handwriting, and which I need not trouble you with rehearsing again; he said he found all the statements contained in that paper to be correct—all marked with good sense.

On Saturday, the first of December, he took himself and the cousin, who is now the object of his bounty in his will, in his carriage to Little London. On Sunday, the 2nd of December, the witness called upon him, and found him treating with a man who came to take some land of him. On Monday he saw him again; he assisted him in making the agreement for letting the land; he appeared to him to conduct that bargain very sensibly. On that day he, the plaintiff, the defendant, and the witness went together to town—as he went he saw tears frequently in the eyes of the gentleman who is the defendant upon this record—the brother of Mr. Greenwood; that nothing in the testator's look or actions at the time marked an insane man. He says that on Tuesday the agreement with the tenant was perfected, and the lease that had been drawn was on that day executed. On Tuesday, the 5th day of that same month—December—a letter of attorney was executed to him and Mr. Hilliard calculated to give them the power which was necessary to conduct the affairs of this gentleman while at Lisbon; on that day they dined at Mr. Hilliard's, and Mr. Blencowe, a respectable gentleman in the county, who lived near them, was there; that he spent the evening with Mr. Greenwood, talking about his affairs; he made memorandums, and calculated his servant's wages accurately; he observed that the wages ran high, and said that his brother, though able in point of fortune, never contributed to the servant's wages.

On Wednesday, the 6th of December, he called upon Mr. Greenwood about seven or eight o'clock in the after-[viii]-noon, and assisted him in packing up his books and papers; he left him at about ten or eleven o'clock at night; Mr. Greenwood said to him at parting, "I will now sit down and make my will;" he said he had mentioned the circumstance of his intention to make a will to him several times before; the testator was in declining health. It being a late hour of the night, the witness suggested that it would be better not to make his will at that time, but to do it some evening at an inn on the road, but the testator answered him, "No, I will make it to-night." On Thursday, the 7th, he saw him again, and Mr. Owen and his clerk either came with him, or immediately followed him into the room; when they came in Mr. Greenwood said, "Well, Pope, I sat down and made my will after you were with me, and now I will execute it." He then produced the will; the witness saw each of the sheets were signed; the testator took up a dry pen, and either drew the pen over the name, or pointed to it, and said, "That is my name;" he is not certain which, nor is it of any importance as to the validity of the will. Mr. Pope observing that the coachman stood at some distance, and the testator being hoarse and speaking low, asked the coachman whether he heard the words "that he published and declared it to be his will;" upon that the coachman, coming near, the testator repeated the words, and it was then attested by the witnesses. Then he folded up the will, and put it in a cover, and desired the witness to seal it, which he did, and another cover was put round it, which had something written on the inside, that the person who opened that cover might know who the executor was, and, therefore, to whom the will was to be handed, and also it gave directions with respect to matters which could not be postponed to any great distance of time, namely, about his funeral; then it was folded up in another piece of paper, upon which Mr. Pope wrote that it was Mr. Greenwood's will. He, conversing with him at that time, thought him completely sane, and fully capable of managing all his affairs; he never saw either anything in his countenance distorted, or anything in his mind disturbed; he received a letter from Mr. Greenwood, dated "Lisbon, the 10th of January;" [ix] that letter I need hardly read again; you recollect it gives a long, accurate, and sensible account; he seems to have had a perfect recollection of what had passed before he left London; he particularly recollects the commission entrusted him by Mr. Justice Heath to buy him a pipe of wine.

Upon his cross-examination the witness says that in Easter Term, 1787, he discovered a very strong coolness in Mr. Greenwood towards his brother; that he

did not speak to his brother; that if he wanted to be helped to a dish at table that stood near his brother he had the dish removed to him, rather than ask his brother to help him. That one day he threw back a letter which his brother William had given him, with marks of contempt and ill-will to his brother. He says, after Trinity Term, 1787, the collector of the land-tax came for taxes while they were sitting after dinner; after having cast up the amount of them, he wrote a draft upon a banker's cheque; he applied to the witness and to his sister for a pair of scissors; his brother took out a pair of scissors and put them towards him, but he refused to make use of them, and tore the cheque off immediately. There was, in all his conduct, a marked unkindness to his brother, and it was clear to him that there had been some disagreement, though he did not know at that time in what it consisted. Mr. Greenwood gave him directions to kill some doe venison at Christmas, and send to Mr. Justice Heath, and some other neighbours; he did not mention his sister. Mr. Pope said his sister would be visiting somewhere at Christmas, should he send some to her; he said, "Yes, by all means." He gave directions to sell all his horses generally. Mr. Pope put him in mind that his sister had made use of one of his horses, and it would be inconvenient to her if she was to be deprived of that animal; upon which he directed that that particular horse should not be sold: he says he observed marks of great dislike to his brother at this time, but never had observed these marks of dislike till about Easter Term, 1787.

Then Mr. Justice Heath was called; he states that he was acquainted with the deceased; he knew him from 1784; was frequently in his company when at his country house, [x] and he never had, upon the whole communication he had with him, the least suspicion of insanity during his life; he conversed as a man of good understanding. He says he was not in his confidence so as to hear anything about his private affairs, but the turn of the conversation was those general topics which exercise the conversation of gentlemen.

Mr. Blencowe is next called; he is a gentleman of fortune and of undoubted respect and character in the neighbourhood; he says that he was acquainted much with the testator; he saw him in the end of the year 1786 and in 1787, and he was frequently at the house of Mr. Blencowe, and Mr. Blencowe at his; indeed they saw each other almost daily; he says that both the brothers were frequently together, that every body in the neighbourhood knew, and he had observed that there was a coolness between them; he never saw any impropriety in the behaviour of one brother or the other, except that there was a sullenness in the testator—that they did not speak together; that Mr. John Greenwood always appeared as a man of sound mind, that he never saw any rudeness between the brothers, but a great degree of sullenness. He dined with him at Mr. Hilliard's the day he made his will; he seemed then very conscious that he was in danger, though not in a desponding state; he confined himself altogether to a vegetable diet, drank no wine or other inflammatory liquor; in the evening he played at whist; he shewed no anxiety, but played his game as a man of good sense would do. It was notorious to his relatives that he was going to Lisbon; in his journey he was accompanied only by his servant, John Turner.

Mr. Long, the surgeon, says in March, 1787, Mr. Greenwood applied to him for his advice; he saw him frequently for about a fortnight, and conversed with him; he perceived no sort of derangement, not in the smallest degree; he attended him again in the same year in May, and again in August; that he explained to him the nature of his disorder, that he consulted him upon it very sensibly, that he did not observe the least degree of derangement. Upon his cross-examination he said that insane people [xi] often appear sound on general subjects, but he never talked to him about his brother.

Mr. Conant knew Mr. Greenwood; he was intimate with him at Cambridge; he heard he had been ill after his father's death—that he saw him in 1787; he called upon him in 1786; he saw his brother, a common friend at that time was with him; he asked to see Mr. Greenwood, the deceased; the defendant, the brother, said he could not, as he was not well; upon that he heard the voice of John Greenwood, who said, "It is quite otherwise, I am very well." In 1787 the deceased called on him, and conversed with him for a considerable time; he paid attention to his conversation and conduct, to see if he could find anything like a derangement in it, but could not discover the least traces of derangement; he saw him frequently afterwards; he took particular notice, but he could not observe in him anything like insanity; he conversed with him frequently till a few days before he went abroad.

Upon his cross-examination he said that it was some months after he had heard his voice before he saw him; that he never talked to him about his brother, or his private affairs; that Mr. Greenwood had once a great affection for Mr. Jones, his tutor. In the beginning of the summer he saw Mr. Jones at Mr. Greenwood's chambers; when Mr. Jones was taking leave of Mr. Greenwood he told him he was going to call upon his brother; "Wm. Greenwood," said he, "is a damned scoundrel."

He saw Mr. Greenwood afterwards with Mr. Jones, that Mr. Greenwood then behaved unfriendly to Mr. Jones; he does not believe Mr. Jones had given him any real cause of offence; he reflected in very pointed expressions on Mr. Jones as a man wanting principle; he gives an account, which has not been well explained, not for want of any attention in Mr. Conant (perhaps it was not very explainable), that Mr. Jones had spoken in favour of Archdeacon Paley's book; Mr. Greenwood said that book would not constitute a man of principle. Mr. Greenwood said he had but a bad opinion of the clergy in general; Mr. Jones took that as a reflection upon himself, and there were some [xii] unkind words between them; that Mr. Greenwood then said to Mr. Jones, "I suppose, from this conversation, you think me a madman!" he afterwards spoke to Mr. Greenwood about Mr. Jones, and Mr. Greenwood drily answered he had now no further connection at Cambridge. He said that the deceased was at that time, in his opinion, so much master of his reason as to be capable to dispose of his property, beyond all doubt.

Mr. Dampier was then called, who says, in Michaelmas Term, 1785, Mr. Greenwood became his pupil, to be instructed in special pleading; he attended him from that time till near Easter, 1786; he was then absent till Michaelmas, 1786; continued with him till the summer of 1787; he then appeared far gone in a consumption; he saw not the least derangement in his state of mind; he continued always capable, and he had continual opportunities of observing him; he never talked to him about his family affairs; that he has seen William Greenwood frequently in his office with John Greenwood, but that he never saw anything which called for any observation from him respecting their conduct to each other; he thinks to all intents and purposes he was as sane a man as he ever conversed with; before Michaelmas, 1787, he had heard of his coolness to his brother, and his former insanity, and he observed him in order to discover if there were any traces of insanity remaining; that he proposed his brother to him, as the person to leave the conduct of his affairs with; that he did not fly out then, but rather evaded giving him an answer to the question; Mr. Dampier said certainly he should have attested his will if he had been asked and had not known the contents; that the will disinherited the heir-at-law; I dare say Mr. Dampier has his reasons for that.

Dr. Ball says he lives at Hillingdon Common; he knew Mr. Greenwood; after the death of his father he had heard of his insanity; from the conversation he had with he him did not believe the account was true; he discovered no symptoms in him of a deranged mind; he thought him a man of great abilities and understanding of his age; he says that he, the witness, said to Mr. Greenwood, "I wish your [xiii] lungs were as good as your head;" he should have had no objection to attesting his will at any time when he saw him.

Mr. James Wortham was concerned in a cause for Mr. Greenwood; he took instructions from him several times; he was perfectly master of his understanding; he asked Mr. Greenwood whether he would draw the declaration in his own cause; he said he would not draw it, because that would abridge the attorney of his fees; he prepared the letter of attorney from him to Mr. Hilliard and Mr. Pope; on the 6th of December, 1787, he saw him, and he seemed perfectly well in his mind—that he directed the witness not to part with the possession of the letter of attorney till he should give him further directions; he had no reason to believe him insane from any conversation he had with him; from what he saw of the state of his mind he should have had no objection to attest his will.

Mr. Dampier was asked about a letter from Mr. Greenwood, which he had in his hand (he produced it), which gives an account of the difficulties he encountered when he got on ship-board at Falmouth, and he also produced a written opinion of Mr. Greenwood's, which certainly, as far as one reads it, seems the opinion of a man in full possession of his reason, giving his opinion respecting the conduct of a cause, and the rights of certain parties which were stated in a case laid before him.

The Reverend Mr. Pope says he lived near Mr. Greenwood; he knew him from his

childhood to his death ; he saw him in the summer succeeding his illness ; he paid him a visit to congratulate him on his recovery ; he had at that time no knowledge of his having been insane ; he had no disordered mind, no disturbed spirits, his conversation was exactly as it had used to be ; he frequently saw him and his brother together afterwards ; he observed a considerable degree of coolness ; the first observation that he made of that was in the month of August, 1787 ; that nothing ever led him to suppose from the conversation that he had with him at any time that he ever had been deranged ; he went with him with some persons who were [xiv] examined before a magistrate ; he could not but admire the adroitness with which he examined the persons—the accuracy with which he got at the truth from those who wished to disguise it.

Mr. Hill, an attorney, knew Mr. Greenwood four or five years ; he transacted business with him in 1787 ; he went to a copyhold court with him, that Mr. Greenwood might be admitted to some copyholds which he claimed ; he appeared to him to be very capable of managing his own affairs ; he has seen him at turnpike and land-tax meetings ; he joined in the business of the meeting ; he should have had no objection to draw or attest his will ; did attest one of the powers of attorney.

Dr. Freeman was next called, who says he knew the deceased from his cradle ; he saw him in the summer of 1786, and in the summer of 1787 frequently ; he was in a large company at the witness's house ; he had heard of his insanity, he then appeared to him a sane man ; if he had been incapable of taking care of his affairs he thinks it could not escape his notice ; he says he never conversed with him relative to his confinement, or his brother's conduct.

Mr. Skinner is called ; he says he treated with him about taking a house ; he appeared a man of understanding ; he did not discover the least want of capacity.

John Whittington says, a week before Mr. Greenwood went abroad he took some meadows of him ; he seemed to him perfectly able to transact business.

Mr. Owen, the witness to his will, the gentleman that lived over him in his chambers, is called again ; he states that they were in the common habit of breakfasting with one another without any ceremony ; in November, 1787, in a conversation he mentioned his brother, Mr. Greenwood said, "Yes, my brother is a very fine gentleman ;" he conversed afterwards with him, he seemed to him perfectly well ; he had a high opinion of him as a man of business and as a man of letters ; that he was astonished to find that he had been treated as a madman ; that afterwards he endeavoured to recollect all that had passed between them, [xv] and he could not think of any circumstance on which he could put that construction ; if he was insane he thinks he must have observed it, he said he was a man of an uniform and amiable disposition.

Now, gentlemen, this is the case on behalf of the plaintiff, and to be sure, if the case were to rest for decision upon the evidence that has been brought on the part of the plaintiff in the cause, one may venture to say, without saying too much, that a stronger case of sound mind and understanding, competent to dispose of property, never was laid before a Court of justice ; but though that is so, one is not to rush on to conclusions without hearing what is said on the other side ; it is due to the parties in this cause, it is due to the general administration of justice ; both sides have a right to be heard—if one side has kept back material circumstances, or if it was not in the power of their witnesses to disclose them, injustice would be done if the conclusion was to be formed before what the other side can say in aid of their case, and to develop the whole case to a jury, has been said and attended to on their behalf.

The first witness called on the part of the defendant was Mr. Hingerston, the apothecary. On the 22nd of April, the day after the father's death, he was sent for to Mr. John Greenwood ; he told him he had had a shivering fit ; he was extremely feverish ; either Mr. Greenwood, or some person in company, said he had taken some brandy and water, and that he thought himself poisoned ; he says he thought him to be in a very melancholy, dejected state ; he saw him again on the 23rd ; that he was then freer from fever, but the fever even then did not intermit, as he wished it would have done. On the 24th he saw him again ; he thought him freer from fever, but it returned on that night, accompanied with a delirium ; that he was restless and suspicious ; he made complaints to him of his brother and servant, and hinted that some plots had been made against him ; that he seemed much under a fever and delirium ; wanting further assistance, Dr. Pitcairn was called in and ordered the bark ; that the bark was

taken [xvi] plentifully. On the 25th he seemed greatly better, and then again he spoke to him of his suspicions of having been poisoned. The fever returned on the night of the 25th with great violence; the next time he saw him he talked very incoherently; it was necessary, he thought then, to have some coercion put over him, and means of coercion were used; he never saw him after the 23rd of June; that he never was, after the 25th of April, as long as he attended him, free from delirium. Between the 10th of May and the 23rd of June he spoke to him in favour of his brother; he thought him then in a delirium; he always saw William Greenwood when he went to the house; he behaved in the most affectionate manner and shewed the greatest concern for his brother's situation; he says that there is nothing more usual than for insane persons to be jealous and to conceive antipathies, and generally these antipathies are against their best friends; as long as the disease continues, so long the antipathies continue.

Upon his cross-examination he says there are antipathies often without any degree of madness; that he considered the delirium as symptomatic of the fever; that he was never free from the fever while he attended him; from the 7th of May to the 23rd no medical man attended him, to the knowledge of this witness; he verily believes no medical person did; that after the keeper came to him he believes there was occasion for coercion, and the keeper had a considerable degree of control over him. He knows nothing of his situation from the 7th to the 23rd of May; he thought he would never get better, for though the fever abated, yet the delirium did not; during the continuance of this fever and delirium he complained of his brother, particularly as to Price; he thought him a very fit person to be entrusted with the care of him; from the 7th of May to the 22nd of June nobody could have conversed with him without seeing that he was in an insane state.

Dr. Pitcairn attended Mr. Greenwood's father; he attended the son on the 24th of April; he had a little fever; he appeared much reserved; he cannot speak from what he saw [xvii] of his state of mind. On the 25th he was easier—he had scarcely any fever. On the 26th he was sent for early; he had been ill in the night and unmanageable; he thought it was necessary he should have a keeper; he says that jealousy and suspicion of those around them are common symptoms of a distempered mind, and that it is common for that jealousy and suspicion to continue when to many other purposes the patient appears to be well. When he saw this gentleman, he thinks nobody could look at him without perceiving that he was in an insane state.

Dr. Budd says he was applied to by Mr. Jones. On the 8th of May he prescribed for him; he did not see him till the 23rd; he attended him almost every day till the 28th of June; he conversed very little—he said he was well, and that he supposed that he, the witness, was come to repeat the same farce as the day before; after about ten days he would talk with him for five or ten minutes upon any indifferent subject, but would not speak about his own health. He believes he took the medicines that were ordered for him. In his opinion there was a necessity that there should be some person who could control him to take care of him.

He thought he had a fever accompanied with insanity; he was in hopes the delirium was symptomatic of the fever, but it did not prove so; as far as he observed, he found William Greenwood, the brother, most attentive to him; in 1787 he met him and thought he had a peculiar wildness in his appearance; he met him afterwards—thought him not well; he perceived also this wildness in his appearance—this was during the time in which all the other witnesses who have been called for the plaintiff speak of him and conversed with him and say they saw no symptom of insanity; he says that from the appearance of his eyes he thought he was insane at that time, pretty late in the year 1787.

On the 10th of May he says he first prescribed for him—that he had not seen him at that time; he prescribed only once, and that was from the representation which had been made of him by Mr. Jones; he says that Price was with him when he saw him on the 23rd of May; he said but a few words whilst he was there; he was very shy, particularly [xviii] when his brother was there; that he complained much of having the keeper about him—he made no other complaint; he said there was no occasion for Price; he talked with him upon a variety of subjects, and talked very well with him upon those subjects; he did not stop him, when he met him in the street, above a minute or two.

Upon his cross-examination he says sulkiness is usual in madness, and madmen usually complain of restraint.

Price was next called. He is an assistant to a person who receives unfortunate people at Hoxton; he has been in that situation eight years; he attended Mr. Greenwood in 1786; he came there about the 26th or 27th of April; he staid ten weeks in all. Mr. Greenwood was sometimes in low spirits, sometimes high—the witness thought him disordered in his mind. One morning early he got out at his window—there was no other way to get out of his room without coming through the room in which the witness was. He got out, he thinks, between three and four in the morning; he came home again late that night with Mr. Jones. Mr. Jones told him Mr. Greenwood had a knife; the witness asked him whether he had a knife—he said he had none; when searching he found a knife in his bed. Mr. Greenwood was very angry at this—so angry that Price did not think it safe to trust him without a strait waistcoat; he put one upon him. Another time he threw a candlestick at him—then he put a strait waistcoat on him. He was with Mr. Greenwood in London; he appeared to him much in the same state of mind then, which was not so well as he should be. He saw him go to the pump to fill his kettle; that he never heard him express any suspicion; that he was removed to town about June; he staid ten weeks in all; he thought him not quite well when he left him, though much better: Mr. William Greenwood always behaved kind, but John Greenwood was very shy to him. The witness treated him generally according to the best of his judgment; he thinks he was not in his perfect mind while he was with him.

Upon his cross-examination he says he put on a strait waistcoat twice; he thought Mr. Greenwood was not clear in his head when he left him; he did not recollect any [xix] complaint made by him; sometimes he cried, sometimes he laughed; he was in a disconsolate state, lying upon a sofa; he knows no instances of his committing any excesses but these two instances; he once forced him to bed about three or four in the afternoon, because he complained of a shivering; Mr. Greenwood would rather not have gone to bed, but he thought it might be of use to his health, therefore he compelled him to go to bed; he did not know of any medical person that saw him during the last month he was there.

Here the journal was read.

Mr. Livie was acquainted with Mr. Greenwood's family; he had been so twenty years. He says that the family lived together upon the most friendly footing; all the whole family of Mr. Greenwood was in great distress upon the death of his father; he appeared much agitated; the next day he was ill; he contributed in recommending this brandy and water and egg to him. On Sunday he dined with him alone; he talked about his future objects in life—of his intention of going into the law; he said he should keep on his house at Little London, and his brother and sister would live with him. A night or two after that he expressed his idea that he was about dying; that he sent for his brother and the witness; he expressed his apprehension of immediate death, and then said if he did his whole property would go to his brother and sister; that he wished them to give a thousand pounds to Mr. Jones, which would be no large sum for them to part with, and be a large sum for Mr. Jones in the state of his circumstances; he said, also, he desired his brother then would supply the place of father and elder brother to his sister; the next day he was excessively low and crying; he expressed a wish that the witness would take him to his house.

The witness thought it necessary that Price should be in the house: after that time he saw little of him until Price was removed. A little before the shooting season commenced he met him and his brother at his father's gate; he went up to him and put out his hand to shake hands with him, but he would not accept of his hand; he said [xx] that he met him afterwards, but the deceased then refused to return his salute; he would not bow to him, but passed on; he never saw more affection, prudence, and good sense in any brother than in Mr. William Greenwood, and he was never witness to any cruelty exercised on him by his brother.

Upon his cross-examination he said he saw him once while Price was in the house, but Price was not in the room with him.

Mrs. Evans was next called, who said that the family appeared to her always to live happily together; that she had a letter from him, which appears to be written during the time that it has been generally understood that he was certainly in a fever and in a state at times, if not during the whole season, of delirium; that letter

speaks of ill usage, of wanting her to come and rescue him, and to make peace and so forth.

The first meeting Mr. John Greenwood had with his brother and sister, after his illness, was at her house ; at the first meeting he behaved kindly to his brother and sister ; the latter end of that year and the year after he behaved very coolly ; at the meeting he shed tears very much ; the witness says they dined that day with her ; they all went in the afternoon and drank tea at Mr. Higginson's ; they returned again and supped at her house ; she saw him again the next day—then he behaved well ; he was reserved, but there was nothing which appeared to her to be a departure from reason ; the appearances were the same—he was grave ; he still continued grave, but nothing like a departure from reason ; she saw him frequently afterwards in the autumn of 1786, in the winter of that year, and in the spring of 1787 ; she saw him frequently, once or twice a week ; she observed in him a great coolness to his brother and sister ; he barely answered them if they spoke ; she saw nothing else particular in his conduct.

The Rev. Mr. Thomas Jones says he was tutor to Mr. Greenwood at Trinity College in Cambridge ; that there was a great intimacy between the deceased and him ; he came to Cambridge on the 5th of May, 1786—that was the [xxi] night he escaped out of the window. He sent a note to him expressing the distress he was in, wishing to see him at the Rose Inn ; he went to him ; he found him dressed in deep mourning, very pale ; he came up to him immediately, clasped him in his arms, and shed tears abundantly, and he appeared to him to be in the greatest distress ; he said he had lost the best of fathers—that his friends had deserted him ; the Higginsons, Livie, and his brother, too, had deserted him, and had spread a villainous report of him—that he had been undutiful to his father, and been accessory to his father's death, and that they had confined him ; and then he said, "Will you go with me to London?" Mr. Jones said, "Yes, most certainly, I will go with you immediately." He had much conversation with him on the road ; he appeared to be low and melancholy ; he shed tears and complained repeatedly of his confinement. Being apprehensive for his personal safety, observing the state of mind he was in, he asked him if he had any knife, giving as an excuse for borrowing it that he wanted to cut a rough stick in his hand ; he got the knife from him ; his mind was much altered to what it had been ; he was vastly low and melancholy, sighing and shedding tears, and complaining of things which he thought could not have taken place. Just before they got to town, for fear he should lose all confidence with him, he restored to him the knife, but immediately told the family the circumstance that he had a knife in his custody ; he did not at that time think him in possession of his right mind. They went to Little London, the witness, Mr. Higginson, the deceased, and Mr. William Greenwood ; he stayed there two or three days ; the testator continued in the same state of mind as in London ; he complained that his friends had deserted him ; Mr. Jones argued with him upon it, that this was not true ; he asserted the contrary very strongly, and affirmed it with great confidence. The witness applied to Dr. Budd : he says Mr. William Greenwood's conduct during the whole, that he could observe, appeared affectionate and anxious in the highest degree for his recovery. He saw Mr. Greenwood again in London about the 20th of June ; he found him [xxii] still low and melancholy, but not so bad as before ; he continued with him about a fortnight ; he says he appeared to have a great dislike to his brother, and to be in great indignation with him ; he went with him to Little London ; during that visit he talked to the testator often of the manner in which he behaved to his brother ; the reasons he assigned in answer were the general ill-treatment which he had received.

In December, 1786, the deceased came to Cambridge with Mr. Wilkinson ; he then appeared to have recovered his senses ; the witness then talked with him about his brother ; the deceased said he would convince him that his brother had not done right, and he called him a hound, a scoundrel, and a villain.

He visited him again in Little London in February, 1787, and still he expressed as inveterate a dislike to his brother as he had done at the preceding visit.

He visited him again on the 4th of June ; he then perceived, for the first time, that the deceased had taken a dislike to him, the witness, and that day, at the Devil Tavern at dinner, he used such language to Mr. Jones as if he thought his professions of friendship were vain ; that he had found friendship was only a name ; that as to principle and those things he was persuaded that no such thing existed, and that

people who pretended to be friends could desert those for whom they professed a friendship, and towards his brother that day his expressions in general were harsh.

Mr. Greenwood came to college in July, 1787; he appeared to him then to be quite calm and reasonable, and he hoped he should be able to convince him that his suspicions of his brother were ill founded; when he began to speak to him about the opinion he entertained of his brother, though he was calm before, he turned suddenly round, and, looking very fiercely at him, said, "Let me ask you a question, sir: Was it or was it not by your advice that Dr. Budd was called in, and that Price was retained?" Mr. Jones was very much surprised with his behaviour, and told him that it was by his advice Dr. Budd was called in; that then [xxiii] he grew extremely warm and abused him for the advice he had given; the witness offered Mr. Greenwood his hand at parting; he refused to give him his hand and turned away harshly from him; he says Mr. Greenwood never conversed with him as he thought rationally upon the subject of the quarrel with his brother; when he came to Cambridge, in the month of May, his understanding was upset; that was apparent to everybody who saw him and conversed with him.

Mr. Jones, on his cross-examination, says he does not know how the testator was treated between the 10th of May and the 20th of June; he saw no violence used to him; he saw nothing to render it necessary to put on a strait waistcoat; his complaint was of the manner in which he was treated; this was his constant complaint against his brother; what the other part of his complaint was he does not know; that during the time, after the keeper was removed, he managed his own affairs and appeared to him to act with discretion; that all that appeared to him to be wrong was that he could not persuade him that his brother had not behaved ill; he does not believe that those who had not heard of his derangement would have discovered that he had been in such a situation.

Mr. Wilkinson says he was acquainted with the deceased at college; they took their degrees together in 1784; he saw him after the death of his father, in November Term, 1786; he met him then in his carriage with his brother. In a little time after that he dined with him at the Crown and Rose; he had heard of his illness, but he did not then know what it was; he staid in the room at the Crown and Rose with him after the rest of the company was gone, as he was anxious to know what it was; he made a great number of inquiries about it. The testator described his illness in various ways—that he had had a fever; had been very ill; that he had been a great deal in the house, and had not been out much; Mr. Greenwood desired him to go home to his chambers, and said he would lay before him a story that would astonish him. He went with him to his chambers, then he told him he had been confined; that he had [xxiv] kept a journal which he would shew him; he shewed him the paper altogether; what is called the introduction and what is called the journal were produced as one set of papers; he also produced some letters which very much surprised him, and he left him in great agitation; he desired that he might meet him again and discuss the matter with him.

From Christmas, 1786, to July, 1787, he had many conversations with him; he endeavoured to convince him how shamefully he had acted towards his brother. The witness had applied to Mr. Jones, from whom he learned the state of Mr. John Greenwood's mind; he represented to Mr. Greenwood the whole state of his case, and everything that had happened to him; he acknowledged it was so, and then charged his brother as the author of that force that had been used to him; he also charged his brother with having accused him with not feeling for his father; he said that they had given him brandy and water in which they had put poison, and that they had put arsenic into his tea-kettle; that he asked the witness whether he would not have him prosecute his brother; that he certainly would prosecute his brother.

The witness was with him at Little London at Christmas, 1786, and they went from thence to Cambridge; he watched the testator more narrowly; he behaved to his brother with great sullenness; he never answered him a question if he could possibly help it. The witness then attempted to convince him that his suspicions of his brother were without foundation, but he could not succeed; on the contrary, his prejudices were more rooted, and his antipathy more violent. In a conversation with the testator, in Easter, 1787, the witness told him he distressed him, the witness, and every other man at his table, by his conduct to his brother, and he would visit him no longer unless he altered his behaviour to his brother and sister; after this conversation the testator seemed to doubt whether his conduct had been correct; he said,

"Possibly I may have been wrong, I will alter," and he desired the witness to watch whether he did not alter his conduct to his brother and sister; the witness observed to [xxv] him that he never took notice of his brother's and sister's salute to him when they wished him a good morning; that he ought to return their salute; that it was unkind to his brother and sister not to do so; he said he would mend in that, and the next morning he took notice of his brother's and sister's salute to him when he came into the room; it did not continue long, but the sullenness of his behaviour soon returned. He several times intimated to the witness his intention to prosecute his brother for his being put in a strait waistcoat, and about the brandy and water, and the arsenic being put into his kettle. He says there was some difference in his behaviour before strangers, to what there was in his behaviour before those with whom he was familiar. When he was with him last he was as violent and as bad as ever; he said his words, actions, and looks were violent.

He produced the journal as the history of what had happened to him; knowing as he did the state he had been in, he would not have attested his will or any instrument he had put into his hands; as to the facts stated in the journal, he did not know whether they were true or false any more than he had them from him as being true. The next witness was

John Bourdieu, Esq.; he knew the testator in the year 1774; that the brothers appeared to him to live in harmony together; he was with him at London in Michaelmas Term, 1786, and in February, 1787, the testator told him that he wanted to lay a scene of villainy before the world about his brother, Mr. Higginson, and Mr. Livie; he talked upon all other subjects as rationally as any man could do. The witness went down to Little London about Christmas; he observed there was a distance and reserve between the brothers; that there was in his looks and manner of behaviour, coldness, distance, sullenness, and aversion to any communication with his brother and sister; that his looks at the time shewed that he resented something.

Mr. Blencowe says the testator's behaviour to his brother and sister appeared to be that of distrust and contempt; his general behaviour before his father's death was quite the [xxvi] reverse; that he never broke out into any violent expressions; that he behaved well to other people, but to them, after the death of his father, he behaved with reserve; when he attempted to persuade him to a reconciliation with his brother, he said, "You are not acquainted with half the damned villainy that exists in this world."

Ann Walker was housekeeper to old Mr. Greenwood; she left the family in August, 1786; she received a letter from Mr. Greenwood which is dated the 31st of May, 1786. You recollect that that state of mind is supposed to continue a good while after that time. She says Mr. Greenwood, the deceased, never gave her the least offence he seems to apologize for in his letter. She saw him a fortnight before he went to Lisbon; she called to ask him how he did; he then asked her if she knew anything of the damned brandy and water that was given him at the time he was taken ill; that if he lived to return he would prosecute Mr. Higginson, Mr. Livie, and his brother, and he asked if she knew where Price lived.

Mr. Cawthorne is then called; he says he is acquainted with the family—that they always appeared to live upon good terms together. He called upon Mr. Greenwood a few days before he went abroad at Little London and took leave of him; he found him in the parlour with his brother, William Greenwood, and with Abram Greenwood. William Greenwood and Abram Greenwood went out of the room. Then Mr. Cawthorne said to the testator he hoped he was convinced his suspicions of his brother were ill-founded—that he was happy to see his brother with him, and he hoped he was going abroad with him; his answer was, "He go with a damned rascal!" and made use of very strong language indeed, and was agitated to a degree.

John Turner, the servant, says he lived with the family twenty years; that they lived upon the most friendly and affectionate terms; that there was no disagreement between the brothers; he was in the room when the father died; the sons came into the room very much affected; Mr. John Greenwood said he would try to be a father to his sister. The next [xxvii] day Mr. Greenwood was taken ill of something like an ague; Mr. Livie bid the witness to mix some brandy and water, and put an egg into it, and carry it up to Mr. Greenwood; he mixed it and carried it up, and Mr. Greenwood drank it; when he sat down to dinner he again complained that he was chilly; his brother then proposed to send for an apothecary; the apothecary was sent for; the testator went to bed; he asked the witness what he had given him in the

brandy and water, and seemed to suspect something bad was put into it; medicines were sent; the brother asked him to take the medicine; he did take it; he then said, "You are a villain, you begin betimes;" and he said he was sure there was something poisonous put into the brandy and water by his direction. In the morning he was much better; he said he had been acquainted with what he had said of his brother over-night, and was sorry he had used those harsh expressions. The next day he became worse, and the same sort of suspicions returned again, and he began to be deranged—that he had thought he had seen his father in the room; sometimes he whistled, sometimes clapped his hands together, and became quite deranged. On the next day he seemed cool and collected, and much better in mind, but it was impressed on his mind then that he was going to die; he said he thought he had no occasion to make a will, as what property he had would go to his brother and sister; they might divide the property between them, only he wished to leave a thousand pounds to Mr. Jones; that he had no further occasion to make a will. Afterwards, he mentioned his suspicions that something had been given to him in the brandy and water to take away his life while he was confined; the witness did not know of any constraint used but what was necessary; as for himself, he told the brother that he durst not wait upon him, he had so alarmed him with threatenings and imprecations. On the 7th of May he said the deceased had symptoms of the chillings which caused him to be extremely suspicious and doubtful of every body; the witness observed that at his dinner he cut off all the outside of his meat, and only ate the inside, and likewise his bread; he refused eating vegetables, salt-~~xxviii~~-butter, and cream; that he filled his tea-kettle for himself; afterwards he had a tin kettle bought, which he kept for himself, and he declared that he had this tea-kettle bought that nothing might be brought to him but what he himself approved. In July, 1787, the witness says he told Mr. Greenwood how uneasy his behaviour to him, the witness, had made him, and asked what was the occasion of it; Mr. Greenwood said the witness need not be surprised, considering what he had done for him. The witness proceeded to ask if he accused him; Mr. Greenwood said he must be conscious that he had given him something in the brandy and water, and must be assured of his villainous conduct towards him; he knew it was done by the direction of his brother; that he had meant to put a stop to it himself, but upon further consideration he found it would give him more pleasure to make a public example of his brother. The witness endeavoured to defend his brother; the testator said he was convinced of it; it was impressed upon his mind; it could never be erased; if an angel were to come down from Heaven to tell him to the contrary, he would not believe it: he said his friends had treated him with treachery and deceit; he asked the witness if he would go with him to Lisbon; he agreed to go with him. Three or four days before he went he said he meant to sell his carriage and live stock at Little London; the witness said he was sorry to hear it, on account of his brother and sister, who were then unprovided with a comfortable residence; he said that he did not think so; that his sister might go and live with her friends—they would be glad to see her—but as for that villain his brother, he should provide a habitation of another sort for him, and in the meantime he might go about his business. The witness saw the journal in August or September, 1786, and he saw it several times afterwards in his hand; it seemed to engage his attention very much; he heard the cousin, in whose favour the will is made, reading part of the journal to the testator a few days before he left England; he was on the other side the wainscoat; he heard Mr. Abram Greenwood read it; he said the testator told him he was going to make ~~xxix~~ his will; he desired him to shut the door and let nobody in; that Mr. Abram Greenwood was with him on the forenoon of the day on which the will was made. The will was made between the 6th and 7th of December, and he went on the 8th.

After they arrived at Lisbon the deceased told the witness he expected a letter from London, and hoped to hear that that villain his brother was laid fast; he then said he was not asked anything respecting this account that he gave about the reading the journal on the last trial; that it did not occur to him as material; he said that it did not strike him that this behaviour of Abram Greenwood, in reading the paper, was at all improper; had he thought it improper he would have mentioned it. Between July, 1786, and July, 1787, he never expressed the cause of his disgust to witness till he inquired of him; he said his looks, deportment, and manner, in general, shewed something was amiss; he said, sometimes that his brother was very expert in

employing doctors to give him medicines to injure his health, or to that purpose; that he understood what he was about. The witness says he informed Mr. Greenwood of the conversation he had with his brother; that neither he nor William Greenwood ever proposed to do anything in consequence of that behaviour. He did not insinuate to Mr. William Greenwood that his master was mad—that he would not insinuate it to him, because he thought it was something material; he says Mr. William Greenwood certainly knew that Mr. John Greenwood was going to Lisbon; that he was certain Mr. William Greenwood did not dare to propose anybody to go with him to Lisbon, because it would have deranged him, at least his brother would have been extremely dissatisfied if he had proposed it.

Gentlemen,—This long account is the evidence on one side or the other—and the question now is for you to draw the fair result that ought to be drawn from this evidence—and I can only leave off where I began, by stating to you that the inquiry and the single inquiry in the cause is, whether he was of sound and disposing mind and memory at the time [xxx] when he made his will; however deranged he might be before, if he had recovered his reason at that time, he was competent to make his will.

And I take it a mind and memory competent to dispose of his property, when it is a little explained, perhaps may stand thus: having that degree of recollection about him that would enable him to look about the property he had to dispose of, and the persons to whom he wished to dispose of it. If he had a power of summoning up his mind so as to know what his property was, and who those persons were that then were the objects of his bounty, then he was competent to make his will.

Gentlemen,—The conduct which he held to his brother certainly is considerably unaccountable—if whenever his brother's name occurred, instantly a fit of delirium had seized him, then I should conceive that he was not competent to make his will; but if his mind remained entire, if he had new raised up prejudices against his brother, though upon improper grounds, yet if they were such prejudices as might reside in a sound mind, it is hard that those prejudices should lead to conclusions unfavourable to his brother; but hard as the case may be, it is better that a thousand hard cases should take place, than that we should remove the landmarks by which man's property is to be decided.

It is for you to look at that conduct to his brother to see whether it is evidence of a derangement of mind, or whether only an unreasonable prejudice which he indulged against his brother—if it be the last, that did not unfit him to make his last will and testament.

A multitude of instances there have been where men have taken up prejudices against their nearest and dearest relations—it is the history of every week in the year, and the history of almost every family at one time or other, that harsh dispositions have been made, that unreasonable prejudices have taken place, that one child standing equally near in blood has been preferred to another; and if once we get into digressions of that kind, then we get upon a sea without a rudder—where will you stop—what partiality will [xxxi] be enough to set aside a will—and what partiality will you give way to, and say the will is good? These are questions which the most correct and acute mind that ever addressed himself to the consideration of questions will not be able to settle.

You are to consider whether his mind was entire to make the disposition—not whether the disposition was whimsical, cruel; what none of you retiring to your own bosoms and collecting your own feelings would have made—but to see whether it was the disposition of this man's mind, exercising the faculties of his mind at a time when in possession of those faculties.

If you think that whenever that topic occurred to him it totally deranged his mind and prevented him from judging of who the objects of his bounty should be, according to his own will, then the will cannot stand, and then you will find for the defendant; but if you think he was of competent mind to make his will—to exercise his judgment—however that might be disturbed by passions which ought not to be encouraged, then the will ought to stand. It is for you to decide, and the care and attention you have paid has made it unnecessary for me to say so much as I have said in addition to the evidence.

Verdict for the plaintiff.

[Referred to, *Frere v. Peacocke*, 1846, 1 Roberts. 450.]

REPORTS of CASES ARGUED and DETERMINED in the' ECCLESIASTICAL COURTS at DOCTORS' COMMONS. By J. E. P. ROBERTSON, D.C.L., Advocate. Vol. I. Containing Cases from June 1844, to July 1849. London, 1850.

REPORTS OF CASES ARGUED AND DETERMINED IN THE ECCLESIASTICAL COURTS
AT DOCTORS' COMMONS.

- [1] IN THE GOODS OF WILLIAM CHAPMAN, Deceased. Prerogative Court, June 28th, 1844.—The rule laid down in *Walpole v. Cholmondeley* (7 T. R. 138), as to the application of extrinsic evidence, to explain or correct testamentary instruments, applied to a will of personalty, since the 1 Vict. c. 26.
[S. C. 3 Notes of Cases, 198 ; 8 Jur. 902. Followed, *Payne v. Meredith*, p. 591, post. Applied, *Newton v. Newton*, 1860, 5 L. T. 223. Considered, *Reffell v. Reffell*, 1866, L. R. 1 P. & D. 142. Referred to, *In the Goods of Steele*, 1868, L. R. 1 P. & D. 576.]
Motion.

William Chapman died in the month of February, 1844: he left the following testamentary papers:—

1. A will, dated 29th January, 1842.
2. A codicil, 24th February, 1842.
3. A codicil, 2nd August, 1842.
4. A will, 30th May, 1843.
5. A codicil, 10th June, 1843.
6. A codicil, 24th August, 1843.

The codicil of June, 1843, purported to be a codicil to the will of the deceased, bearing date the [2] 29th of January, 1842. The codicil of the 24th of August, 1843, purported to be a codicil to the will of the deceased, bearing date the 30th May, 1843.

Certain affidavits were made, offering explanations as to the reference to the will of January, 1842, in the codicil of June, 1843, and, upon the facts appearing therein,

Haggard moved for a probate of the will of May, 1843, with the codicils of June, and August 1843 ; or, with the latter codicil alone.

Dr. Lushington.(a)—In disposing of this motion, I think it is very desirable that I should state the grounds upon which I decree probate of two only of these papers ; because my reasons are founded upon the principles which I conceive must regulate the operation of the present Wills' Act, in a case of this nature.

The papers are six in number : a will, dated the 29th of January, 1842 ; a codicil, the 24th of February, 1842 ; and a codicil, the 2nd of August, 1842 ; then comes a will, dated the 30th of May, 1843 ; the next document is dated the 10th of June, 1843 ; the last document is a codicil, dated the 24th of August, 1843.

Let us see what the effect of these papers is without reference to parol evidence ; and then consider whether the parol evidence offered is receivable in this case.

I think, in the first place, it is clear that the will [3] of May, 1843, revoked the will and codicils of 1842 ; and, if so, the will of May, 1843, remained the substantive testamentary instrument of the party deceased until the 10th of June, 1843. The

(a) In this and the following six cases Dr. Lushington sat as Surrogate, for Sir Herbert Jenner Fust, who was prevented, by illness, from attending to his judicial duties.

codicil of the 10th of June, 1843, commences thus—"This is a codicil to my will, bearing date, the 29th of January, 1842;" then it revokes the appointment of an executor named in that will, and so forth, and goes on in terms which it is not necessary to dilate on. Now, I apprehend the effect of this codicil of June, 1843, without reference to parol evidence, is to revive the will of 1842. Then comes the codicil of August, 1843—"This is a codicil to my will, bearing date the 30th of May, 1843." Now, the effect of the codicil of August, 1843, I take to be this; it revoked the revived will of 1842, and the reviving codicil of June, 1843, which purported to be a codicil to the will of 1842, and reinstated the will of May, 1843: upon the face of these papers, I have no doubt that is the legal effect.

Then the question is whether, under these circumstances, any parol evidence can be received; or whether there is any necessity to take the slightest notice of the codicil of June, 1843?

Try it in this way: Suppose the testator had died before he made the codicil of August, 1843; could you have received parol evidence to shew that the reference to the will of 1842, in the codicil of June, 1843, was a mistake? I apprehend most clearly not. A case, long since decided, has set that question at rest; it is the well-known case of *Walpole v. Cholmondeley* (7 Term Rep. 138; 3 Ves. 402).

[4] Since that case was decided the present Statute of Wills has passed; but I apprehend this statute has made no difference, with regard to the reception of parol evidence, in the rule laid down under the Statute of Frauds. The only difference (and it is not a distinction) is this—this Court now acts the part both of Judge and jury; but can receive no other evidence than what might have been received under the Statute of Frauds.

In *Walpole v. Cholmondeley* (a case most closely resembling this), a testator made two wills, one in 1752, the other in 1756; he sent for his solicitor to make a codicil, who said he should want his will. He sent him to his steward for it, who gave him the will of 1752 instead of that of 1756. No doubt it was a mistake, but in the codicil were words by which the testator referred to the will of 1752, and the codicil was declared to be "a codicil to his said will." Now, in that case, there was parol evidence offered which would, beyond all doubt, have established the mistake; but it was held that the parol evidence could not be received. Now, both these codicils are declared to be codicils to wills of different dates.

It is very desirable, in all these cases, to consider under what circumstances parol evidence is receivable. If a clause is inserted in a will by mistake, parol evidence may be received for the purpose of that clause being expunged, by shewing it never was intended that it should form part of the will. So the Court may receive parol evidence to explain a word in a will, but not to substitute one word for another. In this case, if I decreed probate of the codicil of June, 1843, I [5] should have to strike out the words "January, 1842," and substitute words to make it refer to the will of May, 1843: that is impossible to be done.

On the present question, I rely not on any parol evidence produced in the cause; the Court must be governed by legal principles of construction.

The will of May, 1843, is referred to by the codicil of August, 1843, and this revokes the will of 1842, and, consequently, the codicil to that will.

Probate must pass of the will of May, 1843, together with the codicil of August, 1843, taking no notice of any other papers, and most certainly without any explanatory affidavit.

BURGOYNE v. SHOWLER. Prerogative Court, June 28th, 1844.—Presumptions of law as to compliance with the requisites of the 9th section of the 1 Viet. c. 26.—If upon the face of a will, to which there is no memorandum of attestation, there be the signature of the testator at the foot or end thereof, and the subscriptions of two witnesses, in the absence or death of the witnesses the *primâ facie* presumption is, that the testator signed in the joint presence of the two witnesses, and that they subscribed in his presence.—If (in the same case) the subscribing witnesses do not remember the facts attendant upon the execution of the will, the presumption is the same.—If the subscribing witnesses negative compliance with the requisites of the 9th section, the will cannot be pronounced for, unless their evidence be rebutted, by shewing—1st. That the witnesses cannot be credited, or—2nd. That upon the statement of the facts their memories are

defective.—Alterations on the face of a will, unaccounted for by evidence, are *prima facie* presumed to have been made after execution.

[S. C. 3 Notes of Cases, 201; 8 Jur. 814. Referred to, *Reeves v. Lindsay*, 1869, Ir. R. 3 Eq. 509; *Clarke v. Clarke*, 1879, 5 L. R. Ir. 49. Applied, *Leech v. Bates*, 6 Notes of Cases, 708. Referred to, *Wright v. Sanderson*, 1884, 9 P. D. 153; *Harris v. Knight*, 1890, 15 P. D. 180; *In the Estate of Phibbs*, [1917] P. 94.]

James Chalcraft, a law stationer, died on the 17th of January, 1844. He left a will, dated the 25th of September, 1839, which was found, enclosed in an envelope, in a bureau in which the deceased kept papers of importance. The will was written on the two first sides of a sheet of foolscap paper; it was signed at the foot or end by the deceased, and there was the following attestation clause:—

[6] “Signed, sealed, published, and declared by the said James Chalcraft for his last will and testament, in the presence of us who have hereunto set our names as witnesses.” Then followed the signatures of the two witnesses, “Benjamin Howton,” “William Sibley.” Upon the face of the will were several alterations and obliterations, some legacies being struck out, others altered by substituting different sums from those originally written. Upon inquiry of the subscribing witnesses they were unable to state whether the alterations in question were upon the face of the will at the time of execution, and they were also very doubtful whether the deceased signed his name in their joint presence. Mr. Burgoyne, the executor named in the will, propounded it, without the alterations, against the next of kin of the deceased, and he also cited certain legatees whose legacies were increased by the alterations, and who were consequently interested in procuring probate of the will as altered, to see proceedings. Some of these parties accordingly intervened in the suit. The subscribing witnesses, having been examined, deposed as follows:—

William Sibley. “One evening, about eight o’clock, Mr. Chalcraft, as was his frequent habit, came into the outer or clerk’s office at Mr. Burgoyne’s, in Oxford Street. On the said occasion he seated himself at the desk at which I was sitting, but opposite to me. He then took from his pocket a paper, a sheet apparently of foolscap paper, folded in four equal parts, and he asked me to see him sign his name to his will; such was the purport of what he said. I then across the desk saw him subscribe the said folded paper, for it was not unfolded. I [7] have no recollection of his having used any form of words in the way of publication of such paper as his will. When he had subscribed his name to the paper he handed it, still in its folded state, across the desk to me, and I then subscribed my name in his presence, beneath the clause of attestation already written on the paper. I have no recollection that any third person was present, either when the deceased or I signed the paper. I knew Benjamin Howton at the period of such the execution of the said paper; he was and had for several years previously been a clerk to Mr. Burgoyne; it is very likely that he was present at such time, though I am utterly unable to recollect the circumstance. I believe it to be very likely, and I do not deny, that he was present when the deceased so signed the said paper, or that he signed his name in the presence of the deceased and of myself on the evening aforesaid, but I am unable to recall to my recollection the fact of his having done so, or that I noticed such his signature to the said clause of attestation previous to my subscribing the same. Mr. Howton was in the habit of sitting, not in the outer office, but in Mr. Burgoyne’s room; he may have stepped out to see the will signed, and have then returned to his room, but I do not recollect it on the said evening.”

Upon interrogatories: “I have no reason to alter the statement given by me in chief in respect of the circumstances attending the execution of the said will; I cannot, however, but believe that Mr. Howton must have been present at the time, and on the occasion of the deceased signing the said will in my presence, and of my attesting the same, and my belief is founded [8] on the presumption that the deceased must have known what was required to effect a valid execution of the said will, but my memory does not in any respect serve me so as to enable me to depose as to the fact of Mr. Howton having been present at such time.”

Benjamin Howton deposed, “I know nothing respecting the making of a will by the deceased; I only recollect having witnessed a will for him. I do not recollect the time when I did so, neither the month, day, nor year. It was done at the office of Messrs. Burgoyne and Co., but I do not recollect in which of their several offices. I do not recollect exactly at what time of day I witnessed such will; I rather think it must have been in the evening. On the occasion of my witnessing such will the

deceased said to me, 'Will you witness this as my will?' and he then produced the paper which I witnessed. I do not recollect to have seen him sign the said will previous to my witnessing it, yet I cannot but believe that I must have seen him do so, because I witnessed the said will. I do not recollect whether any third person was present on such occasions, but I believe that William Sibley, a clerk of Messrs. Burgoyne's, was present. I cannot recall to my recollection any circumstances relating to the said will, or the execution thereof, beyond the deceased asking me to witness the paper which he produced, and my witnessing it as his will."

The Queen's advocate for the executor. I must admit there is no positive affirmative evidence to shew that both witnesses were present when the testator signed his name to this will, but [9] then there is not positive negative evidence. In the absence of negative evidence the presumption "*omnia rite esse acta*" applies. It would be very dangerous to set aside a will upon such testimony as this case affords.

White (S. S.) mentioned *Gove v. Gawen* (3 Curt. 151); *Cooper v. Bockett* (ib. 648); *Pennant v. Kingscote* (ib. 642); *Newton v. Clarke* (2 Curt. 320); *Blake v. Knight* (3 Curt. 547); *In the Goods of Colman* (3 Curt. 118); *Todd v. Winchelsea* (2 Carr. & P. 488).

Addams and Jenner for the next of kin. If the 9th section of the Wills' Act was complied with, the memorandum of attestation would have been modelled accordingly; it carefully abstains from any statement that the witnesses were both present when the testator signed his name to the will. The inference is that both witnesses were at their proper stations in Mr. Burgoyne's chambers.

Then the one witness sitting in the inner office could not have seen what took place in the outer office. The onus is on the executor to shew that the requisites of the act have been complied with.

Dr. Lushington. (h) The present question, which arises upon the will of James Chalcraft, a law stationer, is whether this will has been duly executed according to the 9th section of the act for making wills. On the face of the paper there is the signature of the testator, there [10] is an attestation clause, which, however, omits to state that the will was signed in the joint presence of both witnesses; close to the attestation clause is the subscription "Benjamin Howton," immediately under it that of "William Sibley;" the question is whether the signature of the testator was made or acknowledged in the presence of both witnesses present at the same time; and upon this the evidence of the two subscribed witnesses has been taken.

Upon what principle ought the Court to consider a case of this description, where the will upon the face of it appears to be duly executed—where there is an attestation clause, though not quite in the strict form? I apprehend, in the first place, the presumption is "*omnia rite esse acta*."

If a party is put on proof of a will he must examine the attesting witnesses. On the present occasion there are two subscribed witnesses: if these persons were dead, the law would presume the will to be duly executed; if they were utterly forgetful of all the facts, the presumption of law would be the same. If the witnesses profess to remember the transaction and state that the will was not duly executed—that the testator did not make or acknowledge his signature in their joint presence, or so forth—and this negative evidence be not rebutted by proof of circumstances shewing that the witnesses are not to be credited; or that, from the facts and circumstances which they state, their recollection fails them, then, according to my apprehension, the will must be pronounced against.

I will now look to the evidence of the two subscribed witnesses, in order to see, first, how the case [11] stands on their evidence, and secondly, what is the presumption of law arising from their testimony.

Now the first witness is William Sibley, a clerk in the employ of Messrs. Burgoyne and Co., solicitors, and I must here remark that persons in his situation cannot be expected to remember accurately transactions of this kind, which are of every day occurrence with them, for any great length of time. The result of his evidence is that he cannot recollect whether Howton, the other witness, was present or not at the time when the deceased signed his will.

Whether it is probable that Howton was present or not is a question upon which the Court will form its own judgment from the evidence.

Howton's evidence is very nearly to the same purport ; if anything, his memory is more defective than that of the first witness. It really comes to this, that he cannot remember anything about the transaction ; from the circumstances, he thinks it probable that Sibley was present on the occasion of his witnessing the will, but he cannot say positively.

Here, then, are two witnesses on whose credit no observation has been made, or indeed could be made with propriety, who depose that they did see the deceased sign or acknowledge his signature, but cannot remember whether both were present at the time. What is the probability? Let us take it that the signature of the deceased was made in the presence of Sibley ; then when we look to the attestation clause the next name to that of the deceased is "Benjamin Howton ;" and does not that fact go strongly to negative the supposition that it was first [12] subscribed by Sibley, and then carried into the inner office to Howton. Does it not almost conclusively follow, from the priority of the signatures, from that of Howton being as close as possible to the attestation clause, followed as closely as possible by that of Sibley, that Howton must have subscribed first ; if it had been the other way, and if Sibley subscribed first, leaving a hiatus for Howton's signature, would he not have left a much larger space than is here left? If this be so, in my judgment it goes a great way to establish the fact that the will was duly executed ; Sibley, the one witness, remembers that he did see the act of signing by the deceased, and himself subscribed directly afterwards, and as the name of the other witness precedes that of Sibley. I think that fact goes the length of establishing that the other witness also saw the act of signing at the same time, and, consequently, the fact that the will is duly executed ; for then both persons did attest at the same time.

There is no great stretch of imagination in this presumption ; it is not a case where two witnesses were not near to each other at the time of the transaction ; both were close at hand, the one in the outer, the other in the inner, apartment of the same office. All seems to have been one continuous transaction ; and if Howton does not confirm the evidence of Sibley, who swears he saw the deceased sign his name to the will, he does not contradict him, and he admits that he cannot recollect the transaction.

I think I should be establishing a very dangerous precedent if I were to pronounce against this will ; I think the principle on which Sir H. J. Fust has acted in these cases is this, that in the absence of [13] the recollection of the witnesses he will presume the will to be duly executed.

Looking to all the decisions under the Statute of Frauds, to the prevailing principle, that the heir-at-law could not be disinherited without proof of a due execution ; and that it was always left to a jury to say upon the facts whether a will was duly executed or not, I think the fair and conclusive presumption from the facts in this case is, that this will was duly executed. It would be a very different case were the evidence conflicting or directly negative of a due execution ; for I do not think that the Court would be at liberty to make such a presumption against direct negative evidence where the veracity of the witnesses stands unimpeached. I pronounce for the will, and give costs out of the estate.

H. I. Nicholl for the parties intervening, requested the opinion of the Court as to the alterations in the body of the will.

Dr. Lushington. I think, in the absence of all evidence, the inference of law is, that these alterations were made after the execution of the will ; the 21st section of the statute has said that alterations made prior to execution are to be noticed by the testator and the witnesses at the time of execution, and the presumption of law is that the act would have been complied with in this respect if the alterations were made before execution. The probate must go out as the will originally stood.

Nicholl asked for costs out of the estate.

[14] Dr. Lushington. Yes, I think your parties are entitled to their costs.

HUDSON v. PARKER. Prerogative Court, July 4th, 1844.—Two persons subscribed a paper, in the presence of S. L. and of each other, S. L. having previously, in their joint presence, acknowledged the said paper to be his will. The witnesses did not see S. L. sign his name to the paper, nor did they, at the time of subscribing their names to it, see his signature, the writing upon the paper being purposely concealed from them. Upon the death of S. L. his signature was

found at the end of the paper.—Held that this was not a valid will within the 9th section of the 1 Vict. c. 26.

[S. C. 3 Notes of Cases, 236 ; 8 Jur. 786. Applied, *Leech v. Bates*, 1849, 6 Notes of Cases, 699. Not applied, *Norton v. Bazett*, 1856, 1 Deane, 264. Considered, *Charlton v. Hindmarsh*, 1859, 1 Sw. & Tr. 439 : affirmed, 1861, 8 H. L. Cas. 160. Followed, *In the Goods of Gunstan, Blake v. Blake*, 1882, 7 P. D. 102.]

Samuel Land died in the beginning of the year 1844. Upon his death a paper was found containing his last will. It was signed by the deceased at the end thereof, and subscribed in the margin by two witnesses.

Upon inquiry of the witnesses as to the circumstances attendant on the execution of the paper, it was ascertained that, although they both subscribed the paper in the presence of the deceased, and that he, in their joint presence, said "that it was his will," neither of them saw deceased write his name, neither did he shew them any signature at the time ; and that the paper was so folded or covered over with other papers that neither of the subscribing witnesses could see any part of the writing in the body of the paper previous to subscribing their names.

The question was whether this was a valid will within the 9th section of the 1st Vict. c. 26. To try this question the will was propounded in a common condidit, and the subscribing witnesses were examined and cross-examined.

R. Phillimore in support of the will. The present case is favourably distinguished from *Ilott v. Genge* (3 Curt. 160. Affirmed, 4 Moore, P. C. 265). There the testator did not [15] acknowledge the paper to be his will ; in the present instance there was a positive direct acknowledgment of the paper, as being the deceased's will. The Judge of the Prerogative Court cautiously avoided giving any opinion in *Ilott v. Genge* as to what his judgment might have been had the testator acknowledged the paper to be his will.

The cases of *Peate v. Ougley* (Comyn, 196) and *White v. The Trustees of the British Museum* (6 Bing. 310) are authorities that attesting witnesses need not actually see the signature of the testator. In the last of those cases none of the three witnesses saw the will signed, nor did they see the signature of the testator at the time of attesting ; to two of them there was no acknowledgment, direct or implied, as to the nature or character of the instrument they were witnessing ; the third witness did not see the will signed, and was merely told that it was the will of the testator. In the present case both witnesses, at the time of attesting, were expressly told by the deceased that the paper which they were asked to subscribe was his will.

The signature of the deceased is found affixed at the end of the paper, the identity of which is not disputed, and the fair presumption is that the signature was made before the witnesses subscribed.

[Per Curiam. Does your argument go the length of contending that the witnesses need not see the deceased's signature at all?]

It certainly does, and upon the authority of the Court of Common Pleas in *The British Museum case*.

[Per Curiam. Then might not a party procure [16] the subscription of two persons to an incomplete will, which he might afterwards add to at discretion, and by subsequently signing his name at the foot or end, just above the subscriptions, render it a valid will?]

It is submitted that the same fraud might be accomplished by shewing a signature at the foot or end of a blank sheet of paper, concealing the rest of the paper.

Newton v. Clarke (2 Curt. 320) is a further authority in support of this paper as a will, which, if pronounced against, will be a sacrifice of the spirit of the statute to the strict letter.

H. I. Nicholl contra. The sole question is, is this a validly executed will? The Court has nothing to do with the hardship of a case or the disappointment of the intentions of a testator.

In *Brandling v. Barrington* (6 B. & Cress. 475) Lord Tenterden says, "Speaking for myself alone, I cannot forbear observing that I think there is always danger in giving effect to what is called the equity of a statute, and that it is much safer and better to rely on and abide by the plain words, although the Legislature might possibly have provided for other cases had their attention been directed to them."

The statute of 1st Vict. must be construed by reference to the Statute of Frauds, and the decisions thereon.

Granting that the language of the devising section of the Statute of Frauds did not require that a deviser should sign a will in the presence of the [17] witnesses, or that they should actually see him sign, the 9th section of the 1st Vict. c. 26 requires this in the most express language. What, then, is signing in the presence of witnesses? it cannot be a signing in the mere corporeal presence of the witnesses, without their being aware of what a testator is doing. *Longford v. Eyre* (1 P. Wms. 741), *M'Craw v. Gentry* (3 Camp. 232), *Doe dem. Burdett v. Spilsbury* (6 Man. & Gr. 386; 10 Cl. & Finn. 340). If the witnesses need not see the signature of the testator, a will may be attested by two blind persons. It must be assumed that the Legislature intended signing or acknowledgment of a signature to be of equal validity and importance; a signature cannot be acknowledged unless it be shewn to the witness or he see it; it would be absurd to hold that, in the case of acknowledgment, the witnesses must see the signature of the testator, and that in the case of signing they need not. The witnesses are to do two things—they are to attest and to subscribe; they are to subscribe the will—what are they to attest unless it be the signature of the testator?

Phillimore, R., replied.

Dr. Lushington.(d) The validity of the will of the testator in this cause depends upon the construction to be given, under the circumstances in evidence, to the Statute of Wills: I mean the statute of Her Majesty Queen Victoria.

I apprehend that the office of the Court, in all [18] these cases, is, first, if I may use the expression, to find a special verdict as to the facts; and then to apply the law to the facts so found.

All these cases are of great importance to the public; for the decisions thereon, especially if finally adopted in a superior Court, or, indeed, if reversed, and other law laid down, are the means by which the legal operation of this important statute must be governed; and on the correctness of such decisions large property and large interests may depend. Too great care and caution cannot be used in these, the maiden interpretations of the statute, for by them must the code of testamentary law be determined.

I am fully sensible of this responsibility, and I have used my best endeavours to consider the legal bearings of this case; and now, following out the course I have chalked out, I shall begin with examining the facts.

It appears to me that the witness whose attention was more directly attracted to the will is Thomas Saunders; there is no doubt his attention was more alive and alert than that of his fellow-witness, who acknowledges that he did not pay much regard to the transaction. It appears from the evidence that the deceased in the cause was the butler in the service of Lady Arden; that one morning in September he went down into the pantry, at a time when the one witness was cleaning the plate, and the other washing up the breakfast things; that the deceased began to busy himself with some papers, having before him pen and ink, but the witnesses cannot say that he was writing; they do not say he was not writing, but they did not see him write [19] anything. Thomas Saunders thus deposes—"The deceased spoke to us, and said, 'Thomas and James, I want you to sign this paper; this is my will.' He did not hold up any paper at the time; I looked and saw there was a paper on the table before him; only one that I saw at that time; but I noticed that there had been more before that. I recollect he added, 'They say people die the sooner for making their wills.'" Then he states a conversation about the sudden death of an old woman a night or two before, and so on. He goes on, "James Preece and I then went to the table, and signed our names to his will; I think James Preece signed first, but I cannot swear that he did. Mr. Land did not sign his name to it; not in my sight, however; but I saw his name and writing on it: I saw the name Samuel Land in his own writing; it seemed to me, as I looked at the paper, that that name was at the top; I don't think I saw the bottom of it, for he had got the paper so folded up that I only caught sight of 'I, Samuel Land;' that was all that I could see. It seemed to me he had folded it so as to hinder our reading the contents; but he called it his will. We signed our names, both of us, in his presence, and in the presence of each other, and he acknowledged it to be his will in the presence of both of us; but he did not in words say, 'That is my writing,' though I know it was his." He says further,

(d) Sitting for Sir Herbert Jenner Fust.

in speaking of the attestation clause, "I recollect seeing the words 'signed in the presence of' in his, the deceased's, handwriting, written just above the place where he asked us to sign our names. I did not see him write them; they were there before he got us to sign." Upon interro-[20]-gatory he gives the same account, but speaks more particularly as to the mode in which the will was folded; and he fixes the time when he saw the words of the signature, and that they were at the top, and not at the foot of the will. He says, "I do not take upon myself to swear that at the time I signed my name to the paper writing now before me I saw any other writing of the deceased, except the words 'signed in the presence of,' and which appear in the margin thereof. When Mr. Land took up the paper, after we had signed, he opened it a little, and then I saw there was other writing, and my eye caught the words at the top, 'I, Samuel Land.'" Further on, "It is the truth that I did not see the signature of the deceased thereto, before I signed my name in the margin thereof."

Now the paper itself strongly bears out the testimony of this witness, for it does begin with the words which he swears he saw at the top of the paper, and the folds of the paper are such as he describes; and it is impossible, if it was so folded, that the witness could have seen the signature at the foot. Moreover, this is confirmed by the fact of the deceased having written the attestation clause at the side; for the placing the attestation clause there leads to the conclusion that the whole was done for secrecy: undoubtedly secrecy was his purpose.

I will now look to the evidence of the other witness, the only other witness, and that will soon be disposed of. After stating that the deceased called his attention to the paper by speaking of the death of the old woman, "He said, addressing Saunders and me, 'I want you two to sign this paper for me; [21] in fact, it is my will.' He had it on the table before him, but I could not see what sized paper it was, for he had it covered over with another paper." The witness speaks to this latter fact with great positiveness; but the distinction between the paper being folded up, or covered with other papers, is so minute that it cannot make any essential difference in the case: the difference, if any, would be this—if the will was lying open, and the other papers had by accident slipped up, it might have given him an opportunity of seeing the signature. But he says, "I did not observe any writing; I could see a little writing on the paper underneath it, just below the paper he covered it with, but I did not observe what that writing was, not a word of it; not whether it was Mr. Land's signature, nor the date, nor the word 'witnesses;' nothing about it; and Mr. Land did not say whether he had signed his name to it, nor whether the will was his own writing." Then he repeats the words used by the testator in desiring him to sign it, and goes on thus: "I really cannot say whether Mr. Land had signed his name just before we signed as witnesses; I did not see his name to it at all; but he called it his will, and believing it to be such, I signed it as a witness, at his request." He says further on in his evidence, "I recollect seeing just such writing as that which appears at the lower part of the will; the last three or four lines of it—I mean at the time I signed it—but not having noticed or read a word of it, I cannot further depose thereto." The witness leaves it open to the possibility that he might have seen the signature, if there at the time, in consequence of its being exposed; but he expressly [22] negatives the fact that he saw it made at the time, or that it was there at the time, so far as his personal inspection of the paper goes.

Now, then, what are the facts which I must assume in order to consider the law applicable to them? Assuming for the present purpose that the signature of the deceased was affixed to the will as it now appears, in the presence of the witnesses and prior to their signing their names, but without their knowledge—for the first point made by Dr. R. Phillimore was that the signature was affixed in the presence of the witnesses, prior to the signing their names—although I must observe there is no direct proof of this; presuming further that the witnesses did not see the deceased sign, or at any time see the signature, and it being clear from the evidence abundantly clear, that the paper was declared by the deceased to be his will; the question is whether this is a good execution of the will according to the requisites of the statute of Victoria.

Now, before reading the words of that statute applicable to the present case, it may be expedient to consider what are the rules of construction to be used as guides in ascertaining its meaning. The first and cardinal rule is this, Is there any plain

and evident meaning arising from the words used, taking them in their ordinary acceptation, in conjunction with known rules of grammar? If there be no difficulty in arriving at a rational meaning in conformity to these principles, there is nothing more to be done; for nothing is more contrary to sound reason or safe principle than to attempt, by the exercise of ingenuity, to attach to words a far-[23]-fetched meaning, contrary to common sense and common perception.

If there be any doubt, after applying these simple rules, in ascertaining the intention of the Legislature, the next step is, upon consideration of the whole statute, to determine its character, and especially whether it be remedial or not, and then cautiously to use the rules which authority has prescribed as the truest expositors of a statute of that character.

Thirdly. It is expedient, where there have been no decisions as to the statute in question, to examine with care decisions which have taken place as to preceding statutes in *pari materia*; but great caution is necessary in the use of such last materials, for the minutest diversity of words may make a distinction; or such decisions may be founded on erroneous principles, and if so, however sanctioned by use, are not to be implicitly followed. There are, of course, many other known rules of construction which, as occasions arise, may advantageously be followed; but, for the present purpose, those referred to may suffice.

The words of which we now wish to understand the meaning are the following:—"Such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time." The previous part of the clause having required the signature to be affixed "at the foot of the will," the section goes on—"and such witnesses shall attest, and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary. First, then, as to the plain meaning of these words, "that the signature of the testator shall be made in the presence of two wit-[24]-nesses;" will the statute be satisfied if the signature be made in their presence, if they are in ignorance of the fact? I am of opinion, under such circumstances, that the statute is not complied with. It is obvious that the solution of this question must mainly depend on the meaning which the Legislature intended to convey by the use of the word "presence" in this and in the other clauses of the statute. What could possibly be the object of the Legislature, except that the witnesses should see and be conscious of the act done, and be able to prove it by their own evidence: if the witnesses are not to be mentally, as well as bodily, present, they might be asleep, or intoxicated, or of unsound mind. Again, how is the signature so made to be proved, except by parol evidence? to exclude which was one great object of the statute.

In support of this view of the question, let us call to mind how the word "presence" is received in its common acceptation: *Loquendum est ut vulgus*, says Lord Coke (4 Rep. 47). If in the course of common conversation a person wishes to support the truth of a statement, does he not say—"Such a one was present, and he will vouch for the truth?" if a statement be questioned, does not a person say, "I was present and can attest its correctness," and does not the whole world understand by this, mental, not bodily, presence? Would not a contrary construction lead to absurdity, and defeat the plain intention of the statute?

Then, if the witnesses are to be cognizant of the making of the signature, when the execution is in that form, must they not see and be cognizant of [25] the signature when the will is to be executed in the alternative form, by acknowledging the signature? The alternative form of execution by acknowledgment is to answer the same purpose; it is to be equivalent in effect to actual signing; and ought not the acknowledged signature to be proved by the same mode of evidence, namely, by the subscribing witnesses?

What is the plain meaning of acknowledging a signature in the presence of witnesses?—what do the words import but this?—"Here is my name written, I acknowledge that name so written to have been written by me; bear witness;" how is it possible that the witnesses should swear that any signature was acknowledged unless they saw it?

They might swear that the testator said he acknowledged a signature, but they could not depose to the fact that there was an existing signature to be acknowledged.

It is quite true that acknowledgment may be expressed in any words which will adequately convey that idea, if the signature be proved to have been then existent;

no particular form of expression is required either by the word "acknowledge," or by the exigency of the act to be done. It would be quite sufficient to say, "That is my will," the signature being there, and seen at the time; for such words do import an owning thereof: indeed, it may be done by any other words which naturally include within their true meaning acknowledgment and approbation.

Still further to elucidate the question, and not to escape from the difficulties of the case, and to shew that I have paid attention to every argument, and [26] to every case cited, I will proceed to consider the remaining part of the section, "such witnesses shall attest, and shall subscribe the will in the presence of the testator." Here are two things which the witnesses are to do; they are to attest, and they are to subscribe—mark the words! shall attest, and shall subscribe: the word "shall" is repeated; subscription alone will not do, it will not satisfy the statute; and it is a well established rule that you are to give, if possible, a rational meaning to every word of a statute. Then if "attest" means something more than subscription, what does it mean? "To attest" is to bear witness to a fact. Take a common example: a notary public attests a protest; he bears witness, not to the statements in that protest, but to the fact of the making of those statements; so I conceive the witnesses in a will bear witness to all that the statute requires attesting witnesses to attest, namely, that the signature was made or acknowledged in their presence. The statute does say "that no form of attestation shall be necessary;" still the witnesses must attest, although the outward work of attestation may be subscription only. If more be wanted to explain the meaning of the word "attest," the old form of attestation clause will shew that it comprehended more than bare subscription of the will itself. It has been held, in the execution of a power, that subscription is merely the form of bearing witness to the facts required by the instrument creating the power. It was so held in *Doe dem. Spilsbury v. Burdett*.

If this be so, how shall a witness attest who never was cognizant of the signature of the testator? or [27] whether it was made before or after his own subscription?

Now, lest this should appear a harsh construction of the statute, let us look to its whole purview, in order to ascertain its legal character. I apprehend that it is a remedial statute, standing on the same principles as the Statute of Frauds, which, as its name denotes, was partly passed for the object of preventing the setting up of fraudulent wills of real estate. The present statute was intended to effect the same object as to wills of personal estate, and to secure further objects, especially that the testamentary act to be done should be deliberate, and that no doubt should exist as to its finality. The safeguards provided by the act are contained in the 9th section; to relax such provisions would be to break up the foundation of the statute; which, being a remedial statute, must, according to the soundest rules of construction, be so interpreted as to prevent the evil, and advance the remedy. Upon what principle could this be done? It is said by the equity of the statute, by the substitution of supposed equivalents. Perhaps I do not altogether comprehend so accurately as I might do what is meant by the equity of a statute; it may be something which the ordinary meaning of its words does not express; something which the Legislature has not said, but which they might have said had they so intended; and which some persons are therefore inclined to put into the statute, because they think that had attention been called to it the Legislature would have done so. I must here express my cordial concurrence in the opinion of Lord Tenterden in [28] the case (*Brandling v. Barrington*, 6 Barn. & Cress. 475) cited by Dr. Nicholl; the very words it is not necessary to state at length, but it is quite clear that Lord Tenterden was satisfied in his own mind of the infinite mischief which has resulted from Judges, in the constructions which have been put on various statutes, departing from the plain import of words in order to soften the rigour of particular enactments, which appeared harsh and strict when applied to particular cases. That opinion is of great value, and it is not the opinion of Lord Tenterden alone, but of many high legal authorities, who have at various times expressed their disapprobation of such a mode of construction.

I next proceed to inquire whether the decisions under the Statute of Frauds, and those which have taken place under this present Statute of Wills, militate against, and how far such decisions ought to control my opinion. In the first place, the decisions under the Statute of Frauds which have any reference to this case arise upon a section of an act, differently worded in some respects, and so far as this difference makes a distinction I am clearly exonerated from the duty of following them; in the

next place, where these decisions are founded on great and acknowledged principles, it would be folly and presumption to depart from them; but if the force and efficacy of the Statute of Frauds has step by step been departed from by a series of decisions, each departing from the plain import of the act, and if such departure, although fettering the judgments of great legal authorities, has been lamented by them as encroachments upon the statutes, I am not prepared to say [29] that in the exposition of the present statute such decisions are now absolutely binding; if such were the case, what would it be but to perpetuate a mode of construction which so many of the lights of the law have lamented and deplored as being counter to the soundest rules for the construction of statutes. What would it be but to shut the door upon experience, and to canonize error, and, instead of improvement, to combine the failures of the past with the failures of the present. It would be to adhere to the admitted errors of those who have gone before, and to adopt one of the most fallacious modes of solving difficulties.

With these views I will now examine some of the cases cited, and the first on the list is *Peate v. Ogley* (1 Comyn, 197). As to this case, if I am not much mistaken, it is capable of being proved to demonstration to be no authority at all.

The validity of the will in that case came on to be tried twenty-seven or twenty-eight years after it had been made; had thirty years elapsed it would have been received without proof. Of the three attesting witnesses two were dead, and the survivor, speaking of a transaction which happened at least twenty-seven years before, stated that the will was folded up, that the testator desired the witnesses to sign, which they did, but that they did not see the writing, nor were they told what the paper was. It was a very peculiar case; it respected the will of Oliver Earl of Bolingbroke, who had written it all with his own hand, and had written a codicil on the back of the paper; subsequently, at the top of the will he had written, with his own [30] hand, an attestation clause, noticing that the same was written there for want of room below. The question of law arose, Was this a good execution? Now I do not believe that question was ever decided by any body. First, the case was left to the jury—what would be left to the jury? The question of fact, not the question of law. Of what fact? Why, whether, under all the circumstances, considering the lapse of time, and the death of two of the witnesses, bearing in mind that it was written throughout by the testator and signed by him, the attestation clause specifying why it was signed at the top—"for want of room below"—the will in question was duly executed. Every presumption was in favour of a due execution; the only opposing circumstance was the frail memory of one witness, speaking after a lapse of twenty-seven years, and that, too, as to a fact not likely to have made a strong impression on his memory, namely, whether the testator called it his will, or the witness saw his signature. On that view the jury brought in a verdict in favour of the will. It is very true that Chief Justice Trevor might have expressed an opinion that the evidence was sufficient to establish a due execution; I am quite sure I should myself have expressed that opinion—he might have meant that all the circumstances taken together were in favour of the presumption of due execution; but even supposing he intended to give an opinion upon the law, what was it but a mere *nisi prius* opinion, without a single reason stated for it. But suppose the Chief Justice had thought it a nice question, suppose he had thought the validity of the will depended on the evidence of the single witness, and that an important [31] question of law was to be decided, I apprehend he would not have left the case to the jury, but would have desired them to find a special verdict, in order that so important a question might be decided in *banc*. It was said in argument that this case was affirmed in the House of Lords. I greatly regret that I have not had time to investigate by actual search how the fact stands, but I believe this question never came before the House of Lords. First, how could it get there? the question of fact being left to the jury, the course would be to move for a new trial; it could not have got to the House of Lords by that road: there might, indeed, have been another form of proceeding, but of this there is not the slightest trace. That matters of law as to the will of Lord Bolingbroke did get to the House of Lords I have no doubt whatever, but then it was upon another and a very different question—a question of construction on the will itself. What was the result of the trial at *nisi prius*? C. J. Trevor inclined that there was sufficient evidence to find the codicil was well executed, and the jury found it accordingly. But there was matter at law also, and that arose in

consequence of a devise to the brothers of the earl to take in succession, and the question arose whether this devise was null and void by reason of the words in which the devise was expressed; as to the matters of law, the Chief Justice permitted it to be found specially, and therefore the jury brought in their verdict as to all the premises, except a message in Ludgate Street, not guilty; that was found in favour of the codicil—but the question as to the message in Ludgate Street was not as to the factum of the will, but as [32] to the construction. The whole comes to this, that upon a question at nisi prius the Chief Justice inclined to think a will and codicil well proved, and the case never travelled one step further on that point. I think that case has been stated over and over again to afford no ground for decision.

Now comes another case, which I wish I could dispose of as easily and satisfactorily—the case of *White v. The Trustees of the British Museum*. It is perfectly true in that case no one of the three witnesses saw the will signed; to two of the witnesses there was no acknowledgment, direct or implied, and the other was only told that the paper was the will of the deceased. It is equally true that this was held a good execution within the Statute of Frauds. If the same construction is to be put on the present statute, then undoubtedly this case is directly opposed to my own opinion; it would, no doubt, be binding and obligatory were I deciding this case under the same statute: I must have made my decree bow to it, although I much doubt if I could have made my judgment do so.

Let us see what Chief Justice Tindal says in his judgment: I can hardly doubt, if the case had been *res integra*, that his opinion would have been different: he says (6 Bingham, 320): “Whatever might have been the doubt upon the true construction of the statute, if the question were *res integra*, yet as the law is now fully settled, that the testator need not sign his name in the presence of the witnesses; but that a bare acknowledgment of his handwriting is a sufficient signature to make their attestation and subscription good within the statute, though [33] such acknowledgment conveys no intimation whatever, or means of knowledge, either of the nature of the instrument or the object of the signing; we think the facts of the present case place the testator and the witnesses in the same situation as they stood, where such oral acknowledgment of signature has been made; and we do, therefore, upon the principle of those decisions, hold the execution of the will in question to be good within the statute.”

Now I think Chief Justice Tindal, in expressing that opinion, found himself bound and fettered by bye-gone decisions more than by principle; that the true meaning of his judgment is, “*Video meliora proboque: Deteriora sequor.*”

I consider I am justified in making these observations, because I could bring forward a host of legal authorities who have lamented the decisions on the Statute of Frauds; but this would be occupying too much time, and they may be found collected in any treatise upon the subject, such for instance as Darris on the Construction of Statutes. I could furnish a host of authorities, with regard to the interpretation put upon the former poor laws; I find Lord Tenterden lamenting over and over again that by the authorities he was held bound; but saying that he would not extend them one inch further.

I think also that we ought to look a little to what became of the words of the Statute of Frauds—“All devises shall be in writing, and signed by the party so devising, or by some other person in his presence and by his express direction, and shall be attested and subscribed in the presence of the [34] devisor by three or more credible witnesses.” By construction, we got rid of the signature at the bottom of the will; by construction, sealing, at one time, was equivalent to signing; and then these words, “signed by the party so devising, or by some other person in his presence, and by his express direction,” were completely obliterated from the statute, even before the declaration that “this is my will” was held sufficient. As to the word “attest,” it would puzzle the ingenuity of any man to say what meaning was left to that word in the Statute of Frauds.

Look again to the words of the Statute of Frauds and the Statute of Victoria, and see how they differ; by the Statute of Frauds the words “in his presence” have been, by construction, separated from the word “signed;” it cannot by possibility be so in the Statute of Victoria; at all events, as regards the words in this last statute, “such signature shall be made or acknowledged in the presence of two or more witnesses,” it is impossible in construction to say that the words “in the presence of the wit-

nesses" do not equally apply to a signature being made, as to a signature being acknowledged.

I do not, for the reasons stated, consider these decisions absolutely binding in the construction of the new statute; and I cannot but recollect that long before the case of the *British Museum*, it had been observed by Lord Redesdale that the Statute of Frauds had lost its price and efficacy from the mode in which it had been construed.

The next case to which I will advert is that of *Newton v. Clarke* (2 Curteis, 320). This also is a case of con-[35]-struction, on the same clause of the statute which I have now to consider. I need not say that if I thought this decision was directly against the opinion I have expressed in the present case, I should have long hesitated before I expressed it; but put the facts most strongly, and then see whether there is not a substantial distinction: say that the witnesses subscribed the will in the same room where the testator was lying, and that the curtain hindered his power of vision; grant that Sir Herbert Fust held it a good execution; that the statute was satisfied.

It is quite true that the statute requires the witnesses to subscribe in the presence of the testator; and I have no wish to avoid the difficulty; Sir Herbert Fust has put a less stringent construction on the words "subscribing in the presence of the testator" than I am inclined to put on the words "signing or acknowledging a signature in the presence of the witnesses;" but is there not a great difference in the importance of the two acts, and in the objects they are to answer? The witnesses are to see the signature made or acknowledged, because they are to attest it and to bear witness thereof; the witnesses are to subscribe in the presence of the testator for another and different purpose—for the completion of the instrument; of course it is not in order that the testator should bear witness of their subscription as they are to bear witness of his; the witnesses may equally bear witness to their subscription in his presence, although he does not see them sign; but they cannot equally depose to the signature of the testator being made or acknowledged in their presence, unless they see the act. The testator may [36] be passive and not active as regards the subscription of the witnesses; but in the first part of the section the witnesses are to be active; they must see the act done in order to attest it; the passive, if so I may term it, is inseparably connected with the active.

It may therefore be that the words "subscribe in the presence of the testator" may be satisfied with less stringent proof; that the cognizance of the subscription of the witnesses may not be so absolutely necessary, or may be inferred by bodily presence; but it would be very difficult to apply this construction to the prior part of the section—for that is the vital part of the whole transaction, especially when the will is not in the testator's handwriting. Here I think there must be an actual and not a constructive compliance with the statute.

I think my opinion is somewhat fortified by what fell from two of the Judges in the cited case of *Doe dem. Spilsbury v. Burdett* (6 Man. & Gr. 386; 10 Cl. & Finn. 340), and I will take the opinions of Justices Patteson and Coleridge, both of which, although the two Judges came to different conclusions, seem to assist my view. Justice Coleridge says (p. 419), "To attest, in common language, means either to call to witness, or to witness. Any one reading the sentence in the power now under consideration, who was not conversant with legal decisions, would understand it to imply that the execution was to take place in the presence of three credible persons, who were not to be merely present, but present as witnesses, and taking cognizance of what was done." This is in the very teeth of the argument [37] that a witness may be present and not cognizant of what is done. "If such a person had been shewn the fifth section of the Statute of Frauds, the written law which makes a provision in a matter of all others the most analogous to the present—the execution of ordinary wills in writing, which are in truth but instruments framed in the exercise of a statutory power—he would not only be confirmed in his conclusion, but be led to think that the witnesses, by writing their names, had perhaps done something more than was strictly necessary; for he would have found that where signing by the witnesses, as well as merely witnessing, was required, the Legislature, in language cautiously and technically framed, had said that they should not only attest, but subscribe, the instrument. He could not doubt that those who framed that clause had considered that attestation and subscription to be different things, the latter being something superadded to the former." Mr. Justice Coleridge here gives a direct meaning to the word "attestation," cognizant of the transaction, and the ques-

tion is, how can a man be cognizant of that of which he knows nothing? I now come to what is said by Mr. Justice Patteson, and I will here say that I consider him as an authority of the highest character, for I know of no Judge who brings a more powerful mind, or a greater store of learning, to bear on any legal question. He says (p. 394): "The first question which arises appears to me to be, what is the meaning of the word 'attested?' Now the fair meaning of the previous words, 'in the presence of three or more credible witnesses,' must be that three or more credible persons should see what is done; not [38] merely that they should be present, without having their attention drawn to what is done; therefore the word 'attested,' if it have any meaning at all, must import something more than merely being present and seeing what is done." In this case neither witness saw the signature made, nor was their attention drawn to the signature, if then made to the will.

Now I might travel over many other cases, but it would be almost an endless task to do so; I will content myself by adding a word or two as to the case of *Ilott v. Genge* (3 Curteis, 184). I can most truly say I cannot see any broad distinction between that case and this; there is the same presumption in both—that the will was signed before it was attested: that is, there is an attestation clause. The difference is, in the present case the witnesses were told the paper was a will; in the other case they were not told. It is said that on that distinction the case was decided by Sir Herbert Fust; but his words are these—"With reference then to the express direction in the statute, that where the will is not signed in the presence of the witnesses the signature (not the will) shall be acknowledged, I am of opinion, under the circumstances of this case, that the signature was not acknowledged, either expressly (certainly not expressly) or virtually in the presence of the witnesses."

Now I think it may be greatly questioned whether, if the acknowledgment of a signature unseen will suffice, the desiring witnesses to subscribe a paper is not a virtual acknowledgment; it was so held to be in the case of *White v. The Trustees of the British [39] Museum*. Mark the distinction—in that case it was held that simply desiring the witnesses to attest—not the will, for two out of the three did not know what the instrument was: and, of course, it never was intended, under the Statute of Frauds, that the knowledge of one witness of what the paper was, dispensed with the necessity of knowledge in the other two—was sufficient; in the case of *Ilott v. Genge* the deceased desired the witnesses to execute the paper. How the two cases are in that respect to be distinguished from each other I am unable to see. In my own judgment the decision in *Ilott v. Genge* is well founded; I agree that the will was not well executed. The case was argued before the Judicial Committee, and all the members were of the same opinion, upon the ground, as I apprehend, that there was no actual proof that the signature was made at the time of subscription; that it was neither seen by the witnesses at the time, nor at a subsequent period was it acknowledged. If subscribing the paper itself was not sufficient, it would not be sufficient because the testator called it a will; at least a more fine drawn distinction cannot well be conceived; it would make the validity of the will depend on what the testator might say at the time of subscription; it is utterly impossible that the law can rest on such a distinction.

Upon the whole, I am of opinion that this will is not executed according to the exigency of the statute; and I place it distinctly on three grounds:—

First: there is no proof that the signature was affixed prior to the subscription of the witnesses.

Secondly: if, from the circumstances, such fact is to be presumed, it was not made in the mental [40] presence of the witnesses; nor indeed is there any proof that they were present at all.

Lastly: because the witnesses never saw, or indeed could see, the signature, of which there was no acknowledgment unless constructive.

I have endeavoured to give a full explanation of my opinion in order that the grounds of my judgment may be understood and scrutinized, hoping thereby that if there be error, it may be detected, and corrected. That an honest will must thereby be rendered null I know and lament, but this same argument, if of any avail, would tend to emasculate all the provisions of the statute.

I pronounce against this will, but I decree costs out of the estate.

MAULE *against* MOUNSEY. Prerogative Court, July 4th, 1844.—Proof of pedigree. Evidence in a pedigree cause. A verdict of a jury of a manor rejected, as *res inter alios acta*.

[S. C. 8 Jur. 853.]

Elizabeth Sanderson, late of Plumpton Wall, in the parish of Lazonby, in the county of Cumberland, died on the 11th of April, 1834, a spinster, without any known relation, having duly made and executed her last will, and therein named a residuary legatee, who died in her lifetime. On the 30th of May, 1834, letters of administration, with the will annexed, of the goods of the deceased were granted by the Consistory Court of Carlisle to Mr. William Blamire, who had been the committee of the estate and effects of the deceased, appointed by the High Court of Chancery, under a commission of lunacy issued out of that Court against the deceased, under which she was found and adjudged a lunatic. All [41] and singular the next of kin of the deceased, if any, and all other persons in general were duly cited. At the instance of the Lords Commissioners of her Majesty's Treasury, Mr. Maule, the solicitor to the Crown, took the usual steps in this Court in regard to the goods of the deceased. Mrs. Mary Mounsey, widow, appeared, and claimed to be the lawful second cousin, once removed, and the only surviving next of kin of the deceased, and propounded her interest in an allegation, which pleaded—

Second article. That Richard Sanderson, the deceased's great-grandfather, and the great-great-grandfather of the claimant, previous to the year 1652, though when more particularly, or where, was unknown, married a female named Ann, but whose surname was unknown. That Richard Sanderson and his wife lived at Plumpton Wall, and were reputed to be husband and wife.

Third article. That Richard Sanderson had issue by his wife three children, named respectively John, Thomas, and Timothy. That when or where precisely John Sanderson was born or baptized is unknown.

Fifth article. That Richard Sanderson made and executed his will, dated the 12th of July, 1675, and thereby gave to his eldest son, John Sanderson, certain specific articles, and gave all the rest and residue of his goods to his two younger sons, Thomas and Timothy.

Sixth article. Exhibited this will (No. 2), and pleaded relationship in the usual form.

Seventh article. That John Sanderson, the grandfather of the deceased, was duly married to [42] Frances Brown, in the parish church of Lazonby, on the 22nd of October, 1678: that John Sanderson and his wife lived at Lazonby, and were reputed to be husband and wife.

Eighth article. Exhibited certificate of marriage (No. 3), and pleaded identity.

Ninth article. That John Brown, of Plumpton Wall, the father of Frances Brown, duly made his will, dated the 19th of February, 1682, and therein gave to his son-in-law, John Sanderson, and to his (the testator's) daughter, his wife, each of them twenty shillings.

Tenth article. Exhibited will (No. 4), and pleaded as usual.

Eleventh article. That John Sanderson had issue by his wife Frances, formerly Frances Brown, a son named Thomas, but when or where the said Thomas was baptized is unknown.

Twelfth article. That Thomas Sanderson, many years ago, but when or where precisely is unknown, intermarried with a female whose Christian name was Martha, but whose surname is unknown: that the said parties were reputed to be man and wife.

Thirteenth article. That Thomas Sanderson had issue by his wife Martha a son and daughter, named respectively John and Elizabeth (the deceased in this cause). This article pleaded acknowledgment and repute in the usual form.

Fourteenth article. That John Sanderson, the brother of the deceased, was the cousin-german, once removed, of John Brown the younger, of Plumpton Wall, which John Brown was the grandson of John Brown the elder, the father of Frances Sanderson. That on the 6th of October, 1758, the [43] said John Sanderson was, on the death of John Brown the younger, duly presented by the jury of the manor of Plumpton, and admitted to certain copyhold premises, as the heir-at-law of John Brown the younger.

Fifteenth article. Exhibited verdict paper (No. 5), and pleaded it to be a true copy of the original verdict paper of the jury of the manor of Plumpton Wall.

Sixteenth article. That the said John Brown the younger made and executed his will, dated the 23rd of October, 1755, and thereby gave to Elizabeth Sanderson (the deceased), as the sister of his heir-at-law, John Sanderson, 100l.

Seventeenth article. Exhibited will (No. 6), and pleaded identity in the usual form.

The remaining articles of the allegation traced the descent of the claimant from Thomas Sanderson, the second son of Richard Sanderson, and Ann his wife. Evidence having been taken on this allegation, the cause came on for hearing.

Addams and Curteis for the claimant.

The Queen's advocate and H. I. Nicholl contra. Objected that the verdict of the jury (exhibit No. 5) could not be received in evidence, it being *res inter alios acta*. *Neal v. Wilding* (2 Stra. 1151; 1 Phillpotts on Evidence, 234), *Attorney General v. Hotham* (1 Turn. & Russ. 217). That a document of this nature cannot be received as a declaration of any one of the jury, unless his connection with the family be [44] first proved. *Johnson v. Lawson* (2 Bing. 88). They also objected that there was no proof of John Sanderson, who married Frances Brown, being the son of Richard Sanderson the common ancestor. That there was no proof that John and Frances Sanderson had a son Thomas; the will of John Brown the elder (No. 4) only mentioning two children of his daughter, Frances, and those by the names of John and Ann. That there was no proof of Thomas Sanderson having been ever married, and no evidence of repute of the fact. That there was no proof of John Sanderson, the alleged brother of the deceased, being the son of Thomas Sanderson, and no evidence of repute of the fact. That the will of John Brown the younger, in which John Sanderson is mentioned as his heir-at-law (No. 6), was a most suspicious document, such statement being evidently inserted for the purpose of establishing the legitimacy of John Sanderson by means of the verdict of the copyhold jury.

Dr. Lushington. (b) Elizabeth Sanderson is the deceased in this cause. It appears she died in April, 1834, testate, but having appointed a residuary legatee, who predeceased her; in consequence whereof the gift of the residue has elapsed. To this a claim has been made by a Mrs. Mary Mounsey, as the second cousin, once removed, of the deceased. The question is whether, on the evidence before the Court, she has satisfactorily made out that she is entitled to that character.

[45] Now it must be recollected that pedigrees have often to be proved from a very distant time, and that it would often be impossible to establish a relationship, if the strictest evidence should be required to support every fact; consequently the law has, in questions of pedigree, relaxed the rules of evidence applicable to the investigation of all other questions, and has admitted much looser evidence in such cases, such evidence as would be excluded in other instances.

In all these cases absolute certainty can seldom, if ever, be arrived at; lapse of time destroys the ordinary modes of proof, and it is very often necessary to travel back beyond living memory. What are the facts of this case? Richard Sanderson died in the year 1652—nearly two hundred years ago. It is admitted on behalf of the Crown, at least so I understand the Queen's advocate, that the descent of the present claimant, Mary Mounsey, from Thomas the son of Richard Sanderson and Ann his wife, is proved in the cause. Now, if that be so, one question I have to determine is, whether Elizabeth Sanderson, the deceased, is or is not descended from that Richard Sanderson and Ann his wife? The first step with which I shall begin is whether John Sanderson, who married on the 3rd of October, 1678, was or was not the son of that Richard Sanderson.

I should observe that in this case there is a circumstance much in favour of the claimant, namely, all the persons through whom the claim is traced appear to have been resident in the same county and neighbourhood. Now I think the document (No. 2), the will of Richard Sanderson, is sufficiently proved [46] in evidence. In that will he purports to bequeath to his eldest son John certain part of his property, the remainder to his two younger sons, Thomas and Timothy; if that establishes that John Sanderson was the son of Richard, he was also brother of Thomas, and thus the first link is made out. The next point is whether this is the John who married Frances Brown in October, 1678; and I should here observe that where a marriage

is satisfactorily found at such a distant period, identity must be assumed; to get actual evidence of identity would be next to impossible; indeed, I think the evidence is extraordinarily strong in this case considering its nature. I therefore assume John, who married Frances Brown, to be the son of Richard. The next step in the proof is the will of John Brown of Plumpton Wall; that bears date the 19th of February, 1682, and by it, after bequeathing certain property to his children, he gives—"To my son-in-law, John Sanderson, and to my daughter, his wife, each 20s." Now I cannot entertain any doubt whatever, having the marriage of John Sanderson, the son of Richard, with Frances Brown, satisfactorily proved, and finding John Brown the elder recognizing John Sanderson as the person who married his daughter, that this step is established beyond the possibility of doubt.

We now come to the next point; it is alleged that Thomas, the son of John and Frances Sanderson, married a person named Martha; of this fact there is no direct evidence; there is here an hiatus in the pedigree, which I will dispose of presently. The next step is this, that Thomas and Martha had a son John, who died in the deceased's lifetime, and [47] who is not denied to have been the brother of the deceased; now if this John was descended from John Brown the original testator of 1682, it is not of the slightest importance whether he was descended from a Thomas, or any other son of John Sanderson, for he could not be the heir-at-law of John Brown the younger of Plumpton Wall, unless he was descended from John who married Frances Brown, for it is only through Frances that this heirship could take place. If then it be satisfactorily established that John Sanderson the brother of the deceased was the heir-at-law of John Brown the younger of Plumpton Wall, and if that John Brown is descended from John Brown the elder, I think the case is satisfactorily made out. Now it is pleaded that John Sanderson was the heir-at-law of John Brown the younger of Plumpton Wall, who was the grandson of John Brown formerly of Plumpton Wall, whose daughter Frances in 1678 married John Sanderson. Let us see how this stands in point of probability, for absolute certainty in such matters no Court would require. In the first place, the will of John Brown the elder, that of February, 1682, begins thus: "I John Brown being sick in body;" then after disposing of part of his property to his son and heir-at-law John Brown, which clearly shews he had a son, he gives and bequeaths the rest of his property in various ways, to which it is not necessary to advert. What is the next document? No. 6; it is the will of John Brown the younger, and it commences nearly in the very same words as the previous will of John Brown the elder; in point of fact the two wills are in many respects so alike that the one would seem to have been [48] copied from the other. Now I think it is not too much to presume, finding both these persons resident in the same place, that John Brown, the last testator, was the grandson and heir-at-law of the first testator, John Brown. Then I find the last testator, John Brown, leaving his property to a John Sanderson, by the description of his heir-at-law. Is there then evidence that John Sanderson, the brother of the deceased in this cause, was descended from the original John Brown, whose daughter Frances married John Sanderson; for if this be made out, it having been already shewn that the claimant is descended from Thomas, the brother of John Sanderson, I think the relationship between the claimant and John Sanderson the brother of the deceased, and consequently between the claimant and the deceased, will be made out satisfactorily.

Now the Court has been desired to take as part of the evidence of this fact the finding of the jurors of a certain manor; to wit, "a finding that John Sanderson was the heir-at-law of John Brown the younger, of Plumpton Wall." This paper, whatever may be the event of this cause, I shall not admit, however reluctant I may be to reject it, if it be not legal evidence in a pedigree cause. I have always understood that a verdict of this description is only evidence between parties privy to it; that is to say, it may be evidence between tenants and those claiming under tenants; it may be evidence to prove a custom as between the lord and his tenants; or it may be evidence against the lord, to shew the title of descendants of any individual tenant; that is, supposing A. B. to have been once admitted tenant of a manor, his admission would be evidence [49] as against the lord of the title of a party proving a customary descent from A. B., to be admitted a tenant of the manor; but that a document of this nature would be evidence against third parties is a proposition I never heard entertained. What is the nature of this document? it is nothing more than a declaration in writing by certain parties. To make this declaration evidence in a pedigree

cause (for this is not a question of reputation, but a question as to a pure fact, whether one man is the heir-at-law of another) appears to me would be to let in a species of evidence of all kinds the least to be trusted. I reject this document as evidence in this cause.

I now come to look at the remaining proof of the fact, that John Sanderson, the brother of the deceased, was the heir-at-law of John Brown the younger. The will of the 23rd of October, 1755 (No. 6), is clearly evidence in the cause; and the declaration in the will of one of the family is evidence to establish relationship in a pedigree. I know no reason why the declaration in this will should not only be considered admissible evidence, but even be the best evidence which can be produced. In this will there is a clear and distinct declaration, not only that John Sanderson is the heir-at-law of the testator, but that Elizabeth Sanderson is sister to the heir-at-law. I cannot, for one moment, entertain the ingenious supposition of the Queen's advocate that the testator on his death-bed was inventing a fraud; that by the efficacy of his will John Sanderson should be admitted as heir-at-law. There is nothing to support this supposition, and I cannot presume fraud for such purpose. Here, then, is this [50] declaration by a party deceased; and I find in the evidence of the steward of the manor that he remembers John Sanderson in possession of the copyhold property, formerly held by John Brown the younger; I have then a declaration in a will, accompanied by the fact of possession of this property. In my mind this does establish the fact that John Sanderson, the brother of the deceased, was the heir-at-law of John Brown the younger; and if, as I think I have shewn, John Brown the younger was descended from the father of Frances Brown, and if Frances married John Sanderson, the brother of Thomas, from whom the claimant is descended, then I think the relationship between the claimant and John Sanderson is established.

It has been said that, in the will of John Brown the elder, mention is made by name of two children of his daughter Frances Sanderson, and that neither of those names is Thomas; but I do not think that fact of any importance.

I am of opinion that this pedigree has been made out, after rejecting that which I think is not legitimate evidence in the cause.

[51] **DURNELL v. CORFIELD.** Prerogative Court, July 10th, 1844.—To entitle a testamentary paper to probate there must be proof of the testator's knowledge of the contents of the paper. Such proof may be given in any mode; the degree necessarily depends upon the circumstances of each case. Where the capacity is undoubted, knowledge of the contents may be presumed from execution of the paper. Where the capacity is impaired or the drawer of the paper largely benefited by it, the proof must be adequately stringent, and the Court must be satisfied of knowledge of the contents, by proof beyond the bare fact of execution.—Where capacity is impaired, the simplicity or complexity of the instrument is a material ingredient in the case.—Although a will originally valid cannot be affected by subsequent instruments, short of express revocation, yet subsequent instruments may reflect back upon and tend to elucidate the question whether such will is valid or not.

[S. C. 3 Notes of Cases, 225; 8 Jur. 915.]

This was a cause of proving, in solemn form of law, the last will, with a codicil, of Joseph Lawrence.

The deceased died on the 30th of November, 1843. He left three testamentary papers; a will, dated the 23rd of November, 1840; another will, dated the 13th of September, 1841; and a codicil, the 21st of November, 1843.

The will of November, 1840, gave all the deceased's real and personal property to his sister, Ann Lawrence, for life, subject to the payment of three legacies, amounting together to 105l. After the death of the sister, the property was given to Mr. Durnell, upon condition that he attended to the necessary wants and comforts of the sister during her life. Mr. Durnell was appointed executor and trustee, with full power to act for the benefit of the deceased's said sister.

The will of September, 1841, appointed a Mr. Matthews and a Mr. Corfield executors, and bequeathed to them the whole of the deceased's property, in trust, to pay to the sister, Ann Lawrence, the interest thereof during her life, and at her decease to pay certain legacies, amounting in the whole to about 500l., one of such legacies being 50l. to Mr. Durnell. By this will the sister was made residuary legatee.

The codicil of November, 1843, was to the following effect:—

[52] "I, Joseph Lawrence, of the parish of Acton Burnell, in the county of Salop, declare that it is my wish and request that the will I have made, signed, and executed on the 23rd day of November, 1840, shall be the only will or wills I made or might have made before or after the said date of the 23rd of November, 1840, and all and every other to be null and void. I hereby give, bequeath, nominate, and appoint my friend J. H. Durnell, surgeon, or his executors, administrators, or assigns to have full power over the whole, every, or any part of my property, of whatsoever description, for the true benefit and welfare of myself and sister, Ann Lawrence, during our natural lives; also, after which period he truly and faithfully discharge, or cause to be discharged the following legacies—to Martha Everall, 50*l.*; to Mary Swift, 25*l.*; to my godson, John Lawrence Corfield, 50*l.*; to Michael Williams, 5*l.*; to Emily Fernihough, 5*l.* In witness whereof I have set my hand and seal this 21st day of November, 1843.

"Witness—Joseph Lawrence, Richard Pescall, George Roden, Mary Swift."

Addams in support of the will and codicil.

Bayford contra.

Dr. Lushington.(a) In this case there are three testamentary papers: 1st, a will executed in November, 1840; 2nd, a will [53] executed in September, 1841; 3rd, a codicil dated the 21st of November, 1843.

The will of 1841 revokes the will of 1840 (supposing both wills to be valid instruments); the question is as to the validity of the codicil of 1843, which purports to set up the will of 1840.

The deceased died on the 30th of November, 1843; he had resided at a small village in Shropshire, and was by trade a blacksmith; he had retired from business about three or four years before his death. At that period he had not, so far as I can ascertain, reached the age of sixty; according to the evidence of Humphreys, who, I think, is a competent witness, he was fifty-six. He had an only sister, Ann Lawrence, who resided with him; she had two illegitimate children. With one of these children the deceased was on friendly terms; there is no sufficient evidence to shew how he regarded the other. There were also some distant relations.

All the testamentary papers demonstrate that Ann Lawrence was intended to be the great object of his testamentary bounty. Naturally it would be so—she was his nearest relation, she resided with him, and from an infirmity was unable to assist herself.

There is no evidence as to the amount of the property. I cannot take the statement of either party as to the amount, unless it be acquiesced in by the other; and there is no such acquiescence. My means of judging on this point can only be derived from the fact that the will purports to devise houses and other property, and from the probability as to [54] what a person so circumstanced would have been likely to have acquired.

The first occurrence in the testator's life, to which it is necessary that my attention should be directed, is the making of the will of 1840; prior to that time there is no trace of any testamentary act. The contents of this will are to give the property to the sister for life; the interest in remainder to Durnell, upon condition that he takes care of her. Of this will Durnell is appointed the executor.

The next point is, who is Mr. Durnell? He appears, from the evidence, to be a medical gentleman residing in the neighbourhood, and to have constantly attended the deceased in that capacity, and to have been intimate with him for as long a period as that to which the knowledge of any of the witnesses extends; which, in the case of one witness, is seventeen years. His general character and respectability are wholly unimpeached by the evidence; on the contrary it is affirmed; as to his circumstances, there is nothing to shew that he was or is a needy man, and so open to temptation; for the fact of his occasionally borrowing a sovereign of the deceased cannot lead to any such conclusion.

I must next direct my attention to the state of the deceased, bodily and mentally, at the time of making this will [1840]; it is not a point of very great importance in the case, but still it is not wholly to be passed by. It appears that the deceased, prior to making this will, had been subject to illness. Mary Jones says that two

years before he had been delirious. Upon the tenth interrogatory she says that he used to be subject to fits [55] and delirium tremens; but, both in chief and on interrogatory, she denies that at the time of executing the will he was suffering from delirium of any kind: she declares that his illness was quite of a different character. Humphreys, another witness, entirely confirms the evidence of Mary Jones as to the illness at that time, and that it was of a different kind. The deceased had at this time retired from business. The only conclusion to be drawn from this evidence, and that is not very important, is that his constitution was impaired. If, indeed, I felt confident that Mary Jones understood the meaning of the term delirium tremens, it might carry this part of the case further, because it is a disease originating from habitual intoxication; but I cannot rely upon her evidence in this respect.

There are no written instructions for this will, and there is no evidence to shew how it was made, or of whose handwriting it is; the whole depends upon the execution alone. There are three subscribed witnesses, who appear to me to have given their evidence with perfect fairness: the same remark applies to the witnesses to the codicil. The witnesses are Mary Jones, Thomas Humphreys, and John Pescall; and certainly it is not to be presumed that they would have attested a will, or any other instrument of the testator, if they had thought him not competent to do the act: still the Court must judge from the facts they state, and not from their opinions; however, their opinions are not without some weight.

Now all these witnesses agree that the deceased was very ill at the time. Humphreys says, "He was as weak as weak could be." He was confined [56] to his bed, and had been so for some time; and he was propped up with pillows at the time of executing the will. Mary Jones says, "He was so ill and weak that his life was, and had been for some time before, considered in a very precarious state."

This being the bodily condition of the deceased, I will now look to the facts shewing knowledge of the contents of the instrument as a will, and of the testamentary capacity. Mary Jones remembers the deceased saying, "This is my act and deed," and the signature. Humphreys remembers his saying some words, but cannot recollect what they were. Pescall only remembers that, in answer to the question whether he acknowledged the paper as his will, the deceased answered "Yes," or something to that effect.

It is quite obvious that this evidence does not furnish direct proof of knowledge of the contents of a will. If knowledge is to be inferred at all, it must be from approbation; from the signature; the probability of the contents; the degree of capacity; and the other circumstances of the case.

As to the facts denoting capacity, beyond what I have stated, there is no evidence in the testimony of Jones and Humphreys; but it must be recollected that both well knew the deceased. Humphreys was constantly in the habit of seeing him, and saw nothing inconsistent with capacity. Mary Jones's opinion is in favour of capacity, but not very strongly. Humphreys, in chief, expresses himself more decidedly; but he qualifies it on the tenth interrogatory. Pescall speaks in more decided terms as to the capacity of the deceased.

Here for the present I shall pause, and proceed to [57] consider the evidence as to the codicil: when I arrive at that stage of the cause I will settle the legal principles to be applied to the case. I am not called upon to decide as to whether the will is valid as a purely separate and distinct act, but I must consider it in reference to the subsequent acts, namely, the will of 1841 and the codicil of 1843. It may well be that the subsequent acts reflect back on the will; not that a will, originally valid, could be affected by subsequent instruments without express revocation, but because subsequent acts may tend to elucidate the question whether such will is valid or not.

What took place in the interval between November, 1840, and November, 1843, the Court has no means of knowing, except that the will of 1841 was executed whereby Mr. Durnell had a legacy of 50l. only, and, subject to some small legacies, payable after the sister's death, the sister took the whole property, two other persons being appointed executors. It appears, however, that the deceased continued to decline in health, or at least was seldom free from illness, requiring the attendance of a medical man: he was attended by Mr. Durnell. Nine days before his death—his death being terminated by dropsy—the codicil was executed; to that the attention of the Court must be mainly directed. There is, however, one consideration which must not be wholly passed by; the codicil revives the will of 1840. Are there

circumstances which render such a disposition probable or improbable? It appears to me that there is no very strong ground for forming an opinion either way. [58] Assuming the will of 1840 to be validly executed, there is nothing but a bare execution in its favour; and presuming neither more nor less respecting the will of 1841, it comes to this, that the testator executed two wills of a different tenor, and the presumption, without further evidence, is not in favour of either.

I will now consider what the witnesses say as to the codicil. They all agree that the deceased was labouring under a disease which put an end to his life.

I think it is desirable to begin with Mary Swift, because she alone was cognizant of any part of the transaction preceding the execution of the will. I will now refer to her evidence. On the second article she says, "The first thing I recollect hearing was Mr. Durnell asking what that little girl's name was to whom Mr. Lawrence was godfather. To whom that question was addressed I cannot say. Mr. Lawrence did not answer, nor did I, until Mr. Durnell said to me, 'Mary Swift, I speak to you.' I told Mr. Durnell what I knew was the fact, that Mr. Lawrence was godfather to no little girl, but that Mr. Corfield's last little boy was christened after him, and he had stood godfather to that little boy by proxy. That was all that passed in respect to that: Mr. Durnell went on writing."

This part of the case does not shew that the testator was cognizant of the transaction.

"Presently he said to Mr. Lawrence, 'There is Mr. Fernihough's little girl; what shall I say for her? shall I say five pounds?'" In reply to that Mr. Lawrence said, 'Ten.' I heard Mr. Lawrence [59] say that in reply to the question of Mr. Durnell; and that is every word I heard him say, until such time as the witnesses were present."

Now it appears by the codicil itself that the legacy given to this child was five pounds, and not ten. I do not place any great reliance on this part of the case, because Mary Swift was in and out of the room during the conversation, and, whilst she was absent, the testator may have expressed his acquiescence in the arguments of Mr. Durnell in not changing the legacy from five to ten pounds; but at least it goes a very little way to shew that the testator was acquainted with the contents of the instrument.

"When Mr. Lawrence made the reply I have just mentioned, Mr. Durnell remarked to him, 'Mind, Mr. Lawrence, you are going out a great way.'"

Now the meaning of this expression is rather doubtful; at least there is no sufficient evidence to explain what it meant; *primâ facie* it would seem to have reference to the amount of the property, and the legacies given, or about to be given, and to import that the latter bore a large proportion to the total property. This is the only meaning I can attach to it: the only use I make of it is in order to form some opinion in my own mind as to the clear amount of the property; and I think, from this evidence, inasmuch as the whole of the legacies amount to 135*l.*, it must be presumed that the property was not large. This, indeed, is only inferential evidence, but it is all that the case affords me by which to judge of the amount of the property.

[60] As to the execution, the witness says, "In answer to the question whether the paper was according to his wish, the testator said, 'Yes;' whether he wished any alteration, he said, 'No.'"

Now as to the fact of execution, I am not able to understand that this evidence can have any effect, and I do not observe that any of the other witnesses carry it any further.

Richard Pescall states on his evidence "that two questions were put to the deceased—'Whether he acknowledged the paper as his act?' to which he said 'I do:;' 'Whether there was anything more he wished?' he said, 'No.' That he said this, intimating that he was satisfied, and having before signed his will."

George Roden differs in no material respect from Pescall: he speaks to the acknowledgment of the signature, and to certain other circumstances.

The result of the evidence is clearly this, there is no proof of any instructions for the paper; no proof of reading over; and no explanation; in fact, there is no direct evidence of knowledge of the contents of the codicil; but whether there is indirect evidence to lead to that conclusion will depend on the state of capacity; the contents of the codicil; and the other circumstances. Now as to capacity: Mary Swift states in chief: "Whether Mr. Lawrence was capable to make a will I cannot take upon

myself to say ; I will not say that he was not, neither will I say that he was. I have nothing to say against the state of his mind or understanding, except that his memory was very bad. For two months before the time the paper was signed his memory was so bad at times that he [61] could not remember anything for half an hour together."

Upon the 16th interrogatory she says, "Mr. Lawrence was very ill, and very weak in body at the time of the execution of the codicil ; he had for some time before been so weak as not to be able to get out of bed without a great deal of help. I cannot hardly say in what condition of mind he then was ; he answered the questions that I heard put to him on the occasion as if he knew what he was about. I cannot say that he was in a state of imbecility, or utter incapacity for the management of his affairs, or the performance of any serious act requiring thought, judgment, and reflection. I cannot say that ; for if you asked him a question at any time he would answer you properly enough ; at the same time, before the time the paper was signed, his memory was very bad indeed—so bad that he could not recollect things from one half hour to another ; he would tell people that he had been out, and round the garden so many times, and such as that, when he had never been out of his chair. Things of that sort happened several times in the course of the week, and I may say a fortnight before the day the paper was signed. At such times his recollection so completely failed him that he could hardly be said to know what he said. He was at the time the paper was executed lying propped up by pillows ; he required that, and could not move himself in bed without help. I would not say positively that he fully or at all comprehended or understood the effect of the act of the execution of the codicil. I do not think I can say positively whether he did or did not ; at the same time, if I am to speak as to my [62] belief, I should say, upon my oath, that my belief is that he did. He answered questions as I have described as if he knew what he was about."

The question will presently arise, what is the effect of this evidence ? Two objections have been made—the one, that it is very clear the memory of the deceased was very bad ; the second, that at this time, as well as since, he was subject to delusions.

Richard Pescall speaks of the deceased recognizing him, and saying his health was getting better ; and also thanking him for taking the trouble to come and sign the paper ; this is the strongest evidence as to capacity. George Roden is nearly to the same effect.

There is other testimony as to the state of the deceased's capacity more important than either of these witnesses ; it is the evidence of Humphreys, who, although not an attesting witness, yet saw the deceased constantly, slept in the same room with him, and was perfectly cognizant of his state and condition during the whole of this period. Now, Humphreys, on the 16th interrogatory, says : "At the time the last paper was signed the deceased was in a very bad condition as respects his mind, and so he had been some time before. His memory was then so bad that he could hardly recollect anything. He certainly was not then fit for any kind of business, for if he said a thing one time, he would forget all about it in ten minutes after."

What then is the effect of this evidence ? That the deceased was in a very weak state of bodily health ; that his memory was impaired ; that his intellectual faculties, although I do not think he [63] was subject to any delusions, were necessarily greatly diminished in vigour. He was not utterly incapable of any testamentary act, but he was not in a state to originate such an act, or to detect error or discover fraud in one.

The codicil is in favour of Mr. Durnell, the *dux facti* throughout, and by whose instrumentality, in the absence of other evidence, it must be presumed to have been prepared. Subject to a few legacies, he takes the whole property, whatever may be its amount ; subject to the life of Ann Lawrence, not a very good one, and to the not very definable condition of taking care of her, he takes every thing.

What is the doctrine of law applicable to this state of circumstances ? The last authority is the judgment delivered by Mr. Baron Parke in the case of *Bullin v. Barry* (1 Curteis, 614 ; 2 Moore, P. C. 480), in which is expressed the opinion of the whole Court. I am not aware that the doctrine there laid down differs from that heretofore received, and uniformly acted upon in these Courts during my knowledge and experience. It is unnecessary to go through the judgment ; the doctrine is, that proof of knowledge of the contents may be given in any form ; that the degree of proof

necessarily depends upon the circumstances of each case; that although in perfect capacity knowledge of the contents may be inferred; yet where the capacity is impaired, and the benefit to the drawer of the will is large, the suspicion is strong, and the proof must be most stringent; and the Court must be satisfied of proof of knowledge of the contents, beyond the proof of execution by the testator. I must add one other ingredient—the [64] nature of the instrument executed, its simplicity or complexity; because, when you are measuring the power of a weakened intellect, the quality of the subject to which it is to be applied must always be an important test. I have always understood that when the drawer of an instrument gives himself a benefit under the instrument, it is a case for suspicion, depending more or less upon the circumstances of each individual case; that the proof must be in proportion to the degree of suspicion, which of course will vary. But Mr. Baron Parke has only said that the greater the benefit and the less the capacity the more stringent is the requirement of proof of knowledge of the contents.

In this case, then, as to the facts of the codicil, there are no instructions at all, no previous declaration, and no subsequent recognition. If it be said that such would not naturally be forthcoming on a mere *condidit*, the answer is that the party propounding this paper had his choice of proceeding, either by *condidit*, or by special plea, and cannot complain of consequences arising from his own deliberate selection.

The greater part of the codicil is brought to the testator ready written. That fact is manifest on the face of the paper, there is no evidence by whom, or when it was written; although the party propounding it might have proved all this, and brought the writer forward to give testimony, when he would have been open to cross-examination. The writer of the paper might have known nothing of the testator, but he might have stated what was said on the occasion, and thus have better enabled the Court to form a judgment upon the case. All these facts [65] are very obscure; one part of the contents of the codicil is wholly unintelligible. What are the words?

“I, Joseph Lawrence, declare that it is my wish and request that the will I made, signed, and executed on the 23d of November, 1840, shall be the only will or wills I made or might have made before or after the said date of the 23rd of November, 1840, and all and every other to be null and void.” This, although singular language, is intelligible. What follows? “I hereby give, bequeath, nominate, and appoint my friend, J. H. Durnell, surgeon, or his executors, administrators, or assigns, to have full power over the whole, every, or any part of my property, of whatsoever description, for the true benefit and welfare of myself and sister, Ann Lawrence, during our natural lives. Also, after which period he truly and faithfully discharged, or cause to be discharged, the following legacies” (of these I shall speak presently). Now, although, as I have before observed, the first part of this codicil is intelligible, it would, I think, have surpassed the powers of comprehension of the testator, indeed of any other person, to explain the meaning of this latter passage. It is quite obvious that the instructions for this never could have been given by this testator; he never could have understood what it meant.

But it is said, or argued, that this Court cannot set aside wills, merely because testators are presumed not to have understood the whole of them: undoubtedly not, where a testator is of perfect capacity—then the fact that a part of a will is unintelligible cannot operate against its validity; but, if [66] the question of capacity be involved, undoubtedly this is a vital part of the case.

I now come to the legacies. “To Martha Everall, 50l.; to Mary Swift, 25l.; to my godson, Joseph Corfield, 50l.; to Michael Williams, 5l.; to Emily Fernihough, 5l.” How are these legacies to be accounted for? By the original will the testator gave Martha Everall 50l. Was this 50l. additional? So, by the will, Michael Williams took 5l.; he takes the like sum by the codicil. Can I come to the conclusion that the testator understood that these legacies were to be accumulative, particularly after Mr. Durnell had said, “Mind, Mr. Lawrence, you are getting a great way out.”

Let us look further into the case. The will of 1840 was to be revived: there is no proof where the will of 1840 was, and none that the deceased knew what was the nature of the will to be revived; nor whether any will was brought to his recollection at the time when he put his hand to the codicil. There is an unexplained attempt—a lame and impotent one—to incorporate into the codicil which revives the will of 1840 the contents of that will.

Who is the residuary legatee? The medical attendant of the testator, all-powerful

in a sick chamber with a dying man—of fair character I admit : but what said Lord Thurlow, speaking of character (*Welles v. Middleton*, 1 Cox, 112)? “The characters of those concerned in a transaction of this sort must be decided upon singly, by those pertinent allegations and express proofs that are made in the course of the cause. It is impossible to go out of it; the Court cannot [67] receive allegations or admit proofs not in the course of the cause : for if my private persuasion is that none of that imputation does belong to the defendants in this business, yet that must not operate ; every man must come before me to be tried for what he has done in the transaction : it would be frivolous and useless to justice to do otherwise.”

Before I could pronounce for this codicil I must be judicially satisfied that the deceased knew its contents and approved of it : I have no proof of this commensurate to the legal exigency of the case ; and therefore I pronounce against this codicil.

I shall follow the same course which Sir J. Nicholl pursued on other like occasions : I shall pronounce against this paper on the ground “deficit probatio,” not on the ground of fraud, and, doing so, I shall not condemn Mr. Durnell in the costs.

MALTASS against MALTASS. Prerogative Court, July 17th, 1844.—The law of domicile considered as regulating testacy and intestacy in the case of a British subject long resident as a merchant at Smyrna, and dying there, having regard to the treaties between Great Britain and the Ottoman Empire.

[S. C. 3 Notes of Cases, 257 ; 8 Jur. 860. See 3 Curteis, 231 ; 63 E. R. 712 (with note).]

This Court having refused to grant probate of a will of Mr. John Maltass, deceased, dated the 22nd of October, 1841, Mr. John Maltass, a son of the deceased, now propounded a will of the deceased bearing date the 10th of June, 1834.

The allegation pleaded in substance—

Second article. That the father of the deceased was an Englishman by birth, but had settled at [68] Smyrna, as a British merchant, many years before his death. That up to the time of his death he continued to be one of the partners in a mercantile house established at Smyrna, trading under the firm of Lee and Co. That the deceased in this cause was born at Smyrna in the year 1764 ; that when about six years old he was sent to England to be educated, but returned to Smyrna when at the age of fourteen. That the deceased once again visited England in the year 1824, and remained there about two years. That after serving his clerkship in the house of Lee and Co. he set up for himself in business, as a British merchant, at Smyrna, and established a house of trade under the name of J. & W. Maltass, and in which house he was one of the partners at the time of his death.

Third article. That the father of the deceased, as well as the deceased himself, at all times claimed to be, and spoke of themselves as being, British subjects, and they were uniformly so treated by the Turkish authorities, who uniformly conceded to them all the privileges of British subjects resident within the Turkish dominions as merchants.

The fourth, fifth, and sixth articles pleaded the making of the will now propounded, of a codicil thereto, and that the same and the respective subscriptions thereto were both in the handwriting of the deceased.

Seventh article. That it is not competent, by the law of the Ottoman Empire, for a Turkish subject to make any disposition of his property by will, but the same, on his death, is divisible between his relations in certain fixed proportions ; but that by certain articles of peace between England and the [69] Ottoman Empire, made and concluded at the Dardanelles in the year 1809, the property of any Englishman or other person subject to that nation, or navigating under its flag, who should happen to die within the Turkish dominions, shall be given up to the person to whom the deceased may have left them by will, or to the British consul.

Eighth article. That the Turkish authorities at Smyrna, upon the death of the deceased in this cause, left his property there situate to be disposed of as directed by his will, or, in the absence of a will, to be distributed according to the law of this country, and not according to that of Turkey, thereby recognising it as the property of a British subject, and not of a native or domiciled subject of Turkey.

The principal facts pleaded having been admitted in the answers of the widow of the deceased, or in acts of Court, the cause came on for sentence.

Addams and R. Phillimore in support of the will. As a general rule, persons resident at an English factory established in a foreign country continue to be

domiciled British subjects; à fortiori, will it be so where the religion, habits, and manners of a foreign country are at variance with those of the persons resident at the factory. This is the express doctrine of Lord Stowell in the cases of the ships *Indian Chief* (3 Rob. 28), and *Angelique* (ib. Appendix B, p. 7).

[Per Curiam. Do you plead in this case that there is a British factory at Smyrna?]

[70] The existence of such a factory is notorious.

This is the legal view of the case, independent of the treaty between this country and the Ottoman Empire, but when looked at in connection with the treaty of 1809, all difficulty in the case is removed; Mr. Maltass was a British subject to all intents and purposes.

The Queen's advocate and Jenner contra. Primâ facie a party is the subject of a country in which he is born and resides during his life. The facts of Mr. Maltass having been sent to this country for the purposes of education, and the transient visit in 1824, cannot divest him of his national character. Then he must be brought within some exception to the ordinary rule and law of domicile. It has not been shewn that there is a British factory at Smyrna, or, if so, that Mr. Maltass was a member of the factory. *Moore v. Budd* (4 Hagg. Ecc. 346).

Dr. Lushington.(b) The present inquiry relates to the personal property of John Maltass, who died at Smyrna in the year 1842. The case comes on for judgment on an allegation, given in on behalf of a son, propounding a will executed in the year 1834. The only evidence in the cause being the answers of the widow, the other party in the cause.

My attention must be first directed to what I consider the admitted facts of the case. The deceased was born at Smyrna, of English parents, who must, I think, be presumed to have been born British sub-[71]-jects. The deceased is admitted to have passed his boyhood in England for the purpose of his education; he went back to Smyrna where his father was engaged in trade. The deceased for many years was occupied in commercial pursuits, and was a member of a firm established at Smyrna, but which was dissolved a considerable period before his death. Whether the deceased, up to the period of his death, or even during the latter years of his life, was engaged in trade, I find no evidence, save that he described himself as a British merchant in his will; I have looked to the estimates of his property during the latter period of his life; I find some dark indicia that he was engaged in commercial concerns, but nothing to lead to a legal conclusion that he was engaged in trade at the time of his death. He married at Smyrna, was constantly resident there, and died there, leaving a widow and several children.

I have to determine, upon these facts, what is the law to govern the succession to his personalty—the law in this respect being the same whether he has died testate or intestate. The first question I propose to consider is, whether, laying aside the question of domicile, the deceased was or was not a British subject? Now, assuming him to have been born of parents who were British subjects, the deceased, although born abroad, would be a British subject, and would owe allegiance to the Crown of Great Britain, and this whatever might be the domicile of his parents or of himself; the only excepted cases that I know of are those of the peculiar instances of the children of persons whose domicile was in the United States prior to the acknowledgment of the [72] independence of America. Such are the cases of *Doe v. Aclam* (2 B. & Cress. 779), and *Doe v. Mulcaster* (5 B. & Cress. 771).

The next question is, where was the deceased domiciled? for I take it not to be denied that the law of domicile must in some shape govern the succession. But this inquiry will become unnecessary if it should turn out that, with respect to this individual succession, the law of Great Britain and of Turkey is the same; for when we speak of the law of domicile, as applied to the law of succession, we mean, not the general law, but the law which the country of domicile applies to the particular case under consideration. Such law may be totally different as applied to a natural born subject of the country, as exemplified in the case of *Collier v. Rivaz* (2 Curt. 855). There the testator died domiciled in Belgium; but, by the Belgian law, the succession in that case was not to be governed by the law of Belgium, applicable to natural born

subjects, but by the law of that country, applicable to an English born subject dying domiciled in Belgium.

Assuming, therefore, that the deceased died domiciled at Smyrna, the first point is, what is the law of Turkey as to British subjects dying domiciled there? This depends on the construction to be put on the treaties between Great Britain and the Porte. The leading object of these was to protect British subjects trading to Smyrna, and with this view to modify the law of Turkey so as to ensure them justice, so far as could be attained. It is, I think, perfectly clear from the treaty, independent of all historical facts, that a residence in Smyrna by a British merchant was contemplated, and, if the [73] contracting parties have provided for the case of residence, it seems necessarily to follow that they must have intended to provide for the case of domicile, if domicile in Turkey could be acquired by the same means as in other countries. Judge Story says: "That place is properly the domicile of a person in which his habitation is fixed without any present intention of removing therefrom." If this be applicable to a domicile in Turkey, such a case must have occurred in the course of trade; and, therefore, I conceive it must, in legal contemplation, have been included when the parts of the treaty applicable to British subjects trading in Turkey came to be considered. I the more incline to this opinion because, however short might have been the residence of British merchants in Turkey in the earliest times, the fact of their permanent residence for many years is undoubted, and some of the treaties bear date long after such permanent residence existed. It never could, I think, be supposed that the treaties did not intend to protect British merchants, either composing a house of trade, or carrying on business singly, who for years together resided in Smyrna, having no other habitation, and without any intention of quitting Smyrna, or, in other words, domiciled according to Judge Story's definition.

If it be contended that, at the time of concluding the treaties, neither party thought of British subjects domiciled in Smyrna, that may perhaps be true, for little indeed was known or thought of domicile, in the legal sense of the term, in those early times; but if the words of the treaty are sufficient to cover the case, and if the object of the treaties was to apply to all British merchants, then the application [74] to a state of circumstances not particularly contemplated, but within the general scope of the treaties, would not limit their construction. It would not be a *casus omissus*, but simply the use of general terms to attain a particular object, the particular circumstances which should call the compact into action not being foreseen; but the general forms intended to govern all cases falling within the principle, whether seen or not seen. It appears to me that the passages in the treaties which I shall presently cite are so wide in their terms as to comprise all British merchants resident in Smyrna, and that the only exception (which proves the universality) is the case of a British subject becoming a Mussulman.

Perhaps, also, there may be another reason why words distinctly appropriate to domicile were not used; namely, both parties considered domicile in that sense all but impossible, because the sense they would have attributed to it would be a total abandonment of British character. The reasons why they may have so thought I will presently shortly discuss.

I think, before I close this branch of my subject, that there are arguments of no small weight leading to this construction of the treaties. Even at this day, although so many powerful minds have been applied to the question, there is no universally agreed definition of the word domicile—no agreed enumeration of the ingredients which constitute domicile. This is expressed in the following remarkable language by Hertius: "*Verum in iis definiendis mirum est quam sudant Doctores*" (1 Hert. Oper. s. 4, n. 3, p. 120, edit. 1716). Indeed, I [75] think there are no less than fourteen or fifteen different definitions of this word. The gradation from residence to domicile consists both of circumstances and intention; nice distinctions have and must prevail, such as cannot be defined beforehand. Hence, if the treaties did not apply to domicile, as residence would often become fused into domicile, British merchants, and, in case of their deaths, their families, would find themselves suddenly, and contrary to their intention, and to the presumption of intention, subject to a code of laws wholly contrary to their religious persuasions, their feelings, customs, and contemplation in making arrangements for the welfare of themselves and families; and, be it observed, the law of Turkey would come into operation (if residence became domicile), not only on property after death, but during the life; and an individual might be living in

Turkey out of the protection of any treaty. I know not what would be (if the case were capable of arising) the law of Turkey applicable to British merchants so domiciled, but certainly entire subjection to Turkish laws would be a grievous evil to British merchants of Christian belief, education, and habits.

All these reasons appear to me to operate most strongly in favour of a liberal and extended construction of the treaties; in my opinion the contracting parties never contemplated the anomaly which a contrary construction would lead to.

With regard then to the parts of the treaties applicable to the question we are now discussing, to wit, whether the treaties extend to a permanent residence, and not merely to a temporary visit. The treaties commence at an early period, but they [76] are all included in the treaty of the Dardanelles (1809). Now, in the construction of treaties of this description, we cannot expect to find the same nicety of strict definition as in modern documents, such as deeds, or Acts of Parliament; it has never been the habit of those engaged in diplomacy to use legal accuracy, but rather to adopt more liberal terms. I think, in construing these treaties, we ought to look at all the historical circumstances attending them, in order to ascertain what was the true intention of the contracting parties, and to give the widest scope to the language of the treaties in order to embrace within it all the objects intended to be included.

The first begins by stating "that there had existed a good understanding and an amity between the King of England (Charles 2nd) and the Porte. And it was granted to him (Charles 2nd) that his subjects and their interpreters might safely and securely trade in these our dominions." The first article stipulates: "That the English nation and merchants, and all other merchants sailing under the English flag, with their ships and vessels, and merchandize of all descriptions shall and may pass safely by sea, and go and come into our dominions, without any, the least prejudice or molestation being given to their persons, property, or effects, by any person whatever."

At this period one of the objects to be attained was not simply permission to carry on trade, but protection from the Turkish corsairs and pirates of that country, and that not merely confined to English merchants, but extended to all those who should accept the guarantee of the English flag.

[77] Let us look to another part of the treaty. The 15th article says: "All Englishmen and subjects of England, who shall dwell or reside in our dominions, whether they be married or single, artizan or merchants, shall be exempt from all tribute." These words "dwell or reside" clearly contemplate not a temporary but a permanent residence. I think also that the reference to "married persons" indicates the same intention, for the residence of persons in that state is generally looked at as of a more permanent and fixed character than that of mere ordinary traders.

Then it goes on to provide for the establishment of consuls in the different ports, and "that any dispute between the English themselves shall be decided by their own ambassador or consul;" so that the treaty contemplates a residence under the protection of national consuls.

Now I do not intend to go through the treaty in detail: the 16th and 18th articles relate generally to the privileges granted to English subjects perfectly distinct from resident Turkish subjects. The 26th article provides: "That in case any Englishman or other person subject to that nation, or navigating under its flag, shall happen to die in our sacred dominions, our fiscal and other officers shall not, upon pretence of its not being known to whom the property belongs, interpose any opposition or violence, by taking or seizing the effects that may be found at his death, but they shall be delivered up to such Englishman, whoever he may be, to whom the deceased may have left them by will." This, then, in my opinion, it is perfectly clear, must refer to a will made according to the law of England, for I [78] am not aware of any power of testacy by the law of Turkey. The article goes on: "And if he shall have died intestate (this means intestate by the law of England) the property shall be delivered up to the English consul, or if there be no consul, in that case the property shall be sent over to England in the next ship." Now this section alone goes the length of saying, not merely that the property of a person accidentally dying in the Turkish dominions shall be delivered up, but it contemplates the case of a person permanently resident there. The forty-sixth article contemplates the case of an Englishman permanently resident in Smyrna. "If any interpreter shall die, if he be an Englishman, proceeding from England, all his effects shall be taken possession of by the ambassador or consul; but if he be a subject of our dominions, they shall be delivered

up to his next heir." The forty-ninth article speaks of "merchants of the aforesaid nation." The sixty-first article is to this effect: "If any Englishman shall turn Turk, and it shall be represented and proved that, besides his own goods, he has in his hands any property belonging to another person in England, such property shall be taken from him, and delivered up to the ambassador or consul, that they may convey the same to the owner thereof."

What is the effect of this article? If an Englishman turns a Turk, his property will be governed by the law of Turkey; but if he has in his hands the property of any Englishmen, that will be regulated by the law of England. So that the case of an Englishman becoming a Turk, and so becoming subject to the law of Turkey, is contemplated, and "expressio unius est exclusio alterius."

[79] The ninth article of the latter treaty provides that English consuls shall not be named from among the subjects of the Porte. Generally speaking, a consul does not acquire a domicile by residence; but here a distinction is made between British subjects resident at Smyrna and those who are not British subjects.

If, then, the treaty be applicable to British merchants resident or domiciled, in the ordinary acceptation of the term, in Smyrna, the provisions of the treaty decide what is to be done in the case of succession to personal estate, namely, that it is to follow the law of England.

As to the case of *Moore v. Budd* (4 Hagg. Ecc. 352), I consider that my opinion does not militate against that case, or the construction of the treaty with Spain. This Court was of opinion that the will there propounded was invalid by the law of Spain, and, though more doubtfully, by the law of England. It held that the deceased was domiciled in Spain, never mentioning the treaty. Indeed, not even in the argument was the treaty alluded to—no allegation on that point was given in—no answers were taken; the King's advocate of the day declined to argue the point, and not a single word appears in that case upon the construction of the treaty. In my opinion, then, the effect of the treaties is, that the law of Great Britain will operate on property left by a British merchant in the situation of the deceased; and I am not aware of any distinction even in the case of an individual having ceased to carry on trade.

However, I do not wish to conclude myself on [80] this latter point. I think the facts of the case, in this respect, are meagre; but, in the absence of proof to the contrary, the conclusion I must draw is, that such is the law of England, as contradistinguished from the law of Scotland; but I must take care that I do not confuse the case on this point. I consider the deceased was domiciled in England, and not in Scotland, or in a colony; for great difficulty would have arisen had the deceased been domiciled in Scotland, and a new question if he had been domiciled in British Guiana. I take the deceased to be domiciled in England. The will last made is a nullity—it is not properly executed; the will of 1834 must, therefore, receive probate; that will was valid by the law at the time when it was executed, and nothing that has since passed has had the effect of revoking it.

I wish to observe that I am desirous not to be supposed to have given an opinion upon any question not necessary to be decided in this case; my judgment, therefore, does not affect the question of domicile, if the deceased was, in the legal sense, domiciled in Turkey; and if the law of domicile does prevail, the law of Turkey, in conformity with the treaty, says that in such case the succession to personal estate shall be governed by the British law; if he was not domiciled in Turkey, but in England, then the law of England prevails, *proprio vigore*.

I give no opinion, therefore, whether a British subject can or cannot acquire a Turkish domicile; but this I must say—I think every presumption is against the intention of British Christian subjects voluntarily becoming domiciled in the dominions of [81] the Porte. As to British subjects, originally Mussulmen, as in the East Indies, or becoming Mussulmen, the same reasoning does not apply to them as Lord Stowell has said does apply in cases of a total and entire difference of religion, customs, and habits.

I pronounce in favour of this will, costs out of the estate.

SHELDON *against* SHELDON. Prerogative Court, July 17th, 1844.—The principles and practice as to incorporating, in the probate of wills of personalty, papers, sufficiently referred to by such wills, but not per se testamentary.

[S. C. 3 Notes of Cases, 250; 8 Jur. 877. Applied, *In the Goods of the Marquis of Lansdowne*, 1863, 3 Sw. & Tr. 194. Considered, *Bizzev v. Flight*, 1876, 3 Ch. D. 269.]

The testator in this cause, Mr. J. Sheldon, died in the month of March, 1844. On the 30th of January, 1843, he executed a deed of settlement, whereby he assigned and transferred certain premises and monies to his brother, upon trusts therein named. Upon the day following he executed a will. On the 13th of September, 1843, he executed a codicil by which, after referring to the deed of January, 1843, and specifying certain of the trusts thereof, he took notice of, and recited, that in the said deed was contained a proviso that it should be lawful for him, and that he was thereby empowered, at any time thereafter, by any instrument in writing, or by a will or codicil, signed by him and attested in manner therein mentioned, to revoke the said deed, and all or any of the trusts thereof, and to declare new trusts: and further reciting that, being desirous of executing the power so given to him, he did, by that codicil, revoke certain of such trusts. And the testator, in such codicil, ratified and confirmed his will, and the said in part recited indenture of the 30th of January, in every respect, except where respectively by him thereby revoked or altered.

A question arose as to incorporating the deed of January in the probate of the will and codicil, and the case was originally brought before the Court on *ex parte* motion. Sir Herbert Jenner Fust directed the question to be raised by plea.

An allegation was accordingly given in, and came on to be debated.

The Queen's advocate opposed the admission of the allegation.

Addams supported it.

The following cases were cited:—*Masterman v. Maberly* (2 Hagg. Ecc. 235); *Thorold v. Thorold* (1 Phill. 1); *The Attorney-General v. Jones* (3 Price, 366), *Tompson v. Brown* (3 Myl. & Keen, 32).

Dr. Lushington.(e) I confess I do not entertain any doubt as to what ought to be the opinion of the Court on the question of the admissibility of this allegation; but, inasmuch as it is exceedingly desirable that all questions should be settled on just and true grounds, I shall go further into the case than I am otherwise disposed to do, or, as I conceive, the necessity of the case compels me.

I will first dispose of two of the cases cited at the Bar. In *The Attorney-General v. Jones* a question [83] arose whether, under a deed made by a party disposing of property after his death, and which deed was subsequently confirmed by his will, any legacy duty was payable. The object of the deed was, in all probability, to avoid payment of the duty; it reserved a full power of disposition and revocation. The majority of the Court, looking to the contents of the instrument, thought it ought to be considered as of a testamentary nature, and that legacy duty was payable. I have always understood that this case has been disapproved of. In my judgment it is an erroneous decision, and for this plain and obvious reason—the Judges of the Exchequer had to look to a statute, in order to determine whether legacy duty was payable on a testamentary instrument, the statute making no legacy duty payable on a deed; and the Court of Exchequer took upon itself to say that the instrument in question was testamentary, thereby adjudicating on a subject as to which that Court had no authority to decide, and which it was incompetent to decide. I think I can shew, by reference to another recited case, that the opinion of Lord Cottenham is decidedly against the judgment in *The Attorney-General v. Jones*. In *Tompson v. Brown* a question was raised by trustees whether a settlement under which the plaintiff claimed was not of a testamentary nature, and consequently legacy duty payable. Upon looking at the case the point seems almost the same as that of *The Attorney-General v. Jones*. Lord Cottenham, then Master of the Rolls, decided that legacy duty was not payable, but did not enter into the question as to the instrument being of a testamentary nature. I think if that question had been put in more direct [84] terms to Lord Cottenham, he would have done what all other Judges have done, and would have repudiated all authority to determine what is or is not a testamentary instrument of personal property.

(e) Sitting for Sir Herbert Jenner Fust.

I will now look to the facts of this case. The testator died in March, 1844: on the 30th of January, 1843, he executed a deed, by which he purported to dispose of a part of his personal property to his brother. I may here observe that since the decision of *Tompson v. Brown* (3 Myl. & Keen, 32) an alteration of the law as to legacy duty, so as to make duty payable on instruments intended to avoid legacy duty, has been in contemplation, but as yet the alteration has not been effected. On the 31st of January, 1843, the testator executed a will, but in that he made no reference to the deed of the day previous. On the 13th of September, 1843, he executed a codicil, in which he referred to this deed in terms to which I will presently more particularly advert.

The allegation given in on behalf of the brother pleads the facts I have mentioned; and it pleads in the sixth article "that the deceased, after the execution of the deed, so dealt with the property intended to be comprised in it that the deed became void." The prayer is, "that probate may be decreed of the deed, together with the will and codicil." The question is, can this prayer be granted? and, if so, upon what principle?

Now, although I think there is no difficulty in deciding this case, yet, at the same time, I must remember that the present statute regarding wills is a new statute, and that it is very desirable that decisions under it should rest on true grounds.

[85] Let us, then, look back to original principles. There is a well-known and old-established distinction between wills of real and personal estate, which throws some light on this subject. If the Courts of law or equity wished to know what real property a testator had devised, and in what manner, they looked to the original instruments themselves. If they wished to be informed as to bequests of personal estate, they looked to the probate of those instruments, and never, as I believe, to any original. There is a case before Lord Cowper (*Plume v. Beale*, 1 P. Wms. 388) where a bill was filed, alleging that a legacy had been interlined in a will: he dismissed the bill, and said he could not look to anything but the probate. Hence the Ecclesiastical Courts, in the exercise of ecclesiastical jurisdiction, had always to determine what papers a probate should contain; all other Courts were bound by that probate: they could not give effect to anything out of it, nor refuse or avoid to give effect to everything in it.

Before the passing of the present Statute of Wills many well-known rules existed, and were in force on this subject. All papers proved by parol evidence to be intended to be final after death were admitted to probate, without any hindrance arising from shape or form. One of the reasons generally adduced for this was, that these documents would otherwise be void and of no effect. But the papers were admitted to probate not on that account alone, for it was only a circumstance in the case; they were admitted because they were to operate on personal property after death, and because they were proved to contain the final intentions of the [86] deceased. All can recollect this being done on parol evidence only. If a paper was not in the deceased's handwriting, if it was proved by competent evidence, it was always admitted to probate, and if admitted on parol evidence only, *a fortiori*, was it entitled to be admitted when sufficiently referred to in a paper in the deceased's own handwriting, of itself entitled to probate? for it proved the intention of the deceased in more solemn legal form. Very many papers so referred to were therefore admitted into the probate.

I own I was surprised at the argument—that the title to probate depended on the validity or invalidity of the instrument referred to; because, where the reference was sufficient, the question of validity or invalidity never arose; the sufficiency of the reference was the sole point. In the case respecting Lord Keith's will there was a reference to settled property, and all the deeds were incorporated in the probate, and I think, very recently, something of the same kind took place in this Court, in *In the Goods of Dickens, Deceased* (3 Curteis, 60). The general rule used to be, that all papers entitled to probate must be admitted into the probate, and, as papers referred to were legally entitled to probate, the practice was to prove them. But difficulties arose in carrying this rule into practice in all cases; one of such difficulties is alluded to in the case I have just mentioned. Frequently the document referred to was not in the custody of the parties, or the expense of engrossing it in the probate was an important matter. I remember perfectly well, when at the Bar, finding myself on one occasion so pressed with [87] these difficulties that I privately communicated them to Sir John Nicholl, and he pronounced an opinion upon the subject to the following effect:—

He said "he had taken all the circumstances into his consideration, and would relax the general rule, which compelled parties to insert in the probate everything which properly formed a part of it, where the expense of doing so was so very great;" but he held, at the same time, that the parties might, if they chose to do so, take probate of such papers; only, that they should not be compelled to do so: indeed in some cases it is obvious it would not be practicable to do so; for this Court could not say that, because a marriage-settlement is recited in a will, the deed of settlement shall be taken out of the custody of parties properly entitled to it, and be brought into this Court.

The result of this departure from the general rule, however necessary, was this, that inasmuch as Courts of law and equity could only look to the probate, they could not allow papers entitled to probate, but left out of it, to have any legal effect. I am not, however, aware that any great inconvenience arose from this, except in one case, that of *Dillon v. Harris* (4 Bligh, 342), and, singular to say, although the real difficulty was mentioned by one of the counsel it never appears to have struck any one of the Judges. Even had the difficulty been felt, the remedy was at hand, for the probate might have been amended by engrossing in it the document referred to. In the case alluded to a reference was made in a will to a certain document, but probate was not taken of it (there was nothing in contest but personal estate, [88] and that makes it the more singular); one of the counsel said that probate might have been taken of this paper; but, instead of going back to the Ecclesiastical Court, there was a long argument as to the admissibility of the document as evidence, and it was held that it was not competent to produce it.

This was the state of things in law and practice prior to the present Statute of Wills, which has made most essential alterations in one respect. It is no longer allowed to declare by parol evidence any deed or paper to be part of a will, but it is still possible to incorporate into a duly executed will or codicil any written document then in existence; but it must be borne in mind that this incorporation is totally different from declaring an instrument to be testamentary; the validity of the incorporation does not depend on parol evidence (which is no longer permitted), but the paper to be incorporated is protected by exactly the same evidence as renders valid the instrument by which the incorporation is effected, namely, the signature of the testator, and the subscriptions of two witnesses.

Another consequence, of no small importance, flows from this statute, and more peculiarly applies to the allegation given in this case. With respect to the title or right of the paper to be incorporated, it in no degree depends upon whether it be void or valid per se. It is perfectly true that where there is a totally independent instrument, no one would be compelled to take probate of that which is altogether valid in itself; but in my opinion, and I will presently state my reasons, that never could be the case with regard to papers incorporated by [89] reference. The title to probate depends upon the clearness and sufficiency of the words of incorporation; the necessity of taking probate will depend upon the validity or invalidity of the instrument to be incorporated. For instance, if a man, by will or codicil, simply ratifies a deed valid per se, no one would be compelled to take probate of that deed, but the title to probate remains the same; if he ratifies an instrument inoperative or invalid per se, then the title and the necessity co-exist. If a party refers to a valid deed, and directs that his property shall be settled on similar trusts, then there is a title to probate, and, if there be litigation, there is also necessity; for I have yet to learn how a Court of law could give effect to such will, unless the instrument referred to formed part of the probate.

In the present case the first question is whether there is any reasonable doubt as to the sufficiency of the words of incorporation; as to the identification there can be no doubt; the deed is described by its date, &c., and I think the words "ratify and confirm" are sufficient to incorporate it with the will; I am of opinion that, by "ratifying and confirming" the deed, the testator has shewn sufficiently his intention to make it a part of his will, for otherwise those words would be nullities.

The substantive part of the allegation, then, is clearly entitled to admission, but not the sixth article, which pleads the deed to be a nullity. I conceive, as to the question of probate under the Statute of Wills, which I have now alone to consider, that it is of no importance whatever; to admit such an averment would be useless, and I am [90] afraid more than useless, for it would establish a false precedent. See

what a state the Court would be in if it took upon itself to decide such a question even in the most simple case; cases of infinite difficulty and intricacy might arise, depending upon principles of law foreign to the learning of this Court, and which might require this Court to entangle itself with questions more proper for Courts of law or equity. Such would be a question whether a deed was valid or not.

I admit this allegation, striking out so much as pleads the invalidity of the deed.

COCKSEGE against COCKSEGE. Consistory Court of London, June 6th, 1844.—

Cruelty is not pleadable by a wife, by way of defence to a charge of adultery brought against her, except in conjunction with a recriminatory charge of adultery.

[S. C. 3 Notes of Cases, 218; 8 Jur. 659.]

This was a suit, promoted by a husband against his wife, for a divorce by reason of her adultery.

The husband's libel had been admitted. The wife brought in an allegation, charging the husband with adultery and cruelty.

This allegation was objected to by the Queen's advocate and Addams.

Haggard and Harding supported it.

The following cases were cited:—*Durant v. [91] Durant* (1 Hagg. Ecc. 733); *Chambers v. Chambers* (1 Hagg. Con. 439); *Chettle v. Chettle* (3 Phill. 507); *Arkley v. Arkley* (3 Phill. 500); *Worsley v. Worsley* (1 Hagg. Ecc. 734, n.); *Popkin v. Popkin* (1 Hagg. Ecc. 765, n.); *Eldred v. Eldred* (2 Curteis, 376).

Dr. Lushington. This suit was instituted by the husband, charging his wife with the commission of adultery, and praying for a divorce. By way of defence to this charge the wife has brought in an allegation, in which it is pleaded that the husband has been guilty both of cruelty and adultery. Objections have been taken to the admissibility of the first four articles of this allegation, and upon two grounds. First, generally, that it is not competent to the wife to plead cruelty under the circumstances, she being charged with the offence of adultery; secondly, that the articles, assuming the matter to be admissible, are not properly framed.

I will consider both objections in their order.

First. As to pleading cruelty by the wife in a suit brought against her for adultery. Perhaps the decisions on this subject may, in some of the cases, have been stated so briefly as to occasion a little obscurity; but the general rule seems to me to be sufficiently established, namely, that cruelty cannot be pleaded in bar of adultery; by which I understand that, where the wife is charged with adultery, she cannot plead cruelty alone, and contend that, if such cruelty be established, her husband cannot obtain [92] a divorce, although he prove adultery against her.

Now such doctrine, as it appears to me, is perfectly intelligible, and is consistent with sound reason. It is the doctrine of Lord Stowell in *Chambers v. Chambers*. The ground upon which Lord Stowell put it is, that cruelty is not idem delictum with adultery; and it is not a compensatio criminis, both parties not being in eodem delicto. It may perhaps be a more doubtful point whether, where the husband brings a suit for adultery, the wife may not plead cruelty, alleging that she does not plead it in bar, but that she denies the guilt imputed to her, and claims, in the event of it being unproved, to be separated from him on account of his cruelty. I say this may be, perhaps, a more doubtful point; but I am of opinion that it ought not to be doubtful; for, according to my impression of the law, where adultery is charged against a wife, she is not entitled to plead cruelty alone, either in bar or for the purpose of saying, "I am innocent of adultery, and, if I prove cruelty, I am entitled to a separation." I am not aware (and, so far as time would allow me, I have examined the authorities upon this point) of any precedent for the admission of such a plea. I was a little alarmed when the case of *Scrivener v. Scrivener* (November 10th, 1835, not reported) was cited, lest I should have, inadvertently, in any way deviated from the established rule. In that case I acted upon the conviction that a plea of cruelty alone, in the allegation of a wife charged with adultery, was not admissible, and that decision has not been overruled by superior authority. A wife is not preju-[93]-diced by the refusal of such a plea. If adultery is not brought home to her, her right to sue, on the ground of cruelty, will not be prejudiced; and the husband will not be prejudiced by having failed in his charge of adultery; whereas, if both suits were allowed to proceed together, the husband charging adultery and

the wife charging cruelty, the husband might be subjected to unnecessary expense; for, if he succeed in proving adultery against the wife, the establishment of the charge of cruelty against him would not at all avail her for a defence to his suit. I have looked over the case of *Scrivener v. Scrivener*, and I am not prepared to say that I repent of any part of my judgment on that occasion.

In that case the wife was charged with adultery, and she did not, in defence, recriminate adultery, but she endeavoured to raise a prejudice against her husband by charges of harshness towards her, mixing up the charge of adultery against herself with undue jealousy on his part, concluding with a denial of her own adultery, but not charging that offence against the husband at all. I directed all the parts of the allegation relating to cruelty to be struck out, leaving that which related to a denial of the adultery.

The present case is different in its circumstances. Here cruelty and adultery are both charged on the part of the wife; and the question, which is a very simple one, is whether, when the wife recriminates the charge of adultery, she is at liberty to plead cruelty also, by way of defence or otherwise?

Now, on this point I apprehend the authorities to be decisive. There are various cases—certainly there is one case in which Sir Herbert Jenner laid [94] it down that, where a wife pleads adultery by way of defence, she may also plead cruelty. I find nothing in any of the previous authorities which militates against that dictum; although, if there were, I should still be bound by the judgment of the Dean of the Arches, and compelled to follow his decision.

Some little difficulty is created by the case of *Chettle v. Chettle* (3 Phill. 507), in which Sir J. Nicholl certainly admitted a general charge of cruelty, and directed particular facts to be struck out;—why? I am unable to explain. I am anxious to advert to that case because, whilst it does not establish the rule that cruelty is pleadable where adultery is also pleaded, it seems to point out the converse as true, namely, that cruelty is pleadable alone, without adultery. I think, also, there is reason to doubt whether, although in former cases cruelty was admitted to be pleaded with adultery, the party had, on the ground of cruelty alone, a right to a sentence of separation in the same suit.

The result of the cases I find to be this: In *Chambers v. Chambers* especially that cruelty is admissible when coupled with adultery, but not when standing alone. That being so, I think it does not become me to enter into the possible question which may occur in this case, supposing the proof of adultery should fail on both sides, whether, if the cruelty should be proved, the wife would be entitled to a sentence of separation. That is a question which must be reserved until the conclusion of the cause.

I take the true reason why cruelty is allowed to be pleaded in connection with adultery to be this, [95] that it lays a good ground for the probability of the truth of the charge of adultery; for no doubt in very many cases treatment which, according to his marriage vow, a husband ought not to have shewn towards his wife, may render more probable his commission of an act of adultery. This is the substance, though not the precise words, of Sir H. Fust in *Eldred v. Eldred*, when, after reading the passage from Lord Stowell's judgment in *Moorson v. Moorson*—"Indifference, ill behaviour, or cruelty is not pleadable in a suit for adultery, it will not justify criminal misconduct"—he adds (page 380), "But he does not say that it is not pleadable for other purposes." I construe this last passage with reference to the case he was deciding, of a defence by pleading cruelty and adultery, and not a defence of cruelty alone.

I therefore conceive that on principle I am bound to admit the charge of cruelty in this allegation, provided it has been properly pleaded; this brings me to consider the objections as to the form of pleading.

I think I must candidly admit that some difficulty has arisen from the case of *Chettle v. Chettle*; I cannot myself at the present moment understand why the specific charge was struck out and the general charge admitted; though I do not doubt there were sound reasons which induced Sir J. Nicholl so to decide.

I will now proceed to consider the several articles of this allegation.

The first article pleads, "That shortly after the marriage, and during the times that the parties [96] lived and cohabited together, the husband was in the habit of absenting himself at uncertain periods, and without assigning any particular business,

or reason, or occasion for so doing, from his wife, for days and weeks together, and of remaining out absent from her during the whole or the greater part of the night, and not returning home until three, four, and often six o'clock in the morning, and without saying on his return either where or on what business he had been. That on most or many of such occasions he was in a state of intoxication, and on various days and times during such period he, without the slightest cause or provocation, applied the grossest epithets and most opprobrious language to his wife, and often threatened her life, and frequently used personal violence towards her." I will now for the present stop here and consider whether so far this article is admissible. I have no doubt at all as to an article of this description being admissible, but I feel considerable difficulty as to the precise extent it ought to go. This is a difficulty so inherent in the subject-matter of the charge that I fear no pains bestowed by counsel or labour by the Judge could always put such an article into a satisfactory shape. Is the averment generally—that the husband was in the habit of absenting himself from his wife, of returning home in a state of intoxication, and of using threats and violence towards her—admissible. On the one side it is said you may plead generally, on the other that you can only plead specific charges; now, I apprehend that such an averment is entitled to be admitted, and that witnesses may be examined upon it, subject, however, to this, that it is in the power of the Court, after [97] publication, to give the husband the opportunity of defending himself against any charge, which he could not fairly have anticipated, and met in plea. I therefore feel under the necessity of admitting such part of the article as I have before read, and there I think the first article ought to end.

I do, however, object to introducing into a general article anything like the following:—"That in or about November, 1837, whilst living at B., the husband fired a pistol at or near the wife in order to terrify her." The grounds of objection to this are, that many witnesses may be designed to the first article, as it now stands, and it will be utterly impossible to know which of them are intended to be examined on this particular charge; this may lead to expense in preparing the interrogatories, because every witness must be specially interrogated, or the particular witness might escape strict cross-examination on this point. At the same time I think this charge is admissible, only it must be brought forward in a separate substantial article; for I do not think I am at liberty to exclude this particular charge merely on the authority of the case of *Chettle v. Chettle*.

But the next part of the first article is to the following effect:—"That the husband was, on the various occasions of his absence from home, in the habit of associating with divers strange women, &c." I think this part of the article is admissible, but that it is a separate and distinct charge from that contained in the first part, and, for the reasons I have already stated, must be pleaded separately and distinctly.

The second article is to the following effect:—"That the husband, during his residence at B., [98] formed and carried on an adulterous intercourse with several women unknown to his wife." It is objected, and very truly objected to this, that witnesses may be examined upon the latter part of the preceding article to prove this article, because the latter part of the preceding article charges adultery generally since the marriage, and therefore under that general charge would be comprised anything which occurred during the residence of the parties at B. It is impossible to deny this; at the same time it is very difficult to remedy the evil; how is it to be done? Not by excluding from the preceding article the period of time during the residence at B.; that would be a very unsatisfactory mode to adopt; and the second article cannot be struck out, because it alleges more particularly that adultery was committed at B. There is only this to be done in order to put the plea into the most convenient shape; it is to require in the second article that the times during which the adultery was committed at B. should be more specifically stated. By this, however, I do not mean that the article must state the precise day or days, but the periods of time during the residence at B. within which these occurrences are charged to have taken place; so far at least as circumstances will allow.

The third article is intimately connected with the second; the substance of it is to plead that the husband made these women presents of money and of various articles of dress and ornament. I do not think there is any reason why this article should not be admitted as it stands; I do not see that it will lead to the

admission of any extraneous evidence, if proved to the satisfaction of the Court. I do con-[99]-sider that presents of this nature, given to persons of this description, unless some good grounds or reasons for so doing be stated, would furnish strong cause of suspicion, and be auxiliary evidence in support of a charge of adultery.

With regard to the fourth article I see no objection to it.

The allegation must be reformed in the manner I have stated.

STONE against STONE. Consistory Court of London, Nov. 11th, 1844.—Obscene and disgusting language on the part of a husband, entire disregard of decorum will not alone constitute connivance. Facts to constitute connivance must have a direct and necessary tendency to cause adultery to be committed or continued, and such adultery must be clearly proved.

[S. C. 3 Notes of Cases, 278.]

This suit commenced in Trinity Term, 1842, at the instance of Mrs. Stone. The citation called upon Mr. Stone to answer to charges of cruelty and adultery. The libel was given in in Michaelmas Term in the same year.

The husband denied the charges brought against him, and, in a responsive allegation given in Easter Term, 1843, accused his wife of adultery with Lord Sussex Lennox. Adultery with a Mr. Holmes is incidentally stated, but the main allegation of adultery refers to Lord Sussex Lennox.

The wife gave in another plea in Trinity Term, to which were annexed several exhibits. It alleged misconduct on the part of the husband with regard to Mr. Holmes on the 31st of May, 1841, of the nature of connivance.

A report of some of the proceedings in this case, in its early stage, will be found in 3 *Curtis*, p. 341; also p. 721.

The cause was argued in Easter Term, 1844, by [100] the Queen's advocate and Bayford for the wife; by Addams and Jenner for the husband.

Judgment—Dr. Lushington. The parties in this case were married on the 23d of February, 1835. Mrs. Stone was then Harriet Hawkins, widow; her maiden name was Minchin. They had one child, and cohabited together till the 24th of August, 1841. Shortly afterwards a deed of separation was executed. Mr. S. is a partner in a well known banking house in the city, and during his cohabitation he visited with his wife in various places.

Having briefly stated these preliminary facts I come at once to the inquiry, what is proved and admitted in the cause—what is in controversy between the parties?

The adultery of Mrs. S. with Lord Sussex Lennox, in 1842, is proved, and is not denied. Mr. S. therefore is entitled to be separated from his wife, unless he is barred by his own misconduct; to deprive him of his remedy he must have committed adultery, or he must have connived at his own disgrace.

These, then, are the only questions I have to try. It is true that all the circumstances which arise during cohabitation are proper subjects for the comment of counsel and the consideration of the Court, but only so far as they bear on these issues. A great deal may occur in matrimonial intercourse which may deserve severe reprobation; but, unless the circumstances bear upon the questions of adultery or connivance, they are not within the cognizance of the Court.

[101] The learned Judge then proceeded to consider seriatim each charge brought against the husband of adultery; and, having gone through the evidence in reference thereto most elaborately, said, "No charge against Mr. S. of adultery is established."

The judgment thus proceeded: This being so, it follows, as a consequence of law, that Mr. S. is entitled to be separated from his wife, unless connivance at his own dishonour has been proved, or the offence condoned. I use the term connivance in the broadest and most comprehensive sense which, in legal parlance, can be ascribed to it; but it is wholly unnecessary upon this occasion to attempt to define affirmatively the meaning of that term; it will be sufficient to mention some conduct of a husband which may be most reprehensible, and yet not constitute connivance.

I know of no authority for saying that coarse and even brutal behaviour, obscene and disgusting language, entire disregard of decorum, will alone constitute connivance. Such conduct is indeed most degrading to a gentleman, and offensive to all good feeling; but it does not necessarily, either de facto, or by intendment of law, prove that the husband acquiesced in his wife's adultery. Even cruelty and desertion, though tending to induce the wife to disregard her own duties, are not connivance.

Facts, to constitute connivance, must have a direct and necessary tendency to cause adultery to be committed or continued.

The conduct of Mr. S. with regard to Mr. Holmes was the subject of much discussion at the Bar. I will endeavour to ascertain how the facts stand, though it is quite manifest that, as to some part of this [102] branch of the case, the Court is left by both parties in some degree of ignorance. The facts, as I collect them, are as follow:—Some time previous to the separation of the parties in August, 1841, Mr. S., having received a letter from a Mrs. Price, to get franked, read a part of that letter, which he afterwards copied in his own handwriting (exhibit 8, annexed to the libel). It is said, and truly said, that the contents (a) of this extract ought to have excited Mr. S.'s vigilance, and that prudence required that he should have so regulated the intercourse of Mr. Holmes with his family as to secure the honour of his wife. Though this argument is well founded, there is no evidence that I am aware of to establish a judicial conviction that Mr. S. did encourage or sanction the continuance of the intimacy. I infer, it is true, that he did not compel his wife to break off her acquaintance with Mr. Holmes, nor did he discontinue his own intercourse with him; but I must say I doubt if he was called upon to do so merely in consequence of the opinion expressed by Mrs. Price; and the case affords no evidence whatever of improper attachment, or of connivance subsequent to the receipt of that letter, at least till August, 1841. I cannot infer corrupt connivance simply because all connexion was not broken off, nor can I eke out the case by reference to the subsequent finding of the letters, even if the statement and answers as to those letters were to be [103] taken as adequate proof of adultery. This is most clear, that the Court does not know the previous conduct of the parties, nor when nor how such adultery was committed. I do not now know that the adultery might not have been prior to Mrs. Price's letters. I may, indeed, think the contrary more probable, but I cannot condemn a man on mere probability. But how stands the proof of adultery with Mr. Holmes? Why, simply on the answers of Mr. S., and his plea that certain letters of Mr. Holmes were found by him on the 24th of August, 1841, from the contents of which Mr. S. inferred the commission of adultery. Can I act on this conclusion without evidence? Mrs. S. most assuredly could not be convicted of adultery on such statements—the finding the letters not proved, the handwriting not proved, the contents unknown. It may be very true that there could be no proof in this case of the finding, but the absence of proof will not make evidence. I know of no instance where there has been held to be connivance unless the adultery was clearly proved: here it is not even pleaded. It is true that, morally speaking, a man convinced that his wife is carrying on an adulterous intercourse may be, in foro conscientiæ, guilty of connivance, though such guilt may not be provable, or even exist; but I apprehend that in the view of the law, to constitute connivance there must be proof of the conduct of the parties, and proof of the adultery.

This brings me to the last topic in this case to which I think it necessary to advert. I mean the conduct of Mr. S. on the 24th of August, the day the letters of Mr. Holmes are said to have been dis-[104]-covered in Mrs. S.'s depository. The facts alleged against Mr. S. are, that he took his wife and child with him in the carriage to Fulham, and that he treated her during that day with marked attention and kindness in various particulars. Now, suppose the whole of this to be true, what is the legal consequence? under what head of legal offence is this conduct to be ranged? Connivance it cannot be called; for, as I have already said, there is no plea or proof of adultery with Mr. Holmes. Moreover, it could not be connivance at the commission of it, save so far as subsequent conduct may be evidence of connivance; for the discovery of the adultery and the discontinuance of cohabitation are on the same day. The conduct of Mr. S. is not legal condonation; for all know more is necessary to constitute condonation. The most that can be made of it is culpable indifference to adultery discovered. Can I convert that into a legal bar to a divorce, on account of adultery with Lord Sussex Lennox, at a subsequent date, even supposing (though I

(a) The passage referred to is in these words: "T. Holmes is returned from Baden. I am sorry, and so will you be, to hear the world talk loudly of their excessive intimacy. George Stone contributes to this by his conduct. No man ought to place his wife in a doubtful position for one moment, and no woman can, or ought, to defy public opinion."

am not prepared to say that it would so operate) the adultery had been charged with Mr. Holmes?

But I will look a little more closely at the facts; that Mr. S. did take his wife and child in the carriage to Fulham is proved, and he admits the fact, save as to the child, but for what purpose, unless I take it from his answers, which were not read, I have no evidence. Fox (the coachman) says that his behaviour was kind and familiar, and that is the sum of his evidence; I think I cannot infer much from this. As to the evidence of Knowles (the lady's maid), independent of all other objections to her credit, and they are manifold, the conduct she [105] ascribes to Mr. S. is utterly at variance with all probability; she says they were on the best of terms; that Mr. S. paid his wife the greatest attention, much more than usual; and what is the finish? Mrs. S. quits her husband's house that night; then comes a series of letters all manifesting her sense of his anger at her conduct, and desiring, if possible, to obtain forgiveness; added to this a separation by deed. Mr. S.'s conduct in taking his wife to Fulham that day may, if his reason for so doing be disbelieved, have been imprudent and weak, but the whole *res gestæ* are entirely repugnant to culpable indifference to her criminality, and equally so I may add to prior connivance.

I acquit Mr. S. of all legal culpability which can bar him from a separation by the authority of this Court. I am not called upon to give my opinion how far gross and offensive conversation and demeanour, and continued association with persons, not of the purest character, may have tended to destroy all delicacy of feeling in his wife, and so paved the way to the violation of his marriage bed and to all the evils resulting therefrom.

There was an appeal from this sentence to the Court of Arches, in respect of the charges against Mr. S. of adultery and connivance. On the 5th of August, 1845, the dean delivered his judgment, affirming the sentence of the Consistorial Court, and remitted the cause.

[106] THE RIGHT HON. LIONEL WILLIAM JOHN, EARL OF DYSART *against* THE RIGHT HON. MARIA ELIZABETH, COUNTESS OF DYSART. Consistory Court of London, Nov. 19th, 1844.—An allegation was given in by a wife, responsive to a libel for a restitution of conjugal rights, pleading, in bar thereto, cruelty, and praying a divorce.—Held, that the facts, as detailed in evidence on that allegation, did not warrant the conclusion “that a return to cohabitation would expose to danger, or reasonable risk thereof, the personal safety of the lady.”—In consequence her prayer was refused, and that of the husband for a return to cohabitation was pronounced for.

[S. C. 3 Notes of Cases, 324. Referred to, *Kelly v. Kelly*, 1870, L. R. 2 P. & D. 74. Discussed, *Russell v. Russell*, [1895] P. 315: affirmed [1897] A. C. 395. See further, p. 470, post.]

This was a suit, commenced in Trinity Term, 1842, and promoted by the earl against the countess, for restitution of conjugal rights. The cause was argued at considerable length in Easter and Trinity Terms, 1844, by Addams and Harding for the husband, and by Dodson, Q. A., and Haggard for the wife.

Judgment—*Dr. Lushington*. This is a suit for the restitution of conjugal rights. As the marriage is established the onus probandi shifts, and it lies upon the party proceeded against to allege and prove a cause sufficient in law why the usual order of return to cohabitation should not be made.

The primary defence on the part of Lady D. is, that the earl was guilty of cruelty; if that charge be proved, it is clear that not only must the earl fail in obtaining the decree he prays for, but that the countess will be entitled to a decree of separation. It was contended by the counsel for Lady D. that even if the evidence did not legally establish cruelty in the sense in which these Courts understand the term, yet that enough was proved to induce the Court to withhold the customary order that Lady D. should return to cohabitation. This argument raises a question of law of great importance and of equal difficulty; but it is clearly the second question [107] in the cause. I shall, therefore, for the present postpone the consideration of it, indeed, till I have disposed of the main issue.

It is wholly unnecessary to say a word as to what constitutes legal cruelty. The meaning of that term, as used in these Courts, has long since been settled by high authority; moreover, in discussing the acts charged I must inevitably advert to the

standard by which I am bound to measure their effect. The present case is in some respects different from those which ordinarily occur of the same genus, and I regret to say in particulars which enhance the difficulty of ascertaining the truth.

The marriage took place on the 23rd of September, 1819, twenty-five years since, and the final separation in April, 1837, and, added to this, during the whole of this long period the parties cohabited together under the roof of Lord Dysart for a space not exceeding three years; so that I have to consider evidence taken in some instances twenty years after the fact, and even as to the most proximate act of cruelty alleged, more than five years after its occurrence. There are two evils resulting from this state of things, both enhancing the difficulties of discovering the truth; the one is, that the memory of the most veracious witness may fail after so long a lapse of time, and this is peculiarly injurious in a case of cruelty, when so much depends on a knowledge of the whole transaction; the other is that, where the actual cohabitation has altogether occupied so short a period in a married life of so long a duration, the Court is deprived of the ordinary means of tracing the general conduct of the parties. I allude to these circumstances, since they have made a strong [108] impression on my mind, and should the reasons I give for my judgment not prove satisfactory, they may, in some degree at least, account for it.

I must now briefly trace the history of the parties. At the date of the marriage, in 1819, the earl was Mr. Manners, the eldest son of Lord Huntingtower; his grandmother was the Countess of Dysart, who survived her son. He (Mr. M.) was united to Miss Toone, the daughter of Colonel Toone, a director of the East India Company, and she was his own first cousin. Lord Huntingtower was possessed of very large estates, which I apprehend from the tenor of the evidence were entailed upon his son, but as this marriage was against his wishes, he withheld from his son all pecuniary assistance. The issue of this marriage was one son, born in the year 1820.

Here, for the present, I shall stop; it is certainly not my duty to enter into family details and disputes beyond what is indispensably necessary for the purposes of justice, and most assuredly I have no inclination so to do; but I fear that hereafter, in the discharge of that duty, I shall feel compelled to advert to some particulars on which I would willingly have been silent.

In considering what would be the most advisable course for me to take in framing this judgment it occurred to me that, as the cohabitation lasted till January, 1837, the true question was, whether an act of cruelty had been committed since that date, for the cohabitation as husband and wife was a condonation of all past cruelty, which could be revived only by proof of a fresh act of cruelty. Such act of cruelty is alleged to have taken place on the 23rd of January, 1837, and if such act be not proved, then, [109] according to the fixed principles governing all these Courts, the former acts of cruelty cannot be revived. If such alleged act of cruelty be proved, looking at the nature of the charge, the probable, though by no means the certain, consequence would be that Lady D. would be entitled to a divorce. This would be apparently the simplest mode of viewing this case; but as the previous conduct of the parties may have a bearing upon the transactions of January, 1837, and the credit of the witnesses may depend, as to this act, also in some degree upon their evidence as to others, I shall pursue a contrary course, and follow in some respects the line adopted by counsel; namely, look at the facts as they stand in order of time; still the main question is that which I have stated, and which I must not lose sight of.

From the time of the marriage till December, 1820, the parties resided under the roof of Colonel Toone. The first complaint against the conduct of Lord D. is in date, on the birth of his son, in July, 1820, pleaded in the 6th article of Lady D.'s allegation. The only witness to prove that article is Elizabeth Tanswell, speaking nearly twenty-three years after the transaction occurred. The answer of Lord D. has been read, as well as a letter from his lordship to his wife, dated September 26th, 1820. What is the charge, according to the evidence of Mrs. Tanswell? That Dr. Battye requested Lord D. to leave the room; that he declined to do so, unless his wife desired him; that she did so request him, and then he left it in great haste, as if much offended. Without adverting either to the answer or the letter it is to my mind most clearly manifest that no ingenuity can strain this conduct [110] into an act of legal cruelty; it has none of the characteristics of such an act; it has nothing to do with personal violence or menace; the utmost that can be made of it is that Lord D. took offence hastily, without sufficient cause, and manifested it imprudently, considering the

occasion. The answer and the letter carry the case no further ; indeed, if the answer and the letter are to be considered, the whole must be taken and not a part only ; and then the gravamen, if such it could be called, of this charge would be still more diminished, for it would be seen that it was the countess who had changed her mind as to the earl being present, and not that he insisted upon it. As to the propriety or impropriety of all this, it is not within my province to pass an opinion. I see no proof of any intention on the part of Lord D. deliberately to cause suffering to his wife. The letter to which I have adverted shews that, at this early period of the cohabitation, the affection between the parties had suffered some interruption, and a state of feeling had been generated, which was not likely to promote their happiness, when they should be dwelling together alone under the same roof.

About the 21st of December, 1820, the earl and countess took up their residence at Edmonthorpe, where they remained till April, 1821. The 8th, 9th, and 10th articles contain the charges of misconduct said to have occurred at that residence ; and here it may be expedient to notice the statement that the house was dilapidated, and almost unfurnished.

I wish to consider what are the principles of law which must be applied to all averments of that des-[111]-cription, and further, with respect to the mode of living adopted by the earl ; and in reference to this it was observed that his lordship had at that time an income of 3000*l.* per annum, and so he had, but in fact it was all borrowed money.

It would be difficult and dangerous to attempt to lay down any precise rule as governing the conduct of a husband in his mode or rate of living, so far as concerns his wife. The Court has no authority to decide thereon, save so far as it may fall within its jurisdiction, and its jurisdiction is limited to cases of cruelty. Even, however, within this very limited range it is obvious that the means and rank of the parties must raise some distinctions. The denial of necessities and comforts, even of medical assistance when there are no pecuniary resources, never can be construed into acts of cruelty ; but no one could, I think, entertain a reasonable doubt that such a denial, when the fortune was ample, might probably, under circumstances, be considered differently. It also appears to me equally clear that necessities and comforts must have some relation to the rank and station of the parties ; where they are in totally different ranks of life the words "necessaries and comforts" imply not the same things ; the want of some would operate altogether differently. A wife brought up as a gentlewoman would suffer in her health and constitution, nay even her life might be endangered by a mode of living which would be comfortable to a female in a different mode of life. This, I think, is quite apparent, and such must be the mode of viewing these cases when they occur. Let there, however, be no mistake. I speak of necessities and comforts, not of luxuries or enjoy-[112]-ments. Whether the question relate to house, furniture, carriage, or provisions, the Court abjures all right to enter upon it, beyond ascertaining that the health and ordinary comforts of the wife are preserved. As to everything beyond this, the husband, so far as the law is concerned, is the sole judge, and to his will the wife is bound to submit. No human tribunal has authority to interfere, and none could interfere with real benefit to the public interest.

The two witnesses to establish the circumstances pleaded to have occurred at Edmonthorpe are Elizabeth Tanswell and Eleanor Woodley. As regards any personal violence offered to the countess, though pleaded in the 9th article, the proof wholly and entirely fails. The facts pleaded in the 10th article, as to quitting the house in April and deposed to by the witnesses, were admitted by her ladyship's counsel not to constitute cruelty. Then what remains of this part of the case ? Why, that the house was out of repair ; in that both the witnesses agree, but they differ as to the quantum of furniture. What is to be made of this, or the statements as to the provisions, which are so vague and in some respects contradictory as to prove nothing at all. It is useless to examine the opposing evidence, for this part of the case falls by its own weakness. After quitting Edmonthorpe the countess appears to have resided with her father till January, 1822 ; she then joined her husband at Irnham, where she remained till August, 1822. The articles which relate to this period are the 11th, 12th, and 13th. The witnesses to prove them are Elizabeth Meginley and Mary Ann Holmes. I should have been desirous of con-[113]-sidering these occurrences separately if I had found it practicable, but I find it necessary to unite in the same consideration

the charges pleaded in the 14th and 15th articles which apply to a subsequent residence, viz. from July, 1823, to April, 1824; I find it requisite so to do, as the witnesses do not sufficiently distinguish the periods.

As to the state and condition of the house I shall say nothing; for I am clearly of opinion that were I to take the whole of the affirmative evidence as true, without regard to the testimony on the other side, the facts do not amount to legal cruelty. My attention will be applied to the alleged acts of personal violence. The first transaction which can, by possibility, fall within that class is the circumstance deposed to on the thirteenth article by Elizabeth Meginley. [The learned Judge here read the evidence referred to, and then proceeded.] What does this evidence, in substance, amount to? That the witness heard an altercation take place between the earl and countess; that she then went to the door, which she found locked, but which was opened by his lordship, and then she found the countess in a fainting fit. No one can, I think, contend that this is proof of cruelty: here is no evidence either of personal violence or threats, but merely of an altercation and a fainting fit. As to the conduct of the child on the occasion, it would be most extraordinary were I to found any conclusion on the conduct of one not four years old, let the occurrence have taken place when it may; moreover, the date the witness is unable to fix.

To proceed with the evidence of this witness: [114] I come to the transactions mentioned in the fourteenth and fifteenth articles, and here again Meginley is equally unable to specify dates or times. [The learned Judge here read the evidence referred to, and then proceeded.] Certainly the evidence upon these two articles, taken together, approaches much more closely to a case of personal ill-usage. The substance is, that Meginley heard the parties quarrelling upstairs; that his lordship was in a violent passion; that he and his brother brought the countess down in a fainting fit. But the most important part of this testimony is given in the fifteenth article, whence it appears that Mr. Felix Tollemache, on the next day, fetched a medical gentleman, who prescribed for her ladyship and also sent a lotion for an injury said to have been inflicted by the earl. It cannot be denied that this evidence, if true and uncontradicted, does prove that some injury had been received by the countess in the quarrel of the night preceding; though I entertain some doubt whether I can admit the declaration of her ladyship, attributing the injury to a kick from the earl. I entertain the doubt for this reason—it appears not when that declaration was made: to render it admissible evidence it ought to have been made *recenti facto*. The charge rests entirely on that declaration; for the witness says, on her cross-examination, the 28th interrogatory: “I was not an eye-witness of anything that passed upstairs.” Mary Ann Holmes throws no light upon the transaction; indeed, she knows nothing of any important part of it. She speaks of the commencement—a matter of very slight import—[115]—ance, namely, that the countess went to his lordship for a rush-light, it being against his wishes that she should go upstairs.

Here ends all the direct evidence as to these averments. I am not aware that any other witness speaks to any of these allegations of personal violence. Can I say, then, that these (I allude to the last transaction) are satisfactorily proved? Can I trust implicitly to Meginley? I see no reason to infer, from any part of her evidence, that she wilfully desires to mislead the Court. It is but justice to her to say that she is a careful witness, not deposing as a partisan; still, as to the main facts, she is a single witness, one attached to and under some obligations to Lady D.; and what interposes a still greater difficulty, that which alone immediately concerns the act of violence, is a declaration of her ladyship, non constat when made, and this related by the witness twenty years after the time. Were this a single point on which the whole case might turn, I confess the question might admit of great doubt; but I cannot so dispose of this case: I must look at all the circumstances, and then give this incident the weight to which I think it fairly entitled.

I shall follow the course of the allegation and proceed to notice the sixteenth article, which pleads that the earl took for a residence a cottage at Corby, in April, 1824, and his conduct whilst there. I think I can comprise in a few words all that I conceive it necessary to say on that subject. The conduct of the earl in all that relates to this residence was marked by circumstances of extraordinary eccentricity. The Court is not called upon, [116] in the exercise of the functions confided to it, to find any explanation of such conduct, and I certainly will not travel out of the way to try to make the discovery. When I find conduct towards a wife likely to prove

dangerous to her safety, but not in other cases, I shall consider it within my cognizance, whatever may have been the cause thereof, whether having arisen from natural violence of disposition, from want of moral control, or from eccentricity. It is for me to consider the conduct itself, and its probable consequences; the motives and causes cannot hold the hand of the Court unless the wife be to blame, which is a wholly different consideration. In plainer words, even if I were satisfied that conduct dangerous in itself arose from morbid feelings, out of the control of the husband, I must act, if the danger exist, though it is not my province to inquire into or ascertain such cause. In the present case, however, I am not required to say whether, if there had been no charge of cruelty, I would have interposed my authority to compel the countess to return to her husband whilst living at Corby. All I am called upon to say is how such residence and mode of life twenty years past affect the present suit; and I answer, directly not at all, and indirectly only so far as they are ingredients of the case, not to be entirely lost sight of when I come to view the case as a whole.

In the year 1825 the countess, as pleaded in the seventeenth article, went to Buckminster, and I think it is proved that she did so by desire of some of the earl's family: but it is unnecessary to go through the evidence on this article; for, assuming it to be true, as pleaded, that the earl refused to go [117] over to Buckminster to see his son when dangerously ill, such circumstance cannot affect the issue which I have to determine.

Lady D.'s second visit to Buckminster is more important: it took place in July, 1826, and there she continued till the spring of 1827. His lordship had been induced, also, to take up his abode in his father's house, and during this renewed cohabitation, ill-usage, amounting to legal cruelty, is charged against him. I will examine the evidence to see how far it is proved.

The only witness to prove the affirmative is Elizabeth Parker, then a housemaid in Lord Huntingtower's family, and since, and when under examination, in the service of Mrs. Toone, Lady D.'s mother. This witness deposes to very strange habits in which the earl then indulged—to his locking up his bedroom, and excluding his wife and all other persons till most unreasonably late hours, no doubt to her great annoyance and inconvenience. However vexatious this conduct was, it is of importance only as shewing the spirit by which the earl was actuated, and his disregard of his wife's comfort; alone, it cannot be called legal cruelty.

The language which the earl applied to his wife is certainly, if this witness be credited, of the foulest and most disgraceful description, shewing that at the time it was used he was totally forgetful of all respect for himself, and all delicacy towards his wife. Such language alone may not be cruelty in its legal sense, but the use of it would induce the Court more readily to believe evidence as to personal violence, for it would manifest a total want of [118] self-command, and an absence of all controlling principle.

The evidence of this witness, as to personal violence, is this: That she did not witness any pinching or actual violence, but she heard the countess scream "murder," and has seen her in hysterics; she has seen the marks of pinches and bruises, which must have been caused by violence, but did not witness it. I am not aware of any authority, or even principle, which would justify me in saying that those marks must have been occasioned by the earl; and, what is equally material, that force was used in a manner and form to constitute legal cruelty. I have the more difficulty in coming to this conclusion when I call to mind the violent personal squabbles which afterwards ensued; in which, as I think it will presently appear, both were in some degree actors.

The countess quits Buckminster in June, 1827, and does not return thither till 1834. During the whole of that period (seven years) she resides with her own family, and at their expense, though occasionally the earl visits her, and they cohabit as husband and wife. This residence apart from the earl is pleaded to have been with his consent, and I think all the circumstances shew that it was the result of mutual consent.

In 1833 Lord Huntingtower dies, and the cohabitation is again renewed (it matters not for what particular reason) in Hyde Park Place, and continues for a short time. On behalf of the countess there is no oral evidence as to any misconduct until her return to Buckminster, which occurred in 1836. It is to the occurrences which took place from that [119] time till the end of the cohabitation that I must now address

my attention. I must do so with the view of ascertaining whether such acts of cruelty were committed as would revive all former acts, if any such there were, and have the effect of entitling the wife to a separation; for it must not be forgotten that this return to cohabitation, from whatever motive, operated as a legal condonation of all the past, be that what it might.

The transactions I am about to consider are, in my judgment, beyond all question the most important to the decision of this case; not only because, without them, her ladyship's case, if every letter was proved as laid, must fail in bar, in consequence of the admitted condonation by renewed cohabitation, but also because the transactions, though they are now of seven or eight years' standing, are the most recent, and respecting which the hope of something like accurate evidence may with most reason be expected.

Here I shall pursue my former course and take the affirmative evidence first into consideration; indeed, hitherto I have examined none other. In order to make my observations more clear I shall endeavour to make a division of the subject-matter; namely, of the occurrences that took place between July, 1836, and April, 1837. First, general ill-treatment, and in this I include words of abuse and improper deprivations. Secondly, conduct directly falling within the definition of legal cruelty.

Mrs. Hill is the only witness produced by the countess in support of this part of her case. I shall examine what she has proved, assuming for the present that she is entitled to credit, and not contradicted. Her [120] credit and the opposing evidence I shall consider afterwards. Without travelling through all this evidence, in all its details, the result appears to be that the earl kept everything under his own control at Buckminster, including all those matters which are generally committed to the charge and superintendence of a lady; that the house was in many respects in a most uncomfortable condition, there being but one sitting-room for all purposes, and the furniture, carpets, and all similar matters not arranged with any due regard to her ladyship's accommodation; a very scarce supply even of coal, linen, and tea things, and, in one particular respect, a disregard for Lady D.'s health and comfort, which is very disgusting, and this for the almost incredible purpose of obtaining manure for the land; that there was abundance of provisions, though coarsely cooked, is, I think, beyond doubt.

Conduct of this description is petty tyranny. It may shew either a miserly spirit of penuriousness, or a very peculiar disposition of mind, or a very culpable indifference to the happiness and comfort of a wife. Such disregard of feelings, and even of proper decency, may be a breach of moral obligation, though I am not prepared to say that I could impress such facts into the limits of legal cruelty, limits which both my duty and conviction would prevent me from extending. All these circumstances, therefore, even combined, I consider not to amount to cruelty; but they are not unimportant with regard to other matters, as indicia of the mind and disposition, and of the animus with which acts were done.

Here, again, I am compelled to observe that, [121] according to the testimony of this witness too, language appears to have been used by the earl to his wife which, if applied by any man to any woman, even in the lowest grade of life, could not be grosser. If really, under any circumstance, the earl did so entirely forget what was due to his wife, against whose moral conduct there is not the slightest impeachment; if he did so entirely lose all control over himself as to use the expressions imputed to him, most assuredly no words of condemnation would be too strong; and though the expressions did not contain threats, to which, however, there is some approach, the effect on the mind of the Court would be (not that abuse, however outrageous, is alone legal cruelty) that such total abandonment of self-control is a circumstance admissible to shew the danger of future cohabitation; and if personal danger there be, then this Court is bound to afford protection against it.

But to come to the more material parts of the evidence of this witness: Mrs. Hill says on the thirtieth article: "I remember a particular circumstance that occurred at Buckminster about the 8th of December, 1836. I speak to the date now from recollection; but I have a memorandum of it, and of much besides that occurred there. I have it not with me now. I made it while there at the suggestion of Lady Dysart. In the evening of which I am now deposing as inquired of, I went upstairs to my lady's bedroom (I cannot say the hour—perhaps from ten to eleven o'clock), in consequence of what I heard from other servants, and when I got there I saw Lord

and Lady Dysart both lying on the floor together, he under-[122]-most, on his back, holding her by the hands, she lay with her back on his chest, with her hands crossed before her, so that his arms were round her; he appeared to be holding her forcibly. Her ladyship told me she should be strangled; there would be no fear of that, I think, though she might have been hurt on the chest from the manner in which he held her. She told me to fetch a pillow for her head, for in the direction in which she lay it was hanging. I fetched it, and then his lordship told me to put it down 'there,' which I did, thinking it was for her ladyship's head, but he immediately clapped his own on it, and said it would do very nicely. He said more, but I do not remember his words, apparently as if he wished to turn it off as a joke. From what passed while I was in the room I understood it to have begun from a dispute about a new housemaid, whom Lady Dysart would not allow to make her bed, which Lord Dysart insisted she should. He held her till she should say something that he wished her to say, but she for some time would not—I suppose for as much as half an hour after I was in the room; and when she said it, whatever it was—some nonsensical thing it seemed to be—he let her get up. I observed that her ladyship's wrists were discoloured for some days afterwards, and she complained of her bosom also. She was hurt—I do not know I could say seriously. She was bruised, and appeared to be sore for some days."

On cross-examination, the 29th interrogatory, she says that when she entered the room, Lord Dysart "might possibly say, he did say, 'Here, Shaw; here's [123] a pretty piece of business!'" and she adds, "They were laughing part of the time:" and on the 30th interrogatory, "When I went into the room as he held her, she was kicking at his shins as well as she could."

I shall not waste time in endeavouring to ascertain the origin of this dispute; indeed, the evidence would not enable me to do so satisfactorily, for it is rather the belief than the knowledge of the witness. There certainly was the use of force for an object not justifiable, namely, to compel Lady D. to make some promise or declaration. I am not satisfied, however, that all this was done in the spirit of lawless violence; I am not clear that both were not equally to blame—that this scuffle, or whatever else it may be called, was not a species of horse-play, in which both to a certain extent participated. The result in my mind is, that this transaction cannot be imputed to Lord D. as an act of legal cruelty.

The most important transaction of all still remains to be examined. I again refer to the evidence of Mrs. Hill, on the 32nd article; she deposes: "On the 23rd of January, 1837, being in my own room, about ten o'clock at night, I heard Lord and Lady Dysart come upstairs, and also William Pick, a man who waited upon his lordship. They went into Lady D.'s bedroom, and soon afterwards I heard the sound of high words between my lord and lady. Presently afterwards I heard Lady D. cry out 'murder,' and thereupon I went into the room. Lord D. was sitting on the floor, with his legs extended, holding her ladyship before him much in the same way as on the occasion before deposed of, only they were sitting, not lying. He was then holding her [124] and treating her with violence; he was in a passion; he grated his teeth, and called her all manner of bad names—a monster, a devil of hell, an infernal beast, and bitch and whore, with many more gross terms. Her ladyship screamed and told us to go for a constable. Lord D. said if Pick or I went for one, we should never enter the house again, 'He was master of the house,' he said, 'and he would be master of every one in it.' He held her as I have said for, I believe, as much as an hour and a half, forcibly all the time, abusing her a great part of the time, enraged part of the time, and pulling or twisting her hands and wrists, as he held, so I should think, to hurt her seriously; it really was cruel and brutal treatment. Lady D. made very little reply to him during his greatest fury; she never said a word; after a while she asked him to let her get up, and he said that he would not, unless she said something which I do not exactly remember. I think that it was some kind of promise he required of her about throwing water out of the window, but I do not remember the words. She asked him to let her get up repeatedly, but he would not except as I have said; he told her that he mortally hated her, that he had not been in her room before for ever so long, and he would not come again but on business; that if the law allowed him he would give her a damned good thrashing, but he knew that he could not do that, and therefore he would punish her as he did, for he hated her mortally, and he would say so if he had but three minutes to live. He said that she

had been a torment to him as long as they had been married, but she had given herself more airs since she had been at Buckminster that time than ever she had [125] done before, and he would take care she should not be master over him as long as she staid. When speaking about either of us (Pick or myself) going for a constable, he said if we did he would kick us burning to hell; not if we obeyed any order of Lady D., but if I went for a constable, and then he insisted on all the servants going to bed. I think that at last, as she was obliged to say what he required of her, that she did say it, whatever it was, and then he let her go, but she was so cramped by his holding her that she could not get up without his help and he did assist her to get up. Lady D. was bruised and hurt seriously on this occasion; he pulled and tore at her enough to jerk her arms out of their sockets; he looked and acted more like a demon than a human being; her wrists and arms were very much discoloured and bruised and strained. I was alarmed for her as she was in his grasp; I really feared that he would dash her brains out on the floor. When at last she was released and raised, Lord D. said that he should go to dinner as soon as he was cool, but that he was too hot then, and so he left the room. It was then between eleven and twelve o'clock. Lady D. then went to bed intending and resolved, as she said and I believe, to leave Buckminster the next day, but she was hindered."

If this evidence be credible in all its parts, if it be not corrected by cross-examination, or contradicted so as to discredit the witness, or give her testimony a different complexion, I am of opinion that the acts deposed to do constitute legal cruelty.

All personal violence may be legal cruelty; it matters not whether the act consist of blows or other use of force. Here is evidence of personal suffering, [126] of injuries actually inflicted, accompanied with the most violent abuse, and all done in a spirit of violence, and for a cause which never can justify such conduct.

The interrogatories that apply to this part of the case are the 35th and 36th. The greater part is a repetition of what Hill stated in her evidence in chief; still there is a portion in my opinion of importance. She says in the 35th: "She" (Lady D.) "did, I think, get up, being released by him soon after she had made the promise required of her. I was not laughing all the time as interrogate; at first it was no laughing matter at all, afterwards I very likely did laugh at some of the strange expressions which Lord D. was in the habit of using, otherwise I did not. There was no laughing or joking between them that night as I remember; a great deal more passed, and there was a good deal of jangling, but not any joking; when I laughed, it was at such expressions as that no one scarce could help it. Lord D. remained in the room for about half an hour after releasing her, having so held her for as much as, I think, an hour and a half. They parted on unfriendly terms. I do not think that Lady D. spoke to him after she got off the floor." On the 36th interrogatory the witness says: "No other person was present, during any part of the time, but William Pick; that Lord D. did grossly abuse his wife, who called him 'a monster, and a wretch.'"

I must bear in mind that this most important part of the case depends on the evidence of Hill alone. Her credit, therefore, becomes of the greatest consequence, as does her consistency. Here I would observe it does seem strange that, if Lord D.'s con-[127]-duct was such as she has represented it, cruel and brutal, she herself, as she admits, could not help laughing.

With respect to the credit of this witness, her general character is unimpeached, and I am of opinion that her evidence is fairly and candidly given on the whole. In her very long examination and cross-examination I perceive no wilful intention to go beyond the facts within her own knowledge; on the contrary, there are very many occasions where there was a favourable opportunity, of which she has not availed herself, for a corrupt witness to have deposed favourably to her own wish. Her evidence does not present one side only of the transaction; those parts which impute to the earl conduct, in ordinary cases, the most improbable (such as his mode of life, habits, &c.), are not denied, but in fact admitted, and are consonant with all that occurred at Edmonthorpe, Irnham and Corby, indeed, with the tenor of his whole life. As to any bias on her mind from her situation, I think so much attaches, as usually does to a lady's maid; for I do not imagine that the experience of the oldest practitioner can furnish an instance of such a person called on to depose for her mistress who had not a bias. She may have cause of anger against the earl for the action he brought, but I cannot conclude that therefore she would perjure herself.

The evidence of this witness, however, does not dispose of this part of the case; it is my duty now to consider what evidence on the other side applies, and to ascertain the effect of it.

The 57th article of Lord Dysart's allegation counterpleads the 32nd of Lady Dysart's. But I [128] may observe that, if all the allegations contained in the earl's be true, though they would to a considerable extent alter the impression made by Mrs. Hill's evidence, still they would not justify Lord D. altogether, for the most prudent conduct on his part would have been to leave the scene of disturbance without resorting to the violent measures he did adopt. The 57th article assigns the same origin to the dispute, namely, the throwing slops out of the window, but charges Lady D. with the aggression, and states that the restraints were in self-defence only.

William Pick, the only witness produced on this article, deposes: "I was in her ladyship's bedroom one afternoon about four o'clock in attendance on my lord, who was there with her, when they two got to words about my lady throwing slops out of the window, which my lord did not approve of, but she said she would; after they had been arguing upon it for some time my lady flew at my lord as if to tear his hair, to hinder which my lord caught hold of her, and as she was going to kick him, my lord said he must lay her down, for his legs had not recovered the last of that, so therewith he laid her down and held her, which he said he would continue to do till such time as she should promise not to throw any more slops out of the window. I went away for some time by his lordship's leave; I don't remember Shaw (Mrs. Hill) being there at all that time. I do not remember my lady calling to me to fetch a constable. I never heard my lord say such a word as 'damn the constable or me,' or that if any one went for a constable or obeyed any orders of his wife he would 'send them burning to hell.' There was no violence that I saw towards [129] my lady; she was in a great passion, but my lord was cool; he held her and he laid her down because, as he said, his legs were bad, and he should not like to be kicked again, but that is all that I saw; I know that paying him off and tearing his eyes out were expressions of her's that she commonly used on these occasions. I think that when I went back in about an hour they were friends again. I did not hear my lord say that he would hold her down to punish my lady, but only that he would hold her till she promised not to throw the slops out of the window."

According to this account the transaction took place at a much earlier hour of the day, namely, four o'clock. Pick was present at the beginning, but knows no more; he does not remember Mrs. Hill being there. The conclusion of his evidence does not support the plea. If it be correct, Lord D. said he would hold Lady D. till she promised not to throw slops out of the window; not, as pleaded, till she ceased further violence. This is not an unimportant variation, for it applies to the doubt whether the force was used to prevent violence or to extort a promise. To protect himself Lord D. would be justified in what he did, but not for the purpose of extorting a promise.

It is clear that Pick's evidence cannot be deemed a contradiction of Hill's, as he was not present during the whole of the transaction. The commencement rests solely on his evidence, and the conclusion on the sole evidence of Hill. The question comes to this: Am I to take it as true that without provocation the earl attacked the countess when the dispute as to the slops arose? An act of [130] personal violence was certainly committed by the earl; that is admitted in plea; the doubt is whether Lady D.'s conduct provoked it, and rendered it necessary in self-defence. Certainly all that passed in this disgusting business was likely to irritate the countess, or any woman of common decorum; but that it gave rise immediately to an act of personal violence on her part it is difficult to believe, seeing that Lord D. is described as being a most powerful man, and remembering that he was not only a master, but a tyrant, in his own house.

It becomes my duty, in this difficulty, to inquire a little further into the credit to be given to Pick. It is very difficult to describe his evidence: the main defect, as a means of guiding my judgment, is its generality—its want of particularity in the most important points. I cannot discover to what time the witness is referring. It is the evidence of an ignorant man of no education, and his recollection preponderates too much to the side on which he is produced. He describes all the mischief as originating with the countess, and seems wholly incapable of apprehending what feelings certain circumstances must give rise to in persons in a totally different condition of life from

himself. There is, however, another fact deposed to by this witness, which shews that the earl did resort to this personal restraint, which is violence, when no attempt had been made, in any way, against his own person. I refer to Pick's evidence on the fifty-sixth article, giving an account of an after-dinner scene: "My lord's napkin lay on the floor, and my lady kicked it; my lord told her not to do [131] so, as he did not like his napkins being kicked. Her ladyship not giving over, my lord took hold of her, and laid her down on the sofa, not hurting her at all, but just to hold her ladyship till she would promise not to kick his napkin again."

Here is a very strong instance of the use of force for no adequate cause, though I do not know that I can treat it as an act of personal cruelty. However greatly to blame the countess might be in giving this provocation, still it did not justify the earl in the course he adopted.

As Pick's evidence is of importance, I shall read his answer to the eighty-fifth interrogatory: "Lady Dysart was, during her stay at Buckminster, uniformly kind and considerate to the servants—to all of them. She did contribute, all in her power, to their comfort and happiness—I believe she did. I do swear that the ministrant had the necessaries and comforts that she ought to have had—all of them, as I believe. I believe I can say, on my oath, that the conduct of Lord Dysart towards her was kind and considerate. I do not remember that it was a subject of remark or surprise amongst the servants that she should remain at Buckminster to be so treated and abused."

No person, I conceive, who considers the evidence I have read can come to the same conclusion, and believe that this answer contains a correct statement, though this witness may possibly believe it does; for the whole facts not in controversy, as to the state of things at Buckminster, give a negative thereto. When I recollect that this witness was so peculiarly accommodating, in all respects, to the earl—when I look to his conduct at Corby and [132] elsewhere, and find that he was rather a slave than a servant, I do not hesitate to say that on his evidence, unsupported, I can place no safe reliance. I have now finished my examination into the charges preferred by the countess against her husband; but before I express any further opinion as to the effect of this evidence, and its legal consequence, I must consider the conduct of the countess, as it is to be found in the evidence given on behalf of the earl, and in her own letters, and lastly, what has occurred since the cohabitation ceased in January, 1837.

The first part of my duty will, I rejoice to say, for obvious reasons, be speedily disposed of. The earl prays restitution of conjugal rights; he brings no charge against his wife, save so far as is necessary for his own defence against her accusations: he does not seek a separation from her, but that she may return to him. He says that by no part of his conduct has he forfeited his right to compel a return to cohabitation. This is the legal state of the record, and out of it I cannot go in search of motives and reasons in the mind of the one party or the other. In the view I have already taken of the case, I have disposed of nearly all of the early transactions upon Lady D.'s evidence alone, and not to the disadvantage of the earl; it is wholly useless, therefore, to refer to his evidence as to Edmonthorpe and Irnham, or to the state of the house, furniture, or provisions. The same observation applies equally to Corby and to Buckminster, save as to the recent transactions preceding the final separation.

With regard to Lady D.'s general conduct, whether provoking or not, the evidence on both sides [133] is not conclusive. All agree that her ladyship was a kind mistress, but some say she was disposed to irritate her husband. Even if this were so, in this case, I could found no conclusion upon it, any more than I could on the evidence from Lord D.'s own witnesses that he was a passionate man, but forgiving. I cannot so far lose sight of the nature of the whole establishment and general conduct of the earl as not to know that her ladyship must have had cause, and constant cause, for irritation; in human nature it could not be otherwise; but I by no means, on that account, justify her in the use of intemperate and improper language, much less any personal violence.

There is one charge against the countess, namely, the use, on several occasions, of most improper language, as related to the maid-servants. Fanny Christian, as well as William Pick, depose to this on the fortieth article. I cannot say that these witnesses, supported as they are by an exhibit (No. 56) in her ladyship's handwriting,

which tends to give some credit to the statement, are to be discredited. I cannot acquit her ladyship of having used some such expressions, though, considering the lapse of time, all the words deposed to may not be truly stated.

There is no question that to the earl the countess did express herself in terms which no provocation could justify, though the language he indulged in must have caused the greatest irritation. I do not acquit the countess of blame on this account, quite the contrary; yet it is not easy to describe what weight is due to it in the decision of this cause. It will not excuse an act of cruelty proved; still it [134] does go a great way to disprove cruelty, since no one having suffered cruelty would use language immediately calculated to provoke a repetition of it. Fear would prevent that, and the absence of fear tends to shew the absence of cruelty.

There is, however, an expression attributed to Lady D., and deposed to both by Wm. Pick and Fanny Christian on the forty-first article, of so disgusting a character that, though I feel bound to allude to it, I decline to repeat it. There is positive evidence of the utterance of the words; but I must say that the evidence is in many respects deficient in probability; and for this reason, according to the testimony of these witnesses, nothing gave rise to the use of the expression; there was no previous quarrel, and what is most singular, no anger excited on the utterance. Is this credible? The earl is represented by all the witnesses as a passionate man. Did his passion slumber then, when the charge, if made, would have roused the most passive and inert of human kind? Could the parties after this have continued to cohabit? Is this possible? I must say I entertain considerable doubt as to this story.

I will conclude this branch by referring briefly to the evidence of the brothers of Lord D. Their testimony has very little bearing upon the most important parts of this case, and necessarily so, as they were not even in the house at any period of the alleged acts of cruelty, which must and ought mainly to occupy my consideration. I do no injustice to Lord D. in taking this course, as, without having recourse to it, I give him the entire benefit of their evidence. I attribute no blame to his lordship as to the transactions at Hyde Park Place, or the disputes of 1836, [135] and therefore it is needless to go further at present. A task, painful in many respects, still remains to be performed; I allude to the exhibits produced in the cause and begin with Lady D.'s letters. In commenting on these documents it is my duty, and most assuredly my inclination, to confine myself to what applies to the issue in the cause, the charges of cruelty and the defence thereto, including also of necessity the general character of the cohabitation.

I must divide the letters into classes. The first five were written between August, 1821, and August, 1822; and though they certainly give some insight into the motives and conduct of both parties, they require no particular comment, especially as I have disposed of the Edmonthorpe affair. The next series is (No. 6 to 20) from 1822 to 1827. The whole tenor of these letters unquestionably shews undiminished affection and attachment on the part of her ladyship; they are wholly inconsistent with the fear of ill-usage, which must have existed, if all charged at Edmonthorpe and Irnham were true. These letters are produced by the earl, not for the purpose of supporting any charge against his wife, but to shew that what she wrote is inconsistent with the charge she makes of cruelty and indignity suffered at Edmonthorpe, and in that respect they are most important. I must presume that these letters speak the true sentiments of her ladyship's heart, and of that I see no reason to entertain a doubt, for they openly and most unreservedly express many opinions in entire opposition to his lordship's habits and conduct. So far they are strong evidence against continued cruelty, for no woman would have sought so earnestly the renewal of cohabitation at [136] the risk of personal safety and comfort. At the same time they shew the sad diversity of tastes, the love of the north and of the south. I am bound to add they also exhibit how very little affection the earl retained for his wife, and how lightly he prized her society, and the comforts of a married life; no unnatural preparation to scenes of discord, when circumstances did bring them together.

The subsequent letters up to No. 48, from 1827 to 1836, appear to me of the same tenor, and to give rise to no other observations of importance in the cause. No. 49 is one written in great anger in 1836, but it little concerns the present inquiry. Lady D. was perhaps to blame for some passages in letter No. 50, addressed to the Hon. F. Tollemache; but nothing can justify the earl in authorizing No. 51.

The only use of it here is to shew how utterly regardless the earl was of the proper respect due to his wife, when he instigated another to become the instrument to insult her.

I am not aware that anything arises in the exhibits attached to Lord D.'s plea. It is right, however, to notice the observation made at the Bar, that the earl has had an undue advantage in the production of these letters, inasmuch as he obtained possession of his own, and kept them out of the cause. Though this observation is not wholly without weight, yet I think that, had it been strongly felt, an application might have been made to the Court, which would have exerted its authority to obtain them, if in existence. I know of no rule which should make the Court content with a partial correspondence, and before admitting the letters of the countess I should have required the earl to have [137] produced, on oath, all that had been returned to him.

Certainly it is not very convenient to have such a mass of exhibits as are annexed to Lady D.'s interrogatories brought into the cause in that form. At the commencement of the hearing I expressed my opinion as to what portion was admissible, and what not; to that opinion I adhere. Those letters, save those written by the earl, are evidence for a very unimportant purpose only, namely, to shew that Lady D. went to Buckminster, by the desire of the earl's family; that is a fact proved. Lord D.'s are of too remote a date to have any bearing upon the present question; they are mostly love-letters, and many written before marriage.

I have now finished my examination of the evidence, so far at least as I consider necessary for the elucidation of the most important points in the case. I must now notice one or two arguments which were urged by counsel.

It was said on behalf of Lord D. that the institution of this suit by him was for the purpose of obtaining protection from liability to pay his wife's debts. It was answered, Why did he not take the chance of a jury, who would have had the opportunity of seeing the witnesses in Court? I cannot agree with either view. This Court has nothing to do with the motives of the earl further than to presume that they are consonant with the law, and the solemn obligation incurred by his marriage vow. This form of proceeding was instituted for very different purposes than protection from debt, though such a protection may be a collateral consequence of a decree. The proceeding was instituted for the [138] purpose of carrying into effect the obligations which the marriage tie imposes—the consortium vitæ. To the argument that the decision of this case should have been left to a jury I cannot accede, for highly as I value that institution, and greatly as I should have desired to have had the benefit of seeing and hearing the witnesses, I cannot think that such a question as this, involving not merely facts, and the credit of witnesses, but points of law, and very nice considerations, requiring great deliberation, could be safely left even under any direction to the comparatively hasty judgment of twelve inexperienced persons; a case, too, in which it would be very easy to appeal to the feelings and passions rather than the understandings. The earl had an unquestionable right to come to this tribunal, which alone has direct jurisdiction over the whole subject-matter.

I should observe that the commencement of the former suit and the abandonment thereof by Lady D. do not appear to me to have any important bearing on the questions I have now to determine. The utmost extent to which that circumstance can be pressed is that the countess despaired of success. But that consideration goes a very little way, for it is neither the judgment nor feelings of parties or their advisers which can effect the decisions of a Court of Justice.

It is also necessary for me to say that, if the countess is otherwise entitled to the judgment of this Court in her favour, I do not think that the continuance at Buckminster from January the 23rd to April the 18th can prejudice her claim. I enter not into the minutiae of the evidence, for I am quite clear that there was no legal condonation, and con-[139]sidering the undoubted fact of the illness of herself and maid, the season of the year, the sending to her mother so soon after the occurrence on the 23rd of January, there can be no legal bar on account of this delay; though, as I conceive, it was practicable for her to have left Buckminster sooner; it may be argued that the remaining there shewed the absence of fear.

It is now time to advert to the principles on which this case must be decided. Marriage, by the law of England, the settled law of all these Courts, and impugned

by no other, constitutes an obligation co-existent with the lives of the parties—an obligation which they cannot dissolve at pleasure, even by mutual consent; for, as is well known, these Courts hold all such separations as mere nullities—as, in fact, attempted violations of a mutually binding compact—binding on them for the sake of society as well as themselves. There is no legal separation, save that sanctioned by the decrees of these Courts, and they cannot decree separation, save only on satisfactory proof of adultery or cruelty. Of adultery I need not speak: on account of cruelty, occasioning the risk of life, limb, or health, because self-preservation is the first law of Nature—a law which must necessarily supersede all compacts. Such a separation is not voluntary, but the effect of compulsion, brought about by the criminality of another. The question, then, that I have to decide is, Have the acts done by Lord D. rendered future cohabitation unsafe? Is there a risk of danger to the life or personal safety of Lady D.—should I order her to return to cohabitation? If I am not satisfied of the affirmative, if I cannot [140] shew, by reference to the evidence, that the affirmative is true, I cannot pronounce the decree prayed by her. I must be further satisfied that the danger had arisen without provocation on her part, and notwithstanding her correctly performing the duties of a wife, amongst which is obedience in all things not sinful. If a wife can ensure her own safety by lawful obedience and by proper self-command, she has no right to come here; for this Court affords its aid only where the necessity for its interference is absolutely proved. I see very much to blame in the conduct of both parties—great and grievous errors, which have blighted all the fair prospects which wealth, rank, and station combined to form. I think the countess to blame for absenting herself so long from her husband's roof—for not conforming more to his tastes and habits, which, strange and eccentric as they were, it was still her duty to have conformed to to the utmost. Those long absences, for the indulgences and comforts of a father's roof, must and did estrange the affections of her husband from her; her own conduct, in this respect, has tended to produce the present state of things. I know she had a hard task to perform, with habits, views, and inclinations so directly opposite; but the path of duty is often beset with thorns, and their existence does not justify a deviation. I think Lady D. to blame in the language she used, provoked or unprovoked. I think her resorting to violence, be it more or less—not violence for self-protection, though it may be palliated—is not wholly to be excused. In one word, the countess failed in the first great duty of submission; for I never can hold that the wants and ineon-[141]-veniences complained of authorized a withdrawal or justified recrimination. I am now referring to her general conduct, not to any particular instance.

With regard to Lord D., he had, no doubt, a right to choose his own mode and style of life; but, morally speaking, he was not justified in all the petty annoyances and deprivations he inflicted on the countess: above all, he was not justified in the gross, and, I must add, infamous language he applied to her. He was not justified in degrading her, as he did, from the proper sphere as his wife; in degrading her in the eyes of his relations, servants, and dependants: his conduct has alienated her affection and contributed its full share to the disgrace of the present exposure.

The whole character and conduct of the parties have been, and must ever be, in all these cases, necessary ingredients in the judgment; without them the truth never can be sifted, or the just conclusion reached: on a general review must, in some degree, depend the belief of particular occurrences, and the probability of future conduct, if the parties are to live together.

On such grounds alone (I mean a general view) no judgment can ever be founded. I must inquire whether any one in particular, or all united, of the transactions I have examined, demand from the Court a separation. Will the occurrence at Irnham in 1824, proved by one witness, and condoned for thirteen years—condoned by acts without number, by a long series of conduct which denotes a total oblivion, an entire forgetfulness of it in every step taken, a conduct wholly inconsistent [142] with a fear or even apprehension of repetition? I doubt the doctrine of revival applying to such a case at all. As to the last transaction of the 23d of January, 1837, I have the greatest difficulty. I have one witness in the affirmative, and I have from another a history of the commencement of the fray, which would shew that Lady D. was the aggressor. I have yet a still greater difficulty. I find, shortly preceding that of the 23d of January, an occurrence of a very similar nature, which is proved to my satisfaction to have been a mock fight—a sort of childish contest, half jest, half earnest.

Both occurrences bear the same semblance. I cannot forget that Mrs. Hill, speaking of the last, upon cross-examination admits that, though she considered the life of Lady D. had been in danger, she herself indulged in laughing, as she had done before. Can I believe that the countess expected serious personal injury which she could not avoid by her own patience and abstinence? Do I, in any part of her conduct and correspondence, throughout the whole period of her married life, see signs of bodily fear or apprehension? Does her conduct, even since the separation, carry with it any such proof? I think decidedly not. Did the earl, in the midst of his wildest eccentricities, shew any disposition, deliberately, without provocation, to inflict personal violence? I think not. Did he ever threaten or menace, save by the declaration of what he would do if the law allowed, and that during the quarrel? I see no evidence of it. Not that I acquit him of intemperate and most culpable conduct: quite the contrary. I cannot, from a consideration of all the premises, come [143] to a conclusion that a return to cohabitation would expose to danger, or reasonable risk thereof, the personal safety of the countess; and not being convinced that such danger or risk would ensue, I am bound by duty to refuse the prayer for a divorce. It has, however, been contended that I may hold my hand and make a decree in favour of neither party. It is admitted that no such case has occurred; but I have been referred to former judgments in which the possibility of such a course is mentioned. I will not say that extraordinary and unforeseen combinations of circumstances might not justify so novel a proceeding; it would be rash indeed to pronounce such a negative; but if ever such a case should occur, it must, in my opinion, be founded on the same basis—the improbability of safe cohabitation. Such, by possibility, might be the case in instances I can imagine; for an interval, at least, the Court might hold its hand. This, however, is not such a case; for, in my judgment, there is no reasonable risk of personal violence if the countess conduct herself with prudence and submission. I say nothing of that probability of peace and happiness which ought to belong to wedded life: of such consideration, taken alone, I have no cognizance. I may, individually, regret the painful consequences to which my judgment may subject her; but this Court has but to declare the law, and is forbidden, for the wisest reasons, from interfering in matrimonial intercourse, save for the protection of personal safety.

I must pronounce for the prayer of the earl, not because he is free from blame, or entitled by his conduct to any favourable consideration; but because the law declares that, where there is neither adultery nor legal cruelty, the parties ought to live together, and the formal decree is but the sequence of such declaration of law. I therefore pronounce for the prayer of the Earl of Dysart; but I hope, when the parties return to cohabitation, that the countess will remember that her duty is submission, and that the earl will not forget the divine command to render due benevolence to his wife.

PHILLIPS *against* PHILLIPS. Consistory Court of London, Dec. 21st, 1844.—Connivance, to constitute a bar to a divorce by reason of adultery, must be corrupt.

[S. C. 3 Notes of Cases, 444; 8 Jur. 409, 1145.]

[This case was brought before the Court on the admission of the libel, and of an allegation which, after argument, was rejected, on the ground that it was offered too late (see 3 Curteis, 796). The cause was finally argued in Trinity Term, 1844, and stood over for judgment till Michaelmas Term.]

Judgment—*Dr. Lushington*. The marriage between the parties in this cause took place in the year 1825, and the issue of that marriage has been six children. The party proceeding is by profession a barrister and conveyancer; and from the evidence it appears he was in the habit of leaving home to attend to his profession about eight o'clock in the morning and of returning at six to dinner. They had various residences, and amongst the number I shall notice only those at [145] Sloane-street, Eccleston-street, and lastly, Kensington-square. The final separation took place on the 8th of October, 1842.

That Mrs. Phillips has been guilty of adultery, there is most ample proof; indeed the defence is grounded solely on the alleged conduct of Mr. Phillips. The only question I have to determine is whether he has by his own conduct forfeited a claim to a separation, which otherwise would be decreed as a matter of course.

The offence with which Mr. P. is charged is in these Courts generally termed

connivance ; its legal acceptation must be considered hereafter, but it is at first sight evident that, in order to ascertain whether a husband has connived at the adultery of his wife, the following points must be considered.

Firstly : what acts were done by the wife. Secondly : what came to the knowledge of the husband. Thirdly : what might reasonably have come to his knowledge, or, in other words, supposing reason for inquiry existed, what might with ease have been discovered. Fourthly : what the husband did do, and what he did not do. I do not intend, in the course of this inquiry, specifically on each occasion to follow up all these, but they are the main objects of investigation to which my attention must be directed.

In August, 1839, Mrs. P., for the benefit of her health, went to Dieppe, where she became acquainted with Mr. and Mrs. Ranney. In the autumn Mrs. P. returned home, and the acquaintance contracted at Dieppe continued when Mr. and Mrs. R. came back to their residence at Limehouse. This acquaintance met with no disapprobation on the part of Mr. P., nor does there appear at that [146] time any reason why it should. In December Mrs. R. makes a visit to Mr. and Mrs. P. in Sloane-street, and according to the evidence of Mary Ann Gullick, who lived as cook in the service of the parties, which she left in July, 1840, Mrs. R. had been there before.

Gullick, the only witness to the main facts pleaded in the eighth article, says : " I remember Mrs. Ranney being on a visit to Mrs. Phillips at No. 129 Sloane-street, in the December before I last left them ; it was before Christmas. She had been staying there at other times, and I cannot say how long she was there then. She had been there as much as a fortnight or three weeks at a time. During this last visit her husband, Mr. Ranney, dined at our house about two or three times a week ; he breakfasted there pretty well every morning. Mr. Phillips usually left his house at about eight o'clock in the morning, and Mr. Ranney did not come to the house till after Mr. Phillips had gone out. I had to clean Mr. Ranney's boots two or three times a week, that is, when he dined at our house he used to leave his boots there at night, and I had to clean them. One morning Mr. Phillips asked me, seeing the boots, whose they were ; I told him they were Mr. Ranney's, and he seemed surprised ; he said he thought Mr. Ranney went home to Limehouse to sleep ; I only said I did not know ; I know nothing of what passed between Mr. and Mrs. Phillips concerning Mr. Ranney ; I did not tell Mr. Phillips that Mr. Ranney came to his house in the morning ; all that passed between us was as I have said."

The effect of this evidence I apprehend to be, first, that it distinctly proves that Mrs. Ranney slept [147] in Mr. P.'s house during the whole period ; and secondly, that it does not prove that Mr. R. ever slept there. There is no evidence to satisfy me that he did ; for I cannot infer from the mere circumstance of his boots being left to be cleaned any conclusion (though it may not be altogether improbable) that Mr. P. was cognizant of the fact of Mr. R. having slept even in the neighbourhood. As the witness does not state that Mr. R. at that time did sleep in the house, and as there is no evidence to satisfy me that it was so, I cannot presume that he did so. It appears that the visits of Mr. R. in the mornings did not come to the knowledge of Mr. P., for the witness states she never apprized him of them ; the only circumstance, then, that seems to have been at all likely to excite suspicion in the mind of Mr. P. was the mere fact of seeing the boots. I must remember, during this period, Mrs. R. herself was in the house, a circumstance of itself sufficient to remove any suspicion that could arise in the mind of Mr. P. I cannot therefore consider it just to impute to him at this stage want of vigilance.

The ninth article pleads that Mrs. P. left her husband's house about the 1st of January, 1840 ; that immediately afterwards an investigation was made of her conduct by Mr. Preston and Mr. Grainger, the result of which was communicated in a letter to Mr. Phillips. No doubt the circumstances upon which that report was founded came to the knowledge of Mr. P., but what facts were within the cognizance of the gentlemen who investigated the case I have no means of ascertaining ; this much however is clear, that their being desired to examine [148] into her conduct shews that she had been charged with indiscretion, or something worse with Mr. R. ; the report is the following :—

Blackheath, Jan. 28th, 1840.

My dear Phillips,—We have seen the various persons sent to us to be examined. Nothing we could learn criminated Mrs. Phillips. You are fully aware of all the facts

of the case, and we think, if it is your wish, by Mrs. Phillips returning to her home, she may, from the misery she endured, and caused you, alter her conduct entirely and become a pattern to all of us. Our conviction is that Mrs. Phillips is innocent. We are, &c. &c.

WILLIAM SCOTT PRESTON.

R. D. GRAINGER.

Looking at the entire letter, and especially the last passage, it is to my mind a clear acquittal of all guilt. At the same time it is quite evident that an impression must have been made on the mind of each gentleman that Mrs. P. had been guilty of at least gross indiscretion, for had they acquitted her altogether, they would have recommended Mr. P. to take her home to his house; whereas they say, "you are fully aware of all the facts of the case," and "if it is your wish," not prescribing it as a duty, but leaving it to his choice "by Mrs. Phillips returning to her home, she may, from the misery she endured"—now, the misery she had endured could only have arisen from a sense of impropriety on her part. The effect of this report is stated in the evidence of these gentlemen on their [149] second examination, which was rendered necessary by reason of this written report being pleaded and not produced. On their first examination it appears they considered the investigation a painful one; at the same time every step was taken to ascertain the truth. One circumstance, it would seem very properly, made a strong impression on these gentlemen, and that was the countenance given by Mrs. Ranney. Mr. Grainger says on the fourth interrogatory: "I am quite sure that whatever circumstances were brought before us of a suspicious kind, they were covered and counteracted by Mrs. Ranney's presence and approval." To be sure it must have appeared to these gentlemen extremely difficult, if not impossible, to conclude that a wife would have connived at an adulterous intercourse between a married woman and her own husband.

It is from the report that Mr. P. must have formed his own judgment; and as far as the evidence will enable me to judge, he was, as to this transaction, entirely blameless. He found cause of strong suspicion against his wife, but no adequate proof; he referred the case to most competent judges; a bonâ fide investigation was carried through with diligence and energy, and the result was an acquittal. How that was produced Mr. P. did not perhaps exactly know. If he did, it was impossible that the impression made on the mind of Mr. Preston and Mr. Grainger should not have forced itself on his mind also; namely, the countenance given by Mrs. Ranney to the intercourse between her husband and Mrs. P. It was a circumstance which fairly bore on the result, and Mr. P. had a perfect right to take it into considera-[150]-tion in the course he adopted in taking his wife back.

Prior to the acts on the part of Mrs. P. which led to this investigation, the greatest allowance must and ought to be made for Mr. P.'s ignorance of his wife's misconduct. His professional vocations deprived him of all ordinary opportunities of observation—the many years they had been married, the number of the children—the issue of the marriage—the fact of Mr. Ranney being a married man, and the countenance afforded by the presence of Mrs. R.—all these circumstances combined to prevent any suspicion of his wife's conduct. But when the aspect of things was changed, and the eyes of Mr. P. were opened, it clearly became his duty, so far as was possible, to watch the conduct of his wife with the greatest vigilance. Guilty she was not to be deemed; very indiscreet she had been, and that Mr. P. knew.

It would seem, from the first examination of Mr. Preston and Mr. Grainger, it was arranged that some female companion should reside in the house for some time after the return of Mrs. P., as a guarantee for her conduct. This, so far as appears, was not effected. I am not clear, however, that such an arrangement was ever pressed on Mr. P.; besides, I must make some allowance for this consideration, that it might have been difficult to find a person willing to undertake such a task; moreover, considering Mr. P.'s means, the expense might have been burthensome. I cannot, I think with justice, draw any inference from the non-compliance with this arrangement, if, indeed, it was ever proposed to Mr. P. himself.

[151] On the 29th of January, 1840, Mrs. P. returned to cohabitation; and in March Mr. P. changed his residence from Sloane-street to Eccleston-street. During the whole of that year I do not find any evidence of a renewal of acquaintance with either Mr. or Mrs. Ranney; the ordinary presumption must therefore prevail, that the parties lived together without any cause of suspicion arising as to Mrs. P.'s behaviour.

I must now direct my attention to the facts pleaded in the eleventh, twelfth, thirteenth, fourteenth, and fifteenth articles, all of which relate to the year 1841. Stated generally, they are as follow : that, in February, 1841, Mr. Ranney took a house in Chester-street, Pimlico ; that from the 9th to the 23d of February Mrs. P., on the score of ill-health, went from home, and occupied the same lodgings, in Edward-square, Kensington, she resided in when she quitted her husband's house in January, 1840 ; that, at Lady-day, Mr. P. removed to Kensington-square ; and various acts of adultery are pleaded in detail. Three witnesses have been examined on these articles—Sarah Hodgetts, Isabella Perrett, and Catherine Wotten. The evidence of Hodgetts is of considerable importance ; she is a charwoman, and states she was hired about the 12th of February, 1841, by Mr. Ranney and Mrs. Phillips to live with him at his house. On the twelfth and thirteenth articles she thus deposes :—

“I continued servant at Mr. Ranney's house till the following Midsummer. On the Monday morning after I went there Mrs. Ranney and her three children left for Devonshire. Mr. Ranney went with them, but he returned the same night. . . . [152] On the following morning, Tuesday, Mrs. Phillips came to the house, and from that time forward she was in the habit of coming sometimes twice a week. Sometimes she slept there ; she would sleep there one night, stop all next day, and go away at night. She dined there many times with Mr. Ranney, he and she alone.”

This witness deposes, on the third interrogatory, to the facts of Mr. P.'s sons going to Mr. Ranney's house, and seeing their mother there ; and of Mr. R. giving one of them a model of a ship, which he took away with him.

The next witness is Isabella Perrett. She was housemaid in the service of the parties in the year 1841 for four months, and was with them when they removed from Eccleston-street to Kensington-square. On the thirteenth article she thus deposes : “After we were settled in the square I know that Mrs. Phillips was in the constant habit of associating with Mr. Charles Ranney, whom I know. I have seen him come to the square, where he waited till she went out to him in the morning. Other days I have gone with her to his house ; she met him, in one way or other, almost every day after Mr. Phillips had left home. She usually returned, when she did return, at ten o'clock at night ; but a great many nights she slept out. I cannot say what was known to Mr. Phillips besides the circumstance that Mrs. Phillips was from home after he came home himself, which he did daily at six o'clock. He never asked me any questions about Mrs. Phillips, and therefore I did not tell him anything. On two or three occasions I took some preserves for Mrs. Phillips to Mr. Ran-[153]-ney's house. On one occasion I heard Mr. Phillips ask Mrs. Phillips where she had been (that was when she had been out from home two nights), and she said that her sister, Mrs. Dawn, was very ill, and she had stopped with her.” On the second interrogatory she says : “I do not think that the fact of her so visiting Mr. Ranney was known to Mr. Phillips. I think that if he had known it, he would have said something about it.” And on the sixth interrogatory the witness gives a most important testimony. It shews that when Mrs. Phillips was absent from home Mr. Phillips must have been cognizant of it. “The producent did always dine and sleep at home. He did not shew a great deal of concern whether the ministrant was at home or not. I cannot say he was indifferent about it, because he was always pleased when she was at home, but when I told him she was not, he said no more. He never sat down to dinner without inquiring about her ; he always asked if she was at home, or was coming home. At night, at ten o'clock, if she was not at home, he asked if she was coming home ; if I said that she was not, or that I did not know, he would tell me to shut up the house and go to bed, but he did not go to bed himself. I always left him up, and I have heard him let Mrs. Phillips in after we (the servants) had gone to bed.” On the seventh interrogatory the witness speaks of the model of the ship, and says : “It was known to Mr. Phillips. He ordered it away as soon as he knew of it, and he dared them [the children] ever to go to Mr. Ranney's again.” Catherine Wotten, who was nurse in the family, corroborates the last [154] witness in many respects, and speaks to the probable ignorance of Mr. Phillips of his wife's visits to Mr. Ranney.

I will now state my view of the evidence as it relates to the year 1841, and here I must say I am of opinion that the suspicions of Mr. Phillips ought to have been excited when he knew that Mr. Ranney was residing in his immediate neighbourhood, and that his boys had been to Mr. Ranney's house, that the repeated absence of Mrs. P. by day and night is wholly unaccounted for, when I remember that it is sworn by

Mr. Dawn that his wife and Mrs. P. were not at this period on friendly terms, and consequently the two sisters had but little intercourse. I am of opinion, also, that, looking to the former indiscretions of his wife, and her conduct during this year, utterly inconsistent with what ought to have been the conduct of any married woman, it was his duty to have interposed and compelled a different course. I do not say, nor does the evidence warrant me in saying, that he was cognizant of all the facts deposed to by the witnesses; still, I must observe, from facts proved to have been within his own knowledge, he was culpably inattentive to matters which ought to have excited his vigilance and induced him to take measures of prevention.

The most important facts contained in the 16th to the 20th articles are Mrs. Phillips's visit to Dieppe in the summer of 1842, her adultery there committed, the repeated absences from her husband's house on her return home in August, and her finally quitting him on the 8th of October in the same year.

I must observe that I see no reason to impute [155] blame to Mr. Phillips for allowing his wife to visit Dieppe a second time. The fact that, three years before, Mrs. P. became acquainted with Mr. Ranney there, is of no importance as respects that place in particular, unless attended with a probability of another meeting. I see no reason to suppose that there was such a probability; nor is there any evidence that the fact of Mr. Ranney visiting Dieppe on that occasion ever came to the knowledge of Mr. Phillips; whether that fact did or did not come to his knowledge I say there is no proof, for I cannot draw any safe conclusion from a supposition, ingeniously put by counsel, that Mr. P. might have questioned his daughter who accompanied Mrs. Phillips. The adultery at Dieppe is clearly proved. Upon her return, there are similar absences from home, which are deposed to by a servant of the name of Low. She says in the 20th article: "From the very time of such her return, Mrs. Phillips was a great deal from home, in fact she was never at home in the day time, except when she was ill; she stopped out also two nights at one time, and one night another, it might be oftener." On the 6th interrogatory she, in substance, says, "That Mrs. P., both before she went to, and after she returned from, France, was in the habit of not returning home till late at night, and sometimes not at all: that Mr. P. always dined at home." It is, I think, a little to be wondered at that the previous conduct of Mrs. P. produced no effect on her husband; somewhat on a sudden, however, he appears to have had his suspicions excited, altercations ensue, and, strange to say, the party to separate is Mrs. P.; [156] he did not part from her, but she from him, on the 8th of October, 1842.

It is my duty however, to bear in mind that there has been no plea of connivance given in on the part of Mrs. Phillips, the omission of which, in cases like to the present, always increases the difficulty of concluding against the husband. This being so, I conceive that, in matters left doubtful, I am bound to presume in favour of Mr. P. In cases, however, where connivance has not been pleaded, if points unexpectedly come out on cross-examination, which are capable of denial or explanation, application ought to be made to the Court after publication to rescind the conclusion of the cause for the purpose of receiving evidence. There neither is nor could be, consistent with justice, any rule against such a course.

In this case, too, as in many others, no verdict at common law is pleaded, but the absence thereof is never of much importance; still, a verdict has rather more weight in a case of alleged connivance than in any other class of cases. The nearest approach to the truth perhaps is that, in such a case, a verdict for large damages would not affect the husband as in *Moorsom v. Moorsom*, but a verdict for very small damages might in some slight degree prejudice him, as the consequence of proved collusion or connivance. However, I greatly doubt if the Court would have a right to infer that the verdict was founded on such evidence; the ground might be the poverty of the adulterer, or the profligacy of the wife.

Having stated what I believe to be the fair result of the evidence as affecting the conduct of Mr. Phil-[157]-lips, it is now my duty to consider the law and apply it to this state of facts.

The proposition is, whether a culpable indifference (with a previous knowledge of great indiscretion on the part of the wife) to circumstances which ought to have called forth active interposition, but where the cohabitation continued, and nothing was done, is in the eye of the law connivance—conduct to bar a separation a mensa et thoro. I need not say that it is my duty to consider, not what I conceive the law ought to be.

but what it is, and that I must gather from previous decisions—an investigation, I am sorry to say, not altogether satisfactory, perhaps from the very nature of the subject, and the nice shades of distinction that may occur, the difficulty may be inherent.

Before I comment upon the authorities to which I shall refer, I think it right to premise that every expression used by the learned Judges must be considered with reference to the facts in each case, otherwise the greatest misapprehensions will arise. It seldom happens that a Judge lays down any abstract principle of law without reference to the circumstances of the case he has to decide; to repeat all the facts in each case, to prevent misapprehension, would be endless.

The first case to which I refer is that of *Rogers v. Rogers* (3 Hagg. Ecc. 57), in which Sir John Nicholl says, "Without doubt, connivance on the part of the husband will, in point of law, bar him from obtaining relief, on account of the adultery which he has allowed to take place. Volenti non fit injuria is the principle [158] on which the rule has been founded." I apprehend that the meaning of this maxim is, that there must be consent—the party must be acquiescing in (it matters not whether actively or passively) and cognizant of the adulterous intercourse of his wife. That consent must be proved, either by direct evidence or by necessary consequence from his conduct. Sir John Nicholl refers to several cases. "In these cases," he says, "it was held not to be necessary that any active steps should be taken on the part of the husband to corrupt the wife—to induce and encourage her to commit the criminal act. Passive acquiescence would be sufficient to bar the husband, provided it appeared to be done with the intention, and in the expectation, that she would be guilty of the crime"—(with the intention)—"but, on the other hand, it has always been held that there must be a consent. The injury must be volenti"—(nothing can be stronger than these words; and the learned Judge, having stated what connivance is, proceeds to shew what it is not)—"it must be something more than mere negligence—than mere inattention—than over-confidence—than dulness of apprehension—than mere indifference: it must be intentional concurrence, in order to amount to a bar." . . . "If the facts are equivocal, the presumption is in favour of the absence of intention. It cannot readily be presumed that any husband would act so contrary to the feelings of mankind as to be a consenting party to his own dishonour, the effect of which would be, to leave him legally bound for life to a corrupt and adulterous wife."

In the case of *Timmings v. Timmings* an ex-[159]-pression is used by Lord Stowell (3 Hagg. Ecc. 81), to which I think it necessary to advert: "True it is that a husband is not barred by a mere permission of opportunity for adultery; nor is it every degree of inattention, on his part, which will deprive him of relief; but it is one thing to permit, and another to invite:" (now follows the passage I alluded to)—"he is perfectly at liberty to let the licentiousness of the wife take its full scope; but that he is to contrive the meeting, that he is to invite the adulterer, then to decamp and give him the opportunity, I do think amounts to legal prostitution. The analogy as to theft, in the passage cited from Sanchez, shews this doctrine." Now, if I had to put a construction on these words, as they stand, without reference to this passage from Sanchez, I confess that, though I might be constrained to follow Lord Stowell's authority, I never could be induced to adopt this opinion; for I never could conceive that it is the doctrine of the law that a husband "is perfectly at liberty to let the licentiousness of the wife take its full scope." This, however, Lord Stowell never meant to lay down; and I am happy of the opportunity of shewing what he did mean, by reading the passage in Sanchez referred to (*De Matrim. lib. x. disp. 12, No. 52*). "Viro suspicanti adulterium uxoris licitum est illam observare, cum testibus idoneis, ut eam possit de adulterio convincere. Quoniam id non est ejus peccato connivere, sed uti ejus malitia ad proprium commodum. Secundo, quia aliud est rogare, consulere, vel jubere malum, quod nunquam licet, et aliud permittere seu non auferre [160] mali occasionem, quod aliquando licet ob aliquod majus bonum." I understand these words thus: a husband, suspecting his wife of having committed adultery, is at liberty to remain quiet and to watch her, for the purpose of detecting her adultery, and he is permitted this as being the majus bonum. This is the sense in which Lord Stowell is to be understood. He adds afterwards—"If he is once in possession of a fact of adultery, and still continues his cohabitation, it proves connivance, collusion, and facility."

In *Moorsom v. Moorsom* (3 Hagg. Ecc. 106-7) Lord Stowell says, "The first general and simple rule is, if a man sees what a reasonable man could not see without alarm—if he sees what a reasonable man could not permit—he must be supposed to see and

mean the consequences ; but this is not to be too rigorously applied without making allowances for defective capacity : dulness of perception, or the like, which exclude intention, is not connivance ; there must be intention. The presumption of law is against connivance ; and if the facts can be accounted for without supposition of intention, the Court will incline to that construction. Undoubtedly, there have been some persons who have conspired against the virtue of their wives to gain a separation, and (experience has proved) have even connived without such an object ; but either of them is contrary to the usual conduct and disposition of mankind ; and the Court is to presume according to general rules of conduct. However, though to bar the husband there must be intention on his part, I have no difficulty in saying that mere passive connivance is [161] as much a bar as active conspiracy ; he would be particeps criminis. The expression of the books, of a man prostituting his wife, is too strong ; but the rule is ‘volenti non fit injuria ;’ that is the true principle ; active or passive, the husband is not the object of relief.”

I shall advert to the case of *Crewe v. Crewe* (3 Hagg. Ecc. 123) for one remark only, as it illustrates an observation I made in respect of the benefit Mr. Phillips is entitled to, on account of three witnesses to the transactions of 1841 swearing, to their belief, that he was ignorant of the facts. At p. 137 Lord Stowell says, “Not being able to affect the husband with a direct knowledge, and there being three witnesses who swear, in express terms, that they verily believe, in their consciences, the visits were unknown to the husband, I think it would be taking upon myself too much to affirm, in contradiction, that they were known to him.” Now I stated that three witnesses in this case deposed in the same way ; and I therefore feel bound to say that though Mr. Phillips was of course cognizant of his wife’s absences from home, he did not know where she was.

So far as I am able to judge of the decided cases to which I have referred, there is one difference between them and the present case ; whether it be a distinction or not is another consideration. In all those cases the connivance consists in the husband’s disregard of the conduct of his wife, of passive acquiescence in circumstances within his own knowledge in which the adulterer was concerned. The present, in the light in which I view it, is the [162] acquiescence in circumstances tending most strongly to the inference of improper conduct on the part of the wife, but with no proof that the husband knew of any particular transaction, or of any renewed intercourse with the adulterer. The conduct of Mr. P. savours more of general abandonment than of acquiescence in any particular acts with any one ; I cannot say that the mere knowledge of Mr. Ranney residing in the neighbourhood, necessarily without more information, inferred that Mrs. Phillips’s absences from home were visits to him ; more especially as one year elapsed after the renewal of cohabitation, during which no one fact is stated shewing that Mr. P. knew, or could have known, that the parties ever met.

It was decided in *Reeves v. Reeves* (2 Phill. 125), in the Court of Arches, to which decisions I am bound to conform, that even desertion of a wife, though such desertion must in all probability frequently lead to her adultery, is no bar to a separation. I must presume the principle to be that the husband is not barred from a sentence of divorce on account of his wife’s adultery, merely because he himself has neglected or violated the most sacred duties of the conjugal bond, as in the cases of desertion or cruelty ; but only when he has been guilty of a like offence ; or has contributed to his own dishonour, not by general neglect, or indifference, or abandonment, but by actual connivance at particular acts of adultery, or conduct leading directly to adultery, as improper or indecent familiarities. To constitute such connivance, I think the cases go to the length of establishing there must be actual knowledge of the [163] adultery or of the improper familiarities. By actual knowledge I mean proof, or an irresistible presumption of knowledge of the facts, which would, as I think the cases require, constitute a corrupt connivance.

I am of opinion that the evidence in this case does not bring it within the principle of corrupt connivance. I think Mr. Phillips is entitled to every fair presumption, from his character as a man, and as a kind and affectionate husband ; for such the evidence clearly portrays him to have been. I acquit him of corrupt connivance, assuming that to be a necessary ingredient to a bar, and of that, very properly, I think, the counsel for Mrs. P. have disclaimed the charge. “A Court of Justice,” says Lord Stowell, in *Hoar v. Hoar* (3 Hagg. Ecc. 140), “must look quo animo the step is taken, and if it be meant well, though it have a fatal consequence, it were hard indeed to

fasten on mere imprudence the consequence of guilt. Conduct to bar must be directed by corrupt intention." I think Mr. P. is entitled to the benefit of the opinion of the witnesses as to his total ignorance of all the facts. Of most culpable negligence I cannot acquit him; of the most supine inertness, when his honour loudly called for the most active interposition, I must say he is guilty. Still, I think the facts justify me in saying that this case may be brought within the limits of the law, as laid down in *Moorsom v. Moorsom* (3 Hagg. Ecc. 87), and I gladly avail myself of the shelter of that high authority, to give Mr. P. the relief he prays. No authority can be higher; and when I find Lord Stowell using the following [164] language (p. 117), I think I may consider myself, whatever be the consequences, justified in my decision: "In pronouncing for a separation, I feel that I shall tolerate a negligent inattention to marital duty, and that I shall pronounce a decree which will not lead to the peace and honour of families, nor to the purity of private life." If such consequences of the law did not deter Lord Stowell, much less should they deter me, foreseeing, as he did, and lamenting, as I do, in common with him, the effects they may have on matrimonial life.

I therefore pronounce for the separation, but I wish it to be clearly understood that the ground of my so doing is, that I do not find corrupt connivance proved in this case. There must be knowledge, or presumed knowledge, of adultery, or improper familiarities leading thereto; not finding any evidence of this description, I pronounce for the separation.

[165] EVANS *against* EVANS. Arches Court, Nov. 21st, 1844.—The proof of adultery, in a suit for divorce, depending upon the evidence of one witness alone, held to be insufficient to entitle the promoter to his prayer.

[S. C. 3 Notes of Cases, 416; 8 Jur. 1055. Followed, *Simmons v. Simmons*, p. 569, post. See *Burder v. O'Neill*, 1863, 9 L. T. 232; 9 Jur. (N. S.) 1109.]

This was a suit for a divorce by reason of adultery, promoted by Herbert William Evans, Esq., against Jane, his wife, and brought by letters of request from the chancellor of the diocese of Bangor. The marriage between the parties took place on the 6th of April, 1842, Mr. Evans being then a bachelor of the age of twenty-one, and Mrs. Evans, then Jane Jeffreys, a spinster, of the age of nineteen.

The libel was admitted without opposition on the 15th of June, 1843; the fifth article pleaded: That on the 23rd of November, 1842, Mr. Henry Elliott, a friend of the parties in the suit, came on a visit to them at their residence, Trefeiler-house, in the parish of Trefdraeth, ostensibly for the purpose of shooting. That after he had been there about a week on such visit, Mr. Evans had occasion to go to Beaumaris and invited and pressed Mr. Elliott to accompany him, which he declined doing, saying he was unwell; that Mr. Elliott remained alone with Mrs. Evans during the day whilst Mr. Evans was absent.

Sixth article. That on the return of Mr. Evans in the evening he received information which led him to suspect that Mr. Elliott had only feigned illness, and that his real object in not accompanying Mr. Evans was to carry on some improper, if not [166] criminal, correspondence with Mrs. Evans, and that in consequence Mr. Evans resolved to watch their movements.

Seventh article. That on Friday morning, the 2nd of December, 1842, Mr. Evans went out early as to shoot, telling his wife he was going, and inviting Mr. Elliott to accompany him, which he declined, on the plea of indisposition; that Mr. Evans's suspicions being greatly confirmed by such refusal, he, instead of proceeding to shoot, returned home after a short absence, and then desiring his servant, Ann Davies, to accompany him, proceeded at once with her to his bedroom, where they found Mrs. Evans and Mr. Elliott in bed together.

Ninth article. That an action was brought against Mr. Elliott for criminal conversation, and that on the 23rd of March, 1843, a special jury found a verdict in favour of Mr. Evans for 500l. damages, besides costs.

Five witnesses were examined on the libel, but one only, Ann Davies, deposed on the fifth, sixth, and seventh articles.

On the 11th of November, 1843, an allegation in behalf of Mrs. Evans was admitted without opposition, charging Mr. Evans with the commission of adultery with a female by name unknown in April, 1843, in the city of Chester, and amongst other houses in that city, at the inn called the Black Dog, where Mr. Evans was well known. A commission and requisition for the examination of witnesses and compulsories were

decreed, but no witness was examined. On the 11th of January, 1844, the cause was alleged by both proctors to be under treaty, but on the 29th publication was decreed.

[167] On the 29th of February Mr. Evans made an affidavit to the effect "that it was erroneously pleaded in the 6th article of the libel, which he had not seen till just before making the affidavit, that his suspicions of his wife's conduct were excited in consequence of information received on his return home from Beaumaris; on the contrary, he swore he did not then or at any other time receive any information, but that his suspicious arose solely by his having quite accidentally, in the first instance, detected his wife and Mr. Elliott exchanging glances and making signs to each other, which at once, and in the first instance, led him to suppose that there was something improper going on, and which further observations soon convinced him had gone to the length of actual criminality, and that it was in consequence of his suspicions so excited that he went out on the 2nd of December, as pleaded in the seventh article."

Addams for the husband, and Haggard for the wife. The cause stood over, at the suggestion of the Judge, from time to time, to give the husband the opportunity of procuring further evidence, but no other witness was produced.

Judgment—*Sir Herbert Jenner Fust*. I have allowed this case to stand over for some time, with the view of furnishing the husband with an opportunity of obtaining further evidence in support of his prayer, and as I now understand that it is not his intention to produce further proof, I must deal with the case as I find it; but I must [168] observe that the proceedings appear to me to present a case of a peculiar nature, and by no means one altogether free from suspicion.

Upon the libel five witnesses have been examined, and of that number there is but one, Ann Davies, who knows anything of what occurred at the house when the adultery is pleaded to have taken place. She was the only servant, with the exception of a lad, who lived with the parties; she gives the following account on the fifth article:—"I do not recollect exactly when it was that Mr. Elliott came on a visit to Mr. Evans, it was sometime in November last (1842), and he remained a fortnight all but a day; he came to have some shooting, he brought his gun and things with him. I recollect my master, Mr. Evans, going to Beaumaris during Mr. Elliott's visit; it is a long way from Trefeiler to Beaumaris—eighteen or twenty miles. Mr. Evans went by the mail, and I got breakfast ready for him and Mr. Elliott, as I understood Mr. Elliott was going too, but he said he was ill and did not go. I heard Mr. Elliott say that he was ill and would not go, and so Mr. Evans went without him. The mail time is about seven o'clock in the morning, and it was at that time Mr. Evans went. After he was gone Mr. Elliott remained in the house until about two o'clock in the afternoon. Mr. Elliott and Mrs. Evans breakfasted together alone after Mr. Evans had gone, and they dined alone together. I did not see them together, except at breakfast and dinner, and whether they were so or not I cannot tell." This is the evidence of the witness on the fifth article, and there is nothing therein contained that [169] can shew or be construed into proof that any improper familiarity passed between Mrs. Evans and Mr. Elliott.

On the sixth article she says: "It was late before Mr. Evans returned from Beaumaris on the day I have spoken of—it was past ten o'clock at night. I did not give him any information about Mr. Elliott when he returned. I had seen nothing to inform him of." It is clear, therefore, that whatever suspicions were excited in the mind of Mr. Evans, they were not raised by this witness.

On the seventh article she deposes: "I do not recollect the day, but I recollect perfectly one morning, when Mr. Evans went out to shoot, Mr. Elliott did not go with him. I did not hear Mr. Elliott say why he would not go. Mr. Evans went out by himself, and in about half an hour or three quarters of an hour he returned to the house, and desired me to go upstairs with him; he did not say for what purpose. I went up, and he close with me, and when we got to his bedroom door he opened it and said, 'Ann, go in,' and I went in before him, and there I saw Mr. Elliott and Mrs. Evans, my mistress, in bed together. Mr. Evans was close by me, and took hold of the curtains of the bed and said, 'There, Ann, you see where they are,' and I left the room immediately, and so did Mr. Evans. Mr. Elliott and Mrs. Evans were undressed, both of them in their night-clothes. I only remained in the room so long as to see where they were. I could not bear to stay any longer. I do not know how long Mr. Elliott had been in the room with Mrs. Evans. I had no suspicion of them whatever, and Mr. Evans

did not give me any [170] notion of what he wanted me to go upstairs with him for. I do not know what took place afterwards. Mr. Evans came down stairs almost with me, and went and fetched a car, and as soon as Mr. Elliott and Mrs. Evans could pack up their things they went away in the car together."

This is the only evidence brought before me to establish the adultery, which, if one witness alone be sufficient, it certainly does. It is true that Mr. Evans has pleaded and proved he obtained a verdict for 500l. damages; but such a verdict has never been considered in these Courts to furnish any confirmation or corroboration of the charge, as the wife is no party to the proceeding at common law. That proceeding is, as regards the present, *res inter alios acta*, and consequently it can afford no evidence against the wife. I know not what passed at the trial, or what witnesses were examined and cross-examined, but I must say, judging of what is before me, the damages seem most exorbitant.

I have said this case is not free from suspicion. Mr. and Mrs. Evans were not married more than eight months before the act of adultery was committed; the adulterer was in the house nine days only; there is no evidence to shew what gave rise to Mr. Evans to suspect any impropriety, but his own affidavit; Mr. Elliott and Mrs. Evans go away in a car together, and no evidence is adduced of what became of them, or whither they went; added to this, the wife gave in a plea charging Mr. Evans with the commission of adultery; a treaty is entered on and broken off, and still she produces no witness in support of her allegation. All these [171] circumstances are, I say, to my mind, most extraordinary.

The question still remains whether Mr. Evans is entitled by law to his prayer; and here I must observe that no case has been pointed out to me, no authority cited, shewing that on the evidence of one witness alone, without any corroborating circumstance, a sentence of divorce, by reason of adultery, has ever been pronounced. Several cases have turned on the evidence of a single witness, with corroborating circumstances, and such evidence has been held to be sufficient; but I cannot find, though I have been at some pains, a single case of a sentence pronounced on the evidence of one witness standing completely alone. This being so, it is for me to consider, upon principle, whether the evidence of Ann Davies alone is sufficient to justify me in pronouncing a sentence of separation.

I must look to the source from which the law of these Courts is derived, and on so doing it is clear that neither by the civil nor by the canon law (the principles of which are one and the same) is the evidence of one witness, standing entirely alone, sufficient. Ayliffe (par. 444) says: "Now, that is called full proof, which gives so great an assurance to the Judge that he seems to himself to be fully instructed on the merits of the cause; and this kind of proof is made by two or three witnesses at the least. For there are some matters which, according to the canon law, do require five, seven, or more witnesses to make full proof; yet full proof cannot be said to be made by one witness alone. . . . Full proof may be made by the testimony of one witness, and a [172] well-grounded fame concurrent thereunto. . . . According (par. 448) to the civil and canon law, two witnesses of entire credit and reputation do make full proof. For two or three witnesses are sufficient for the proof of any matter of fact, unless it be in some particular cases where a greater number of witnesses are required." Again (ibid. 541): "Though regularly single witnesses make no proof, according to the civil and canon law (x. 1, 6, 32), nor yet so much as half proof by these laws; unless such single witness's deposition be given upon the principal fact or matter in controversy; yet this rule does not proceed in the proof of jurisdiction, or in the proof of servitude, which may both be proved by one witness."

By the civil and canon law, then, as it is laid down in Ayliffe, there must be something more than the evidence of one witness, even of entire credit, to constitute full proof; and on reference to many decisions in these Courts it will be found that this principle has been maintained. In *Crompton v. Butler*,^(d) which was a suit for defamation, it is clear, from the argument of counsel, as well as from the judgment, that there was no doubt as to the necessity for two witnesses, though it was there made a question whether both ought to speak to the same fact. In *Hutchins v. Denziloe* (1 Hagg. Con. 181), though that was a proceeding for brawling, under the stat. 5 & 6 Edw. 6, c. 4, which requires two witnesses on the specific charge, Lord Stowell con-

(d) 1 Hagg. Con. 460; and see the note in respect of two witnesses.

siders how that case would have stood on the general law, and says, "By the ancient ecclesi-^[173]astical law, I conceive, one witness to the fact, and one to the circumstances, was sufficient, and would be so still in a proceeding in that form, according to the ordinary rule of the ecclesiastical law, which satisfies its own demand of two witnesses, by receiving one to the fact and one to the circumstances." So in *Donellan v. Donellan* (2 Hagg. Ecc. 144 (Supp.)), which was a suit for divorce by reason of the wife's adultery, Lord Stowell refused the prayer, on the ground that the proof did not come up to the requisites of the law. We well know the rule was adhered to in the Prerogative Court prior to the Will Act of the present reign, and so late as in the year 1832 Sir John Nicholl said, in *Theakston v. Marson* (4 Hagg. Ecc. 313)—"The Court cannot wholly pass over without notice the point of law—whether the evidence of one witness unsupported by any circumstances makes legal proof a testamentary act. The recognition of the sufficiency of such evidence seems to be big with all the dangers against which the Statute of Frauds was intended to guard. By the general law of these Courts one witness does not make full proof; not that two witnesses are required to each particular fact, nor to every part of a transaction; for it often happens that, to the contents of a will, or to instructions, there is only one witness—the confidential solicitor, or other drawer; but there are, and must be, adminicular circumstances to the transaction. . . . I am strongly inclined to think that these Courts have never held, that such evidence of such an act, by a single witness, is alone sufficient to sustain it; and I should be unwilling to make such a precedent."

[174] It is true that Courts of Common Law generally hold proof by one witness sufficient, but they do not issue a prohibition against us, unless we, in questions of law incidentally arising, require two witnesses, where they are satisfied with one. Thus, in *Richardson v. Desborough*,^(a) a prohibition was prayed, because the Spiritual Court refused the proof of plene administravit by one witness, and it was granted; and Hale, C. J., said, where the matter to be proved (which falls in incidentally in a cause before them in the Spiritual Court) is temporal, they ought not to deny such proof as the common law allows (Ventr. 291). And in *Shotter v. Friend* a prohibition was prayed and obtained, because the Spiritual Court would not allow the proof of the payment of a legacy (which is the payment of a debt) by one witness. Upon which occasion the Court said, they (the Ecclesiastical Courts) may follow their own rules in things which are originally in their own cognizance; but if any collateral matter doth arise, as concerning the payment of a legacy, if the proof be by one witness, they ought to allow it (2 Salk. 547). So also in *Breedon v. Gill*, Holt, C. J., said: "When the Ecclesiastical Courts are possessed of a cause which is merely of spiritual conusance, the Courts at Common Law allow them to pursue their own methods in the determination of it; but when in such case collateral matter arises which is not of their consue-^[175]sance properly, there the Courts of Common Law enforce them to admit such evidence as the common law would allow. Therefore, if the Spiritual Court require more than one witness to prove the revocation of a nuncupative will, the King's Bench doth not intermeddle. But if, in a suit for a legacy, payment or a release be pleaded, if they do not admit proof by one witness the King's Bench grants a prohibition?" (Ld. Raym. 221).

These cases, then, at common law, affirm the principle which, as far as I know, has always prevailed in these Courts, that the evidence of one witness alone does not make full proof. This being so, I should not feel myself at liberty in this case, even were it free from suspicion, to pronounce a sentence of divorce. I am of opinion that the evidence of Ann Davies alone is not sufficient to satisfy the demands of the law, and, consequently, I pronounce that the proctor for Mr. Evans has failed in his proof, and I dismiss Mrs. Evans from all further observance of justice in this cause.

THE OFFICE OF THE JUDGE PROMOTED BY TITCHMARSH *against* CHAPMAN. Arches Court, Nov. 21st, 1844.—To justify a conviction of a clergyman, under the 68th canon, for "refusing or delaying" to bury the corpse of a parishioner brought to the churchyard, it must be proved that "convenient warning" was given him

(a) This, and the two following cases, amongst others, will be found in Burn's Ecclesiastical Law, tit. "Evidence." For the general proposition, see also Comyn's Digest, tit. "Prohibition" (G. 22).

beforehand of the intention to bring the corpse. What will constitute the warning convenient must depend on the circumstances of the case.

[S. C. 3 Notes of Cases, 370 ; 8 Jur. 316. Explained, *Barnes v. Shore*, p. 398, post.]

This was a cause of office promoted against the Rev. William Herbert Chapman, vicar of Basingbourne, in the diocese of Ely, for having refused, [176] without any just or sufficient cause, to bury the corpse of an infant parishioner, when duly applied to, after convenient notice or warning given. This proceeding was had, not under the general law, but under the 68th canon of the Church.

The defendant at first appeared under protest, which was overruled,^(a) and after having given a negative issue to the libel he tendered a defensive allegation, which was rejected.^(b) On the 2nd of November the cause came on for hearing on the evidence taken on the libel, and the only question then raised by the counsel for Mr. C. was whether the requisite of the 68th canon had been complied with—"convenient warning being given him thereof before."

The Queen's advocate and Addams for the promoter argued that the words "convenient warning being given him thereof before" were merely parenthetical, and formed no essential part of the canon. Even supposing that the notice given to Mr. Chapman was not sufficient in point of time, still, from the nature of this case, it was clear there was all that could be required. That this suit was not instituted against Mr. C. for delaying, but for positively refusing, to bury the body, by reason of the alleged want of baptism. That he was fully aware that the body would be brought for burial; consequently he had all the law requires, namely, a competent knowledge of the matter, "notitia competens" according to the Latin version of the canon.

Phillimore and Harding for the defendant. All [177] penal laws must be construed strictly; no case can be held to be reached by them but such as is within both the spirit and letter of such laws. The present is a proceeding under the canon which makes the offence. The notice is a condition precedent: unless "convenient warning" be given, the penalty will not follow. The warning required is but reasonable; without it, in large parishes in particular, the utmost confusion and indecorum would constantly arise. Moreover, a clergyman is not bound to bury every corpse that may be brought; were he to do so, he would subject himself to ecclesiastical censure; ^(a) he must therefore have due time for inquiry. No penalty at common law can be inflicted on a clergyman for non-performance of a duty requiring previous notice, unless a demand of that duty be made and proved. *Clovell v. Cardinall* (1 Sid. 34), and *Davis v. Black* (1 Q. B.). In this case the proof fails; there is no evidence of a "convenient warning."

Cur. adv. vult.

Judgment—*Sir Herbert Jenner Fust*. The only question on which I have now to deliver my judgment is whether the Rev. Mr. Chapman received that notice on the 26th May, 1841, which is required to be given by the 68th canon; for I am fully satisfied with the evidence that the corpse was brought to the churchyard to be buried, that the [178] reverend defendant did refuse to bury the corpse so brought, and that the corpse was entitled to burial.

I will observe in the outset that the canon under which this proceeding is had is highly penal; that a negative issue has been given to the libel, and therefore it is incumbent on the party proceeding to make out his case; if any material defect exists, the defendant will be entitled to the benefit derivable therefrom.

The promoter has to prove that "convenient warning was given Mr. Chapman beforehand, that the corpse of Jane Rumbold would be brought on the 26th of May, 1841, to the churchyard for burial." Let us see the evidence on this head. Hopkins, in his evidence on the 5th article, says: "Knowing that Mr. Chapman had on a former occasion ^(a) refused to bury the corpse, and that it was to be offered to him again for burial this day, the 26th of May, 1841, I went with other persons to witness what passed. Mr. Chapman was not in the churchyard to meet the corpse, and it was deposited in the porch of the church whilst John Rumbold, the father, went to the vicarage close by to ask for Mr. Chapman. I saw him enter the house, and presently

(a)¹ 3 Carleis, 703-15, where a fuller statement of the facts will be found.

(b)¹ Ibid. 840-868.

(a)² See the rubric prefixed to the burial service.

(a)³ 17th February, 1840.

he returned, and asked me to go into the house as a witness to what passed between Mr. Chapman and him. I went with him, and in the parlour found Mr. Chapman and a Mr. Seabrook, clerk to a solicitor at Royston. Mr. Chapman then said he wished some one to be present to be a witness to what passed for fear of any misunderstanding."

It has been argued from this passage in the evidence that Mr. C. must have had notice, otherwise he would not have provided himself with a witness. It is not clear to my mind that Mr. Seabrook may not have been present on the occasion on other business. Mr. C. might have said to him, being present, "Will you be a witness to what passes?" It would, I think, be stretching this evidence too much were I to infer from this passage that Mr. C. had a "convenient warning" beforehand.

The witness proceeds: "And then, having asked my Christian name, he desired John Rumbold to state what he wanted him to do, or his business. John Rumbold then said, 'I wish you to bury my child, to perform your office, I mean to read the prayers of the Church, and I will pay your demands whatever they are.' But the poor man hesitated in what he said; but he repeated the same request to Mr. Chapman to bury his child, in different words, several times. Mr. Chapman refused each time; he said he declined to do it; he positively refused each time. I do not know what warning Mr. Chapman had of the intention to bring the corpse for burial; but he positively and formally refused to bury the corpse." On the second interrogatory: "I do not know whether any notice was given to Mr. Chapman that the corpse of the said Jane Rumbold would be brought for interment on either occasion."

Rumbold on the same article says:

"On the 26th of May, 1841, he [Mr. C.] refused to bury the corpse of my infant, Jane. I took the corpse into the churchyard on the said 26th, at half-past six o'clock in the evening, the time which Mr. Moase wrote to me to bring the child to be [180] buried. . . . When I had taken the child into the churchyard, not finding Mr. C. there, I went to his house close by, joining the churchyard, and there I saw him, and asked him to come and bury my child. He asked me what I wanted of him, and I said I wanted him to bury my child, to read his prayers over him, and I would pay his demand; and he answered, 'I still refuse to do so.'" Whether these words refer to anything that took place in February, 1840, or to what passed before Hopkins was called in, is not perhaps clear. The witness goes on: "I repeated my request several times, offering to pay his demand, but he answered, 'I have nothing more to say; I shall refuse to do so.' I left the house when I found he would not do what I asked, and took the child back, and it is not buried yet. I do not know what warning Mr. C. had of my intention to bring the child for burial; Mr. Moase managed that, and gave me notice when I was to come over to take the child for burial."

Mr. Moase, the dissenting minister who baptized the child, says: "I had a communication with Mr. C. respecting the interment of the corpse, but not on the 26th of May, 1841; it was in the year preceding. I do not recollect seeing him on that day. I had no communication with him certainly. I saw the corpse of the said Jane R. pass my house on the way to the churchyard, but I did not accompany it. I do not, myself, know personally what warning Mr. C. had that the corpse would be brought to the churchyard for interment."

The result of the evidence of all the witnesses is, that not a single one can depose that any notice was [181] given to the reverend defendant before the corpse was actually deposited in the church-porch. Mr. Moase, who has taken a prominent part in this case, expressly says that he had no communication with Mr. C. on the 26th of May; and the other witnesses state they know not what warning was given. This being so, I am of opinion that the charge has not been proved, and consequently that no canonical offence has been committed. However, before I conclude, it may be right to notice the argument at the Bar.

It was contended by the counsel for the promoter that the words "convenient warning being given him thereof before" form no essential part of the canon; that they are merely parenthetical, and are to be considered, under the circumstances of this case at least, as surplusage. I must say I take no such view of them; whether in a parenthesis or not, they seem to me extremely material, and to have been advisedly introduced. It could not, I think, be seriously maintained that, even were the words not there, some qualification to the canon would not be implied. The mere fact of an intimation to a clergyman that a corpse was brought could not be a sufficient notice

in itself. He might be engaged in other duties of his office—in the performance of other services—which would render his attendance on a funeral utterly impracticable. Surely, under this supposition, he would not be punishable. “The law forces not to impossibilities, it always intends what is agreeable to reason.” It is needless, however, to pursue this argument further, for here we have the words; and it is to be observed that, if any difference exist between the Latin and English [182] version of the canon—between “*competens notitia*” and “*convenient warning*”—the latter is pleaded in the articles; to that, therefore, I must look.

I now proceed to consider the words.

A warning, it would seem, is not of itself sufficient; it must be convenient; that is, in reference to the time, distance, and the various vocations of the clergyman; for that which might be a convenient warning in one case, or in one parish, might not be so in another. Moreover, he is to have a convenient warning thereof. To what does the word “thereof” refer? It cannot be to the fact of the corpse having been brought into the churchyard, but to the intention to bring the corpse; and for this reason—the clergyman is bound by law to meet the corpse at the entrance of the churchyard, and, going before it, either into the church or towards the grave, to say or sing certain sentences, according to the order for the burial of the dead. But this is not all; a convenient warning is to be given him thereof before. Before what? Not merely before the clergyman is to bury the corpse, but before it is brought to the churchyard; such is evidently the plain and grammatical interpretation of the passage. That a convenient warning should be given beforehand of the intention to bring a corpse is not only reasonable, but necessary, in order that a clergyman may have an opportunity to make his arrangements, and prepare himself for his duty, as well as to afford time for preparing the grave, or anything else that may be requisite.

Without reference to decisions in any other Court, I should feel no hesitation as to the conclusion at which I must arrive; still, as two cases at [183] common law have been cited in behalf of the defendant, it may be right to advert to them.

The first is that of *Clovell v. Cardinall*, in the Common Pleas, 12 Car. 2. It was an action on the case against a parson for refusing to administer the Sacrament of the Lord's Supper on two Sundays: the jury found a verdict for the plaintiff, and assessed the damages at 40l. After argument, on a motion for arrest of judgment, Bridgman, C. J., held that, as the plaintiff had declared for the non-administration on two Sundays, and had not shewn that he had requested the parson, on the second occasion, to administer the sacrament to him, the exception was fatal, and, in consequence, judgment was arrested.

The other case is that of *Davis v. Black*, in 1841, which was also an action on the case against a parson for refusing to solemnize a marriage. The jury found a verdict for the plaintiff; but, on a motion for arrest of judgment, Lord Denman said, “There is no great danger in saying that an action can hardly be maintained against an officer not required by law to perform the duty at any particular time, without allegation of malice, or of the time at which he refused, being a reasonable time for the performance. Allowing fully that the action is maintainable on principle, the declaration is essentially defective. Hardly any of the objections made can be got over. One is clearly fatal. At the time when the clergyman is supposed to have acted wrongfully it does not appear that he had notice that both parties were willing to be married. It is alleged that, at the time of the grievance, they were, in fact, willing; but it is not averred that the [184] woman joined in the request. This is quite fatal; for you charge the minister with having improperly refused to marry, yet the whole declaration might be proved, although he had no reason to believe the woman to be willing.”

Though the circumstances of these two cases are not the same with the present, still they shew how strict the law is in requiring full proof before it will impose damage. In the present case, which is a penal one, the promoter pleaded and was bound to prove that “convenient warning was given to Mr. Chapman thereof before,” and he has failed to prove that notice. Under this circumstance, I pronounce that the promoter has failed, and therefore I dismiss Mr. Chapman from all further observance of justice in this cause, and I do so with costs.

FAULKNER *against* LITCHFIELD AND STEARN. Arches Court, Jan. 31st, 1845.—An immovable structure is not a communion table within the meaning of the rubrics of the Book of Common Prayer and the canons ecclesiastical; nor is there any authority in the same for the use of a credence table. Therefore a faculty to confirm the same was refused.

[S. C. 3 Notes of Cases, 511; 9 Jur. 234. See *Martin v. Mackonochie*, 1868, L. R. 2 P. C. 365; *Rector of St. Luke's, Chelsea v. Wheeler*, [1904] P. 257.]

This was an appeal on the part of the incumbent of the parish of the Holy Sepulchre, in the town of Cambridge, from a decree of the chancellor of Ely, for a faculty confirming, amongst other things, "a stone communion table," and also "a credence table," which had been erected in the church of that parish. The facts will be found to be fully stated in the judgment.

The case was argued in December, 1844.

Bayford for the appellant. The affidavits which are before the Court clearly [185] shew that the structure, under the name of a communion table, is of immense weight, composed of stone, and immovable. The question is whether such a structure is a communion table within the meaning of the rubrics of the present Book of Common Prayer, forming a part of the Act of Uniformity, 13 & 14 Charles 2nd, c. 4, and of the canons of the Church. The 82nd canon, which was considered in the case of *St. Gregory's Church* (2 Card. Doc. Ann. 237, edit. 1844), and acted on by Bishop Wren (*ibid.* 253), clearly implies that the table should be movable; and that it should be so is manifest from a consideration of the liturgy, and the alterations made therein. In the first Service Book of Edward 6th, the words altar and table are used indiscriminately; but in the second the word altar is everywhere expunged (excepting in certain quotations from the Bible), and the word table substituted, which has so continued in every subsequent revision of the Prayer Book.

That these changes were designedly made will appear on a consideration of the thing itself. The word table would not naturally suggest the idea of the structure now in question, but the word altar would. It answers to an altar, inasmuch as it is composed of a material indestructible by fire, and it corresponds with the definition of altar (De Consecr. dist. 1, cc. 26, 30, 31). According to Lyndwood (lib. 3, tit. 26), in England, at least, it was not absolutely necessary that there should be relics, but that the material should be of stone was [186] of the utmost importance (Gavanti Thesaur. Sac. Rit. p. 1, tit. 20; Janssens. Explanat. Rub. Miss. Rom.; Dr. Rock's Hierurgia). The structure in question, then, is not a table, but an altar, according to the definition.

In the next place, there was not merely in the reign of Edward 6th a change in the name from altar to table, but in the thing itself. Injunctions were issued by Bishop Ridley for the erection of tables in lieu of altars (1 Card. Doc. Ann. 94), which injunctions were carried out by royal authority (Burnet's Hist. of Reform. vol. 2, pt. 2, pp. 24, 31; Fox, book 9, p. 47; 2 Strype's Ecc. Mem. 390). Though the Acts of Uniformity of Edward 6th were repealed by Queen Mary, and altars were protected by stat. 1 Mar. 2 sess. c. 3, s. 4, still, on the accession of Queen Elizabeth, the second Service Book was revived by stat. 1 Eliz. c. 2, but that Act did not extend to the first. The extreme views of the ultra-Protestants (1 Strype's Ann. 160) drew from the Queen "the Injunctions" (1 Card. Doc. Ann. 233) in favour of movable tables, which injunctions were enforced throughout the kingdom (1 Strype's Ann. 165, 169, 267). "The Advertisements," anno 1564; the Canons of 1571, though not authorized by the Queen (1 Card. Synod. 123); the Canons of 1640 (*ibid.* 404); the Visitation Articles of Archbishops Parker, Grindall, Bancroft, and Abbott, together with those of Bishop Wren (Card. Doc. Ann. *passim*), Bishops Jewell (Defence of Apol. pt. 3, c. 1), and Babington (Babington's Works, p. 307); all establish [187] the fact of the usage being in accordance with the existing law, namely, of wooden movable tables. Moreover, altars are classed by stat. 3 James 1, c. 5, s. 26, amongst Popish relics. Finally, no argument can be derived from the rubric which directs those ornaments of the Church, which were in use by authority of Parliament in the 2nd of Edw. 6th, should be retained; for a communion table is not an ornament, otherwise parishes would not be bound, as they are (82d can.) to provide it.

2. Credence tables are of Popish origin,(a) and if not of modern introduction

(a) Gavanti Thesaur. Sac. Rit. p. 2, tit. 2, s. 5; Janssens. Explan. Rub. Miss. Rom. p. 2, tit. 3.

generally, they are so at least into England. Lyndwood makes no mention of them, and Archbishop Laud, at his trial, was unable to trace them further back than to the time of Bishop Andrews. Had they, however, been in general use in this country, they would have been destroyed under the authority of the injunctions of Edward 6th, of Cranmer, and of Elizabeth (1 Card. Doc. Ann. 17, 50, 221). If any difficulty be supposed to exist with respect to the elements, before they are placed on the communion table, it may be disposed of by following the directions of the 20th canon.

Twiss followed on the same side.

Phillimore for the respondents. There must be something adduced to oust the local ordinary, who felt no difficulty in the matter, but decreed the faculty in question without hesitation, after having heard counsel in opposition to the [188] grant. It was incumbent on the opposite side to shew that the ordinary was at fault, and, instead of so doing, they have merely thrown a mist over the case by referring to by-gone injunctions and Acts of Parliament which are superseded by the Act of Uniformity of Charles 2. The character of the faculty, which is most material, was not stated. Its object is to restore the church and render it uniform in its architectural character, without putting the parishioners to any expense whatever, who are, with the single exception of the appellant, unanimous in asking for it.

The injunctions cited on the other side are of a theological nature; and when it is recollected that within a very short space of time the public worship of the country was four times changed, they can have no bearing on the case. The question depends on the Act of Uniformity of Charles 2, and the Canons of 1603; with that Act it is utterly impossible to reconcile the injunctions.

Two points arise for consideration: 1st. Whether it is essential to the communion table that it should be movable; 2nd. That it should be made of wood.

To shew that the table should be movable, the eighty-second canon has been by the opposite side relied on. Whatever doubt might have existed in respect thereto, the question appears to have been set at rest by the decisions in the case of *Crayford Church in Kent* (Card. Doc. Ann. Nr. 137), the Order in Council respecting *St. Gregory's Church in London* (ibid. Nr. 140), and in the case of *Allhallows, Barking* (Gibs. 1465). It [189] is true there is an alternative as to the position of the table left by the rubric before the communion service; still, under all circumstances, the Court would not disturb the present table. It might, if required, be moved by the aid of machinery.

2nd. As to the material of the table. It was contended that the very word table implies that it must be composed of wood, as being derived from tabula. Tabula, in the Augustan age, did not necessarily imply anything of the sort; mensa was the word used to denote a table. In no book of authority is it laid down what the material must be; it is, therefore, purely optional. The word altar was wisely avoided on the last review of the Prayer Book; but the distinctions which gave rise to that omission have long since passed away. Communion table and altar are now regarded as synonymous. "Altar" is used by the Legislature in 59 Geo. 3, c. 134, s. 6.

The credence table, it was contended, was of Popish origin. That that was not so is obvious from no mention being made of it in Bishop Bonner's injunctions, or in any Romish writer. It is an architectural word; the thing is particularly useful; and as the use of it is not contrary to the canons or rubrics, there is no just reason why it should be disturbed.

Phillimore, R. J., followed on the same side.

Judgment—*Sir Herbert Jenner Fust*. This is an appeal from a decree of the chancellor of the diocese of Ely. In the Consistory Court of [190] that diocese an application was made on the behalf of the churchwardens of the parish of the Holy Sepulchre, in the town of Cambridge, for a faculty to confirm certain alterations, repairs, and restorations which had been made under a faculty previously granted for that purpose; and the prayer of the petitioners for the grant of this additional faculty also extended to such other alterations and repairs as had not been comprised in the former faculty which had been obtained at the instance of the minister and the then existing churchwardens jointly.

To this second application the minister was not a party; on the contrary, it appears that after the citation was returned he appeared to oppose the grant of the faculty; and therefore the question before the chancellor of the diocese of Ely was between the churchwardens on the one hand, and Mr. Faulkner, the minister, on the other.

The churchwardens in the case, when the faculty was originally granted, were Mr. Jordan and Mr. Ekin; but when the confirmatory faculty was prayed for, Mr. Litchfield and Mr. Stearn had become the churchwardens.

The original faculty was granted upon the 25th day of February, in the year 1842; and by that faculty the minister and the churchwardens were authorized to repair the church, and as to such parts thereof as had been rendered unsightly by injudicious repairs, to restore the same as near as may be according to the original design, and also according to the design and plan which are deposited in the registry of the Court, and which, as it is stated, have been made by a skilful ecclesiastical architect.

[191] Under this original faculty the works proceeded and had nearly arrived at their completion, and the church was nearly prepared to be re-opened for divine service when Mr. Faulkner, the minister of the parish, appears to have received for the first time, as he states, information of an intention to erect in the church that which is now the subject of discussion before the Court—that which is called in the petition for the faculty “a stone communion table,” and also “a credence table” made of the same material; and Mr. Faulkner expressed his intention, or at least it has been expressed to the effect, that had he been aware of this proceeding, that it was intended to make these two new erections in the church, he would have appeared to oppose them. However, the works were still proceeded with, and on the 29th of February, 1844, a vestry meeting of the parish was called and a report was made to it of what had been done under the faculty which had been granted, and that report contained a detail of the different items under twenty-four different heads, to which it will be necessary hereafter, I think, for the Court more particularly to advert.

Of that vestry meeting of the 29th of February the minister took the chair, and there was proposed and seconded at that meeting a resolution to this effect (and the resolution, I may state here, was carried with only the dissentient voice of the minister):—

“That the report should be adopted: that the works therein detailed as done, or intended to be done, had had the full sanction and approval of the committee, and that the churchwardens should take such [192] measures by obtaining a further faculty or otherwise as might be deemed necessary for the due ratification and confirmation of the said works and otherwise, in order to carry into effect the former resolutions in vestry relative to the restoration of the said church, and also for selling three bells then no longer necessary, and appropriating the proceeds derived from such sale in aid of the expenses which were incident to the restoration of the said church.”

A further resolution was proposed and also carried, “That the thanks of the meeting and the parish generally were due to the members of the Camden Society in Cambridge for their assistance in restoring the church, and to the Venerable Archdeacon Thorp especially, for his courtesy in explaining the various forms necessary for ratifying the former faculty and applying for another confirmatory thereof.”

Now this resolution which was proposed and seconded the minister declined to put to the meeting, and he resigned the chair; Mr. Litchfield, at that time senior churchwarden, then took the chair, and, as I before stated, the resolution was carried with one dissentient voice only—who was Mr. Faulkner, the minister.

In furtherance of these resolutions an application for a further faculty to the effect I have stated was applied for; the citation issued on the 9th of March, 1844, and in that citation was recited the former faculty, and a statement of what had been done as to the report made to the vestry; and it called upon the vicar, parishioners, and inhabitants of the parish in special, and all others in general, [193] having, or pretending to have, any right, title, or interest in the matter, to appear on the 26th of March, 1844, and shew cause why a license or faculty should not be granted to the churchwardens ratifying and confirming the original faculty, and also, so far as might not be comprised therein, the restorations, renovations, repairs, alterations, erections, and other works in the said church and the chancel thereof specified in the aforesaid report, and also for selling the three bells which had become useless. The citation also contained the usual intimation that if the parties did not appear, or appearing did not shew sufficient cause against the grant, that then the ordinary, the chancellor of the diocese, would proceed to decree the faculty to the tenor and effect stated.

Upon the return of the citation Mr. Faulkner appeared to oppose it, and prayed time, which was allowed him, till the next Court day to set forth his objection to the granting of the faculty: on the next Court day, the 17th of April, he appeared by a

proctor, and put in his answer and objections to the grant of the faculty. The next Court to that, 1st of May, an appearance was given on behalf of the churchwardens by a proctor, and he put in his answer to the objections of Mr. Faulkner. Certain other proceedings were resorted to, and affidavits were exhibited on each side, and the cause came on for hearing on the 25th of July, before the Rev. John Henry Sparke, clerk, Master of Arts, chancellor of the diocese of Ely, assisted by a learned advocate from this Court as his assessor. The case was argued very elaborately, I have no doubt, on that occasion (though I have not an authentic [194] report), by two of the learned counsel who addressed the Court on this appeal, and the result was, the chancellor of the diocese, with the advice of the assessor, decreed that the faculty should issue, pursuant to the intimation returned into Court.

From this decree an appeal was immediately asserted, the usual proceedings took place, and in the course of last term the case was very elaborately argued by all the counsel in it, and it remains now for the Court to pronounce its judgment upon the whole case. It being somewhat of a novel character, and having somewhat of interest, the Court thought it right to take time to consider the arguments addressed to it, and to look at the authorities cited in support of those arguments. The Court required to be furnished, by counsel, with a list of the authorities which were referred to by them in argument, and has now to thank them for their ready compliance with its request. I may here state that this request was addressed solely to the counsel in the cause, but it seems that the intimation of this request having appeared in the public prints, it was received as a general invitation; and from several individuals I have received letters, some subscribed with the names of the writers, and others anonymously: to many of these persons also I have to express my thanks for a reference to some authorities not stated in the course of the argument, and to which I have had recourse, though, perhaps, it may not be necessary to refer to them, but which have contributed very much to the result of the general conclusion on the case. I have also received letters from other persons who have not, I think, done that which they ought to have done on the [195] occasion. I have received letters intimating to the Court the great and important question here to be decided, and the effect which would be produced by the Court deciding the case in a particular manner. I have received, among others, that which purports to have been a sermon preached at Cheltenham by a reverend gentleman, a beneficed clergyman there, which bears for its title, "The Restoration of Churches is the Restoration of Popery, Proved and Illustrated from the Authenticated Publications of the Cambridge Camden Society," and containing extracts from their proceedings, at least, stated to be extracts, and certain publications purporting to be sanctioned by that society, and containing the opinions of the writer of that tract or pamphlet, or sermon, whatever it is to be called, shewing that in accordance with the title of the book, the effect of sanctioning the erection of stone tables, or credence tables, would be the re-introduction of Popery, its rites and ceremonies. This book was transmitted to me without any signature to the paper which contained it: by whom it was addressed to the Court I know not, but I must say, by whomsoever it was addressed, it came in a very improper manner; and I think the person who so transmitted it forgot what was due to the Court, or had forgotten what was due to the administration of justice. Within the leaves of that book was an extract from one of the public papers of the day to this effect, unsigned—but the extract being contained in the leaves, I presume, therefore, sent to me by the same person:—"Mr. Faulkner, like Mr. Hensloe, is, I maintain, contending for a great and vital [196] principle in his resistance to the innovations of the Cambridge Camden Society, and we are bound to give him credit, likewise for genuine courage, acute perception, and a tender conscience."

Now really these are most improper communications to be made to those intrusted with the administration of justice, and it is an entire misapprehension on the part of persons by whom they are addressed to suppose that they can have any influence on the Court, that it can suffer its judgment to be perverted by such communications as these, or be deterred from doing that which it deems its duty. The only effect such conduct could have would be to make the Court doubt whether it had taken a right view of the case, supposing it adverse to the grant of the faculty. I must repeat, I think it extremely improper that any such communications as these should have been addressed to the Court.

I will here take notice that I have received another letter, purporting to be signed

by Mr. Faulkner, one of the parties in this cause. This was a circular addressed to me, not as Dean of the Arches, but in another capacity—that of head of one of the colleges in Cambridge. The purport was to solicit a subscription to enable Mr. Faulkner to defray the expenses of prosecuting this appeal, the object of which, it was stated, was to maintain an important principle. I have taken notice of this letter, merely in order to express my opinion that it was inadvertently sent; that it was forgotten that the master of Trinity Hall is the same person who presides in this Court, and is called upon to decide this important question. I acquit Mr. Faulkner, [197] or those by whom the letter was sent, of intentional disrespect, or of any attempt to forestall my judgment.

These observations I have thought it right to make before I enter upon the consideration of the case.

The question is between the churchwardens and minister of the parish. With the Camden Society I have nothing whatever to do, further than as the name may be incidentally mentioned as the society under whom the reparations and renovations which have been made in this church have been carried on, and by whom and other persons, from voluntary subscriptions, this church has been placed in such a state and condition, and the general style rendered such as to have met with, I may say, the universal approbation of all persons who have had an opportunity of seeing it (an opportunity of which I availed myself, being in Cambridge in the vacation, to enable me to judge and form my own opinion)—with the exception of these two erections, the credence table and the stone communion table.

In the course of the argument there was much comment on the motives by which the parties in the suit had been actuated. On the one hand it was said that the erection of the stone communion and credence tables were for the covert purpose of laying the foundation for the introduction of Popish rites and ceremonies; on the other, that the opposition to the grant of the faculty was founded in bigotry and prejudice. Now I must repeat that with the motives of the parties I have nothing whatever to do. The Camden Society, whatever their [198] motives may have been, cannot be arraigned in the course of these proceedings; I cannot call them to an account or to explain their motives. I can only look on the conduct of those before me—the minister and the churchwardens—and judge of their motives by their acts, supposing that those acts do in any way elucidate what their motives were. Again, I am not called upon to determine whether the opposition to the grant is, or is not, a vexatious and groundless proceeding; that is a matter which must depend on the result to which the investigation may lead: nor am I bound to consider what the effect may, on certain minds, be, by deciding the case in a particular way. As I understand the question, it is one simply of the construction of the rubric and Book of Common Prayer, which are incorporated into the Statute of Uniformity, passed in the 13 & 14 Charles II. and of the canons which were passed in 1603, and, of that number, the 82nd, which more particularly applies to the subject. In proceeding to consider this statute, the Court must proceed precisely in the same manner as it would in construing other Acts of Parliament: it is not to go out of the way to put a misconstruction on an Act of Parliament because the motives of the parties on the one side or the other are improper. It is not to go out of the way to put a forced construction, in order to meet a particular case called to its attention. The simple question for me to determine is, as was stated in argument, and I see no reason to depart from that opinion, whether this stone communion table is or is not “a Communion Table” within the meaning of the rubric, and the constitutions and canons [199] ecclesiastical. If it is a communion table within the meaning of the law, the Court cannot hold it to be an unauthorized innovation, and upon that ground refuse to issue the faculty confirming the erection. Upon the other hand, if it should be of opinion that it is not within the meaning and sense of the Act of Parliament, whatever may be the effect of the judgment, it is bound to pronounce its conscientious opinion and also to refuse to confirm the faculty granted by the chancellor of the diocese of Ely, for I apprehend that no one can contend that a faculty ought to sanction that which it ought not. If eventually, upon a full consideration of the rubric, with all the circumstances brought to the notice of the Court, it should appear that the true construction of the word “table,” as it is used in the rubric and canon, is that the table should be made of wood, or should be a movable erection, and not fixed and immovable, the

Court then must proceed precisely in the same manner as it would have done if it had been precisely declared and enacted that it should be made of that material.

Before entering on the law I proceed to ascertain what the facts are which are set forth in this act on petition, which contains the principal grounds upon which the parties are now before the Court. Mr. Faulkner in the first instance being called upon to appear, and having appeared to set forth his objections to the grant of this faculty, pleads, in the first instance, "that at the time the faculty was obtained to repair the fabric, the church was furnished with a table in good and substantial repair; that this stood in the chancel of the church, and was well suited, and commonly used therein, for the celebra-[200]-tion of the Lord's Supper, and of a kind such as is generally used for that purpose in all churches of and belonging to the Established Church in this country: that in the course of repairing the fabric of the said church, but without his sanction, knowledge, or consent, a stone altar, or altar table and credence table, such as are used for idolatrous and heretical purposes in Popish Churches, have been erected and set up in the chancel of the said church, in lieu of the said Lord's Table of and belonging to the said church, and previously used for the celebration of the Lord's Supper." He goes on to allege, "That the said stone altar being moreover cemented to the wall of the said chancel from its form and great weight is incapable of being moved to any other part of the said chancel or church, if required to be so at any time hereafter by proper ecclesiastical authority;" then he submits "that the said erection and fitting of the same is contrary as well to the laws, canons, and constitutions of the Reformed Protestant Church as by law established in this country, as to the rubrical directions contained and set forth in the Book of Common Prayer published by the authority of the same, and repugnant moreover to the pure and Apostolical doctrines maintained and taught by the said Church; the said article of furniture called a credence table being, as he expressly alleges, an article of church furniture not recognised by the rubric or canons of the said Church, which also enjoin that in every church there shall be provided a decent and movable table for the celebration of the Lord's Supper thereon, and not an altar of stone or an altar table of stone such as has been erected in the [201] said church, and cemented to the chancel wall thereof. And he prays the Court therefore to refuse the confirmation of the faculty so far as these two articles are concerned; to monish the churchwardens, moreover, to take down and remove the same as having been wrongfully and unlawfully set up; and to provide the said church with a decent communion table, conformably to the uses and customs of the Established Church; and to condemn them in the costs of this suit."

The churchwardens, in reply, admit that there had been, at the time the faculty was applied for, such a table formed of wood, and standing in the chancel of the church, as alleged by Mr. Faulkner. They deny that in lieu of the said table a stone altar or altar table and credence table, such as are erected and used for idolatrous and heretical purposes in Popish countries, have been placed in the said chancel. Then, having denied the facts, save as above excepted, they go on to state what has been done, and the reasons on which the acts have proceeded. They allege "that the greater proportion of the funds for the restoration of the church having been contributed by voluntary donations, and at a very considerable cost, the said church having been out of such funds restored (by the substitution for the wooden roof of a stone roof, and otherwise) to its original architectural character, it became essential, in accordance with such restoration and to preserve the uniformity of the internal arrangements of the said church, that a new communion table, corresponding with such arrangements, should be provided; and from the rare architectural style of the said church, and the [202] interest it excited among the admirers of ancient ecclesiastical architecture, and from the desire for the preservation, as far as practicable, of the character and harmony of the edifice, and the carrying out of the terms of the before-mentioned faculty, a private contributor to the funds for the restoration of the said church presented, as a free gift to the said parish, a new stone communion table, corresponding in design with the interior arrangements of the said church, and also a table usually termed a credence table, for the reception of the bread and wine about to be used in the celebration of the holy communion prior to the consecration of the same; and such gifts were thankfully accepted by the churchwardens and parishioners, and the said tables were thereupon, in accordance with the ancient design of the fabric, placed in the said chancel." The churchwardens "deny that such tables

were placed in the said chancel without the sanction of the said faculty, or without the previous knowledge of Mr. Faulkner; or if he was ignorant of the intention to place them there, that he was wilfully ignorant of it, for he was a member of the committee called the restoration committee, and that his curate also was a member of that committee, and due notices in writing were given to him of the several meetings of the said committee, and that at one or more of such meetings the subject of the stone communion table, and also the aforesaid other table, and the offer of the same as a free gift to the parish were taken into consideration and determined upon." They deny that which is alleged by Mr. Faulkner, "that the communion table of stone is cemented or otherwise fixed to the [203] wall of the said chancel, or that it is incapable of being removed if required to be so at any time." They further allege "that the said communion table of stone and other table were, as aforesaid, placed with the unanimous concurrence and approval of the parishioners signified in vestry." Then they pray a confirmation of the faculty, that the faculty might be issued pursuant to the intimation returned in this cause; and submit that the said communion table is a decent and convenient table, well fit for the due celebration of the holy communion, and that the other table placed contiguous thereto is assistant to the ministration of the same; that neither of the said tables is in any way repugnant to the laws or lawful usages of the Church of England; and they pray that the party may be condemned in the costs of the suit.

These are the grounds set forth in the act on petition on the part of the churchwardens as those on which the Court is to direct the faculty to issue confirming these erections; and, as such, declaring that they are not repugnant to the laws or the lawful usages of the Church of England—that the one is a convenient table, and that the other is assistant to the ministration of the holy communion.

Mr. Faulkner, in his rejoinder to this answer of the churchwardens, proceeds to state further the point on which he differs from them with respect to the statements they have made. He denies, he says, in the first place, "that the principal part of the church, the entire body as it now stands, is of very ancient date, or of a very rare style of architecture; for a part only, to wit, the round part [204] thereof, is of such date and such style as aforesaid; and that the part wherein the said stone altar (falsely and untruly called and alleged by them to be a communion table, but which he expressly denied it to be), and the credence table have been erected as hereinbefore alleged is of a more modern erection, and of a more ordinary style of architecture; and he further alleges that by means of the repairs and alterations lately made in and about the said church, the said ancient part, to wit, the round part, has altogether been rendered incapable of having divine service performed in it, inasmuch as the pews heretofore placed therein have been altogether removed, and the floor of the area thereof made entirely clear and free, and that the said ancient part now forms only an entrance or approach to that part of the building, to wit, the modern part, which has been fitted up and is intended to be used for the celebration of divine service." He then goes on to state that he refers to the decree issued by the Court. He denies that there is a stone roof (this is perfectly immaterial to the question before the Court). He goes on to argue, "That if the said stone altar and credence table are or are intended to be in accordance with the ancient design of the fabric of the said church and in uniformity with the original internal arrangements thereof, as by the churchwardens alleged (but which he expressly denied them to be), they are of necessity, as by him hereinbefore alleged, such as were and are erected and used in Popish churches, inasmuch as the said church was originally designed and built in Popish times and used for Popish purposes; and he humbly submits that [205] it was the imperative duty and office of the churchwardens, in seeing that the said church was provided with a communion table, to have had respect to the canons and rubric of the Established Church made and provided in that respect, which he humbly submits they have neglected to do, and that they ought not to have been influenced by any other motives or considerations whatsoever." He goes on to state, "That if, as by them also alleged, the said stone altar was a free gift to the said church, yet that a like duty was, in that respect, also imposed upon them, and, moreover, that in and before accepting the same they were in duty bound to confer with the minister upon the subject, which they altogether omitted to do." Then he goes on to state, "That previously to and up to the year 1550, and whilst the religion commonly professed in this country was the religion of the Romish Church, stone altars and altar tables

had been and then were erected in all or in most of the churches in this country, to aid and assist in the performance of the idolatrous services of and belonging to the said Romish Church." He then goes on to state, "That one was so erected and fixed for such purposes in the said church of the Holy Sepulchre, and that which had been erected in the church was well known, or ought to have been well known, to have been removed about the year 1550, when a reformation of the said professed religion was being effected, and the said idolatrous services were no longer allowed to be performed; that divers express orders and injunctions were issued by full and sufficient ecclesiastical authority to churchwardens and others to pull [206] down and remove all stone altars or altar tables so erected and fixed, and to provide all churches with a table according to the true and literal meaning of the word." Then he goes on to allege, "That these having been pulled down by authority, that in the Holy Sepulchre was also removed, and that the communion table, which was there at the time the faculty was applied for, was standing in the church in good and substantial repair. That it has ever since been and still is unlawful to erect or re-erect an altar or altar table in any church or building of and belonging to the said Established Church. And further, that he, though on the committee, never attended, and was utterly unapprised till October, 1843, that there was any intention of proceeding to erect this stone altar. That upon the first day of November he protested against it. He denies that this altar is capable of being removed, as by the churchwardens alleged, save by the aid of powerful machinery, by which means the stone slabs composing the said altar might be separately, and one by one, lifted and moved away, as he admitted, and as he humbly prays they may be, by separating the stones from each other, and that a proper communion table may be supplied." Then he further alleges that, independently of the said slabs composing the same being plastered or cemented to that part of the chancel wall which they touch, and in manner hereinbefore alleged by him, the bottom or lower slab thereof has been and now is let into the foundation of the said chancel floor, and is imbedded in the said floor. And he further alleges that the said altar has been carefully and accurately surveyed, and [207] that the whole together is of the weight of one ton and three quarters. He denies that the credence table is or can be assistant to the ministration of the holy communion as ordered to be ministered in the said church; for he alleges that the same is no way required to be used by the canons of the said church, or by the rubric which sets forth the way in which the same shall be duly administered; and he submits that this is an unauthorized innovation upon the mode of administering the holy communion therein.

Then the churchwardens pray, 'That before anything is done or decreed in the premises that a personal inspection may be made of the said church and chancel, and of the restorations made in the same, and of their fitness and propriety, and of their conformity with the known usage and practice of the Established United Church of England and Ireland.' Then, as illustrative of such known usage and practice, they crave leave to refer to the communion tables of the construction of stone or marble now existing in numerous churches in England and Ireland; and they set forth a list of those churches in which there are communion tables approaching very nearly in construction and character to that which is now in question.

This, in point of fact, is the whole substance of the case, and I have found it necessary to enter thus minutely into it, in order that the ground upon which the faculty is prayed on the one side, and opposed on the other, may more clearly and largely appear.

In support of what is alleged in acts of Court, several affidavits have been exhibited.

[208] The affidavits on behalf of Mr. Faulkner go to the actual construction of this altar; to his ignorance, in the outset, of its erection; and to those points which are important to establish the model which is in Court, as being in all respects a correct model.

On the part of the churchwardens several affidavits have been exhibited, none going to the facts of the particular case, but merely with respect to other churches in which similar erections have been found. There is no denial on oath of that which is alleged in the act on behalf of Mr. Faulkner, that this table is cemented and made to adhere to the walls of the church. It was stated in argument that it is not made to adhere to the wall, and some dispute on that point not only arose here, but also at the time of the inspection by the chancellor of Ely in July last, and Mr. Faulkner has pro-

duced the affidavits of two or three persons concerned in the work done, made so late as the 12th of June, in which they do expressly state that "the top slab and the three upright slabs were jointed against the finished plaster of the upright chancel wall with mortar."

Under these circumstances the Court would be bound to take it as stated in the several affidavits. Allegations there are on both sides—on the one side supported by affidavit; on the other, consisting in mere allegation. Perhaps in the interval between the 12th of June and the 25th of July there might have been some alteration effected. But in my view of the case this will make no difference whatever. If the altar or table be fixed in the manner described; if it be firmly embedded in concrete below [209] the floor of the church, and that floor covered with encaustic tiles, made up to it, it is just as immovable as if it had been made to adhere to the church wall itself. It might be necessary, perhaps, in respect to what is required in Roman Catholic churches, that the altar should adhere to the wall of the chancel, and, in the first instance, this table may have been so made to adhere. If so, I cannot but say that the alteration so subsequently made is not quite fair—it is not altogether a just representation of the manner in which this altar or table was originally erected.

It has been stated in argument that in the plan, as originally produced, the erection of an altar and a credence table was not considered or contemplated in the first instance; for, in fact, the plan, as originally drawn, and referred to in the citation, and left in the registry of the Court, contained no alteration with respect to the communion table, which at that time remained in good repair, and was used for the due administration of the Lord's Supper. Certainly, if I look at the plan according to which these alterations were by the first faculty directed to be carried into execution, there is no ground for supposing that such an erection as this was contemplated, or that any communion table should be set up but that, or one of a similar kind to that, which had been used for so many years. It appears an after-thought, arising from the offer made by a liberal individual; he—conscientiously believing, I have no doubt, that it was more in accordance with the general character of the church than a communion table would be—made this offer to the churchwardens, who, I [210] presume, were in communication with the restoration committee, and they consented to receive it into their church. The communion table has been removed—I believe broken up, and this table has been substituted for it. The credence table has been erected to hold, before their consecration, the elements which the minister is required by the rubric to place at a certain part of the service upon the table.

I will now dispose of one or two facts contained in the act on petition. It is perfectly immaterial to this question whether Mr. Faulkner attended any of the committees or not. It would have been more satisfactory, undoubtedly, if Mr. Faulkner—being one of the parties to whom the original faculty was granted, to whose care was ordinarily entrusted the carrying out of the alterations, restorations, and repairs—had attended to see that the provisions of the faculty were complied with; but it unfortunately happens that, from some circumstance or other, Mr. Faulkner, being resident at another incumbency he possessed, heard nothing of this till the month of October, 1843. But with the view the Court takes, I say this is perfectly immaterial; because it is not a question in which the conduct or rights of individuals are concerned: it is an important principle to be decided on the law, which is not solely applicable to this church, but will apply to every parish in the kingdom. Again, the Court has been told, in the act on petition, that it becomes essential, in order to preserve the uniformity of the arrangements of the architectural style of the building, that a new communion table should be erected, and that it should rather be in [211] the form now proposed (for that is the effect of the allegation), than that of an ordinary communion table. Now, this also is a question perfectly immaterial. The Court can never hold that the uniformity of a building, the architectural style of a building, is to be consulted and to be preferred to that which it is the intention of the Act of Parliament to preserve—uniformity in divine service. It cannot sacrifice that great principle to the minor one of the uniformity of the architecture of the church; and the Court might doubt whether, even in that respect, the committee thought it would be essential to the due preserving of uniformity of style. In the first instance nothing of the kind was contemplated; and I find that there are three other churches of the same character, though not quite so ancient, in none of which is a stone altar to be found. I do not, therefore, think that even in point of taste they

are borne out, so as to render it necessary to make this altar supersede the table originally placed in the chancel of the church. I do not apprehend that in the Temple church, which has been recently repaired and ornamented, and which is of the same description, though not so ancient as the Holy Sepulchre at Cambridge, that it has been thought necessary to remove the communion table, for the purpose of placing a table of the description now before the Court.

I am told, in the course of the argument, that it is very improbable that instances of the erection of stone altars would be multiplied; for that the expense of such erections would be sufficient to deter parties from it. But what does this, in point of fact, amount to? It is asking me to put a particular [212] construction upon the rubric and the law for the purpose of meeting this case. These are matters that cannot enter into my consideration; and for this reason I cannot direct the faculty to issue unless I am satisfied that the law will sanction such a proceeding, and that it is the true construction of the Act of Parliament that a table may be constructed of stone, and be fixed and immovable.

It has been contended, and very properly so, that the present question must be determined by the Act of Uniformity, and those rubrics that are incorporated in and form a part of it; that the former Acts of Uniformity, as to this question, are repealed by the present Act of Uniformity, and, consequently, they are not in any way binding: no doubt that is perfectly correct. But, in order to arrive at the true meaning of the expressions which are used in the present rubrics, it may not be improper to consider the sense in which the same terms were used at the time at which the alterations were made at the era of the Reformation; and from that date down to the passing of the Act which is now in force, which establishes the present Book of Common Prayer and the order of the administration of the sacraments of the Church; and also to review what has taken place downwards to the present time. And here it is to be observed, with respect to the use of the word "table" itself in the present rubric, the term is to be construed according to its usual and popular meaning; no forced construction is to be put thereon, unless it be shewn that the term has derived a particular determination from the manner in which it was used in the first instance in the orders and rubric, or from the acceptance which [213] it has since obtained by usage. In construing all Acts of Parliament, it is right to consider in what sense a word is generally used, and to resort to any other interpretation only when it is clearly the object of the framers of the Act that the word shall receive a more restricted or a more extensive signification than the term naturally suggests. It is competent, however, for the churchwardens to contend that the word "table" may, in its common signification, be that of an article composed of wood, standing on a frame, and movable; yet notwithstanding that, that at the time it was first inserted in the rubric it contained another meaning, which is the construction that is to be put on it in the present rubric. Therefore it is necessary to see what was the meaning when there was first a change from the word "altar" to "table," and to look at the form in which the table had been fixed, and ascertain the time at which the alteration took place; for that some difference was intended by those by whom the change was originally made there can be no doubt.

Now, looking at this part of the question, what is the state of the churches at that date? We all know, and it has been argued on both sides, that, from some date, down to the Reformation, the religion of this country was that of Romanism; that the Church of England, prior thereto, held the doctrine of transubstantiation; but that doctrine, at the time of the Reformation, was one of the most important, if not the most important, on which the two Churches differed from each other. On denying that doctrine, which, by the Articles of the Church of England, is declared to be "repugnant to the plain [214] words of scripture," it was thought necessary to alter the form, as well as the name, which had been before described as an "altar," upon which the sacrifice was supposed to be offered up whenever the sacrament was administered. I say we must consider what was the alteration introduced at that time; for the names of "altar" and "table" were differently used at different times.

It was contended that, by the rules of the Romish Church, altars must be built of stone; that they must be immovable, and various authorities from the books of the canon law were cited, in order to shew that these tables could not otherwise be fully consecrated; that if they were removed, they must be reconsecrated. Now the Court does not think it requisite to follow all these authorities, and to carry this argument to the full extent contended for; nor is it necessary that it should be proved, as is

alleged on the part of Mr. Faulkner, that this structure is, in fact, though called a "communion table," essentially an altar. The tests applied to an altar by the learned counsel were that it should be made of stone; that it should be fixed to the wall, or so fixed, at least, as to be an immovable structure; and, therefore, that every article which was so fixed, and made of that material, was in fact and essentially an altar. I do not think it necessary to carry the argument to that extent, because, if the Court should be satisfied that it is not a communion table, that is all that is necessary to the decision of this case. But it is not unimportant to consider what was the structure, and what was required at the time at which these tables, under the name of altars, were [215] used in the Romish Church, and also to see what changes have been made in the material, and in the mode of erecting these altars.

In the course of the argument upon this point the Court was referred, as to the Romish Church, to the authority of Cardinal Bona, in his treatise "*De Rebus Liturgicis*," and the particular passages which were cited are to be found in the 1st book, cap. 20, and of his entire works, published in 1723, page 251. That author proceeds to describe what was the state and condition of altars, and the uses to which they were applied from their earliest introduction. Speaking of the antiquity of altars, he says: "*Cujus vero structuræ altaria illa fuerint, an sub dio, an in loco clauso et Deo specialiter consecrato, cum de his Scriptura sileat, non est facile definire. His igitur omissis, quæ ad nostrum institutum non pertinent, de altaribus Novi Testamenti agendum est, in quibus corporis et sanguinis Christi sacrificium incruentum immolatur. . . . Primis ecclesiæ seculis an lignea fuerint, vel lapidea, non liquet. Utraque crediderim tempore persecutionis usitata, prout rerum locorumque opportunitas ferebat. Usus autem ligneorum magis expeditus erat, quia facilius de loco in locum transferri poterant. Plerique scriptores asserunt a S. Sylvestro constitutum, ut altaria lapidea essent; sed hujus decreti nulla mentio apud antiquos reperitur. Concilium Epaonense, Anno 509, celebratum statuit, cap. 26, ut altaria, nisi sint lapidea, infusione Chrismatis non sacrentur. Altaris quoque lapidei tanquam communiter tunc usitati meminit Gregorius Nyssenus, qui eodem sæculo quo Sylvester claruit, Orat. in baptismum Christi, his verbis: Nam et altare hoc [216] sanctum cui adstimus lapis est natura communis, nihil differens ab aliis crustis lapideis: ex quibus parietes nostri extruuntur, et pavimenta exornantur. . . . Ligneum vero ex ipso sæculo Athanasius commemorat epist. ad Solitarios dicens, cum rapuissent subsillia et Cathedram et mensam, erat enim lignea, (a) et vela (b) Ecclesiæ, &c. Ex quibus intelligimus, promiscuum tunc usum in Oriente lignei et lapidei viginisse.*"

From this it would seem that in the early ages of the Church the material of which altars were composed was considered a matter of indifference. The Cardinal, after mentioning a few instances of silver being used for the purpose, proceeds: "*Postea sancivit Ecclesia, ut nemini liceat celebrare, nisi in altari lapideo consecrato; sed quis hoc primum certa lege firmaverit, Sylvesterne an alius, adhuc incertum est.*" Then as to the difference in the structure: "*Erant autem olim diversæ altariorum structuræ; nam aliquando uni tantum columnæ mensa lapidea superjacebat . . . qualia sunt etiam hodie altaria quædam subterranea Romæ in Ecclesia S. Ceciliae. Aliquando quatuor columnis eadem mensa suffulta erat. . . . Interdum duæ solæ columnæ ex utroque latere ipsum altare sustinebant, suntuque adhuc Romæ in cryptis et cæmeteriis quædam hujusmodi . . . quibus [217] Christiani tempore persecutionis ibidem latentes utebantur. Denique nonnulla quadro superposita ædificio tumuli formam referebant, tanquam martyrum sepulera; quæ proprie altaria quasi altæ aræ dicebantur. Et hæc quidem altaria fixa et immobilia loco adhærent, in quo construuntur.*" We find then that after the early ages of the Church (but the exact date is not clear), that altars were to be of stone, and fixed, supported sometimes by two, sometimes by four pillars, and that latterly they assumed the form of a tomb. But there were altars of a different description: "*sunt autem et alia portatilia et motoria, quæ Episcopi iter agentes secum olim ferebant, ut in his possint extra Ecclesiam in*

(a) Vide Fleury's Church History, xxii. 7, p. 129, note (k) [Oxf. Tr. 1843]. By specifying the material, Athan. implies that altars were sometimes not of wood.

(b) Curtains were at the entrance and before the chancel, vide Bingh. Antiq. viii. 6, s. 8; Hofman. Lex. in voc. velum; also Chrysost. Hom. iii. in Eph. [Tr. p. 133, note (o)]. Vide Historical Tracts of St. Athan., editor's notes (g) and (h), p. 269 [Oxf. Tr. 1843].

locis ab ea remotis celebrare." The movable altars then were the exception to the general rule.

In a work of a later date, "*Joannis Devoti Institutiones Canonicae*," vol. 2, pp. 290-1, Venice, edit. 1827, similar information is to be found: "In medio sanctuario a pariete sejunctum erat altare, quod etiam, ara, mensa sacra, sanctum sanctorum dicitur. Initio lignea, ut plurimum, erant altaria, deinde lapidea facta sunt; erantque etiam in locis compluribus auro, argentoque cooperta. Unum in Græcis ecclesiis erat altare, uti nunc etiam est; sed Latini jam inde ab antiquissimis temporibus plura in una Ecclesia altaria habere consueverunt." Then in the notes on the word "altare" he says, "Altare semper Christianos habuisse, in quo rem divinam conficerent, certum est." Again, on the word "lapidae," "De lapideis altaribus decretum extat Silvestri Pontificis: sed hujus decreti suspecta fides est. Certe etiam post hanc ætatem non multis Ecclesiis lignea fuisse altaria, ostendit Mar-[218]-tenius de Antiq. Eccles. rit. lib. 1, c. 3, art. 6, § Lapideum altare memorat Gregorius Nyssenus de Baptism.; et Concilio Epaonensi Can. 26 sanctum est, ut altaria nisi lapidea, unctione non sacrentur. Cum autem altarium materia mutari cæpit, formam etiam mutatam fuisse tradit Binghamus Orig. et Antiq. Eccles. lib. 8, c. 6, § 15. Nam cum ea mensarum similitudinem antea referrent, ad instar aræ erigi cæperunt, et una, quatuor columnis lapidea mensa nitebatur, ac nonnulla etiam quadro superposita ædificio, uti observat Card. Bona tumuli formam referebant, tanquam martyrum sepulchra, quæ proprie altaria, quasi altæ aræ, dicebantur."

On the authority of these two writers of the Romish Church, who evidently were well acquainted with its rites and ceremonies, it appears that these altars, which at first were indifferently made either of stone or of wood, of different forms, could by the decree of the Church be used for the purpose of the most important and solemn ceremonies, only when fixed, made of stone, and consecrated by a bishop. The early Christians performed their rites and ceremonies in any place to which they could resort with safety, and very frequently at the tombs of martyrs, whence it was that altars afterwards assumed the form of tombs. Under these circumstances it was that altars came to be erected in the Church; and there are several authorities, to which I could refer, to shew that it was held to be generally requisite that there should be certain relics deposited.

I think I may now assume the fact that at the time of the Reformation this was the usual form of altars in most churches: they were certainly made of stone, they were fixed and immovable, and the [219] generality of them were in the form of the tombs of the martyrs. Such was the description of altar which was to be got rid of at this time, in order to remove as far as possible all those superstitious notions which attached to the performance of those services in the Church of Rome which were connected with the doctrine of transubstantiation, or the change of the elements of the Lord's Supper. As that was one of the principal points upon which the Church of England separated from that of Rome at the commencement of the Reformation, alterations were made in the performance of the service to a certain extent, but not to any great extent at that time. The mass continued to be performed during the time of Henry VIII., and also for the first two years of the reign of Edward VI. We find by his Prayer Book, set forth in 1549, the service thus described: "The Supper of the Lord and the Holy Communion, commonly called the Mass;" and the word altar in different parts of that book. In the second book of Edward VI., set forth in 1552, an alteration was made—a very material alteration. By it the service was described as "The Order for the Administration of the Lord's Supper or Holy Communion," leaving out, therefore, altogether the latter part of that contained in the first Prayer Book, "commonly called the Mass." The second book then went on to say, "The table, having at the communion-time a fair white linen cloth upon it, shall stand in the body of the church, or in the chancel, where morning prayer and evening prayer be appointed to be said;" and the directions, as it will presently appear, in the present rubric are substantially the same. Again, in the [220] Prayer Book of 1549, the priest is directed to stand "humbly afore the midst of the altar," and say the Lord's Prayer, &c. In that of 1552, the priest is directed to stand "at the north side of the table." Now the word "altar" occurs in several other parts of the first Prayer Book; the minister is said to set the bread and wine on the "altar;" again, the priest turning him towards the "altar." After the Consecration Prayer the priest is still to turn to the "altar," but without any elevation or shewing the sacraments to the

people. Again, on Wednesdays and Fridays, &c. the priest shall say all things at the "altar." In the bread there is an alteration made, and it is a point to which the Court must advert; the bread is declared to be bread. There is some alteration in the form of the bread which was received by the people in the sacrament. It was, according to the first book, to be fashioned after the manner of "unleavened" bread, "and round, as it was afore;" but in the second Prayer Book the direction runs thus: "And to take away the superstition which any person hath or might have in the bread and wine, it shall suffice that the bread be such as is usual to be eaten at the table with other meats." Now here it does appear to me impossible to doubt what the meaning of the word table was as used in the second Prayer Book, in reference to the bread which is to be taken on this occasion, that it shall be such as is "eaten at table with other meats." Can the word "table" mean anything but that table at which meals are usually eaten? The expression, bread usually "eaten with other meats," necessarily implies it. It was not to be such as was received before 1549, but it should [221] be bread such as is commonly used at tables. It appears therefore to me that these alterations throw a very important light upon the meaning of the word table which is substituted for altar in these several portions of the Prayer Book, and it is to be observed that the word "altar" occurs nowhere in the rubric of the second Book of Prayer of Edward VI., although it is used as well as the word "table" in that book published in 1549.

But there was a considerable interval between the publication of the Prayer Book of 1549 and the other of 1552, and in that interval various rules and regulations, orders and injunctions, had been issued, which account for the change which had been made. It appears that in 1547, before the publication of the first Prayer Book, injunctions had gone out to (among other things) "utterly extinct and destroy all . . . tables, &c., and all other monuments of feigned miracles, pilgrimages, idolatry, and superstition." (a) Bishop Ridley, in his visitation of the diocese of London, in 1550, issued, amongst his injunctions, the following: (b)—"Whereas in divers places some use the Lord's Board after the form of a table, and some as an altar, whereby dissention is perceived to arise among the unlearned; therefore, wishing a godly unity to be observed in all our diocese; and for that, the form of a table may more move and turn the simple from the old superstitious opinions of the Popish mass, and to the right use of the Lord's Supper, we exhort the curates, churchwardens and questmen here present to erect and set up the Lord's Board after the form of an honest [222] table"—I agree with the interpretation put upon that word, that it means nothing more than an ordinary and decent table—"decently covered in such place of the quire or chancel as shall be thought most meet by their discretion and agreement, so that the ministers, with the communicants, may have their place separated from the rest of the people; and to take down and abolish all other by-altars or tables." The purpose, therefore, for which this alteration was made, and tables ordered to be substituted for altars, was to turn the simple from the old superstitious opinions of the Popish mass, and to the right use of the Lord's Supper; and, accordingly, here is an injunction, or rather an exhortation, to the churchwardens of the parishes by the bishop of the diocese to set up a table in the form of a table, no longer in the form of an altar formerly used, and for the express purpose of preserving not only unity in the diocese, but for removing all superstition connected with the ancient altars. That was the purpose for which this was to be done, and the means of removing that superstition were by the substitution of tables for altars.

Now these injunctions were in the first instance, as it should seem, confined to the diocese of London, and there to have effect, as being the advice or exhortation of the bishop. But it appears from the journal of King Edward's reign, to be found in Burnet's History of the Reformation, vol. ii. pt. ii. p. 31, Oxford, edit. 1829, that, on the 19th November, 1550, "there were letters sent to every bishop to pluck down the altars;" and that on the 24th of the same month the order was transmitted to [223] Ridley (Doc. Ann. Nr. 24, vol. i. p. 101). On the 26th of June, 1550 (Burnet's Reform. vol. ii. p. 325), the high sheriff of Essex was sent to see whether the bishop of London's injunctions were performed, the Order in Council, sent to pluck down every altar, being subsequent thereto, i.e. 19th of November. The Order in Council

(a) Cardwell's Doc. Ann. Nr. 2, vol. i. p. 17; edit. 1844.

(b) Ibid., No. 21, pp. 94-5.

was very strong, "especially to charge and command you, for the avoiding of all matters of further contention and strife, about the standing or taking away of the said altars, to give substantial order throughout all your diocese, that with all diligence all the altars in every church or chapel, as well in places exempted as not exempted, within your said diocese be taken down, and instead of them a table to be set up in some convenient part of the chancel, within every such church or chapel, to serve for the ministration of the blessed communion." There were sent with this to Bishop Ridley and bishops of other dioceses, reasons and considerations on which that order had been issued. The reasons were (in the words of Burnet, vol. ii. p. 328-9), "to remove the people from the superstitious opinions of the Popish mass; and because a table was a more proper name than an altar, for that on which the sacrament was laid. And whereas in the Book of Common Prayer these terms are promiscuously used, it is done without prescribing anything about the form of them, so that the changing the one into the other did not alter any part of the liturgy. It was observed that altars were erected for the sacrifices under the law, which ceasing, they were also to cease; and that Christ had instituted the sacrament, not at an altar, but at a table. And it had been ordered by the preface to the Book of Com-[224]-mon Prayer that, if any doubt arose about any part of it, the determining of it should be referred to the bishop of the diocese. Upon these reasons, therefore, was this change ordered to be made all over England, which was universally executed this year."

So that in the year 1550 there was a general order for the setting up of tables instead of altars, for the purpose of removing the superstitions of the Popish mass; and it is most important to keep in mind the motive which induced this alteration to be made, and also that this was executed throughout the kingdom in the year 1550, and from that time to the end of Edward the Sixth's reign the communion was administered accordingly. The riots which followed shortly after this were said to be owing to tables being used instead of the altars formerly set up in churches.

These were the alterations which took place in the short reign of Edward VI., and are most important for the consideration of the question now before the Court, because they are the foundation of all the subsequent proceedings that I shall have to consider. The table was not to be of stone and fixed, but of wood and movable; and unless some alteration has taken place, the same interpretation must be put on the word which was applied to it by Edward VI., and this in conformity with the rule that the same signification is to be given to the same word, unless it shall be shewn that there is an intention to depart from that use of it.

In the short reign of Mary which followed, the Act of Parliament which had confirmed the second Prayer Book of Edward VI. was repealed, and altars were then restored to the state in which they stood at the latter years of the reign of Henry VIII.; [225] altars were re-erected, and so continued to be used and applied for the purpose of the administration of the communion to the end of her reign.

But as soon as Elizabeth succeeded to the throne, which was on the 17th of November, 1558, the most important Act of her reign was the repeal of those statutes of Mary, which had repealed the former Acts of Edward VI., on matters of religion, and then there was a return to the administration of the sacrament, and the performance of the rites and ceremonies of the Church, as they stood at the end of his reign. At this time, then, the order of the second Prayer Book of Edward VI. was that which was to constitute the rule for performing this service.

It is to be observed that the object in framing the second Prayer Book was the removal of old superstitions; and when one of the modes of carrying that object into effect was to be the abolition of all altars and the substitution of tables for those altars, it must be that something more than a mere alteration of name was intended. It would not have satisfied the purpose for which the alteration was made merely to change the name of altar into table. The old superstitious notions would have adhered to the minds of the simple people, and would have continued so long as they saw the altar, on which they had been used to consider a real sacrifice was offered. For these reasons I consider a substantial alteration of the structure was made.

In the year 1559, amongst the injunctions issued by Queen Elizabeth, was the following (Doc. Ann. Nr. 43, vol. i. p. 233):—"Whereas Her Majesty understandeth that in [226] many and sundry parts of the realm, the altars of the churches be removed, and tables placed for the administration of the holy sacrament, according to the form of the law therefore provided; and in some other places the altars be not yet

removed, upon opinion conceived of some other order therein to be taken by Her Majesty's visitors; in the order whereof, saving for an uniformity, there seemeth no matter of great moment, so that the sacrament be duly and reverently ministered; yet for observation of one uniformity through the whole realm, and for the better imitation of the law in that behalf, it is ordered that no altar be taken down, but by oversight of the curate of the church and the churchwardens, or one of them at the least, wherein no riotous or disordered manner be used."

It was contended by counsel, relying on 1st Mary, sess. 2, c. 3, s. 4, that altars were re-erected; that no altars were pulled down and tables substituted in their place; and that there had been no repeal of this statute. I do not understand that by virtue of that Act of Parliament they were re-erected; they were certainly re-erected during that reign, but I do not apprehend that in that Act there is any special order to that effect, or that it goes further than to impose penalties on those who should, without sufficient authority, take upon them to destroy altars. As to Elizabeth not taking a more active part immediately on her accession, there was no necessity, for the second Prayer Book of Edward VI. was revived. Moreover, she considered it a matter of indifference, so far as she was concerned, whether the altars were removed or not, but still, for the sake of uniformity, it is clear that [227] the intention was that they should be, and tables substituted for them, because she says, in 1559, in her injunctions, "Yet for observation of one uniformity through the whole realm, and for the better imitation of the law in that behalf, it is ordered that no altar be taken down but by oversight of the curate of the church and the churchwardens, or one of them at the least, wherein no riotous or disordered manner be used." The object of this was to prevent that for which penalties had been imposed by Mary, namely, individuals of their own accord pulling down altars. It appears that some persons had broken into the churches, destroyed the altars, and committed various excesses. But it is quite clear, from what follows, that tables were substituted: "And that the holy table in every church be decently made, and set in the place where the altar stood"—that necessarily seems to imply that the altar was removed and the table put where the altar formerly stood—"and there commonly covered, as thereto belongeth, and as shall be appointed by the visitors"—that is, by the power given her to appoint High Commissioners, she appointed visitors to go to the different churches to see that the orders were carried into execution—"and so to stand, saving when the communion of the sacrament is to be distributed; at which time the same shall be so placed in good sort within the chancel, as whereby the minister may be more conveniently heard of the communicants in his prayer and ministration, and the communicants also more conveniently, and in more number, communicate with the said minister. And after the communion done, from time to time, the same holy table to [228] be placed where it stood before." Here, to be sure, is a most complete substitution of the table for the altar; the injunction shews not only that the table was to be so substituted, but also that it was a structure capable of being moved from time to time, and calculated, as it was considered, to do away with all superstitious notions that belonged to the Popish mass, one of which was that it was essential that the altar be immovable. The altar was to be fixed; here the table was to be substituted for the altar, and moved from time to time when the holy communion was to be administered.

This was further followed up by what were called "interpretations and further considerations" of those injunctions. They were prepared by the archbishop and bishops; and on the subject in hand the following is to be found (Doc. Ann. Nr. 43, vol. i. p. 238):—"That the table be removed out of the choir into the body of the church, before the chancel door, when either the choir seemeth to be too little, or at great feasts of receivings, and at the end of the communion to be set up again, according to the injunctions." On the meaning, then, of the injunctions as to the table, there cannot be a shadow of doubt.

Some doubt has been raised as to the force of the injunctions: into that question, however, I am not going to enter. What I am seeking to establish is the fact that the communion table was movable, not fixed, and that the material of which it was composed was changed. I may here observe, however, that these injunctions were referred to by Laud, in the trial in the year 1637 of Bastwick, [229] Burton, and Prynne (State Trials, vol. iii. p. 739, Cobbett's edit., 1809), for libels to which I must again presently advert, as lawful injunctions, as justifying the removal of the com-

munion table; also upon his own trial, in 1640-44 (State Trials, vol. iv. p. 454), when justifying himself in the course he had pursued in changing the position of the communion table. Again, they were quoted, and their authority was not questioned, in the trial of Henry Sherfield, Esq., for breaking a painted church window at Salisbury (*ibid.* vol. iii. p. 533). However, as I before said, that point is immaterial, according to the view I am taking of this case.

I will now proceed to shew that these "injunctions" were almost immediately acted upon. An order from the Queen was issued to certain persons to visit, amongst other cathedrals, that of London. The proceedings are fully set forth in Strype's *Annals of the Reformation* (vol. i. p. 168, fol. edit., 1725); the following is a summary:—

"On the 11th of August, in 1559, the visitors went to the church of St. Paul in London. After Litany read and a sermon, the venerable commissaries went to the chapter house of the cathedral, and there sat judicially. The Queen's Letters Com-missional, signed by her own hand and seal, were read, by the principal registrar of the Queen in that behalf, names were called, few appeared, and the absent were declared contumacious for not appearing. Then the Articles of Inquisition were publicly read, and after other proceedings were had, the visitors enjoined them that they should [230] take care that the cathedral church should be 'purged and freed from all and singular their images, idols, and altars; et in loco ipsorum altarium ad providendam mensam decentem in Ecclesia pro celebratione cænæ Domini ordinaria.' The injunctions were then delivered to certain persons to carry into effect with all speed."

On the 15th of August the roods in St. Paul's were pulled down, and the high altar, and other things pertaining, spoiled. Westminster Abbey did not escape; it appears, on the 16th of April, 1561 (Strype's *Annals of the Reformation*, vol. 1, p. 267), the altars in that church were demolished, and also the altar in Henry the VIIIth's chapel.

In 1564 the "advertisements" were drawn up. Amongst the number was an order (Doc. Ann. Nr. 65, vol. 1, p. 326) that "the parishe provide a decente table," stating more particularly the description of table, one "standinge on a frame for the communion table." Words, I think, cannot speak more plainly. In 1569 Archbishop Parker issued, with other inquiries on his visitation, the following (*ibid.* Nr. 73, p. 355):—"Whether you have a convenient pulpit, well placed, a comly and decent table for the holy communion, covered decently, and set in the place prescribed by the Quene's Majesty's Injunctions, . . . and whether your aulters bee taken downe, accordinge to the commaundemente in that behalfe geven." Her injunctions had enacted that the table was to be a decent table, and set where the altar had formerly stood, except at the time of the celebration of the holy communion.

[231] In 1571 Grindall, Archbishop of York, issued his injunctions, and this amongst the number (Doc. Ann. Nr. 76, vol. 1, p. 371):—"All altars to be pulled down to the ground, and the altar stones defaced and bestowed to some common use; and rood lofts altered. The materials to be sold to the use of the church."

In the year 1576 Archbishop Grindall had been translated from York to Canterbury, and his inquiries were (*ibid.* Nr. 82*, vol. 1, p. 397): "Have you a comely and decent table?"—making use of the very words of the injunction, "Have you a comely and decent table standing on a frame for the holy communion? . . . Whether in your churches and chapels all altars be utterly taken down and clear removed, even unto the foundation, and the place where they stood paved, and the wall whereunto they joined whited over and made uniform with the rest, so as no breach or rupture appear?"—a strong phrase. These inquiries are followed up by an injunction to the same purport and effect.

I may observe that the inquiries of Archbishop Bancroft (*ibid.* Nr. 122*, vol. 2, p. 110), at his visitation in 1605 (the year after the canons now in force were ratified), and those of Archbishop Abbott (*ibid.* Nr. 128*, vol. 2, p. 168) in 1616, were to the same effect as those issued by their predecessors, to whom I have referred.

Here, then, is a complete carrying out of these injunctions, with the intention of removing altogether anything of the nature of superstition which was supposed to attach to altars; and what was [232] effected on this head does not appear to have been afterwards undone.

In the year 1571 there was a book of canons and constitutions prepared, and

though they received not the royal assent, still, inasmuch as they were approved by the Convocation, they are not to be altogether passed by without notice. One of the canons is important to the point in hand, as it fully accords with everything that had been previously done. The title of the canon (Cardwell's Synodalia, vol. 1, p. 123, and p. 126) is, "*Æditui Ecclesiarum et alii selecti viri*;" therein are these directions [*Æditui*] "*curabunt mensam ex asseribus composite junctam, quæ administrationi sacrosanctæ Communionis inserviet. . . . Postremo æditui diligentur observari curabunt ea omnia, quæ ad ipsorum officia pertinebunt, quæque regiis injunctionibus, et in libello admonitionum continentur, quæque vel ab archiepiscopo, vel ab episcopo in suis ejusque visitationibus ad usum Ecclesiarum proponentur.*" In 1604 those canons were issued which are now in force, and the 82nd canon is entitled, "*A Decent Communion Table in every Church,*" and runs thus: "*Whereas we have no doubt but that in all churches within the realm of England, convenient and decent tables are provided and placed for the celebration of the holy communion, we appoint that the same tables shall, from time to time, be kept and repaired in sufficient and seemly manner, and covered in time of divine service with a carpet of silk or other decent stuff, thought meet by the ordinary of the place, if any question be made of it, and with a fair linen cloth at the time of the ministration as be-[233]-cometh that table, and so stand, saving when the said holy communion is to be administered.*" There is, therefore, reference to the same order which had been given in the preceding reign: it was to stand covered with a carpet of silk, except at the time when the holy communion was to be administered, "*at which time the same shall be placed in so good sort within the church or chancel, as thereby the minister may be more conveniently heard by the communicants in his prayer and ministration, and the communicants also more conveniently, and in more number, may communicate with the said minister.*" This, then, is precisely in accordance with what had been done in Elizabeth's reign. The 82nd canon does not, indeed, express, as that of 1571 does, that the table should be "*ex asseribus juncta*;" but is there any possible reason to be conceived or assigned why this should not be of the same material? That it should be a movable table is necessarily implied, because it is to be placed in a different position, if required, at the time when the communion service is performed from that in which it is to stand when not in use.

We approach now to another, and, as it appears to me, a most important period with respect to the question before us, I mean the reign of Charles I., in which we know that disputes about religion and the mode of administering the holy communion did proceed to a great length, and were followed by most lamentable circumstances. The contention between the High and the Low Church reached almost to an unlimited extent. The consequences which attended these disputes are to be found set forth in Lord Clarendon's History of the Rebellion. [234] In respect to what took place on the subject of the communion table we know that Archbishop Laud was very materially concerned, and the account given by Lord Clarendon on that point may not be without its use in some respects at the present day. The passages to which I more immediately refer are to be found in vol. i. pt. 1, p. 95, Oct. Ed. 1705. He gives an account of the manner in which the churches had been for some time kept previous to Laud's translation to Canterbury. "*The remissness of Abbott, and of other bishops by his example, had introduced or at least connived at a negligence that gave great scandal to the Church, and no doubt offended very many pious men. The people took so little care of the churches, and the parsons as little of the chancels, that instead of beautying or adorning them in any degree, they rarely provided against the falling of many of their churches, and suffered them at least to be kept so indecently and slovenly that they would not have endured it in the ordinary offices of their own houses—the rain and wind to infest them, and the sacraments themselves to be administered where the people had most mind to receive them. This prophane liberty and uncleanness the archbishop resolved to reform with all expedition, requiring the other bishops to concur with him in so pious a work, and the work sure was very grateful to all men of devotion: yet, I know not how, the prosecution of it with too much affectation of expense, it may be, or with too much passion between the ministers and the parishioners, raised an evil spirit towards the Church, which the enemies of it took much advantage of as soon as they had an opportunity to make the worst use of it.*"

[235] Now he goes on to say what were the alterations effected by Archbishop

Laud: "The removing the communion table out of the body of the church where it had used to stand and to be applied to all uses"—here we have the fact that it was not in the upper part of the chancel, not fixed to the wall, not of great weight, imbedded and fixed by concrete or cement so as to render the removal of it next to impossible—"and fixing it to one place in the upper end of the chancel, which frequently made the buying a new table to be necessary; the inclosing it with a rail of joiner's work, and thereby fencing it from the approach of dogs, and all servile uses"—upon one occasion a dog ran away with the consecrated bread, and Archbishop Laud directed that rails should be erected to prevent such desecration for the future—"the obliging all persons to come up to those rails to receive the sacrament, how acceptable soever to grave and intelligent persons who loved order and decency (for acceptable it was to such), yet introduced first murmurings amongst the people (upon the very charge and expense of it); and if the minister were not a man of discretion and reputation, to compose and reconcile these indispositions (as too frequently he was not, and rather inflamed and increased the distemper), it begot suits and appeals at law. The opinion that there was no necessity of doing anything, and the complaint that there was too much done, brought the power and jurisdiction that imposed the doing of it to be called in question, contradicted and opposed. Then the manner, and gesture, and posture, in the celebration of it, brought on new disputes and administered new subjects of offence, according to the [236] custom of the place and humour of the people: and those disputes brought in new words and terms (altar, adoration, and genuflection, and other expressions) for the more perspicuous carrying on those disputations. New books were written for and against that new practice with the same earnestness and contention for victory as if the life of Christianity had been at stake. Besides, there was not an equal concurrence in the prosecution of this matter amongst the bishops themselves: some of them proceeding more remissly in it, and some not only neglecting anything to be done towards it, but restraining those who had a mind to it from meddling in it, and this again produced as inconvenient disputes, when the subordinate clergy would take upon them, not only without the direction of their diocesans, but expressly against their injunctions, to make those alterations and reformations themselves and by their own authority. The archbishop, guided purely by his zeal and reverence for the place of God's service, and by the canons and injunctions of the Church, with the custom observed in the King's chapel, and in most cathedral churches, without considering the long intermission and discontinuance, in many other places, prosecuted this affair more passionately than was fit for the season, and had prejudice against those who, out of fear, or foresight, or not understanding the thing, had not the same warmth to promote it." There is a reference to those unfortunate circumstances that had their termination in Archbishop Laud losing his valuable life—for so I believe it was. He acted without any intention to introduce Popish rites and ceremonies, but he unfortunately excited [237] the enmity of those who were opposed to all those alterations which were necessary for the due observance of that reverence which is owing to the Church. I have no doubt that many of the alterations were acceptable to many persons, but they did, nevertheless, give offence, and he unfortunately fell a sacrifice (through his zeal in the cause of religion, and his desire that proper reverence should be paid to the Church) to those to whom these rites and ceremonies were objectionable.

Now, it is stated that new books were written for and against this new practice with the same earnestness and contention for victory as if the life of Christianity had been at stake. Amongst others, he says, "The Bishop of Lincoln (Williams), who had heretofore been Lord Keeper of the Great Seal of England, and generally unacceptable whilst he held that office, was, since his disgrace at Court and prosecution from thence, become very popular; and having several faults objected to him, the punishment whereof threatened him every day, he was very willing to change the scene and to be brought upon the stage for opposing these innovations (as he called them) in religion. It was an unlucky word, and cozened very many honest men into apprehensions very prejudicial to the King and to the Church. He published a discourse and treatise against the matter and manner of the prosecution of that business: a book so full of good learning, and that learning so close and solidly applied (though it abounded with many light expressions), that it gained him reputation enough to be able to do hurt, and shewed that in his retirement he had spent his time with his books very profitably. He used all the [238] wit and all the malice he could to

awaken the people to a jealousy of these agitations and innovations in the exercise of religion, not without insinuations that it aimed at greater alterations for which he knew the people would quickly find a name; and he was ambitious to have it believed that the archbishop was his greatest enemy, for his having constantly opposed his rising to any government in the Church, as a man, whose hot and hasty spirit he had long known.

"Though there were other books written with good learning, and which sufficiently answered the bishop's book, and, to men of equal and dispassionate inclinations, fully vindicated the proceedings which had been and were still very fervently carried on, yet it was done by men whose names were not much revered, and who were taken notice of with great insolence and asperity, to undertake the defence of all things which the people generally were displeased with, and who did not affect to be much cared for by those of their own order. So that from this unhappy subject, not in itself of that important value to be either entered upon with that resolution, or to be carried on with that passion, proceeded upon the matter a schism amongst the bishops themselves, and a great deal of uncharitableness in the learned and moderate clergy towards one another: which, though it could not increase the malice, added very much to the ability and power of the enemies of the Church, to do it hurt, and also to the number of them. For without doubt many who loved the established government of the Church, and the exercise of religion as it was used, and desired not a change in [239] either, nor did dislike the order and decency which they saw mended; yet they liked not any novelties, and so were liable to entertain jealousies that more was intended than was hitherto proposed; especially when those impressions proceeded from men unsuspected to have any inclinations to change, and known asserters of the government both in Church and State. They did observe the inferior clergy took more upon them than they were wont, and did not live towards their neighbours of quality, or their patrons themselves, with that civility and condescension they had used to do; which disposed them likewise to a withdrawing their good countenance and good neighbourhood from them."

I have read this latter part for the purpose of introducing what is written by Bishop Williams in a book to which I presume Lord Clarendon refers. The treatise certainly displays considerable learning (for that at least Lord Clarendon is willing to give the bishop due credit); though there was a feeling of animosity towards Archbishop Laud. The title runs: "The Holy Table, Name, and Thing, more anciently, properly, and literally used under the New Testament, than that of an Altar: Written long ago by a Minister in Lincolnshire, in Answer to D. Coal, a Judicious Divine of Queen Maries Daies:" published in 1637. It purports to be in answer to one entitled, "A Coale from the Altar," which seems to have been written by Dr. Heylin, one of the historians of the Reformation; indeed he allows himself to be the author, in another tract written on the same occasion. I refer, at this time, to the work, for the purpose of noticing particularly two letters which are stated [240] to have been composed by Bishop Williams on the question of a stone altar and a communion table. The treatise in which they occur is published under his sanction; his imprimatur runs thus: "I have read and thorowly perused a Booke, called the Holy Table, Name and Thing, &c., written by some Minister of this Diocese, and do conceive it to be most Orthodox in Doctrine, and consonant in Discipline, to the Church of England: And to set forth the King's Power and Rights, in matters Ecclesiasticall, truly and judiciously, and very fit to be printed: And doe allow and approve of the same Treatise to be printed and published in any place or places, where as Ordinaire I am enabled and licenced so to doe. And in witness hereof, I have subscribed my name the last day of November. Jo. Lincoln. Deane of Westminster."

The occasion on which the treatise was written was this: there was a controversy between the vicar of Grantham and his parishioners with respect to the place where the holy table should stand; and, among other things, the vicar is represented to have removed the table from the body of the church, where it before stood, into the chancel. One of his chief parishioners, an alderman in the town, ordered it to be taken back again into the body of the church. Upon a violent dispute arising between the parties, a representation was made to the bishop, who, having heard what each had to advance, delivered the letter following to the alderman (see "The Holy Table, &c.," p. 10):—"Mr. Alderman, I do conceive that your communion table, when it is not used, should stand in the upper end of the chancell, not altar-[241]-wise

but table-wise." It was in controversy whether the table was to be placed with the ends to the east and west, or to the north and south, and it was contended that if the table stood as the altar did the superstition would be to a certain extent retained. "But when it is used, either in time of the communion, or when your vicar shall be pleased to read the latter part of the divine service thereupon, the churchwardens are to cause the clerk or sexton to remove it, either to the place where it stood before, or any other place in the church or chancell where your minister may be most audibly heard." Here is a following out of the injunctions. Then, "If both your churchwardens agree with the vicar upon such a place, let it be disposed of accordingly; and your ministers are not to officiate upon it in any other place. If your churchwardens disagree with the vicar, let them take the opinion of that surrogate of my chancellour who dwells next unto your town of Grantham, and he and any one of the churchwardens, shall, on view, assign a place where the table shall stand in most conveniency, when it is to be officiated on by either of your ministers."

The second is addressed to the vicar (see "The Holy Table, &c.," p. 12). "Sir, when I spoke with you last, I told you that the standing of the communion table was unto me a thing so indifferent, that unless offence and umbrages were taken by the town against it I should never move it or remove it. That which I did not then suspect is come to pass. Your alderman whom I have known these 17 or 18 yeares to be a discreet and modest man, and far from any humour [242] of innovation, together with the better sort of the town, have complained against it. And I have, without taking any notice of your act, or touching one syllable upon your reputation, appointed the churchwardens, whom, in my opinion, it principally doth concern, under the diocesan and by his directions, to settle it for the time, as you may see by this copie enclosed. Now, for your own satisfaction, and my poore advice for the future, I have written unto you somewhat more at large than I used to expresse myself in this kinde." . . . "But that you should say you will upon your own cost build an altar of stone, at the upper end of your quire; that your table ought to stand altar-wise; that the fixing thereof in the quire is so canonical that it not ought to be removed (upon any occasion) to the body of the church, I conceive to be in you so many mistakings."

"For the first, if you should erect any such altar (which I know you will not), your discretion (I fear me) would prove the onely holocaust to be sacrificed on the same. For you have subscribed when you came to your place that that other oblation which the Papists were wont to offer upon these altars is a blasphemous figment and pernicious imposture. (In 31st Article.) And also that we in the Church of England must take heed less our communion of a memory be made a sacrifice. (In the first homily upon the sacrament.) And it is not the vicar, but the churchwardens that are to provide utensils for the communion, and that not an altar, but a faire joyned table. (Canons of the Convocation, 1571, p. 18.) And that the altars were removed by law and tables placed in their stead in all, or the most [243] Churches of England, appears by the Queen's Injunctions, 1559, related unto and so confirmed in that point by our canons still in force. (Canon 82.) And, therefore, I know you will not build any such altar, which vicars were never enable to set up, but were once allowed (with others) to pull down." (Injunct. 1mo. Elis. for Tables in the Church.)

For the second point:—

"That your communion table is to stand altar-wise; if you mean in that upper place of the chancell where the altar stood, I think somewhat may be said for that, because the Injunction, 1559, did so place it. And I conceive it to be the most decent situation when it is not used, and for use too, where the quire is mounted up by steps and open, so as he that officiates may be seen and heard of all the congregation. Such an one, I am informed, your chancell is not. But if you mean by altar-wise that the table should stand along close by the wall, so as you be forced to officiate at the one end thereof (as you may have observed in great men's chappels), I do not believe that ever the communion tables were (otherwise than by casualty) so placed in country churches." It appears that in cathedral churches the altars and tables were suffered to stand in the manner stated along the wall; but he says, "I do not believe that even the communion tables were (otherwise than by casualty) so placed in country churches. For, besides that the country people, without some directions beforehand from their superiors, would (as they told you to your face) suppose them dressers rather than tables. And that Queen Elizabeth's commissioners for causes ecclesiastical directed that the table should stand, not [244] where the altar, but where the steps to the

altar, formerly stood. (Orders 1561.) The minister appointed to read the communion, which you (out of the books of Fast, in 1mo. of the King) are pleased to call second service, is directed to read the commandments, not at the end, but at the north side of the table which implies the end to be placed towards the east great window. (Rubric before the communion.) Nor was this a new direction in the Queen's time only, but practised in King Edward's reign. For in the plot of our liturgy, sent by Mr. Knox and Whittinghā to Mr. Calvin, in the reign of Queen Mary, it is said that the minister must stand at the north side of the table. (Troubles at Frankfort, p. 30.) And so in K. Edw. Liturgies, the minister standing in the midst of the altar, 1549, is turned to his standing at the north side of the table, 1552. And this last liturgie was revived by Parliament, 1st Eliz. c. 2, and I believe it is so used at this day in most places of England. What you saw in chappels or cathedral churches is not the point now in question, but how the tables are appointed to be placed in parish churches. In some of these chapels and cathedrals the altars may still be standing for aught I know; or to make use of their covers, fronts, and other ornaments, tables may be placed in their room, of the same length and fashion the altars were of. We know the altars stand still in the Lutherane Churches, and the Apologie for the Augustane Confession, Article 11, doth allow it. The altars stood, a year or two in the reign of King Edward, as appears by the liturgie printed 1549; and it seems the Queen and her Council were content they should stand, as we may guesse by the [245] Injunction, 1559. But how is this to be understood? The sacrifice of the masse abolished (for which sacrifice only altars were erected), these (call them what you please) are no more altars, but tables of stone or timber. And so was it alleged 24th of November, 4th Edward VI., 1550. *Sublato enim relativo formali, manet absolutum et materiale tantum.* So he goes on to argue that where they were made of stone they were not in effect and essentially altars, but they became tables, upon which the communion might be administered. If the principles of the Reformation could have been carried into effect, stone tables might have been continued, but it was feared, without their removal, the notion amongst the simple, that a real sacrifice was offered up, would have remained. "So they may be well used in the King's and bishop's houses, where there are no people so void of instruction as to be scandalized. For upon the order of breaking down altars, 1550, all dioceses, as well as that of London, did agree upon receiving tables, but not so soon, upon the form and fashion of their tables."—Acts and Mon. p. 1212.

Then he goes on to shew the difference: "Besides that, in the Old Testament one and the same thing is termed an altar and a table. An altar, in respect of what is there offered unto God; and a table, in respect of what is thence participated by men, as, for example, by the priests. So have you God's altar the very same with God's table in Malachi i. v. 7. . . . The proper use of an altar is to sacrifice upon; the proper use of a table is to eat upon. Reasons, &c., 1550, vide Acts and Mon. p. 1211. And because a communion is an action [246] most proper for a table, as an oblation is for an altar; therefore the Church in her liturgie and canons calling the same a table only, do not you now, under the Reformation, call it an altar? In King Edward's Liturgie of 1549 it is almost everywhere, but in that of 1552 it is nowhere, called an altar, but the Lord's board. Why? Because the people being scandalized herewith (in country churches), first it seems beat them down *de facto*; then the supreme magistrate (as here the King), by the advice of Archbishop Cranmer and the rest of his Council, did, anno 1550, by a kind of law, put them down *de jure* 4 Edward 6, Novemb. 24"—referring to those orders in Edward the Sixth's time to pluck down the altars—"and setting these tables in their rooms, took away from us, the children of this Church and Commonwealth, both the name and the nature of those former altars, as you may see Injunct. 1559, referring to that order of King Edw. and his Counsell, mentioned Acts and Mon. page 1211. And I hope you have more learning than to conceive the Lord's table to be a new name, and so to be ashamed of the word. For, besides that, Christ Himself instituted this sacrament upon a table, and not an altar, as Archbishop Cranmer and others observe."—Acts and Mon. page 1211.

"Lastly, that your table should stand in the higher part of the chancell, you have my assent in opinion already; and so was it appointed to stand, out of the communion. Orders by the Commiss. for Causes Ecclesiastical, 1561. But that it should be there fixed is so farre from being the only canonically way, that it is directly against the canon. [247] For what is the rubric of the Church but a canon? And the rubric

saith it shall stand in the body of the church, or in the chancell, where morning prayer and evening prayer be appointed to be said. If, therefore, morning prayer and evening prayer be appointed to be said in the body of the church (as in most country churches we see it is), where shall the table stand in that church most canonically." His reasoning is sound: if the morning and the evening prayer is to be said in the body of the church, and if the table is to stand where prayer is to be said, then the conclusion is irresistible that the place where the morning and the evening prayer is read is the proper place where it should stand. "And so is the table made removable, when the communion is to be celebrated, to such a place as the minister may be most conveniently heard by the communicants; by Qu. Eliz. Injunet. 1559. And so saith the canon in force, that in the time of the communion the table shall be placed in so good sort within the church or chancell, as thereby the minister may be most conveniently heard, &c. (Canon 82). Now judge you whether this table (which, like Dædalus his engines, moves and removes from place to place, and that by the inward wheels of the Church Canons) be fitly represented by you to an altar that stirs not an yneh." Here we have a contrast between a table that is movable and an altar which he says stirs not an inch: this, I may observe, is probably the true test between table and altar. "The summe of all this is—

"1. You may not erect an altar where the canons admit only a communion table.

[248] "2. This table (without some new canon) is not to stand altar-wise, and you at the north end thereof, but table-wise, and you must officiate on the north side of the same, by the liturgie.

"3. This table ought to be laid up (decently covered) in the chancell only, as I suppose; but ought not to be officiated upon either in your first or second service (as you distinguish it), but in that place of church or chancell where you may be most conveniently seen and heard of all."

I have read more of this letter than I should otherwise have done, as it is not to be had access to very easily. On the assumption that this is an authentic letter of the Right Reverend Bishop,^(a) by whom it purports to have been written (and there is some reason to believe it to be), it may be regarded as a production of some authority, when it is recollected the station he for some time filled.^(b)

It is, however, proper to state that the treatise in which these letters occur did not pass without notice. It was replied to at considerable length, under the title of "Antidotum Lincolnense, or An Answer to a Book entitled The Holy Table, Name, [249] and Thing, &c., by Peter Heylyn, Chaplaine in Ordinary to His Majesty, London, 1637," in which he enters very fully into the question of the proper position of the table, and the standing of the altar in former times. "The proper place," he says, "is where the altar stood, and the true interpretation of the injunction is that it should fill the space formerly occupied by the altar, and therefore stand length-wise and not table-wise."

There was another work published in 1637, under the name of "Altare Christianum, or the Dead Vicar's Plea, wherein the Vicar of Grantham being dead yet speaketh, and pleadeth out of Antiquity, against him that hath broken downe his Altar," by Dr. Pocklington. In short, the question at that period appears to have caused so much discussion, and provoked so many treatises on the subject, that I shall content myself with naming two others only; one entitled "Superstitio Superstes, or the Reliques of Superstition new Revived and Manifested, in a Discourse concerning the Holiness of Churches and bowing towards the Altar;" published in 1641; the other, "A Discourse of Proper Sacrifice, in answer to A. B. C., Jesuit, another Anonymous of Rome," by

(a) According to "The Holy Table, &c.," p. 7, this letter (as well as that to the alderman) was written in the summer of 1627.

(b) The custody of the Great Seal was committed on the 10th of July, 1621, to John Williams, Dean of Westminster. He was made Bishop of Lincoln in August, 1621, and translated to York the 4th December, 1641. Charles I. (immediately on his accession) issued his letters to John Williams, Keeper of the Seal, informing him of the death of King James, and that the Great Seal which was in use during the late reign was to continue in the keeping of the bishop until a new seal was engraved. Williams resigned the seal on the 30th October, 1625.—Hardy's Catalogue of Lords Chancellors, &c. This bishop was the last ecclesiastic who held the Great Seal.

Sir Edward Dering, Kt. and Bart., in 1644, said in the preface to have been written in 1640.

The facts developed in the treatises published at this period shew that the same state of things existed then as in the reign of Elizabeth—that the tables were no longer fixed. There is not an instance in which it is shewn that stone tables were used under legal authority, though it does appear by the list annexed by the church-wardens [250] that there are some few churches in which there are stone tables similar to that now standing in the church of the Holy Sepulchre at Cambridge. I have already stated that Queen Elizabeth's Injunctions were referred to and recognised in the trial of Henry Sherfield, in 1632, as well as on Archbishop Laud's impeachment, in 1640, to which cases it is unnecessary to advert particularly. There are, however, two or three passages in the trial of Bastwick, Burton, and Prynne, for libel, in 1637, which it may not be amiss to set forth. Many of the bishops had been accused of introducing what were called innovations into the service of the Church, and, amongst others, that which was instanced as the 13th, on the trial of these parties. The following passages are to be found in Archbishop Laud's speech on that occasion. He says (3 State Trials, p. 739): "The thirteenth innovation is the placing the holy table altar-wise at the upper end of the church: that is, the setting of it north and south, and placing a rail before it to keep it from profanation, which Mr. Burton says is done to advance and usher in Popery. To this I answer, it is no Popery to set a rail to keep profanation from that holy table, nor is it any innovation to place it at the upper end of the chancel as the altar stood. And this appears both by the practice and by the command and canon of the Church of England. First, by the practice of the Church of England. For, in the King's royal chapels, and divers cathedrals, the holy table hath, ever since the Reformation, stood at the upper end of the choir, with the large or full side towards the people; and though it stood in [251] most parish churches the other way"—therefore confirming the view which Bishop Williams takes, that it stood table-wise, and not altar-wise—"yet, whether there be not more reason the parish churches should be made conformable to the cathedral and mother churches than the cathedrals to them, I leave to any reasonable man to judge. Secondly, this appears from the canon of the Church of England too: for it is plain, in the last injunction of the Queen, that the holy table ought to stand at the upper end of the choir, north and south, or altar-wise; for the words of the Queen's Injunction are these, 'The Holy Table in every Church'—mark it, I pray, not in the royal chapels or cathedrals only, but in every church—'shall be decently made and set in the place where the altar stood.'"

All these instances to which I have referred tend to shew that the understanding of all persons who were called upon to act on these injunctions was, that the table was no longer to remain immovably fixed, but that, for the purpose of removing the superstition connected with the Popish mass, it was to be movable, as the occasion might require.

Here I will advert to two cases which were adduced by the counsel for the church-wardens as making for them, though I confess they seem to me, upon examination, to tend the other way. The first case occurred in 1633, the 9th Charles I., about the church of Crayford, in Kent (Doc. Ann. Nr. 137, vol. ii. p. 226). There was a great dispute in that parish where the communion table should stand. Sir Nathaniel Brent, vicar-general, to whom the case had been referred [252] by Archbishop Abbott, with reference to the 82nd canon, reported, after viewing the church, "That the most decent and convenient position for the more reverent receiving of the holy communion is in the chancel." Directions were given accordingly, and they shew that if convenience required it, at a future time the table might be transferred.

The other case occurred likewise, in 1633, and is still more decisive; it was with reference to St. Gregory's Church, in London, and determined by an Order of Council (Doc. Ann. Nr. 140, vol. ii. p. 237). . . . "For so much as concerns the liberty of the said Common Prayer Book or canon for placing the communion table in any church or chapel with more convenience; that liberty is not so to be understood as if it were ever left to the discretion of the parish, much less to the particular fancy of any humorous person, but to the judgment of the ordinary, to whose place and function it doth properly belong to give direction in that point, both for the thing itself, and the time when, and how long, as he may find cause."

I will, however, instance another case, though not referred to by counsel—the orders and directions issued by Bishop Wren, in 1636, the third of which is (ibid. Nr.

143, vol. ii. p. 252), "That the communion table in every church do always stand close under the east wall of the chancel, the ends thereof north and south, unless the ordinary give particular directions otherwise."

These cases, then, so far from oversetting what has been hitherto advanced by the Court, tend rather to confirm the view it has taken.

[253] The inquiry is now brought down to the Restoration, and the next and most important question that arises is—Was any alteration affecting this subject made or intended to be made in 1662, when the last review of the Book of Common Prayer took place?

There is no intimation, that I can discover, leading to the supposition that a different sense was intended to be applied to the word "table" from that which I have hitherto considered to be the true meaning of the word. Moreover, "table" is used throughout; "altar" nowhere appears, except in one or two sentences in the offertory, wherein the word "altar" was necessarily retained as being the term used in those passages of scripture whence the sentences were taken. Added to this, there is a declaration made, after the last rubric in the communion service, not to be found in the Prayer Book as revised in the reign of Elizabeth, respecting the meaning of the posture of kneeling prescribed in receiving the holy communion, which goes to subvert the notion that a real sacrifice is intended, and is, consequently, at variance from the proper meaning of "altar."

What is the notion that would present itself to any one's mind of the word "table," taken abstractedly. Surely it would not be that of the object now under consideration—a stone structure of amazing weight and dimensions immovably fixed. It is undoubtedly possible, by an ingenious argument, to contend that the present erection is a "table;" it may be so according to one definition given by Dr. Johnson—"a flat surface raised [254] above the ground;" but that notion would not readily present itself to the mind; such is not the ordinary meaning of the word.

When I take into consideration, then, that there is nothing whatever, so far as I can see, in the injunctions and canons which I have reviewed, to lead me to a conclusion that the word "table" in the Book of Common Prayer is to be understood in an unnatural sense, but much the other way, I must pronounce that the structure in question is not a communion table, within the meaning of the rubric.

There were two or three arguments urged by the counsel for the respondents, which I will not pass over unnoticed. One was founded on the order in the Prayer Book, which immediately precedes the morning service; "that such ornaments of the Church . . . shall be retained and be in use, as were in this Church of England by the authority of Parliament, in the second year of the reign of King Edward VI.;" and it was contended that, as stone altars were then in use, they, being ornaments, are now to be retained. To be sure, were that argument valid, not only is this stone altar or table proper, but no other species of table ought to be erected. Durandus was cited to shew that the altar is to be considered an ornament; but it seems to me that that writer is an authority the other way; in lib. 1, c. 3, of his *Rationale Divinorum Officiorum*, Venice, edit. 1568, he says, "Porro ornamenta in tribus consistunt, id est, in ornatu Ecclesiæ, chori, et altaris. . . . Altaris vero ornatu consistit in capsis, in palliis, in phylacteriis, [255] in candelabris, in crucibus, in aufrisio, [aurifrigio? (a)] in vexillis, in codicibus, in velaminibus, et in cortinis." The altar is nowhere, that I can find, enumerated amongst the ornaments of the church or choir.

I was asked, Why should a stone font be directed to be used, and a stone communion table be proscribed? To this I answer, the law has sanctioned the one and excluded the other, and for this very obvious reason; to stone altars or tables superstitious notions were attached, which did not belong to stone fonts.

Another reason was urged on the Court why it should direct its faculty to issue. It was said that the stone table at Cambridge would be no novelty. Some churches were referred to in which it is stated similar erections exist; and it was put to me, rather pointedly, in the shape of an *argumentum ad hominem*, that there is a stone table at Roehampton Church, consecrated not long ago, at which ceremony I myself officiated. Here I must state I was in no wise consulted on the matter; of that stone table I knew nothing till I entered the church on the day of its consecration. Even

(a) "Cappæ tres cum aurifrigiis, palla altaris cum aurifrigio," &c. Chron. Laurisham.

had I been called upon to express, without time for deliberation, an opinion, I am not prepared to say what that might have been. After much consideration now given I am of opinion the matter is not one of discretion, but of law. Were it otherwise, I should be desirous of consulting the wish of the parish; it is with reluctance that I feel myself called [256] upon to reverse the decision of the chancellor of Ely.

The other point which remains to be considered is the credence table. Though this table had its origin most probably in the Western Church, I cannot find any sufficient information to enable me to judge of the date of its introduction. It is, however, clear that it was known in this country in the time of Archbishop Laud; for he confesses that it was in use in his own chapel,^(a) and justifies it on the score that the communion table was too small to hold the elements, and also that Bishop Andrews and some other bishops used it in their time without exception.

As to the word credence, a difference of opinion seems to exist, not only with respect to its derivation, but likewise as to its meaning. Of all the attempts that I have seen to clear up these difficulties, by far the most satisfactory to my mind has been furnished to me by a learned friend, who refers me to Adelung's German Dictionary, wherein credenzen is stated to be a verb reg. act. from the Italian credenzare, to taste the meats and drink before they are offered to be enjoyed by another: an ancient Court practice which was performed by the cup-bearers and carvers, who for this reason were called credenzer.

Credenz teller (credence plate), on which the cup-bearers credenced the wine, and in general a plate on which a person offers anything to another.

[257] The credence tische (credence table), a side-board, an artificial cupboard, with a table for the purpose of arranging in order and keeping the drinking apparatus therein. From a different sense of the word credenza (in mediæval Latin, credentia), the expression credenschriben or creditio, credence-writing, signifies as much as letters of credit or testimonials, particularly those of an ambassador or minister.

The tasting of meats and drinks may, I think, account for the application of the term to a table, the purpose of which is to receive the elements before consecration, and a very convenient article it may be for that purpose; but still I do not find it mentioned in any of our canons.

In the Greek and Latin Churches something of the same kind appears to have been used under the name of Προθεσιν or a table of proposition.

The author of "The Holy Table," &c., says, p. 213, "In the Βῆμα, or chancell, there be two altars, whereof the greater stands in the midst of that room, and the lesser close by, at the left side of the greater, saith Gentian Hervet. There be in those churches two altars; the greater is in the midst, and called the Holy Table; the lesser is called the Prothesis, or Table of Proposition, saith the setter forth of the Greek and Latin liturgies."

In the "Antidotum Lincolnienſe," sect. 2, c. 8, p. 113, is the following reply to the above observations:—"That which you tell us from the Greek Churches is indeed considerable, if it were as true. You tell us out of Gentian Hervetus, that in the Βῆμα, or chancell, there be two altars, whereof the [258] greater stands in the midst of that roome, and the lesse close by, at the left side of it. Yet Bishop Jewell, in his 13th art., being of the pluralitie of masses, cites many of the ancient fathers that say there is but one altar in every church, and then concludes with Gentian Hervet: In Græcorum templis unum tantum est altare, idque in medio choro aut Presbyterio." . . . "Genebrard, whom you blindly call the setter forth of the Greek and Latin liturgies, hath told us such a tale as will marre your markets. For hee divides their churches into these five parts, the first called Βῆμα ἁγιον, the Holy Tabernacle, so called quod gradibus in illam scandatur, because it is mounted up by steps, and this is entered into by none but the priests. The second he entitleth ἱερατειον, the quire or chancell (properly and distinctly so entitled), locus clero et cantoribus deputatus, a place assigned for the clergy and singing men. The third was Ἀμβων, or the pulpit-place, where the epistles and gospels were read, and sermons preached unto the people. The fourth, called ναος, or the body of the church, wherein the people had their places, both men and women, though distinct; and last of all the Πρόναος, or place for baptism. Now for the altars which he speaks of, they stood not, as you make them

(a) The archbishop's mode of administering the Sacrament of the Lord's Supper was one of the charges brought against him. See 4 State Trials, p. 462.

stand ἐν ἱερατείῳ, in the quire or chancell, distinctly and properly so called, and much less in the middle of it, but in the upper part thereof, mounted up by steps (and severed from the rest by a vaile or curtaine), which place was therefore called τὸ Βῆμα, i.e. the altar-place, the θυσιαστήριον or altarium, which before we spoke of. Illic sunt duo altaria, there, in that upper end, above the steps stood those two [259] altars which you talk of; not in the middle of the chancell, as you falsely say. And there the greater of the two did stand in medio, in the middle, between north and south, as they still continue; the lesser, which he calls the prothesis, standing on the left side thereof, and thereon stood the bread appointed to be consecrated, till it was offered on the altar." . . . "Though, indeed, one of them was no altar, but a table only; a table either of proposition or of preparation, no great matter which."

There are not many instances, as far as I know, of the credence table in this country at the present day. In two churches consecrated by the bishop of Bangor in 1843 it is to be found, both in the same parish; and here, again, I must take a fair modicum of correction; for I find amongst the churches referred to in the list given in, there is one at Roehampton. It is possible that more instances might be found of stone altars and credence tables in our churches, but we have had no information of the circumstances under which they were erected. I believe that this is the first time that a judicial decision has been sought on the question.

After maturely weighing the subject, the conscientious impression on my mind is, that a structure like the present is not a communion table within the meaning of the rubric; and that the credence table, being an adjunct not recognised by our Church, cannot be pronounced for. In coming to this conclusion, I do not go so far as to admonish the churchwardens to remove them. All I can do is to refuse to confirm the sentence of the Court below.

A question here arises whether I can so alter the [260] faculty prayed as to omit the stone altar and credence table, and grant it in other respects, confirming all other things not comprised within the former faculty. I see no objection to that, and such must be the decree of the Court.

Lastly as to costs.(a)

The appellant has succeeded in his appeal; he was forced to come here, for the purpose of having the sentence of the chancellor of Ely reversed, and I cannot but think that I should fall short of that justice which is due were I not to condemn the respondents in the costs of the appeal. No costs were given in the Court below, but as that sentence is erroneous, and a further appeal is liable to be made to another tribunal, I think I am bound in justice to Mr. Faulkner to condemn the churchwardens in the costs of these proceedings, which I do accordingly.

Mr. Shephard (proctor for the respondents). At Ely, the churchwardens waived their right of applying for costs.

The Court. Very properly so.

The decree. The Judge having maturely deliberated, by interlocutory decree having the force and effect of a [261] definitive sentence in writing, pronounced for the appeal and complaint made and interposed on the part and behalf of the Rev. Richard Rowland Faulkner, clerk, Blackburn's party, and for his jurisdiction, and that the Judge from whom this cause is appealed hath proceeded wrongfully nully and unjustly, reversed the order or decree appealed from, and retained the principal cause, and therein rejected so much of the prayer made in the Court below, by Edward Litchfield and Thomas Stearn, the churchwardens of the said parish of the Holy Sepulchre in the town and county of Cambridge, as relates to the granting a faculty for ratifying and confirming the faculty heretofore granted by the said Court, to wit, on the 25th February, 1842, and also for ratifying and confirming the erection of the new communion and credence table of stone in the chancel of the church of the said parish specified in the report referred to in the proceedings in the said Court, but rejected the prayer made by Blackburn on behalf of the said Reverend Richard Rowland Faulkner, clerk, that the said Edward Litchfield and Thomas Stearn might be monished to take down and remove the said communion and credence table of stone, and directed a faculty to be granted to them, the said Edward Litchfield and

(a) As a subscription was set on foot to assist the appellant to discharge the "enormous expenses" he incurred in this appeal, it may not be amiss to state that his costs were taxed, on the 18th of March, at 100l. 11s. 10d.

Thomas Stearn, for ratifying and confirming (so far as may not be comprised in the said faculty heretofore granted by the said Court) all other the restorations, renovations, repairs, erections, and other works in the said church and chancel specified in the afore-said report, and for selling the three bells, also in the said report mentioned, and appropriating the proceeds arising from such sale in aid of the expenses incident to the [262] restoration of the said church and chancel, and moreover condemned the said Edward Litchfield and Thomas Stearn in the costs of the appeal, present both proctors.

SMITH *against* HARRIS. Prerogative Court of Canterbury, April 26th, 1845.—One of two attesting witnesses to a will is competent, under 1 Vict. c. 26, s. 9, to sign for a testatrix at her direction.

[S. C. 4 Notes of Cases, 48; 9 Jur. 406.]

Elizabeth Beard died a widow, leaving a will, bearing date the 6th of March, 1843, with the following attestation clause:—

“Signed, published, and declared, by the said Elizabeth Beard, as and for her last will and testament, in the presence of us present, at the same time, and in her presence, and in the presence of each other, we have hereunto subscribed our names as witnesses, and at her request, and by her direction, I, the undersigned George Lay, have hereunto subscribed her name, and which was done previous to this attestation being signed by us. } ELIZABETH BEARD.

“G. Lay, John Fowler, clerks to H. Nethersole, 15 Essex Street, Strand.”

[263] The will was propounded, and the admission of the allegation was opposed.

Haggard and Robinson contended that the will was not attested according to the provisions of the act. The words in the ninth section clearly import that, whether a will be signed by a testator, or at his direction by another, in either case there must be two witnesses to attest the act done. No person can be properly denominated a witness of an act done by himself; it is inconsistent that a person should attest his having seen himself do an act. Our position is in accordance with the view taken by Mr. Sugden, in his learned Essay on Wills (page 38). The decision *In the Goods of John Bailey* (1 Curteis, 914) is not conclusive of the question; for, independently of that being merely on an *ex parte* motion, there is a distinction between that and the present case. John Bailey did a personal act, which amounted to a confirmation, namely, sealing the will; though the sealing was superfluous, still it was an act of the testator, whereas in the present case there is no one act done by the testatrix.

Addams and Nicholl, H. L., in support of the allegation, contended that the objection taken was not maintainable. It never was intended that a party should witness his own act, and that has not been the case in the present instance. The witness simply attests the testatrix's acknowledgment of the signature which he was directed to make by the testatrix, and that is the same thing as if he had attested an acknowledgment of a signature pre-[264]viously made by the testatrix herself. There is no distinction between this case and the one referred to, *In the Goods of John Bailey*. The passage read from Mr. Sugden's Essay rests merely on his opinion. We submit the will in question is duly attested.

Judgment—Sir Herbert Jenner Fust. I must adhere to the opinion I expressed *In the Goods of John Bailey*, for no substantial difference has been pointed out to me. I am not satisfied, notwithstanding Mr. Sugden's opinion, which I considered at the time, that I was wrong. The witness here attests the direction of the testatrix, and that direction amounts to an acknowledgment, as was said by Dr. Addams. I therefore admit the allegation to proof.

PLENTY *against* WEST AND BUDD, AND OTHERS, cited to see Proceedings. Prerogative Court, May 14th, 1845.—A testator by his “last will,” in which executors were appointed, disposed of a part only of his personal estate, and did not expressly revoke a former testamentary paper; the two were not wholly inconsistent, but there was no evidence to shew he intended them to be taken conjointly as his will. Held that the paper of the earlier date was in effect revoked by his “last will.”

[S. C. 4 Notes of Cases, 103 ; 9 Jur. 458. In Common Pleas, 6 C. B. 201 ; 136 E. R. 1227 (with note). In Chancery, 16 Beav. 173 ; 51 E. R. 743.]

This was a cause of proving in solemn form of law the last will, contained as alleged, in two paper writings, bearing date respectively the 5th of October, 1837, and the 13th of April, 1838, with a codicil also of the latter date (written on the same sheet of paper), of William Budd, gentleman, deceased, and of shewing cause why the probate, and also the double probate heretofore granted (to wit, [265] in December, 1840, and in May, 1843) of the said paper writings of the 13th of April, 1838, which had been acted on till the early part of the year 1844, should not be revoked, and probate of all the aforesaid papers, as together containing the will of the deceased, granted to the executors.

The suit was promoted by Caroline Plenty, wife of Edward Pellew Plenty, formerly Simmons, spinster, one of the executors, against William West, the other executor, and also against the Rev. Budd, clerk, and others, cited to see proceedings.

The testamentary papers above referred to are as follow :—

“ I give, devise, and bequeath all my estate and effects, both real and personal, or mixed, to my nephew, Henry Budd, my friends, William Vincent and Frederick Vincent, and to the survivor of them, and the heirs, executors, and administrators of the survivor of them, in trust, to divide the same between the three boys of William West and Caroline Simmons, at their respective ages of twenty-one years, the same to be vested interests. Witness my hand and seal, this 5th day of October, 1837, to this my will.

“ W. BUDD.

Seal.

“ Witnesses.

“ Bromley Challoner

“ The mark of

“ Frances Simmons

Eliza

“ Henry Geirs

“ Eliza Gough.”

[266] “ This is the last will of me, William Budd, late of Burghelere, in Hants, but now of Newbury, in Berks, gentleman. I give and bequeath all my estate and effects as hereafter mentioned ; namely, all my household goods at Newbury to Caroline, the daughter of William and Frances Simmons, for ever. I also give all my real estate, as well freehold, copyhold, or leasehold, to the said Caroline Simmons, for her life, and, after her decease, to William West, of Speen, ironfounder, for the term of his life, and after both their deceases, to William and George West, the sons of the first-named ~~and their heirs, executors, and administrators, for ever,~~ William West, \wedge or all my interest therein, during the term of their natural lives, and to the survivor of them, for their life ; and then, as to all my copyhold estate of Burghelere, to the Rev. Henry Budd, of White Roothing, in Essex, and his heirs for ever, subject to the payment of five hundred pounds to Caroline Simmons, and five hundred to the said William West, first named, as soon as the said Henry Budd shall come into possession thereof, or within one year after ; the words ‘ and their heirs, executors, and administrators for ever,’ being first drawn through with the pen as erased. Dated this thirteenth day of April, one thousand eight hundred and thirty-eight.

—————“ W. BUDD.

Seal.

————— “ Signed, sealed, published, and declared by the testator, William Budd, as and for his last will, in the presence of us, who, at his request, in his and each other’s presence, have [267] hereunto set our hands, this thirteenth day of April, 1838. ——— Bromley Challoner. ——— Henry Geirs. ——— Henry Geirs.

“ Of this my will I appoint the said Caroline Simmons, and William West, the father, executrix and executor, as witness my hand and seal the day and year above written.

—————“ W. BUDD.

Seal.

“ ——— Bromley Challoner. ——— Henry Geirs. ——— Henry Geirs, Junior.”

On the 25th of May, 1844, an allegation, after some reformation, was admitted on

behalf of Mrs. Plenty, wherein it was pleaded that the testator meant and intended the paper writings of the 13th of April, 1838, should form a part of and be taken, together with the paper writing of the 5th of October, 1837, as his will. Five witnesses were examined on the allegation, but their evidence did not substantiate the above plea.

Phillimore, R. J., for Plenty. Nothing turns on the evidence. The question is one purely of law. By the testamentary writings of 1838 a portion only of the personal estate is disposed of; there is not either a clause of revocation contained therein, or is that paper wholly inconsistent with that of 1837. Such being the case, they must be taken together as the will of the testator, otherwise, by rejecting the one of prior date, a par-[268]-tial intestacy will ensue, which it is the inclination of the law to guard against.(a)

Addams contra. The rule attempted by the other side to be imported into this Court amounts to this; if a single passage can be found in a latter paper not utterly at variance with a former disposition, the two are to be taken together. This is an attempt entirely inconsistent with the law, as it has been laid down in these Courts in, amongst other cases, that of *Henfrey v. Henfrey* (2 Curteis, 468).

The facts as developed by the will of 1838 clearly shew the testator intended that will alone to operate. Were the Court to pronounce for all the papers conjointly, it would, in fact, hold, contrary to the doctrine of Swinburne, that a man can die with two testaments. It may happen that a partial intestacy may ensue, but that will not affect the principle of law as established in these Courts.

Judgment—*Sir Herbert Jenner Fust.* I adopt the view taken by the learned counsel who spoke last. The testator has declared, at the very commencement of the paper of 1838, "This is the last will, of me, William Budd;" again, in the attestation clause, he declares it to be "his last will." There is no reference whatever to any [269] earlier paper, nor did anything pass at the execution to shew that the testator intended to limit the effect of the paper of 1838. I find, too, in a codicil of the same date as the will there is an appointment of executors, which has always been considered to effect a complete disposition.

How can I, then, in the face of the written declarations of the testator, that the will of 1838 is "his last will," say that it is not; which I should, in effect, do, were I to hold that the paper of 1837 is to be taken conjointly with it. It was clearly his intention that the paper of 1838 should stand alone, though that disposed of a part only of his personal estate. I asked the question of counsel for Mrs. Plenty, but received no answer, whether there is a case like the present, where the testator has called a will "his last will," in which this Court has held former papers to be included. I know of none. I enter not into consideration of what was said in respect of wills of realty; that doctrine may or may not have been correctly stated. I am of opinion that the paper of 1837, though not in terms, is in effect, revoked, and therefore pronounce the paper of 1838 to be alone entitled to probate; at the same time I decree the expenses of all parties to be paid out of the estate.

[270] KIPPING AND BARLOW *against* ASH AND OTHERS. Prerogative Court, June 25th, 1845.—The bare possibility of an interest is sufficient to entitle a party to oppose a testamentary paper.

[S. C. 4 Notes of Cases, 177; 9 Jur. 542. Applied, *Dixon v. Atkinson*, 1864, 10 Jur. (N. S.) 1242. Referred to, *In the Goods of White*, 1893, 31 L. R. Ir. 385.]

On petition.

William Winham Ash of Loose, in the county of Kent, gentleman, by his will dated the 1st of March, 1839, disposed of all his personal estate. He devised a certain real estate, consisting of 135 acres (alleged to be of the value of 3500l.), to his brother, Thomas Ash, in fee simple, and in case of his dying in the devisor's lifetime (which event occurred), to the children, both sons and daughters, of his said brother, Thomas A., in fee simple, as tenants in common. Under the will, they had no interest in the personalty. By a codicil, dated the 17th of September, 1841, amongst other alterations in his will, he gave the children of his late brother, the said Thomas A., pecuniary legacies amounting together to 550l., and revoked the devise

(a) Note to *Duppa v. Mayo*, 1 Saund. 279 h (6th edit.); 1 Wms. on Executors, 117, and 1 Jarman on Wills, 159.

to them of the real estate. The residue of the personal estate was disposed of by the will.

A caveat was lodged in behalf of the children of Thomas A., against the grant of probate of the above-mentioned papers; and their proctor being assigned to declare whether he would oppose the will and codicil (scripts marked A and B), declared he opposed the codicil, script B.

The proctor for the executors, Kipping and Barlow, denied the interest of the opposite parties to oppose the codicil, and in reply to the act on petition entered into, alleged "that none of the parties is opposing the will; that the revocation contained [271] in the codicil is altogether of realty, and not personalty; that the interest (if any) of the opposers in the personal estate is not directly or indirectly prejudiced or injuriously affected by any thing in the codicil contained; and that, by the law and practice of this Court, they are not entitled to oppose the codicil in this Court."

Jenner and Phillimore, R. J., for the parties opposing the codicil. As the codicil purports to dispose of realty and personalty, the subject is within the jurisdiction of the Court, *Partridge's case* (2 Salk. 552). It is allowed we might have opposed both the will and codicil, but it is alleged we are not entitled, by the practice of the Court in such a case as this, to oppose the codicil alone. If such a rule exists, it is a highly absurd one. What must be the effect of such a rule? In future a party would have to carry on a sham opposition only to a will to enable him to attain his object, namely, the opposition to a codicil. Though the case has not arrived at that stage to enable us to set forth the ground of our opposition, still it must be clear we have a sufficient interest to enable us to do so. We might, for instance, contend that the testator intended a larger benefit for our party; that the gift, as it appears, is merely insidious and prejudicial; and that fraud was had recourse to in the matter. The rule set up on the other side appears so harsh and unmeaning as to justify us in calling for some authority, instead of mere assertion as to the practice.

[272] Haggard and Harding for the executors, Kipping and Barlow. Our position is wholly misunderstood by the other side. The case in Salkeld has nothing to do with the point, as the jurisdiction of the Court is not questioned by us. The practice for which we contend is supported by authority, *Wright v. Rutherford and Others* (2 Lee, 266). It has not hitherto been considered harsh, and there is nothing of the sort in the present instance, as the opposite party have the power, if they please to exercise it, of questioning the revocation of the devise before another tribunal. They must shew that they have an interest to oppose the codicil here; interest they have none, for their only right to a share of the personalty is under the codicil.

Jenner in reply. The case of *Wright v. Rutherford and Others* is not in point; in that case Tyrrell had no interest whatever under the second will. We have; we say we ought not only to have what is given us in the codicil, but more.

Judgment—*Sir Herbert Jenner Fust*. It has been argued for the executors that the other party has no interest to oppose the codicil, as under the will their only claim is to a portion of the real estate; that it is by the codicil alone they are entitled to any share of the personalty. I am not prepared to say that it is not competent to the party to oppose the codicil, for instance, on the score of [273] fraud; that they can be precluded from shewing fraud in the transaction. Though at present that is merely a suggestion, still I know not what case may be made out against the codicil. I am therefore of opinion that they have an interest, and that the bare possibility of an interest is sufficient.

The petition was admitted, and the proctor for the executors assigned to declare whether he will propound the codicil, the script B.

IN THE GOODS OF ANN CHANTER, Widow, Deceased. Prerogative Court, Nov. 7th, Dec. 12th, 1844.—Motion for a decree to cite the next of kin of an intestate to accept or refuse letters of administration of all the goods, &c., of the deceased, otherwise to shew cause why such administration should not be granted to a stranger; a nominee of certain plaintiffs in a suit in equity, rejected, though a general grant was held necessary by the Vice Chancellor of England.

[S. C. 3 Notes of Cases, 438.]

Motion.

In January, 1838, Eliza Davis and others by their next friend, Thomas Hunt, filed a bill of complaint in the High Court of Chancery against the said Ann Chanter,

widow, and others, in relation to an estate in the county of Devon, devised by the will of Edward Snell, deceased, bearing date the 13th of November, 1765, in which suit a bill of revivor and also a supplemental bill have been filed, and other proceedings since had.

The said Ann Chanter died on the 20th of February, 1842, intestate, leaving her surviving Elizabeth Snell Chanter, spinster, her natural and lawful and only child, the only person entitled to her personal estate and effects. In January, 1843, letters of administration were granted by authority of the Prerogative Court to William Bertram, a nominee of the said T. Hunt, with the consent of the said Elizabeth Snell Chanter, limited for the [274] purpose of substantiating and carrying on the proceedings in Chancery. The said William Bertram died in June, 1843. In September following letters of administration of the goods of the said Ann Chanter, under the same limitations, were granted to Henry Best, also a nominee of the said T. Hunt, with the consent of the said Elizabeth Snell Chanter.

On the 5th of July, 1844, when the said cause was heard, the Vice Chancellor of England held that the limited administration was insufficient, and that there must be a general representation, and directed the cause to stand over to enable the plaintiffs to cure the objection.

Addams moved the Court, as application had been made without effect to the said Elizabeth Snell Chanter to accept or renounce, to decree her to be cited to accept or renounce letters of administration of all and singular the rest of the goods, &c. of the said Ann Chanter, otherwise to shew cause why such administration should not be granted to the said H. Best with the usual intimation.

Judgment—Sir Herbert Jenner Fust. Mr. Best has no interest in the estate of the deceased; he is the mere nominee of the plaintiffs in a suit in equity. I have no power to make a grant of a general administration to such a one, nor is it pretended that there is a precedent for granting such a prayer. I am not informed of the ground of the decision by the Vice Chancellor. This Court might, perhaps, make such a grant to a nominee of its own; at present, however, no suffi-[275]-cient reason for so doing is stated; moreover, that is not the prayer now made. I must refuse the decree; it is a very serious thing to subvert the practice of the Court.

IN THE GOODS OF REBECCA BULLOCK, Widow, Deceased. Prerogative Court, May 27th, 1845.—If a party be entitled to a grant in a superior, the Court will not make that grant to such person in an inferior, character.

[S. C. 4 Notes of Cases, 645.]

Motion.

Rebecca Bullock died on the 4th of May, 1844, having duly executed her will, bearing date 28th October, 1836, and thereof appointed her niece, Mary Shirgill, spinster, the executor, who renounced the probate; no representation was taken out. The testatrix left a son, the only person who would have been entitled to her personal estate had she died intestate, but he was not mentioned in the will: to him was granted administration with the will annexed of the goods of his father, left unadministered by his mother, who was the executor. Subsequently thereto it became necessary to obtain a representation to Mrs. Bullock, owing to certain property having been found to be vested in her.

Addams moved the Court (as great inconvenience would arise to the son—the administrator of the father—were Miss Shirgill to retract her renunciation, and prove the will of Mrs. Bullock, for in that case she would become the legal representative of Mr. Bullock) for letters of administration with the will annexed of the goods of Mrs. Bullock, to be granted to Miss Shirgill as one of the residuary [276] legatees named in Mrs. Bullock's will, other residuary legatees being minors.

Judgment—Sir Herbert Jenner Fust. Under the circumstances stated I should, were it possible, be desirous to assist the parties, but the Court cannot alter its practice. If a party be entitled in a superior character to a grant, the Court cannot make it to the party in an inferior. Miss Shirgill is entitled as executor; I cannot allow her to take as a residuary legatee.

IN THE GOODS OF MAJOR GENERAL CLEMENT HILL, Deceased. Prerogative Court, June 25th, 1845.—Will of a soldier made at Bangalore, in the East Indies, whilst in command of the Mysore division of the army there stationed, and who died whilst on a tour of inspection of the troops under his command, not admitted to probate, not being executed according to 1 Vict. c. 26, s. 9, and not being held to be within the exception contained in sect. 11.

[S. C. 4 Notes of Cases, 174.]

Motion.

Clement Hill, Esq., late a major-general in her Majesty's Army, died on the 20th January, 1845, leaving a paper dated May, 1843, intended as a will, in the form of a letter signed by him, but not witnessed.

The facts are fully stated in the following affidavit, made by Lord Fitzroy Somerset, Military Secretary to the Commander-in-Chief of the Army, who swore, "That he knew and was well acquainted with the above-named Clement Hill, Esquire, deceased. That the said deceased was a major-general in her Majesty's Army, and left England in the year one thousand eight hundred [277] and forty-one for the purpose of assuming a divisional command in the East Indies. That on his arrival in India, in November, one thousand eight hundred and forty-one, he was appointed to, and in the following month assumed, the command of the Mysore division in India, the head quarters of which were stationed at Bangalore; and that he continued to hold such command, and to have his ordinary place of residence at such head quarters at Bangalore till the period of his death. That he was actually resident in such head quarters in the month of May, one thousand eight hundred and forty-three. And this deponent further made oath that the said deceased died on or about the twentieth day of January, one thousand eight hundred and forty-five, whilst on a tour of inspection of the troops under his command. And this deponent lastly made oath that the said deceased was, during the whole of the period, from the time of assuming the aforesaid command in December, one thousand eight hundred and forty-one, till the date of his death, in the active performance of the duties of such military command, and was at any moment liable to have been called on to march with his division, or other body of troops, to whatever point the exigencies of the wars, which were during such time carrying on in India, might have required. That he was, during the whole of the time aforesaid, subject to martial law, and was, according to the rules of the army and in military understanding and acceptance, in actual military service."

Addams, on these facts, moved the Court to decree probate of the paper, as coming within the exception contained in the 11th section of the Will Act.

[278] *Judgment*—*Sir Herbert Jenner Fust*. This is a stronger case than any which has hitherto been brought before the Court. Still I cannot, after my decision in *Drummond v. Parish* (3 Curteis, 522), grant probate of this paper. I much wish the parties interested would propound the paper, and take the opinion of the Supreme Court thereon.

IN THE GOODS OF CHARLOTTE PIERCY, Widow, Deceased. Prerogative Court, August 5th, 1845.—A will being attested in the constructive presence of a testatrix, it must appear that, though she was blind, she could, had she had her eye-sight, have seen the witnesses sign.

[S. C. 4 Notes of Cases 250. Referred to, *Scott v. Scott*, [1912] P. 281.]

Motion.

Charlotte Piercy died in February, 1845, having just before her death executed her will. She was very ill in bed, and totally blind, but in full possession of her mental faculties. The will was prepared according to her directions, and read over to her. In the presence of the attesting witnesses she signed her name in bed, one of them having placed her hand on that part of the paper where it was necessary for her to sign. By reason of there not being any table or other convenience in the bedroom on which the witnesses could sign their names, they all proceeded immediately to an adjoining room on the same floor, across a landing or passage, and there within view of the bedroom, the doors of both rooms being open, respectively subscribed their names. A plan of the rooms was laid before the Court, and in a second affidavit it was sworn that the testatrix, from her bed, could have seen the [279] witnesses at the table when they signed, had she had her eye-sight.

Addams, on these facts, moved the Court for probate.

Judgment—*Sir Herbert Jenner Fust*. When this case was moved on a former occasion, there was no evidence to shew that the testatrix could have seen the witnesses sign, had she had her eye-sight, and I felt I could not place her in a better position than one who could see. It does not appear whether there were curtains to the bed; still, as it is positively sworn by two witnesses that she could, had she had her sight, have seen from her bed the witnesses subscribe, I cannot refuse this application.

D———E *against* A———G, FALSELY CALLING HERSELF D———E.(a) Consistory Court of London, May 16th, 1845.—Sentence of nullity of marriage pronounced, by reason of a natural, incurable malformation of the sexual organs of the female, those organs admitting of a partial connexion only with the male.

[Referred to, *Lewis v. Heyward*, 1866, 35 L. J. P. & M. 107.]

A citation was taken out on the 13th of November, 1844, at the suit of Thomas D. and duly served on Maria D., described therein as Maria A., spinster, falsely calling herself D., and pretending to be the [280] wife of Thomas D., calling upon her to appear and answer him in a cause of nullity of marriage, by reason of the natural incurable malformation of her, the said Maria D., rendering carnal consummation impossible.

The libel, which was admitted without opposition, pleaded :

First, second, and third articles. The fact of marriage on the 3rd of February, 1842, the certificate of the marriage and the age of the parties, Thomas D. about twenty-six years of age, Maria D. about twenty-five.

Fourth. That the marriage was never consummated though they continued to live and cohabit as husband and wife.

Fifth, sixth, and seventh. The various places of residence of the parties from the day of the marriage, that they always slept together in the same bed and continued so to do till about the 11th of November, 1844, when the said Maria A. returned to her father's house.

Eighth. That during all the nights they so slept together the said Thomas D. was apt and fit for and desirous of carnally knowing and endeavoured to know the said Maria A. and that she, the said Maria A., endeavoured so to be carnally known, but that notwithstanding the marriage was never consummated.

Ninth. That the parts of generation and sexual or seminal organs of the said Maria A., otherwise D., were and are not such or in the same state as are the same parts and organs in women capable of having connexion with or of being carnally known by a man, but were and are naturally in a different [281] state, and that by reason of such the natural malconformation thereof, and other her natural bodily defects, she the said Maria A., otherwise D., was and is incapable of having connexion with or of being carnally known by man. And the party proponent further expressly alleges and propounds that it will appear to competent judges (physicians and surgeons or others) on a due examination of the person of the said Maria A., otherwise D., that such were and are the facts, and also that such the malconformation and bodily defects of her the said Maria A., otherwise D., were and are irremediable and not to be removed or relieved by art.

Tenth. That the said Thomas D. long conceived that such the incapacity of the said Maria A., otherwise D., to consummate her pretended marriage with and to be carnally known by him was the result of a temporary obstruction which would probably yield to simple remedies aided by horse exercise, and which he recommended to her, and in the use whereof she long persisted; to wit, until about the month of June last (1844), wholly without effect; that between the said month of June and the months of September and October last (1844), she the said Maria A., otherwise D., at the earnest entreaty of the said Thomas D., repeatedly at intervals submitted her person to the examination and inspection of Drs. Bird and Lever (the latter Assistant Physician and Accoucheur, and Lecturer on Midwifery at Guy's Hospital), and that upon their concurrent reports in or about the months of September and October last (1844), as to the natural and irremediable malconformation and bodily defects of the said Maria A., otherwise D., as herein above stated, the said Thomas [282] D. for the

(a) As this is in every respect a singular case, the evidence of the medical witnesses is given entire.

first time disclosed to his legal advisers the non-consummation of his pretended marriage with the said Maria A., otherwise D., together with the cause of the same, and that the result of such disclosure has been the return, to wit, early in the month of November last (1844), of the said Maria A., otherwise D., to the house of her father at A———n, and the institution of this suit on behalf of him, the said Thomas D.

Eleventh. That the said Maria A., otherwise D., has admitted that she is subject to a natural malconformation, by reason whereof her pretended marriage never had been or could be consummated.

Twelfth and thirteenth. The jurisdiction.

Fourteenth. The concluding article.

The answers of the said Maria A., otherwise D., were taken to the above libel, and were to the following effect:—

The first, second, third, fourth, fifth, sixth, seventh, and eighth admitted in substance the facts as pleaded, except as to the marriage being a profanation or a pretended marriage, and that it was not consummated.

The ninth denied the facts pleaded.

The tenth. To the tenth position or article of the said libel this respondent, in answering, saith she disbelieves and denies that the said Thomas D: did conceive, or could have long conceived, that the articulate or any incapacity in this respondent to consummate the said marriage with or to be carnally known by him was the result of a temporary obstruction, which would probably yield to simple remedies aided by horse exercise. She admits that he recommended horse exercise as condu- [283]-cive to her health, and in the occasional use whereof she, in the month of September, 1843, indulged with her said husband, but she denies she long persisted in the use thereof, or after the month of September, 1843. And this respondent further answering, saith she admits that between the month of June, 1844, and the said month of September or October, 1844, she, the respondent, by reason of not having had any child, and not on account of any natural or irremediable malconformation or bodily defects, at the earnest entreaty of the said Thomas D., repeatedly at intervals submitted her person to the inspection and examination of the persons articulate, the latter of whom (as this respondent believes) holds the situation articulate, but this respondent knows not of her own knowledge, or otherwise, and can form no belief or disbelief, whether upon their concurrent or other reports (if any such were made in or about the months articulate) the said Thomas D. for the first time disclosed (though she denies he could with truth have disclosed) to his legal advisers the non-consummation of the said marriage, together with the cause of the same; but respondent disbelieves and, therefore, denies that it was in consequence of the disclosure articulate, though she admits that it might have been in consequence of the said Dr. Bird having informed this respondent, as the fact was, that although her intercourse with the said Thomas D. might have been constant, it was not effectual in causing conception, she, this respondent, was at the time articulate compelled to return to her father's at A———n by the said Thomas D., who shortly afterwards instituted this suit, and further or other- [284]-wise to the said article this respondent answering, saith she disbelieves and denies the same to be true.

The eleventh denied the facts pleaded.

On the 5th of April, Dr. Bird, Dr. Lever, and Dr. Cape were appointed inspectors, and sworn "to examine particularly the parts of generation of Maria D., and whether she is capable of performing the act of generation, and of being carnally known by man, and if she be incapable of performing that act, and of being carnally known by man, whether such her incapacity can be so remedied as to enable her to perform that act, and to be so known." They were admonished to deliver in their report in writing.

Report.

"14 Lloyd's Square, Pentonville,

"Saturday, 5th April, 1845.

"We the undersigned have this day particularly examined the parts of generation of Maria D., and we are unanimously of opinion that she is undoubtedly capable of performing the act of generation, and of being carnally known by man. We are further of opinion that although sexual intercourse can occur, yet conception cannot result.

"GOLDING BIRD, M.D. LAWSON CAPE, M.D.

"JOHN C. W. LEVER, M.D."

Subsequent to the above report, Dr. Bird and Dr. Lever were examined on the ninth and tenth articles of the libel.

[285] Dr. Bird's Evidence.

Ninth article. "I became acquainted with Maria D., otherwise A., party in this cause, by having been on various occasions, since the twenty-seventh day of May last, consulted by her in my professional character of a physician, and from the nature of the ailment under which she at such time appeared to be labouring, namely, a determination of blood to the head, which I traced to a constitutional deficiency, I prescribed remedial measures, and subsequently, under my advice, she underwent a regular course of treatment: and in pursuing my inquiries respecting her indisposition, I found it absolutely necessary to make an examination of her sexual organs, the result whereof was that I ascertained that the external sexual organs of the said Maria D. were imperfect, or rather undeveloped; that she had the appearance rather of a girl not having attained puberty than an adult; and internally I found that the vagina, which ought naturally to have been of an internal depth of about three inches, was in fact, as I ascertained by admeasurement, only three quarters of an inch in depth. This was decidedly a natural malformation of the parts, but not such as I was enabled, without further investigation, to pronounce whether remediable or irremediable, though it was certain that, if the former, it could only be effected by an operation. With the view of endeavouring to ascertain if an operation could be performed with a prospect of success, a more minute and careful investigation became necessary, and such was subsequently (and, as I believe, on the 27th day of July last) made by myself, in conjunc-[286]-tion with Dr. Lever, and it was then ascertained that the internal structure of the organs of generation of the said Maria D. were, in addition to the deformity already mentioned, further importantly deficient and imperfect, there not being any uterus. This was ascertained by me beyond the slightest possibility of doubt, and that the vagina formed an impervious cul de sac, and that, consequently, any operation would be wholly ineffective; and I depose that the said Maria D. is, therefore, irremediably incapable of procreation or conception, arising entirely from the organic deformities which I have explained, namely, the absence of the uterus, and the irremediably impervious state of the vagina. Under an order from the Honorable Court, I on the fifth day of this instant month of April again inspected the said Maria D., otherwise A., in consultation with Dr. Lever and Dr. Cape, and I then found that the vagina had become considerably elongated, being now of the depth of two inches, ascertained, as on the former occasion, by actual admeasurement; and this extension having taken place, I cannot, therefore, depose that it is absolutely impossible for the vagina to obtain a further elongation, but I am not acquainted with any means, medical or otherwise, capable of improving its existing condition, and it must inevitably remain throughout her life in a deformed and unnatural state, forming an impervious cul de sac. I further depose that such the formation of the sexual organs of the said Maria D. is decidedly an unnatural formation and is irremediable, but is not such as entirely to prevent her having connexion with or being carnally known by man, for it has undoubtedly taken [287] place; there is physical evidence thereof, but such connexion must unquestionably be of a very imperfect character, from the peculiar and unnatural formation of the vagina; it being, as I have already explained, an actual cul de sac, and admitting only a very partial insertion of the penis, necessarily restricted to the very limited dimensions of the vagina. And further to the said article of the libel I cannot depose."

Tenth article. "Thomas D., the party promoting this cause, is known to me only in connexion herewith. He on one occasion accompanied his wife, the said Maria D., when she came to consult me, and I also on one occasion saw him at lodgings occupied by them in Devonshire Street, Queen's Square, and some time in the autumn of last year, I cannot fix the date precisely, but as well as I can remember it must have been about the latter part of October, 1844, which was the last time of my seeing the said Maria D. previous to the consultation on the fifth of this month. In an interview with the said Thomas D., I communicated to him the irremediable malformation of the said Maria D., his wife, and he then declared to me the fact of his having been enabled to have connexion with her, but very imperfectly, and with great declared suffering from pain on her part, but that he had attributed it only to a mere temporary obstruction capable of being overcome by further intercourse; and I am quite satisfied

he must up to that time have been wholly ignorant of the real state of the said Maria D., otherwise A., as it was only ascertained by competent and careful surgical investigation. I heard that some months after this commu-[288]-nication by me, the said Maria D. was removed to her parents or family; and further to the said article I cannot depose."

On Cross-examination.

"I answer to the interrogatory that I have examined the private parts of the ministrant, and that she is capable of having connexion with and being carnally known by man, meaning thereby that although there is a total absence of the uterus, and a malformation of the vagina, as already fully particularized in my deposition in chief, still a very small portion of the penis can be undoubtedly introduced, and connexion by that means takes place; and the appearance of her sexual organs afford very, very strong presumption, if not positive evidence, that to such extent sexual intercourse has taken place; there were all the symptoms thereof; and I have admitted my conviction to be to that effect, and also that there is every evidence of the ministrant's capability for receiving sexual gratification; there is nothing attending on her state to prevent it; those parts tending to that result being with her fully developed; as to her power or capability of imparting it, I can offer no opinion. I have examined the said ministrant on four different occasions, and on the last examination her private parts did present an appearance different to that which they had done on my first examination, in consequence of the elongation of the vagina, which I have mentioned in my deposition, and therefore, in my opinion, more favourable for sexual intercourse since my first examination; because, although such result might have arisen from [289] violent effort at connexion, yet it might have been produced by artificial or mechanical means of dilatation. And further to the said interrogatory I cannot answer."

Dr. Lever's Evidence.

Ninth and tenth articles. "To the ninth and tenth articles of the libel, I first became acquainted with Maria D., the party proceeded against in this cause, by the introduction of Dr. Bird, my fellow-witness, by whom I was called into consultation on the 27th day of July last, and I attended such consultation in Devonshire Street, Queen's Square. I, on this occasion, saw Thomas D., the husband of the said Maria D., previous to my seeing her, and he then informed me that he had been married to the said Maria D., otherwise A., for upwards of two years, and had very frequently attempted to have sexual intercourse with her, but had never been able to effect it, even with force, though he had made every effort. I knew from Dr. Bird that the object of my attendance was to ascertain the state of the sexual organs of the said Maria D., with the view of deciding, or rather of ascertaining, whether any operation was advisable, or indeed possible to be performed upon the said Maria D., so as to afford the means of natural sexual intercourse. I learnt from the said Maria D., who was at such time, I believe, about twenty-three years of age, that she had never had any of those periodical illnesses to which females are naturally subject. Upon examination I found her external sexual organs perfectly formed and developed, and that the formation necessary for creating sexual desires [290] was also perfect, but upon introducing the finger into the vagina, an impediment at once presented itself, and I discovered that the vagina, instead of being, as it ought naturally to have been, of the depth of four inches, or thereabouts, was in the said Maria D. of the depth of only one inch and a quarter, so far as I could judge without positive admeasurement; it might have been less, but most certainly not more: and the said vagina was so constructed as to form a perfect cul de sac, without any apparent means of communication with any internal organ. As this state of things, however, might have arisen from causes which were capable of being overcome, I required a further inspection, or rather examination, to enable me to determine with more precision as to the actual position of this lady, and of the possibility, or otherwise, of remedying her then state; for although from my then examination I had every reason to believe that the said Maria D. had not any uterus, I was desirous of seeing her again, under circumstances more favourable for determining whether such was the case. On the twentieth of October I made such further examination, and I then ascertained, to an absolute certainty, that there was not any uterus, and that any attempt to perform an operation for the extension of the vagina would not only be useless, but, in all probability, fatal. I communicated thereupon to the said Maria D. that her situation was irremediable,

and that no operation could be performed successfully or beneficially, though she was herself very urgent that it should be tried. I also on this occasion made a similar communication to the said Thomas D., who, as he gave me to [291] understand, had, up to such time, regarded the obstruction to sexual intercourse as temporary. In virtue of an order from this Honorable Court, I, on the fifth day of this instant month of April, attended in consultation with Dr. Bird and Dr. Cape, and again examined the said Maria D., and I then ascertained that since my previous examination on the 20th of October an extension of the vagina had taken place, so that I could insert my finger to the depth of two inches: this must have been effected by dilatation, but how attained I cannot state; in all other respects the state of the said Maria D. remained as on the previous examination. I cannot depose generally that the said Maria D. is, in consequence of such malformations as I have hereinbefore fully particularized, wholly incapable of being carnally known or having sexual connexion, for the male organ might be inserted to the extent of two inches, and the ordinary excitement created; but I depose that the vagina of the said Maria D. being, as I have described, a cul de sac, and of such contracted dimensions, would prevent the insertion of the male organ as in ordinary cases; and the fact of such cul de sac being wholly impervious prevents the possibility of procreation or conception, and no course can be adopted by medical art or skill, nor by any other means, to alleviate these malformations of the said Maria D., and they are of such a nature that she would be necessarily unconscious of their existence, as their actual character could only have been ascertained by careful medical examination, although the obstruction existing in the vagina would necessarily be discovered [292] upon any attempt at connexion. And further I cannot depose."

On Cross-examination.

"I have examined the private parts of the ministrant. She is capable of having connexion with and being carnally known by man, but only imperfectly. From the appearance of such private parts of the ministrant it is evident that sexual intercourse has taken place; but, as I have already described, it must of necessity have been of a very imperfect character, from the natural malformation of the vagina. I have admitted my conviction that sexual intercourse had taken place, and that the ministrant is capable of receiving sensual gratification, and of so far imparting it as to afford the ordinary excitement to the male organ, under the restriction as to insertion, which I have already fully described. I have examined the ministrant on three different occasions, and on the last occasion, to wit, the 5th day of April instant, her private parts did present an appearance different from the former occasions, and so far more favourable for sexual intercourse that there was the trifling extension of the vagina which I have already explained. I am quite unable to form a belief as to whether such altered appearance was or was not occasioned by her having had sexual intercourse since my first examination of her, inasmuch as the same result might have been effected by artificial means. And further I cannot answer."

Upon this evidence of the medical gentlemen the cause came on for hearing.

[293] Addams and Harding for Mr. Thomas D. The marriage of the parties is proved; the cohabitation is admitted in the lady's answers. The simple question is, whether her impotence is made out. If that depended merely on the certificate of the inspectors no doubt some difficulty would exist. The ambiguity, however, there arising is cleared up by the evidence of Dr. Bird and Dr. Lever, who have been examined on the libel. It appears there is a natural malformation in the lady, irremediable by art. This is not the case of a woman who is barren—that undoubtedly would be no ground for a sentence of nullity—but of one who has no uterus, and, in addition to that defect, has her vagina so formed as to preclude sexual intercourse, in the proper sense of the term, whereby the two-fold object of marriage, namely, to procreate children and to prevent fornication, is wholly frustrated. Though this is probably a case, *primæ impressionis*, still it would seem to fall within the scope of acknowledged dicta. If a woman be "*mulier viro inutilis*," or, as it is otherwise expressed, "*inhabilis*," arising from a natural irremediable defect, which is the case here, there is just ground for a sentence of nullity.(a) It cannot be said that there

(a) C. ex literis 3, x. de Frigid. et. Malefic. et impot. coëundi. Godolp. Repert Canon. c. 36 (1), and Ought. tit. 193, s. 17.

has been any delay in instituting this suit; for the real defect in the lady "was only ascertainable by competent and careful surgical investigation."

Dodson, Q. A., and Jenner contra. To entitle a party to a sentence of nullity there must be an utter impossibility ("omnino") of sexual [294] intercourse. That is the case set up in the libel, but the evidence does not support the plea. The certificate of the inspectors says the lady "is undoubtedly capable of being carnally known by man, though conception cannot result." The case then is one merely of sterility, which is no ground for a sentence. The evidence on the libel does not clear up this difficulty; the opinions of the medical witnesses do not coincide. Dr. Bird says on examination he found the external sexual organs "imperfect, or rather undeveloped," whereas Dr. Lever says he found them "perfectly formed and developed." This is not all: it appears, moreover, from the joint testimony of these gentlemen that an improvement has, within a few months, taken place in this lady; there has been an "elongation" of the vagina, and they will not undertake to depose that there may not be a further elongation. To justify the sentence prayed the defect must be permanent and irremediable. But, in the next place, it appears beyond a doubt that there is not merely a possibility of consummation, but that actual consummation has taken place; and though sexual intercourse between these parties may still be attended with some difficulty, still it is perfectly clear from a high authority (Sanchez de Matrimonio, lib. 7, disp. 92) on this subject that that will not justify a sentence. On every point the case on the other side is defective; there is no ground for the sentence prayed.

Addams and Harding in reply. Though there may be some difference in the testimony of Dr. Bird and Dr. Lever, still our case in the main is not affected thereby. It is not one of sterility but one in which conception is impossible: [295] moreover, the passages referred to in Sanchez suppose the potentia coeundi complete; that is not so, in any proper sense of the word, here. As to any material improvement in the condition of the lady, how can that be, unless a miracle be worked? There is an entire absence of a uterus, and with respect to the vagina, both the medical witnesses substantially agree "that though its elongation is not absolutely impossible, still they are not acquainted with any means, medical or otherwise, capable of improving its existing condition, and it must inevitably remain throughout her life in a deformed and unnatural state." Under these circumstances, though we are not able to refer to a case in point, the Court will, we trust, pronounce for the nullity.

Cur. adv. vult.

June 7th.—*Judgment*—Dr. Lushington. I regret to say it is impossible for me to do justice to the question before me without entering into a very minute investigation of every particular connected with it.

This is a suit brought by Mr. D. against the lady to whom he was married for the purpose of obtaining a decree, pronouncing the marriage had between them null and void, by reason, as alleged in the citation, of her incurable natural malformation and bodily defect, rendering carnal consummation impossible.

I will first state what I conceive to be the fair result of all the evidence before the Court, and then [296] consider what legal conclusions should be drawn therefrom.

The inspectors' report, if considered by itself, is clearly insufficient to justify any decree in favour of the party promoting this suit; that report declares in the most express terms the power of consummation, but denies the power of conception.

If this were the whole case there cannot be a doubt of its being the duty of the Court to pronounce that the husband has failed in the proof of his libel; but two of the gentlemen who have signed the report have been examined, and their evidence must now be considered.

The marriage took place on the 3rd of February, 1842; the parties were of the respective ages of twenty-six and twenty-five. It appears from the answers that the parties lived together, and for the most part, at least, slept in the same bed until November, 1844, shortly before the commencement of this suit.

The evidence of the two medical gentlemen who have been examined clearly proves that the lady is incapable of conception, and is in strict accordance with that part of the report. Mere incapability, however, of conception is not a sufficient ground whereon to found a decree of nullity, and alone so clearly insufficient that it would be a waste of time to discuss an admitted point. The only question is, whether the lady is or is not capable of sexual intercourse, or, if at present incapable, whether that incapacity can be removed.

The effect of Dr. Bird's testimony is that there may be connexion of a very imperfect character, [297] from the peculiar and unnatural formation of the vagina. With respect to the possibility of more, he says that the vagina has been considerably elongated; that he cannot say it is impossible it should obtain a further elongation; that he knows of no means which will improve it; that it must always remain in a deformed and unnatural state, forming an impervious cul de sac. The evidence of Dr. Lever varies in the form of expression, but I think there is no material difference as to opinion between him and Dr. Bird.

Now I must observe that this evidence and the report do not convey to my mind the same idea. The report would induce me to believe that the act of generation might take place in its ordinary and perfect form: the evidence introduces a most material qualification; it speaks of a connexion of a very imperfect character. Such is the evidence of both the witnesses. The report is silent as to the possibility of cure.

Certainly all these circumstances combined form a case of no ordinary difficulty. It is no easy matter to discover and define a safe principle to act upon: perhaps it is impossible affirmatively to lay down any principle which, if carried to either extreme, might not be mischievous. Very little assistance can be obtained from authorities: it may be well to consult Sanchez for minute and ingenious disquisitions on the subject, but I should not be disposed to consider his authority of any very great weight, even if it governed the present question, which I do not think it does. I must rather endeavour to find out what are the true principles of law and reason applicable to the case, following, as far [298] as practicable, or rather not contradicting, former decisions.

I apprehend that we are all agreed that, in order to constitute the marriage bond between young persons, there must be the power, present or to come, of sexual intercourse. Without that power neither of two principal ends of matrimony can be attained, namely, a lawful indulgence of the passions to prevent licentiousness, and the procreation of children, according to the evident design of Divine Providence.

Though all are so far agreed, this unanimity of opinion does not remove the existing difficulty, for that difficulty lies in the meaning of the term "sexual intercourse." How is it to be defined? This is a most disgusting and painful inquiry, but it cannot be avoided.

Sexual intercourse, in the proper meaning of the term, is ordinary and complete intercourse; it does not mean partial and imperfect intercourse: yet, I cannot go the length of saying that every degree of imperfection would deprive it of its essential character. There must be degrees difficult to deal with; but if so imperfect as scarcely to be natural, I should not hesitate to say that, legally speaking, it is no intercourse at all. I can never think that the true interest of society would be advanced by retaining within the marriage bonds parties driven to such disgusting practices. Certainly it would not tend to the prevention of adulterous intercourse, one of the greatest evils to be avoided.

There is, I think, some ambiguity in the evidence. The two witnesses are both agreed as to the connexion being imperfect; but I am not satisfied as to the true meaning of their evidence as to incurability. In one sense of the term, there can be no doubt, namely, that as relates to conception, the malformation is incurable; but it is to me doubtful whether they mean that it is incurable as to the mere coitus. In this difference, I think, lies the true distinction. If there be a reasonable probability that the lady can be made capable of a vera copula—of the natural sort of coitus, though without power of conception—I cannot pronounce this marriage void. If, on the contrary, she is not and cannot be made capable of more than an incipient, imperfect, and unnatural coitus, I would pronounce the marriage void.

I will very briefly state my reasons. In the case first supposed, the husband must submit to the misfortune of a barren wife, as much when the cause is visible and capable of being ascertained, as when it rests in undiscoverable and unascertained causes. There is no justifiable motive for intercourse with other women in the one case more than in the other. But when the coitus itself is absolutely imperfect, and I must call it unnatural, there is not a natural indulgence of natural desire; almost of necessity disgust is generated, and the probable consequences of other connexions with men of ordinary self control become almost certain. I am of opinion that no man ought to be reduced to this state of quasi unnatural connexion and consequent

temptation, and, therefore, I should hold the marriage void. The condition of the lady is greatly to be pitied, but on no principle of justice can her calamity be thrown upon another.

Having made these observations I will now state [300] the course I shall pursue. I cannot pronounce the marriage void on this evidence with perfect satisfaction to my own mind, especially considering the wide discrepance between the report and the evidence. I shall rescind the conclusion of the cause for the purposes of allowing Dr. Cape to be examined; and this may be done in the usual mode, by examination in chief, and cross-examination, if the parties think fit; but I think myself justified in a case of this great peculiarity in directing that two questions shall be put to him:—

1st. Whether (without regard to the impossibility of conception) the lady was at the time of his examination capable of the act of generation in its natural and ordinary meaning, or only of incipient and imperfect coition.

2nd. Whether, if not capable of generation in its natural and ordinary meaning, but only of incipient and imperfect coition, such defect arises from malformation incapable of cure, so as to allow of the natural and perfect act of coition.

When this has been done I will decide the cause according to the principle I have stated.

Dr. Cape's Evidence.

Ninth and tenth articles. "To the ninth and tenth articles; I know Maria A., otherwise D., the party proceeded against in this cause, but only by having been consulted by her professionally in the month of March last, and again in the month of April, when I attended in consultation with Drs. Bird and Lever for the purpose of making a report to this Honorable Court in reference to the state of [301] the sexual organs of the said Maria A. On the former occasion in March the said Maria A. called at my house in Brook Street, and I then made an examination of her sexual organs. I found the same externally perfect, but on introducing the finger into the vagina I found the same in a very contracted state as regarded its depth, and also that it was quite impervious and formed a cul de sac, having no communication whatever with any of the internal organs; the depth of the vagina on this occasion I cannot accurately specify, for I have no recollection of making any note thereof; on further prosecuting my then examination of the said Maria A., for the purpose of ascertaining if any further defect existed, I was unable to discover any uterus. It is just possible that one might exist without my having been able to discover it; yet from the examination which I then made I have every reason to believe that there is in the case of the said Maria A. a total absence of the uterus. On the second occasion of my examining the said Maria A., in consultation as above mentioned, I did so with more accuracy and by actual inspection, and I then found the vagina to be in the same state of deformity which I have already explained, namely, that it consisted of an impervious cul de sac of a confined and limited character as regarded its depth, though I consider on this occasion it was decidedly increased in depth a trifling degree, and I on this occasion ascertained the depth thereof by actual admeasurement, and it was precisely two inches; the natural depth would be from four inches to four inches and a-half; this state of things is decidedly a natural malformation of the sexual organs of the said Maria A., and is [302] positively irremediable—no operation could be performed to effect a cure; the said Maria A. is wholly incapable of conception, but she is capable of having connexion with and being carnally known by man, nevertheless only in a restricted and limited manner, in consequence of the contracted depth of the vagina, and its being an impervious cul de sac incapable of expansion; the said Maria A. is not capable of the act of generation in its natural and ordinary meaning, in consequence of the deformed state of the vagina not admitting, from want of depth, of the natural insertion of the male organ; that is, it can admit it only to the extent of about two inches, whereas naturally it would be to the extent of at least four. She is capable of coition, but the male organ being restricted from its full natural insertion I can hardly designate such coition perfect, though it is beyond incipient coition, as personal gratification can be afforded and actual emission ensue; exclusive of such restricted admission of the male organ, the act of coition is perfect, the only distinction as regards such act in the case of the said Maria A. being, that the male organ can only be inserted to the limited extent which I have already set forth. Such the state of the said Maria A. is wholly incapable of cure; it arises from

an irremediable malformation, and no means exist that I am aware of for rendering the act of coition otherwise more natural or complete."

On Cross-examination.

"The ministrant is capable of having connexion with and being carnally known by man, to the extent I have explained in my deposition in chief. [303] She is also, as I have explained, capable of sexual intercourse, and in my opinion her sexual organs do afford strong evidence that such intercourse has taken place, and she, in my opinion, is not a virgin. It must be distinctly understood that this is mere matter of opinion. When I examined the private parts of the ministrant, with Drs. Lever and Bird, they did present an appearance in some respect different from my first examination. The vagina was in a slight degree extended in depth, and, therefore, so far more favourable, though but in a trifling degree, for sexual intercourse. I have no means whatever of accounting for such improvement. It is just possible that a further improvement—but that would be only to a very slight degree indeed—might take place by continual frequent sexual intercourse, or by mechanical means, but no amendment would or could arise to any but a very trifling extent. I will not swear that the vagina is impossible to be further elongated, but I do swear that it could not be effected without endangering life, or running serious risk of doing so. The ministrant is as other females, feminine, and indeed particularly so, in external form, as of breasts, pelvis, and skeleton, and also voice."

July 8th.—The cause came before the Court again with the additional evidence of Dr. Cape, and after hearing counsel thereon, the learned Judge pronounced the marriage null and void.

[304] CATTERALL *against* SWEETMAN, FALSELY CALLING HERSELF CATTERALL. Consistory Court of London, July 8th, 1845.—A marriage purporting to have been had under authority of the Colonial Act of New South Wales, passed on the 4th of July 1834, held not to be invalid, by reason of a non-compliance with its provisions, there being no words therein expressly creating a nullity.—Query, unless there be in a marriage act such words, whether any other words could be held to import a nullity.

[S. C. 4 Notes of Cases, 222; 9 Jur. 951. See p. 580, post.]

This was a question as to the admissibility of a libel in a suit for nullity of marriage promoted by Joseph Catterall against Georgiana Ann Sweetman, falsely calling herself Catterall.

The libel pleaded—

First. That in and by an Act of the Governor and Legislative Council of the Colony of New South Wales, passed on the 4th of July, 1834, entitled "An Act to remove doubts as to the validity of certain marriages had and solemnized within the Colony of New South Wales, and to regulate the Registration of certain Marriages, Baptisms, and Burials," it was and is, amongst other things, enacted as follows, to wit:—"That from and after the passing and publication of this Act, all marriages between persons, both or one of such persons being members, or a member of, or holding communion with, the Presbyterian Church of Scotland, or the Roman Catholic Church respectively, and making a declaration to the effect hereinafter mentioned, which marriages shall be had and solemnized within this colony by an ordained minister of the Presbyterian Church of Scotland, or by a priest or minister of the Roman Catholic Church, duly empowered by his proper superior respectively, shall be, and shall be adjudged, esteemed, and taken to be, of the same force and effect as, and no other, than if such marriage were had and solemnized by clergymen of the Church of England; provided always that from and after the passing of [305] this Act, no such marriage as last aforesaid shall be had and solemnized until both or one of such persons, as the case may be, shall have signed a declaration in writing, in duplicate, stating that they, or he, or she, as the case may be, are or is members or a member of, or hold communion with, the Presbyterian Church of Scotland, or the Roman Catholic Church respectively, according to the form hereunto annexed, and marked with the letter A." And further, "that the minister or priest, by whom any such marriage as aforesaid shall be solemnized, shall, immediately upon the solemnization thereof, certify such marriage by a writing under his hand in duplicate, subjoined to or endorsed upon the declaration in duplicate hereinbefore mentioned, specifying in such certificate the names and descriptions of the parties between whom,

and of the witnesses in whose presence, the said marriage has been had and solemnized, and the time and place of the celebration of the same, according to the form hereunto annexed, and marked with the letter B; and such certificate in duplicate shall be also signed forthwith by the parties entering into such marriage, and by the witnesses to the same, according to the said last mentioned form, and the minister or priest officiating shall deliver one duplicate of such declaration and certificate to the persons married, or to one of them, and shall transmit the other duplicate of such declaration and certificate to the registrar of the Supreme Court." It pleaded further, "that the said Colonial Act was made and passed under the authority and provisions of an Act of Parliament of the 9 Geo. IV., entitled 'An Act to provide for the Administration of Justice in [306] New South Wales and Van Diemen's Land, and for the more effectual government thereof, and for other purposes relating thereto;' and that the said Colonial Act was on the 29th of July, 1835, in force, and still is within the said colony."

Second. That on or about the 29th of July, 1835, a (pretended) marriage was solemnized in the town of Sydney, New South Wales, by a Presbyterian minister of the Church of Scotland, between the parties. That that minister, immediately after the ceremony, certified the marriage in writing, in duplicate, specifying the particulars required by the act; that the certificate in duplicate was signed by the parties as well as by the witnesses; that the said minister delivered one duplicate to the said Joseph Catterall (who afterwards lost it); and that the other duplicate was lodged in the Registry of Marriages kept by the Presbyterian Chaplain of the Scots Kirk.

Third. That a true and collated copy of the one duplicate of the certificate remaining in the registry aforesaid was annexed, and that the parties in the cause were the same as those mentioned in the certificate.

Fourth and fifth. That the names Joseph Catterall and Georgiana Sweetman, subscribed at the foot of the one duplicate of the certificate aforesaid, were the proper handwriting of the parties.

Sixth. That neither of the parties was, at the time of the celebration of the (pretended) marriage, or at any other time, a member of, or held communion with, the Presbyterian Church of Scotland, but that they then were, and still are, members of the Church of England; that neither of the parties, [307] either previous or subsequent to the (pretended) marriage, signed a declaration in writing in duplicate, that they, or he, or she, were or was members or a member of, or held communion with, the Presbyterian Church of Scotland, and accordingly that the aforesaid certificate in duplicate of the (pretended) marriage was not (nor could be) subjoined to or endorsed upon the declaration as required; and that by reason of the premises the (pretended) marriage was null and void.

Seventh, eighth, and ninth. The usual concluding articles.

Dodson, Q. A., against the admission of the libel. The question of the nullity of the marriage is made by the opposite side to depend on certain provisions contained in the Colonial Act, which is partially pleaded in the libel; the grounds on which the marriage is said to be null and void are set forth in the sixth article. To arrive at a just conclusion on the question at issue, it is necessary to see what object the Governor and Council had in passing that act. The preamble tells us it was "to quiet doubts respecting marriages already had," and to declare "all marriages before the passing and publication of this act had and solemnized by ordained or officiating ministers of the Church of Scotland as by law established, or by ordained or officiating priests or ministers of the Roman Catholic Church, shall be, and shall be adjudged, esteemed, and taken to have been, of the same force and effect as, and no other than, if such marriages had been had and solemnized by clergymen of the Church of England, according to the rites and ceremonies of [308] the Church of England." The 2nd and 3rd sections (which are pleaded in the first article of the libel) then proceed to provide for marriages to be had after the passing of the act. What does the act in effect do? It affirmatively declares all marriages had in conformity therewith shall be deemed good, but it does not go on to enact that those in which its provisions are not complied with shall be deemed bad. There is no express proviso that for a non-compliance with the formalities therein prescribed a marriage shall be null and void. If the marriage would have been a valid one prior to the passing of the act (which I submit it would), there is nothing therein contained to invalidate it. The act is evidently one of mere order and regulation: it provides not merely for a registration of

marriages, but likewise of baptisms and burials. Parties might probably be punished for disobedience to the provisions of the act, but non-compliance with those directions cannot work the effect contended for, namely, the nullity of the marriage. The act carries with it no such consequence. The libel must be rejected.

Addams in support of the libel. It is perfectly clear that the marriage in question purports to have been had under authority of the act pleaded; for the parties, though they were members of the Church of England, and there is no pretence for saying they could not have obtained an ordained minister of that Church, had recourse to a Presbyterian minister to perform the ceremony. That being so, they were bound to comply with the act. In the present instance there is not an omission of [309] one requisite only, but of every essential provision therein contained. It has been contended that the marriage is not void under the act, inasmuch as the act does not, in express terms, say that all marriages had contrary thereto shall be null and void; for that I contend there was no necessity. Take, for instance, the Vestry Act, which provides for the observance of certain forms, and still does not enact that a meeting held contrary thereto is void. Yet there is no doubt, if the regulations therein contained are not complied with, the meeting amounts to nothing. Again, though the stat. of 5 & 6 Wm. 4, c. 54, does not enact that all marriages within the prohibited degrees of consanguinity had before the passing of that statute shall be deemed null and void, there is no doubt that they are so, if the question be raised in the lifetime of the parties. The marriage is not a valid one according to the *lex loci*, and clearly not so by the general law of this country.

Cur. adv. vult.

July 16th.—*Judgment*—*Dr. Lushington*. This suit is instituted by Joseph Catterall against a person to whom he was married, as it appears from the certificate, by banns, in New South Wales; her name was originally Georgiana Ann Sweetman; the husband was twenty-three years of age, the wife twenty, and the object of the suit is to obtain the decree of this Court declaring such marriage void.

The party cited appears to be still resident in New South Wales, but she has appeared in this Court by her proctor. A libel has been given in, and it is upon the admissibility of that libel which I am now to determine.

[310] The only question I have at present to consider is whether the marriage is null and void by the local act referred to. That is the only question raised on the libel, and any other as to the invalidity of the marriage could be raised only by an alteration of the pleading.

Now this being a question of nullity of marriage, and consequently having, or possibly having, the effect of bastardizing issue, and the marriage *de facto* being admitted, the presumption of law is in favour of its validity; but that presumption will be rebutted, and the Court will necessarily be called upon to pronounce it null and void, if that be the true construction and legal effect of the local act. I must therefore consider the whole of this act with great care; first, as to the title of the act.

It is "to remove doubts as to the validity of certain marriages had and solemnized within the colony of New South Wales, and to regulate the registration of certain marriages, baptisms, and burials."

It would appear, then, from the title that the object of the act was to declare valid certain marriages and to regulate the registrations of marriages, baptisms, and burials. Apparently the title refers to past marriages, but no satisfactory conclusion can be derived from the title, for the act unquestionably goes far beyond it.

The preamble refers to future doubts as to past marriages: "Whereas doubts may hereafter arise concerning the validity of marriages which have been had and solemnized within the colony of New South Wales, and whereas it is expedient that such doubts should be quieted, and that the law respect-[311]-ing such marriages should be declared for the future." Such future doubts as to past marriages are to be quieted, and the law respecting such marriages (without saying what they are) is to be declared for the future. What is the meaning of the word "such"? Does it mean marriages already had, or future marriages *ejusdem generis*? I apprehend that, strictly speaking, the word "such" refers to past marriages. Then comes a declaratory and enacting clause that certain marriages had before the passing of the act shall be valid.

The second section relates to future marriages, and, amongst other things, are

required the making a declaration to the effect thereafter mentioned, and that the Scotch minister or Catholic priest shall be "duly empowered by his proper superior." Such marriages are to have the same force as if solemnized before a clergyman of the Church of England.

To consider the import of so much of this section : it is, I think, clear that parties married without making the declaration, or by a minister or priest not duly empowered, would not be entitled to the benefit of the enactment. If the act had ended here that would have been the whole effect of it ; it would have left the marriage just as it stood in law before the passing of this act ; but the proviso is most important, for on that the question mainly hinges, "Provided always, that from and after the passing of this act, no such marriage as last aforesaid shall be had and solemnized until both or one of such persons, as the case may be, shall have signed a declaration in writing in duplicate, stating that they or he, or she, as the case may be, are or is, members or a member of, or hold communion with, [312] the Presbyterian Church of Scotland, or the Roman Catholic Church respectively, according to the form hereunto annexed," &c.

The object of a proviso is generally to qualify something gone before ; and the point now is whether this proviso, if the directions be not followed, takes away only the benefit before conferred, or renders the whole act done—that is, the marriage—null and void.

The words in this proviso are negative words ; and such marriage must mean a marriage by a Presbyterian minister ; they are certainly prohibitory of such marriages being had without the prescribed requisites, and no doubt the acting in disobedience of this law is a punishable offence ; but whether the marriage itself is void, or only deprived of the validity given by the act, is, I feel, a question of the greatest difficulty : there are no words annulling such marriage.

In endeavouring to obtain some light to guide me to a correct interpretation of this act, I have, amongst other inquiries, sought to discover if there is a case on record where any Court had pronounced a marriage null and void, unless there were words in the statute expressly so declaring it, and I can find none. This, however, I admit, affords me no great assistance, because, though the facts to constitute such a case have often occurred, no such question has been tried before any Court, to my knowledge, except to the extent I shall presently notice.

Prior to Lord Hardwicke's Act, 26 Geo. 2, c. 33, I am not aware that there was any statutable nullity, by which I mean that no statute regarding marriage contained in it any clause directing the marriage to [313] be null and void if certain rules were not complied with. There were several statutes for the regulation of marriages, and punishments for disobedience prescribed, but no clause of nullity, nor any attempt to obtain from any Court a decree of nullity on the ground that statutes were disobeyed. Those statutes were the 6 & 7 Wm. 3, c. 6 ; 7 & 8 Wm. 3, c. 35 ; and 10 Anne, c. 19. In the 6 & 7 Wm. 3, c. 6, s. 52, are to be found the words following :—"No person shall be married at any place pretending to be exempt from the visitation of the bishop of the diocese, without a license first had and obtained, except the banns shall be published and certified according to law:" then follows a penalty of 100l. on the clergyman for disobeying the statute, and for the second offence three years' suspension. It should be observed that not a word of nullity is to be found in this statute, nor, indeed, of any punishment to the parties married. Then came the 7 & 8 Wm. 3, c. 35, which extended the act to any places whatever, and inflicted a penalty of 10l. on the man married.

Here let us consider how far the statute of 6 & 7 Wm. 3 accords in terms with the present statute or act upon which I am to determine. This statute of Wm. 3 forbids every person from being married, &c. ; the New South Wales Act any marriage from being had. The first prohibits the person from doing the act, the second prohibits the thing from being done. I doubt if there be any real distinction. If there be none, the construction applicable to the statute of 6 & 7 Wm. 3 will apply to the New South Wales Act, and I think it quite clear, by looking at the act which followed in the 7 & 8 Wm. 3, that the Legislature was of opinion [314] that no nullity was created by the statute of 6 & 7 Wm. 3, c. 6. This, then, is a statutable recognition that, as relates to marriage, prohibitory words do not necessarily create a nullity. Not only was this the legislative but the admitted construction, for before the Marriage Act of Lord Hardwicke the previous acts were constantly disregarded, yet

the violation of them was never supposed to create a nullity; in fact, the Act of Lord Hardwicke was passed for the purpose of creating the nullity.

At the same time, it is right to observe that, in many cases, negative terms like these have been held to render the act done in disregard of them null and void. In *The King against The Justices of Leicester* (7 B. & C. 12) Lord Tenterden says (it was not a question of marriage), speaking of the construction of Acts of Parliament, negative words will make a statute imperative; and in *Davidson against Gill* (1 East, 71) Lord Kenyon held that where a form was prescribed by an Act of Parliament for turning a road, the non-compliance with that form was a fatal defect, and all the proceedings were void. This principle too is to be found in a still higher authority (2 Inst. 388), “non observata forma infertur adnullatio actus.”

Where affirmative directory words are used, a different construction has been applied, as in *The King against The Inhabitants of Birmingham* (8 B. & C. 34), which was a case under the Marriage Act, where the marriage was by license, and the father of the husband, who was a minor, had not given his consent to the marriage. It was held that the 16th section of the act of the 4 Geo. 4, c. 76, was directory [315] only, that though the clause required a consent, the absence of that consent did not work a nullity.

I cannot deny that, as in this New South Wales Act there is a form prescribed, to be observed prior to the marriage, the authority of Lord Kenyon does not, in some sense, apply; but, on the other hand, I must remark how distinguished a marriage is from all other subject-matter, and I must remember that, in the statute of the 6 & 7 Wm. 3, there are prohibitory and negative terms.

With respect to Lord Hardwicke's Act, there are certain directions given, the disobedience to which, by the words of the act itself, constitutes nullity, and we all remember the many questions which arose thereon. In addition to the provisions so much discussed, there are certain other directions given in that act, but I am not aware of any decision which shews the legal effect of disregarding them. At the end of the first section are to be found the following words:—“That in all cases where banns shall have been published, the marriage shall be solemnized in one of the parish churches or chapels where such banns have been published, and in no other place whatsoever.” These words are affirmative, negative, and prohibitory. It may be expedient to inquire whether, where such directions have been infringed, any marriage has been pronounced null and void.

I am aware of one case only in which this question has been discussed—the case of *Stallwood against Tredger* (2 Phill. 287), which occurred in the year 1815. Sir John Nicholl evidently entertained considerable doubt how he should deal with that case. [316] The facts were these: While the church of St. Mary, Newington, was shut up, being unroofed, and in part pulled down, the banns of marriage were published in the adjoining parish church of St. George's, Southwark, but the parties were married on the site or ruins of the church of St. Mary, Newington. Now, under these circumstances, the marriage was had in a different church from that where the banns were published, whereas the act is imperative, requiring that the marriage shall be solemnized in one of the churches or chapels where the banns have been published, and in no other place whatsoever. Sir John Nicholl, after having observed that this was “a case of momentous importance”—these are his words—and that no doubt the marriage would have been valid before the statute, said, “The clause of the Marriage Act recited does not expressly and in terms declare the marriage void; but it is contended that such must be the construction of it, with reference to the rest of the act. I am not disposed to go to the extent of giving an opinion that under no circumstances would a marriage be void if contrary to this provision, and had elsewhere than in the church in which the banns were published.” He then stated the object of the act, and then pronounced for the marriage on the following ground: that the publication of the banns must be considered legally as having been in the parish church of St. Mary, Newington. The Court of Delegates affirmed the decree, but on what ground they so did, what view they took of the case, I am unable to say; but I must confess that I think that judgment could be supported on no other ground than that the clause [317] did not create a nullity; because any supposition of Sir John Nicholl that the parish of St. George was the proper place for the publication of the banns (which I think was well founded) does not support the marriage in St. Mary's, inas-

much as the statute directs that, even in the case supposed, the marriage shall take place in the church of publication of the banns.

That case affords very little assistance; yet, to the extent to which it goes, it is an authority that the words used in the first section of Lord Hardwicke's Act, which I have read, do not clearly import a nullity in case of disobedience. In the 4 Geo. 4, c. 76, s. 2, the same words are to be found; in section 22 the nullities are contained, and if not expressed, it is clear it would have been a question whether they attached. In the Marriage Act, 6 & 7 Wm. 4, c. 85, the 42nd section enumerates the nullities.

From this examination I draw two conclusions: 1st. That, so far as my research extends, it appears that there never has been a decision that any words in a statute as to marriage, though prohibitory and negative, have been held to infer a nullity, unless that nullity was declared in the act. 2nd. That, viewing the successive Marriage Acts, it appears that prohibitory words, without a declaration of nullity, were not considered by the Legislature as creating a nullity, and that this is a legislative interpretation of acts relative to marriage.

If I am correct in these premises, I apprehend that it will follow that I must construe the Act of New South Wales accordingly, that is to say, as an act in *pari materia*, to which the same rules apply. [318] I conceive (though I know of no direct authority for the position) that the acts of colonial legislatures, where the English law prevails, must be governed by the same rules of construction as prevail in England, and that English authorities upon acts in *pari materia* are authorities for the interpretation of colonial acts.

I think this true as a general principle; but there is another reason in the present case. The New South Wales Act is framed from the 58 Geo. 3, c. 84, as to Presbyterian marriages in India, and is nearly verbatim the same. That act was passed on the 5th of June, 1818, to remove doubts as to the validity of Presbyterian marriages in British India.

Several most important considerations hereupon arise. 1st. It is clear that if I hold the present marriage void under the New South Wales Act, it would be a precedent for holding void all similar marriages throughout the East Indies, under the India Act. 2dly. From the India Act it is clear that all those directions, prohibitions and nullities (if nullities they are) apply only to ordained ministers of the Church of Scotland who are appointed to officiate as chaplains, and that all other marriages by ordained ministers of that Church, not being chaplains, are out of the benefit, as well as out of the prohibitions of the act altogether. If this be so, would it not be strange that a marriage of two persons, by an ordained minister of the Church of Scotland not a chaplain, had without regard to the directions of the act, should be left to rest on the common law, but that a similar irregular marriage by one who is a chaplain of the same Church should be null and [319] void? It may be said that such consequences would be an anomaly in the India Act only. But would it not shew the extreme difficulty of holding such marriages null and void when such strange results would follow, for the words said to import a nullity are the same in the two acts.

There is yet another consideration; whether there is not a restriction of a similar nature in this very New South Wales Act. What is the meaning of the words "duly empowered by his proper superior respectively?" I apprehend those words apply to a Presbyterian minister as well as to a Romish priest; the context leads to that inference. It is not necessary for me to decide upon the precise meaning of those words; but I conceive, as regards a Presbyterian minister, they must be understood to mean some power conferred by authority of the kirk beyond common ordinations, as a power to undertake some special care of a district.

Here, again, if this be well founded, a marriage by an ordained minister of the Church of Scotland, not "duly empowered," would be out of the provisions of the act, and would be left to the common law, whereas a similar irregular marriage by one who is "duly empowered" would, according to the construction contended for by the party proceeding, be null and void. In fact, it comes to this: a marriage wholly deficient in ceremonials would stand in a preferable position to a marriage where a part only of the prescribed forms was omitted.

Nor is this an imaginary inconvenience either in the East Indies or in New South Wales; for in the East Indies there must have been Presbyterian ministers not chaplains, and in all probability in New [320] South Wales Presbyterian ministers

not duly empowered by the proper superior. Moreover, I cannot forget what might be the condition of marriages by Presbyterian ministers duly ordained, but now of the so-called Free Church.

I must notice another difficulty (though easy of correction); it is in the pleading of the libel as it now stands. The second article does not plead that the minister, who solemnized the marriage, was duly empowered by his proper superior, which is essential. The certificate describing him as chaplain would go to favour the fact that he was duly empowered; but the fact must be averred to bring the case within the act, in my opinion, whatever may be its operation, nullity or not.

That some of the reasoning to which I have been compelled to have recourse depends on nice and subtle distinctions I am not disposed to deny, nor that I am unable to furnish a more clear and indisputable chain of reasoning leading to the result to which I propose to arrive; but such difficulties are unfortunately of ordinary occurrence in the construction of statutes, furnishing but a choice of doubtful conclusions.

I am of opinion that, in any case of doubt, I ought never to pronounce a marriage null and void. In this case I do entertain (to express my opinion in the weakest terms) the gravest doubt as to this act creating a nullity. I think so, firstly, because I find no instance of any words in any Marriage Act being held to import a nullity, if the act did not expressly create a nullity. Secondly, if this interpretation should be at variance with decisions of other Courts on other matters, it must always be [321] remembered that marriage is essentially distinguished from every other species of contract, whether of legislative or judicial determination; that this distinction has been universally admitted; that not only is all legal presumption in favour of the validity and against the nullity of marriage, but it is so on this principle; that a legislative enactment to annul a marriage *de facto* is a penal enactment, not only penal to the parties, but highly penal to innocent offspring, and therefore to be construed according to the acknowledged rule, most strictly. Thirdly, I am confirmed in this opinion for this reason: the primary object of this New South Wales Act is remedial—to render indisputably valid past marriages; the second object is regulation—to determine what marriages in future shall be entitled to the benefit given by the act. I consider, therefore, the regulation as restrictive of the benefit, that is, upon the legislative validity conferred by the act, but leaving all other marriages as they stood before, according to law. As this legislative nullity is the only ground upon which the libel stands, the libel must be rejected, unless the party be desirous to amend, by pleading that the marriage is null and void by the law, independent of the statute. The citation is wide enough to admit of this, and I shall therefore allow the libel to stand over for that purpose, if the party should be advised so to plead.

[322] THE OFFICE OF THE JUDGE PROMOTED BY HODGSON *against* OAKELEY.

Arches Court, June 30th, 1845.—An unbeficed clergyman being proceeded against, under the general ecclesiastical law, for “maintaining and affirming, contrary to the true usual literal meaning of the articles of the Established Church, all Roman doctrine,” and being convicted thereof, inhibited from performing any ministerial duty whatever, within the province of Canterbury, until he shall retract his errors.—It was held, as the offence charged was for maintaining and affirming all Roman doctrine, not to be necessary to specify in the articles any doctrine in particular.

[S. C. 4 Notes of Cases, 180. See *Martin v. Mackonochie*, 1883, 8 P. D. 197.]

This was a cause of office, in virtue of letters of request under the hand and seal of the Lord Bishop of London, promoted by Christopher Hodgson, of Dean's Yard, Westminster, in the county of Middlesex, against the Rev. Frederick Oakeley, minister of Margaret Chapel in the district rectory of All Souls, Saint Marylebone, in the county of Middlesex, diocese of London, and province of Canterbury.

On the 8th of April, 1845, a citation issued by which Mr. Oakeley was called on to answer to certain articles touching his soul's health, “and more especially for having, within the said diocese of London, offended against the laws ecclesiastical, by having written and published, or caused to be published, a certain pamphlet entitled ‘A Letter to the Lord Bishop of London on a Subject connected with the recent Proceedings at Oxford,’ in which said pamphlet or letter doctrines are openly main-

tained and affirmed directly contrary and repugnant to the true usual literal meaning of the articles of religion, as by law established, some or one of them, and contrary to the laws, statutes, constitutions, and canons ecclesiastical of the realm, and against the peace and unity of the aforesaid United Church of England and Ireland, as it is now by law established."

[323] On the 15th of April the articles with three exhibits annexed, marked A, B, and C, were given in, and on the 22nd were admitted without opposition. They were twelve in number, and pleaded :

1st. We article and object to you the said Rev. Frederick Oakeley, clerk, that you know, believe, or have heard, that by the laws, statutes, constitutions, and canons ecclesiastical of the realm, all ecclesiastical persons of what rank or condition soever, who have been admitted into holy orders of the United Church of England and Ireland, ought to adhere to and maintain with constancy and sincerity the doctrines of the said Church, as by law established, and that whosoever, having been so admitted and having subscribed and declared his assent to the articles of religion agreed upon by the archbishops and bishops of both provinces, and the whole clergy in the Convocation holden at London in the year of our Lord, 1562, and ratified by the royal authority, shall revolt from, or impugn, or deprave the said articles, or any of them, or any of the doctrines therein contained, ought to be punished and corrected according to the gravity of his offence and the exigency of the law.

2nd. Pleaded that Mr. Oakeley did, on or about the 8th of July, 1839, subscribe the Thirty-nine Articles, and the three articles of the thirty-sixth canon, and make a declaration of conformity to the liturgy.

3rd & 4th. Pleaded that Mr. Oakeley was minister of Margaret Chapel and licensed thereto; also a collated copy of the license to be annexed, marked A, and his identity, as well as that of the chapel.

5th. That notwithstanding the premises in the [324] foregoing articles contained, you the said Frederick Oakeley, at divers and sundry times, or at least once within two years previously to the date of the decree issued in this cause, have advisedly, in writing and otherwise, maintained or affirmed, and have declared in writing and otherwise, that you have maintained and affirmed, and do maintain and affirm, doctrines which we article and object to you to be directly contrary or repugnant to the true usual literal meaning of the said articles of religion, as by law established, some or one of them, as herein after more particularly mentioned.

6th. That some time in the year of our Lord one thousand eight hundred and forty-five, you, the said Frederick Oakeley, wrote and published, or caused to be published, a certain pamphlet, entitled "A Letter to the Lord Bishop of London, on a subject connected with the recent proceedings at Oxford," in which pamphlet or letter you advisedly maintained and affirmed, and declared you maintained and affirmed, and do maintain and affirm, doctrines directly contrary or repugnant to the true usual literal meaning of the articles of religion, as by law established, some or one of them, and contrary to the laws, statutes, constitutions, and canons ecclesiastical of the realm, and against the peace and unity of the Church.

7th. That in the said pamphlet or letter, mentioned in the next preceding article, are contained the following passages :—

[Page 11.] "I do not deny that it may naturally strike your lordship, as a gratuitous and disturbing movement. Nor, again, could I be surprised to hear that your lordship had been seriously startled [325] by my further declaration of an opinion that the articles are subscribable in what may be called an ultra-Catholic sense, so as to involve no necessary renunciation on the subscriber's part of any formal decision of the Western Church; and that I myself actually so subscribe them." . . .

[Page 12.] "And now I wish to draw your lordship's attention to the following point. The distinction in question is, as I contend, wholly irrelevant to my question with the university; for in the university it is not the practice of teaching certain doctrines, which is even apparently impugned, but the claim to hold them. Mr. Ward himself never claimed to teach Roman doctrine; on the contrary, he urges over and over again that such a procedure would be highly wrong under our circumstances. What he maintains, and what the vote of Thursday seems to deny, is the honesty of subscribing the articles in a certain sense. The university, then, cannot pretend to let me off on the ground of the above distinction; for with respect to it I differ in no

way from Mr. Ward, whom it has, by the hypothesis, condemned. Mr. Ward does not claim to teach. I claim to hold.

"But with your lordship I contend this distinction ought to, and will, receive consideration. Were I to be found teaching Roman doctrine in my public ministrations in your lordship's diocese, I should, as I feel, most deservedly expose myself to your lordship's censure. It is plain that your lordship, as a bishop of our Church, could not, and would not, suffer it." . . .

[Page 14.] "It may be replied that my public declaration, on the subject of subscription, precludes [326] me from preaching against the Roman doctrine. Most assuredly it does. If my obligations as an English clergyman require me to controvert the doctrines of Rome, then I freely admit that I do not fulfil those obligations. But surely, my lord, if I be justified in considering that there are things among us to be done more important than controverting dissent, a *multo fortiori* am I bound, upon any Catholic principles whatever, not to be harder on what your lordship acknowledges to be a branch of the Catholic Church than upon those who are not even members of the Church of England." . . .

[Page 17.] "But here I shall be asked, 'Is then your claim to hold (as distinct from teaching) all Roman doctrine no more, after all, than the assertion of a right to a merely speculative opinion? Because, if so, you are doing yourself injustice, and coming forward in an obnoxious character for no sufficient purpose.' I reply frankly that my opinion is not merely speculative. I hope none of my opinions on religious subjects are merely speculative. If I say that the view in question is not practical, I mean that it in no way affects my teaching, except negatively." . . .

[Page 18.] "Still, I do not at all deny that when I plead for the utmost latitude in the interpretation of our formularies on the Catholic side, I mean something very real, and, in a certain sense, very practical. Now, then, I will crave your lordship's kind attention for awhile, that I may say what I do mean by the exceeding reluctance I feel to accept anti-Roman limitations of our Articles and Prayer Book. I will try to analyze the feeling under which I regard it as a point of duty to my own commu-[327]-nion, to extract, nay, and if so be, extort, the most Catholic meaning possible from the apparently anti-Catholic determinations; and why, moreover, I cannot consent to draw those distinctions between the 'Catholic' and the 'Roman' sense, upon which some of my respected friends are disposed to lay so great a stress. My lord, I am not in the number of those who are able to draw a line between the earlier and the later decisions of the Catholic Church. . . . The ramifications of heretical invention would appear to be almost indefinite and incalculable; but so many as are the extravagancies of theological errors, so many also must be the safeguards of orthodoxy. I will never believe then that the strong current of dogmatic theology was suddenly frozen up in the fourth or the sixth century of the Christian Æra. Moreover, I believe also that, in the latter centuries, heresy assumed quite a new shape, and, whereas in earlier times, it occupied itself in dealing with the objective doctrines of the Gospel, in the more modern ages it caught the subjective spirit of the times, and issued in all kinds of fatal speculation upon matters connected with the internal life of the Christian; such, for example, as the mode of his justification in the sight of God. Shall I suppose the Church to have been silent on such emergencies? On the contrary, I believe her to have been ready at Trent, as at Nicæa, with her scholastic definitions, and her preclusive anathemas. And so in the times intermediate. That sort of relation which the Athanasian Creed bears to the Apostles, I believe that still later dogmatic decisions bear to it. With these feelings your lordship can hardly wonder that I should deem too well of [328] my Church to suppose, without overpowering reason, that she directly and unequivocally contravenes the decrees even of the later councils. What? a body of divines in one corner of the world (good men, I doubt not, in their way, yet surely exposed, and apparently not superior, to exterior influences) set about deliberately to call in question the solemn acts of the assembled prelates of Christendom." . . .

A copy of the letter or pamphlet was annexed as an exhibit and marked B.

8th. That on or about the twenty-fifth day of February, in the present year, one thousand eight hundred and forty-five, you wrote, addressed, and sent a letter to the said Lord Bishop of London, and which was duly received by his lordship, in which letter you stated that you had been enabled to put out a pamphlet in the shape of a letter to his lordship, and which pamphlet or letter we article and object to be the

very pamphlet or letter several times mentioned in these articles as being written and published by you as aforesaid.

9th. The original letter referred to in the preceding article as the exhibit marked C, and pleaded to be in the handwriting of the said Rev. Frederick Oakeley.

10th. The jurisdiction, and the public scandal in consequence of the publication of the pamphlet.

11th. That the premises have been rightly and duly complained of.

12th. The general and concluding article, alleging the truth of what was alleged, and that on proof Mr. O. ought to be canonically punished and condemned in the costs.

May 10th. The proctor for Mr. Oakeley admitted [329] the second, third, and fourth of the articles to be true, and so much of the fifth and sixth articles as pleaded the writing and causing to be published the pamphlet entitled "A Letter to the Bishop of London, on a subject connected with the recent proceedings at Oxford," therein referred to. He also admitted the seventh, eighth, and ninth articles to be true, and so much of the tenth as pleaded Mr. O. to be of Margaret-street, in the diocese of London and province of Canterbury. The proctor for the promoter declared thereon he should not examine any witness; on which the Judge concluded the cause, Mr. O. not having thought fit to give in a plea.

On the 10th of June the case was argued in behalf of the promoter by the Queen's advocate and Bayford. The argument is here omitted, as it would be to anticipate, at least as far as the Queen's advocate is concerned, the judgment of the Court.

Mr. Oakeley did not appear by counsel, or in person, to argue in his defence; he, however, did not retract his proxy.

Cur. adv. vult.

Judgment—Sir Herbert Jenner Fust. The question which the Court is now called upon to decide is one of a most grave and important nature, when we regard the peculiar character of the times, and the dissensions which have so long and so unhappily prevailed amongst the members of our Church, and still continue to vex and disturb its peace.

In approaching this question I cannot but be sensible of the heavy weight of responsibility cast [330] upon me, and of the consequences, good or evil, which may possibly result from my decision, whichever way it may be given; still, I have no alternative—I cannot escape from the burthen imposed, and must, therefore, proceed to discharge myself of it in the best manner I am able. Considering the peculiar circumstances under which this case has been conducted, I might, perhaps, have been justified in taking some further time for deliberation; but, on reflecting that this is the last regular Court day of the term, and that the judgment, if not to-day given, must probably have stood over till November, I did not deem it right to keep the parties and the public in suspense for so long an interval.

It is necessary I should examine minutely the various steps taken in this cause, in consequence of the course adopted by Mr. Oakeley. Though he appeared to the citation, and took a part in the proceedings up to the hearing of the cause, much to my surprise and regret, when the cause came on for argument he neither instructed counsel in his behalf, nor did he come forward to conduct his own defence. It is not for me to conjecture what motives may have led him to the adoption of that course at that stage of the case. I can lament only that I have not had that assistance which I usually receive from the learning and ingenuity of counsel, and must, therefore, consider for myself what might have been advanced in his behalf.

[The learned Judge here stated, in detail, the formal proceedings that had taken place, and then went through the articles seriatim.]

In answer to these articles, Mr. Oakeley, though [331] he could not have been called upon, has voluntarily made certain admissions. These admissions, however, were prepared evidently after great deliberation, and were drawn up with the most guarded caution. They do not commit Mr. Oakeley to any thing which it would not have been altogether useless to deny, and which, if he had denied, would have been productive of expense only. He does not admit the law as pleaded in the first article. He does not admit, as pleaded in the fifth article, that he has, within two years previously to the decree issued in this cause, advisedly maintained or affirmed, or declared in writing, or otherwise has maintained or affirmed, and does maintain and affirm, doctrines directly contrary or repugnant to the true usual literal meaning of the

articles of religion, as by law established, some or one of them. He does not admit, as pleaded in the sixth article, that he has or does maintain or affirm such doctrines in the letter exhibited. He does not admit, as pleaded in the tenth article, that there is any scandal or report of his having offended against the laws ecclesiastical in the manner before mentioned, or that he is, in consequence, subject to the jurisdiction of the Court. He does not admit, as pleaded in the eleventh article, that the promoter has rightly complained. He does not admit, as pleaded in the twelfth article, the truth of what is alleged in the articles, or that he ought to be canonically punished according to the gravity of his offence and the exigency of the law, or that he ought to be condemned in the costs.

When this case was in the first instance presented for my consideration, I had some doubt whether the [332] articles were laid with sufficient specification of the offence charged. Of the law as pleaded I had no doubt, as in that respect the articles are fully in accordance with very many precedents; but the general manner of pleading the offence did attract my attention, and I did expect to hear from the counsel of Mr. Oakeley (taking it for granted he would have appeared by counsel) an able argument on this head. However, after the best consideration I have been able to give this point with reference to earlier cases that have occurred, I am of opinion that the offence is, under the circumstances of this case, pleaded with sufficient specification. To be sure, in the case of *Salter v. Davis*, in the year 1692 (Court of Delegates), in *Whiston's case*, in 1713 (Court of Delegates), in those of *The King's Proctor v. Stone*, in 1808 (1 Hagg. Con. 424), and *Sanders v. Head*, in 1843 (3 Curteis, 565), the offences charged were set forth specifically, and it was easy so to do. But the present case is materially distinguished; here there is no affirmance of any particular doctrine; Mr. Oakeley claims to hold, affirm, and maintain all the doctrines of the Church of Rome; consequently it would be next to impossible to plead the charge in detail.

With respect to such parts of the libel as are not admitted by Mr. Oakeley to be true, I must look to the letter itself which is annexed to the libel: I cannot travel out of that letter: I am bound to look to that alone, not only for a proof of the charge, but to see whether those passages that are set forth in the articles will admit of an [333] interpretation in anywise favourable to Mr. Oakeley: this course unfortunately necessarily involves me in the necessity of examining the letter minutely.

The title of the pamphlet runs thus: "A Letter to the Lord Bishop of London, on a subject connected with the recent proceedings at Oxford. By the Rev. Frederick Oakeley, M.A., Fellow of Baliol College, Oxford, Prebendary of Lichfield, and Minister of Margaret Chapel, St. Mary-le-bone, London, 1845." Mr. Oakeley's object in writing the letter appears to be to offer some explanation of the active and zealous part he took in support of the Rev. W. Ward, on the occasion of certain proceedings taken against that gentleman by the University of Oxford: with Mr. Ward, however, I am in nowise concerned, further than the introduction of his name may tend to elucidate and explain some passages contained in the letter before me.

[Page 7.] "With respect to myself, it is no news to your lordship or to the public at large that, almost as soon as the measures against Mr. Ward were announced, I felt myself called upon to declare that I sign the articles in the sense which Mr. Ward vindicates. This was little more than a repetition of what I said years ago; for as far back as 1841 I put out a pamphlet, the object of which was to prove historically that the articles were intended to include the Catholics of the time,^(a) and that this circumstance might very fairly be taken to illustrate the position which had been maintained [334] by others; namely, that their wording does not in terminis exclude the formal decisions of the later Church, as contradistinguished from certain popular misrepresentations of those decisions." . . . "Now, if your lordship, or any other person, asks why I felt it necessary to say what I did when the propositions relating to Mr. Ward made their appearance, considering the very serious consequences to myself, and even to the Church of England, which such an act might entail, I answer, 1st. That I considered it a plain matter of duty to Mr. Ward not to allow him to

(a) Whatever may have been the intention, it is certain that Romanists remained in the Church of England, after the Articles of 1562 were set forth, without any complaint being made against them for so doing.

sustain alone the whole brunt of a battle, in which I feel that I ought to stand by him. 2nd. I was not without hopes, however feeble, that with many minds the circumstance of knowing that the attack upon Mr. Ward might very probably affect others besides myself, might tell as an argument against taking the first step in a certain direction. 3rd. I felt it likewise due to the Hebdomadal Board itself to give that Board a full and clear foresight of the possible consequences of the proposed measures. Not, of course, that I wished the Hebdomadal Board to pause in what it might consider an act of duty to the university, through the mere apprehension of consequences; still less, as I hope I need not say, because I supposed that my own poor name could carry any great weight either with the Board or with the other members of Convocation, but merely because I thought it right all persons should know exactly what they were about in taking, what I felt to be the first of a series of aggressive steps." . . . "I offered myself, as plainly as I could offer myself without seeming to act in a spirit of disrespect and defiance, [335] to encounter a like penalty to that with which Mr. Ward had just been visited. But at the same time I stated, and here I think your lordship and the public will bear me out in considering that I was justified in stating, that, supposing no measures of penalty to be instituted against me, I should regard myself after that plain and public declaration as justified in maintaining, without even the suspicion of dishonesty and disingenuousness, my present place in the university."

Thus much of this letter the Court has deemed it necessary to read as introductory to that portion of it which more particularly concerns the bishop of London, in whose diocese Mr. Oakeley is at present officiating. Whether the explanation which Mr. Oakeley addressed to the University of Oxford proved satisfactory to that learned body it is not in my province to inquire. Mr. Oakeley may possibly be right in saying that what passed between the university and himself is to be considered in the light of a mere academical procedure; but the case was materially altered when he came forward as a clergyman of the Church of England, and addressed his diocesan. The doctrines contained in that letter, which Mr. Oakeley claims a right to hold and maintain, are a matter for inquiry in this Court; for if an individual, in the character of a clergyman of the Church of England, professes to hold doctrines which are, or are supposed to be, adverse and repugnant to the articles of religion, then the right as well as the duty of his diocesan commences to inquire what those professed doctrines are.

I proceed now to that portion of the letter which more immediately concerns my inquiry.

[336] "But because there happens to be no sort of outcry on the subject [he is alluding to his letter to the vice-chancellor of Oxford], there is no reason why I should abstain from giving your lordship these explanations of my step which may tend to clear it in your lordship's mind from the suspicion of wantonness or undutifulness. I do not deny that it may naturally strike your lordship as a gratuitous and disturbing movement. Nor, again, could I be surprised to hear that your lordship had been seriously startled by my further declaration of an opinion that the articles are subscribable in what may be called an ultra-Catholic sense, so as to involve no necessary renunciation on the subscriber's part of any formal decision of the Western Church; and that I myself actually so subscribe them."

Here I think it right to state that I enter not into the consideration of the sense in which Mr. Oakeley has subscribed the articles, for that I think forms no part of the present inquiry; but I will just observe that his reasons, whatever they may be, for supposing the articles may be subscribed in an ultra-Catholic sense would seem to be his ground for holding all Roman doctrine. What I have to decide is whether Mr. Oakeley has, in this letter, set forth and maintained doctrines which are opposed to those of the Church of England, and that fact I must ascertain from a consideration of the entire letter. I must, however, say it does seem strange to me that Mr. Oakeley should have ventured to give publicity to his so-called "explanation" and "declaration" when, according to his own view, the movement was not only "gratuitous," but likely to disturb the peace of the Church.

[337] He proceeds: "I do admit that, considering the temper of our Church, there is something apparently wanton in such an announcement; that it requires, in mere charity, some intelligible explanation [which, I regret to say, I cannot find]; and that my own bishop is, of all other persons, the one to whom it is most natural to explain

it. It is for these reasons that I come forward before the public, 1st, to account to your lordship for the act [which he satisfies himself he has done]; and 2nd, to explain the meaning of the declaration in question" [that he has subscribed the articles in a certain sense, which the plain and grammatical construction will not bear. The following is his explanation]:—

"I wish your lordship, then, very particularly to observe that in the passage of my pamphlet on Tract XC., to which I refer in my letter to the vice-chancellor, I not only draw a distinction between holding Roman doctrine and teaching it, but in a note to that passage I explain very fully what I mean by not teaching, and how very far I carry out the principle which is involved in that distinction." Mr. Oakeley here refers to a pamphlet, of which no more is before the Court than the following paragraph:—

"As respects teaching, however, there is no duty which I hold more sacred than that of abstaining, in sermons and other acts of public ministration, from the statement of theological opinions, or the recommendation of devotional practices, allowed, as I conceive by the articles, but foreign to the views and habits of our Church. And generally, I will say, even of what are called 'Church principles,' that it seems to me far better to imply them in our [338] public teaching than to assert them in a dogmatical and controversial way. It is in the very rudiments of faith and practice that our flocks, as a general rule, need to be instructed. Moreover, to speak to them of Church authority, and such like subjects, when the whole practical system of our Church is a flat contradiction to such claims, is to tempt the more thoughtless to the use of words as mere unmeaning sounds or mere party symbols, and the more serious to the disparagement of very real privileges which they possess, through craving after others of which, it may be, that the thankful and diligent use of actual means is the appointed preliminary condition." All that I can extract from this quotation is that Mr. Oakeley abstains from teaching those doctrines and recommending those practices, whatever they may be, which are allowable according to his view of the articles, but foreign to the views and habits of our Church; and he justifies himself on the ground that it is advantageous to the Church so to abstain.

"And now I wish to draw your lordship's attention to the following point:—The distinction in question is, as I contend, wholly irrelevant to my question with the university; for in the university it is not the practice of teaching certain doctrines which is even apparently impugned, but the claim to hold them." How that claim to hold can be made out without, in some degree, publicly teaching, it is to my mind difficult to conceive. It cannot be that the mere holding of [certain doctrines, unless publicity be given to them in some way, can be deemed objectionable either in the university or in the Church; for who can know what these doc-[339]-trines are, as long as they are confined to a man's own breast. "Mr. Ward himself never claimed to teach Roman doctrine; on the contrary, he urges over and over again that such a procedure would be highly wrong under our circumstances. What he maintains, and what the vote of Thursday seems to deny, is the honesty of subscribing the articles in a certain sense. The university, then, cannot pretend to let me off on the ground of the above distinction; for, with respect to it, I differ in no way from Mr. Ward, whom it has by the hypothesis condemned. Mr. Ward does not claim to teach. I claim to hold." There is no distinction whatever, then, between Mr. Ward and Mr. Oakeley; for as Mr. Ward did not claim to teach, so Mr. Oakeley only claims to hold; and to hold those doctrines, such as they are, and such as they appear to be, by what subsequently follows.

"But with your lordship, I contend this distinction ought to, and will, receive consideration. Were I to be found teaching Roman doctrine in my public ministrations in your lordship's diocese, I should, as I feel, most deservedly expose myself to your lordship's censure. It is plain that your lordship, as a bishop of our Church, could not, and would not, suffer it." Why not? If the articles do permit the holding of certain doctrines, or if they are so lax in their phraseology as to admit of a doubt whether they are opposed to Roman doctrine or not, what right had the bishop of London, as his diocesan, to interfere? But it is quite clear that Mr. Oakeley admits that the Roman doctrine which he claims to hold, but abstains from teaching, is opposed to the Articles of the Church of England, [340] otherwise he never could, in this which he calls an explanation of his meaning, have expressed himself thus: "Were I to be found teaching Roman doctrine in my public ministrations in your

lordship's diocese, I should, as I feel, most deservedly expose myself to your lordship's censure. It is plain that your lordship as a bishop of our Church could not, and would not, suffer it."

The distinction which Mr. Oakeley attempts to draw between teaching and holding Roman doctrine I confess I am unable fully to understand. I presume his meaning to be that he considers himself at liberty to proclaim that doctrine everywhere, save from the pulpit. If he has that right, and exercises it, surely he can never say that this is merely to hold; it is to affirm and maintain. Though he does not teach in his public ministrations Roman doctrine, is not this letter which is now under the consideration of the Court sufficient to shew that he maintains and affirms the peculiar doctrines of the Romish Church, and that is the point on which I have to decide?

"But what is the fact? It is that which I have stated in the above extract. Far from introducing in my public ministrations characteristically Roman doctrine [this shews beyond a doubt what he means elsewhere by 'the ultra Catholic sense,' and that throughout this letter Catholic doctrine and Roman doctrine are with him one and the same thing], I am not in the habit of introducing (dogmatically and controversially) what some persons call (though I do not), by way of contradistinction from it, Catholic doctrine. . . . It may be replied that my public declaration on the [341] subject of subscription precludes me from preaching against the Roman doctrine. Most assuredly it does. If my obligations as an English clergyman require me to controvert the doctrines of Rome, then I freely admit that I do not fulfil those obligations. But surely, my lord, if I be justified in considering that there are things among us to be done more important than controverting dissent, a multo fortiori am I bound, upon any Catholic principles whatever, not to be harder on what your lordship acknowledges to be a branch of the Catholic Church, than upon those who are not even members of the Church of England. It would indeed be hard to expect of me that I should spare Dissenters at the expense of Catholics. . . . I take it for granted that I am generally supposed to controvert (I mean of course directly controvert) dissent; in that case, I admit that I might not unnaturally be called upon by those who consider our Church as a *via media*, to controvert supposed error in an opposite direction. But I really do not think that controversy of any sort is my 'line.'"

Such is the ground on which Mr. Oakeley seeks to justify his abstaining from controverting the doctrines of the Church of Rome. How far and on what occasions it would be right and proper that he should in his public ministrations enter into controversial points it is not for me to say; but I must say it is no sufficient justification for the neglect of one duty to allege as a set off the neglect of another; it is clearly the duty of a minister of the Church of England, it is an engagement into which he enters at the time of his ordination, "with all [342] faithful diligence to banish and drive away all erroneous doctrines."

"I will make one or two further remarks only in connexion with this part of the subject. My flock never so much as hear a (characteristically) Roman doctrine from my lips." This I presume is exclusively Roman doctrine, and not any part of that which the Church of Rome holds in common with the Church of England. "If those doctrines be not intrinsically true, certainly I take the course of all others calculated to explode them. No Roman doctrine makes its way to the minds of those who are under me through my intervention. I very much doubt whether twenty members of my congregation, or one poor person in my district (except actual Roman Catholics), know even what Roman doctrine is." He then adverts to an objection taken to his views founded upon the alleged impossibility of not teaching (by implication) that which is in the mind of the teacher. "The teaching, it is said, of one who holds a certain doctrine must needs be tinged with that doctrine. This no doubt would be true if what is called 'Romanism' implied a certain *ῥθος*, or habit of mind, distinct from Catholicism. I suppose, for instance, that a Socinian could not hold his baleful heresy without in a certain way teaching it. And so again, no doubt, a strictly Catholic temper results in strictly Catholic teaching, even though doctrine be not directly brought forward. So far then I acknowledge the truth of the remark. But I deny that the teaching of one who holds Catholicism in the Roman form, but who studiously abstains from [343] exhibiting specially Roman doctrine, will be in any way different from that of another who holds (essential) Catholicism at all, though in a less full-grown state of development [what the distinction here intended is, I am at a loss to

understand], excepting, indeed, that I think he is less likely to allow particular Catholic truth to protrude in his teaching above others. The objection, therefore, tells in no degree more strongly against what are denominated 'Romanizers,' or 'Romanists,' than against all teachers of a 'Catholic' profession, but rather, as I believe, less so."

Hitherto it would seem Mr. Oakeley has been contending chiefly for the right of holding Roman doctrines, provided those doctrines are not taught in the public ministrations of the Church, or intruded beyond other doctrines; but now it appears from the following passage in his letter he lays claim to something more—to publish them in some shape or other, for he in effect says his holding of such doctrines is not barren or unfruitful, is not a mere exercise of the mind, but productive of some practical effects. He supposes the following question addressed to him, and in framing that question and answer he appears to me clearly and distinctly to shew the extent to which he goes, not confining himself to one or two of the peculiar doctrines of the Church of Rome, but embracing the whole range of doctrines of that Church. "But here I shall be asked, 'Is then your claim to hold (as distinct from teaching) all Roman doctrine no more, after all, than the assertion of a right to a merely speculative opinion? Because if so, you are doing yourself injustice, and coming forward, in an [344] obnoxious character, for no sufficient purpose.' I reply frankly that my opinion is not merely speculative. [It is not merely an opinion which I entertain and confine within my own bosom, it is something more.] I hope none of my opinions on religious subjects are merely speculative. If I say that the view in question is not practical, I mean that it in no way affects my teaching, except negatively. I do not follow out a particular line of action either in public or in private, with any view of making converts to Rome. I could wish, as best I might, to make people good Christians in the Church of England; I think this is work enough for me. But, more than this; if I see any one disposed to join the Church of Rome, my arguments with such an one are always in arrest, generally even in contravention, of that step: though, even were it otherwise, I do not see how those could very consistently charge me with 'tempting' persons to 'schism' who are continually urging myself and others who think with me to quit the Church of England."

This, then, is what Mr. Oakeley considers a conscientious discharge of his duty as an ordained minister of the Church of England. He deems it quite sufficient that he does not preach the doctrines of Rome, or attempt to make converts to that Church. He satisfies himself by taking no more active a step to prevent a secession from the Church of England than persuading a person to remain outwardly a professed member of that Church, though he in his heart dissent; that there is no necessity for withdrawing, though he hold in common with Mr. Oakeley all Roman doctrine, and that too in a sense by no means merely speculative, but [345] practical. Surely this can be no sufficient justification of his conduct in the eye of his diocesan, to whom by his own admission he considers himself bound to give an intelligible explanation. How is it that Mr. Oakeley can persuade himself that he has thus satisfied the demands which his Church has on him? Such conduct is in fact evasive; he is outwardly professing the doctrines of one Church, and in his heart attached to another; it can hardly be reconciled with integrity, when he professes himself to sign the articles in a sense different from that in which they are received and understood. But Mr. Oakeley, having some way or other contrived to satisfy his own conscience that all is right, proceeds further to develop his views.

"Still, I do not at all deny that, where I plead for the utmost latitude in the interpretation of our formularies on the Catholic side, I mean something very real, and, in a certain sense, very practical. Now, then, I will crave your lordship's kind attention for awhile, that I may say what I do mean by the exceeding reluctance I feel to accept anti-Roman limitations of our Articles and Prayer Book. I will try to analyze the feeling under which I regard it as a point of duty to my own communion, to extract, nay, and if so be, extort, the most Catholic meaning possible from her apparently anti-Catholic determinations; and why, moreover, I cannot consent to draw those distinctions between the 'Catholic' and the 'Roman' sense, upon which some of my respected friends are disposed to lay so great a stress."

Here it appears beyond a doubt that the Catholic and the Roman sense are precisely and identically [346] the same in Mr. Oakeley's estimation and understanding of the terms. He admits the Articles and the Prayer Book to be anti-Roman, still he

confesses himself determined, if he cannot by legitimate construction extract a Roman meaning, to "extort" such a meaning from them; and moreover, he regards such a course to be "a point of duty." This is a most extraordinary avowal to come from a minister of that Church which separated itself from the Church of Rome, not upon mere matters of discipline and ceremonies, but upon points of vital and fundamental importance. He proceeds:

"My lord, I am not in the number of those who are able to draw a line between the earlier and the later decisions of the Catholic Church. I can understand those who make a broad difference between 'primitive' and 'patristic' Christianity; but I cannot follow the farther distinction between 'patristic' and 'mediæval.' [Mr. Oakeley's views would seem to be that once admitting the decrees of the first four general councils, and the teaching of the fathers, it is impossible to stop short at any particular date; the Council of Trent and all the intermediate ones between it and the fourth general council are of equal authority with the first four, and cannot therefore be rejected. To this extent I conceive Mr. Oakeley must be understood in claiming to hold all Roman doctrine; and that this is so does, I think, clearly and distinctly appear from that which immediately follows.] Certainly I cannot imagine the creed of the Church to have been put into its final shape in any of the earlier centuries. We all know that the course of dogmatic theology runs parallel to the course of [347] heresy; and it will not, I suppose, be contended that heresy had its ultimate issue in the fifth or sixth century of Christianity. The ramifications of heretical invention would appear to be almost indefinite and incalculable; but so many as are the extravagances of theological errors, so many also must be the safe-guards of orthodoxy. I will never believe, then, that the strong current of dogmatic theology was suddenly frozen up in the fourth or the sixth century of the Christian æra."

What is the meaning which Mr. Oakeley wishes to convey in this paragraph? Is it anything more than this? That as fresh errors and heresies arise they must be met by new measures for the purpose of preventing their growth and increase, and that the Church has power and authority to issue her decrees for that purpose. Admitting this to be true, how are these measures to be set in motion? Who are to take the necessary steps? Are they to be met in the mode adopted by Mr. Oakeley, or any other individual setting up his own authority against the existing laws of that Church of which he is a member and minister? The necessary measures can be framed and carried into execution only by those who have authority.

"Moreover, I believe also that, in the latter centuries, heresy assumed quite a new shape, and . . . issued in all kinds of fatal speculation upon matters connected with the internal life of the Christian; such, for example, as the mode of his justification in the sight of God. Shall I suppose the Church [the Roman Church] to have been silent on such emergencies? On the contrary, I believe her to have been ready at Trent [where the [348] doctrines of the Roman Church were last revised], as at Nicæa, with her scholastic definitions and her preclusive anathemas. And so in the times intermediate. . . . With these feelings, your lordship can hardly wonder that I should deem too well of my Church to suppose, without overpowering reason, that she directly and unequivocally contravenes the decrees even of the later councils. What? a body of divines in one corner of the world (good men, I doubt not, in their way, yet surely exposed, and apparently not superior, to exterior influences) set about deliberately to call in question the solemn acts of the assembled prelates of Christendom! I know it is a moot point how far the Council of Trent is to be regarded as œcumenical. I do not wish to enter upon this question, but I cannot conceive any Catholic-minded person not feeling that (considering our Blessed Lord's promise) there is on the whole so much reason for expecting that the Holy Ghost would be present in any large assembly of bishops, representing the different members of the Catholic body, as to dispose him to grasp any alternative which would at all events keep him clear of the unspeakable danger of maligning, if so be, that unutterably sacred Presence!"

Such is the language which Mr. Oakeley, a minister of the Church of England, thinks fit to address by way of "explanation" to his bishop. He deems it consistent with his duty thus to speak of those persons by whose labours and learning the independence of his Church was re-established and secured. Surely Mr. Oakeley should have paused before he applied such disparaging and con-[349]-temptuous language to the pious and learned Reformers, describing them as "a body of divines in one corner of the world (good men, I doubt not, in their way, yet surely exposed, and apparently

not superior, to exterior influences)." Mr. Oakeley ought to have known that those venerable persons to whom he refers were not self-appointed Reformers; they did not of their own accord set about framing the articles of religion in opposition to the Church of Rome. Their labours were recognised and duly appreciated, and received the sanction not only of the Church in Convocation, but also of the State, and that too not once but repeatedly.

Very different indeed is the language employed in respect of those venerable Reformers by that learned Judge who so long was the pride and ornament of his profession. He formed a very different estimate of those persons from that which is expressed by Mr. Oakeley. The judgment to which I am referring was delivered by Lord Stowell in the case of *Bishop against Stone* (1 Hagg. Con. 424); and I feel it my duty to read all that fell from that very learned Judge, because I consider almost every word applicable to the general view of the present case. The two cases are not precisely alike; the proceeding against Mr. Stone was under the statute of the 13th of Eliz. c. 12, for preaching against the divinity of our Saviour; the present is under the general ecclesiastical law, for proclaiming to the world in a published letter, not preaching, which Mr. Oakeley disclaims the right to do, all Roman doctrine. [350] With these exceptions there is not, as far as I can discover, any other material distinction.

[The learned Judge here read the entire judgment in the case of *Bishop against Stone*, and in his observations thereon said the decision of Lord Stowell is a complete and direct answer, as far as a judicial decision can go, that the articles of religion are not to be construed according to the private opinions of any individual whatever; and that Mr. Oakeley, having on sundry occasions declared that he willingly and ex animo subscribed these articles according to the 36th canon, was more especially precluded from affixing his own interpretations. The learned Judge observed that Mr. Oakeley seemed to claim some latitude in the performance of his ministerial duties, on the ground that he was merely the minister of a chapel, and not the incumbent of the parish church. He read the following paragraph of the letter at page 32]:—

"But (and this brings me at once to the next division of my subject) I have always attributed, whether rightly or wrongly, your lordship's forbearance, in the case of Margaret Chapel, to your conviction, first, that I had a basis of rubrical authority for every considerable 'innovation' upon existing practice; and that 'innovations' are only wrong where existing practice is perfect (which cannot be pretended); and second, that, above all, there was the great distinction between Margaret Chapel and some other churches where improvements had been attempted, that my regular congregation were quite unanimous, either in approving the alterations, or in delegating to their clergyman the power (so far as they were concerned) of making [351] them. My lord, it is not necessary I should say to your lordship how very different are the circumstances of a chapel from those of a parish church. I am not going to argue the question on which side abstractedly is the advantage, for on this matter the minds of English churchmen are pretty well made up; but I certainly feel, after some considerable experience, that in the present state of our Church, what is called the 'voluntary system' is not without its own very special advantages. It is a miserable thing indeed when a clergyman's influence depends upon the popularity of his preaching; but I do not see any harm, quite the reverse, in an influence which is derived, if so be, from the mode in which divine service is celebrated. And besides, since the tie between a chapel and its congregation is either one of affection or none at all, I do not see why persons, who dislike a particular service or ministry, should not withdraw themselves. If people recognise strongly the parochial tie, then I wonder why they come to Margaret Chapel at all; and if they do not, there is an ample choice of chapels in London."

I must say I cannot accede to the distinction which is here attempted; it seems to me very untenable. Does Mr. Oakeley forget that his license to officiate in Margaret Chapel was granted to him as a minister of the Church of England, and as such only was he permitted to officiate at all? This, as well as all other chapels to which ministers of the Church of England are appointed, is for the accommodation of parishioners who choose to resort to it; undoubtedly, they are not bound to go to Margaret Chapel, still had there not been a [352] want of church-accommodation in the parish, wherein it is situated, that chapel would not have been opened.

I have by necessity been driven to a long and tedious examination of this letter;

the result of it, as far as concerns the present inquiry, seems to be that Mr. Oakeley holds and professes, without distinction, all Roman doctrine—every thing that has been and still is maintained and taught by that Church. He, therefore, throws himself entirely upon the Roman doctrines as taught by the later councils as well as the earliest; he can make no distinction between the decisions at Nice and those at Trent; every thing which has been promulged, maintained, and affirmed, Mr. Oakeley professes. If this is not the true interpretation of his letter, I should be very glad to be instructed what the real meaning of it is, for, I must confess, I am unable to affix to it any other construction.

The question which now remains for my consideration is, what are the doctrines of the Church of Rome? Is any one of them opposed to any article of the Church of England? If there is, Mr. Oakeley, by professing, as I have observed, the whole range of Roman doctrine, is guilty of the offence charged. He says at p. 20, "I believe her [the Church] to have been ready at Trent, as at Nicæa, with her scholastic definitions and her preclusive anathemas;" and he calls the proceedings of the Council of Trent, which, generally speaking, contains the present doctrines of the Church of Rome, "the solemn acts of the assembled prelates of Christendom." In pursuing this inquiry the course which I am inclined to take is to confine myself to the [353] plain and grammatical construction of our articles, and not to seek the opinion of others; for to do otherwise would, I conceive, tend to weaken their authority. The articles must speak for themselves; I must make out from them the points, or some of them at least, upon which the two Churches differ; for all our articles, with the exception of the 22nd, were subsequent in point of time to the doctrines laid down at Trent. Mr. Oakeley, I think, can have no cause for complaint that I take as the standard of the doctrines of the Church of Rome the decisions of the Council of Trent, when it is recollected that he has expressed himself in such high terms of that council, and that the doctrines therein contained, many of them at least, are no more than a re-assertion and confirmation of what are to be found in some of the preceding councils.

The first of the articles of our Church that I take is the 6th, "of the sufficiency of the Holy Scriptures for salvation." This article expressly declares the sufficiency of the scriptures for salvation; that nothing is required to be believed as an article of faith or to be thought requisite or necessary to salvation but what may be read therein or proved thereby. The foundation, therefore, upon which the Church of England is built is, that it derives its doctrines from the scriptures alone. The Church of Rome on the contrary not only receives certain books, which we do not admit as canonical, but goes further, and adds thereto tradition, as appears from a decree passed in April, 1546, in the fourth session of the Council of Trent: . . . "*Perspicuousque hanc veritatem et disciplinam contineri in libris scriptis, et sine scripto traditionibus quæ ipsius [354] Christi ore ab Apostolis acceptæ aut ab ipsis Apostolis, Spiritu Sancto dictante, quasi per manus traditæ ad nos usque pervenerunt; Orthodoxorum Patrum exempla secuta, omnes libros tam Veteris quam Novi Testamenti, cum utriusque unus Deus sit auctor, necnon Traditiones ipsas, cum ad fidem tum ad mores pertinentes, tanquam vel ore tenus a Christo, vel a Spiritu Sancto dictatas, et continua successione in Ecclesia Catholica conservatas, pari pietatis affectu ac reverentia suscipit et veneratur.*" The Council of Trent then places tradition on the same footing as the scriptures themselves. This constitutes the most essential difference between the two Churches, and must, as long as it remains, form an insuperable bar to their reconciliation; for it is clear that to this doctrine many of the most objectionable errors of the Church of Rome are to be traced.

The nineteenth and twenty-first articles have a bearing on each other: the former declares that "as the Church of Jerusalem, Alexandria, and Antioch have erred, so also the Church of Rome hath erred, not only in their living and manner of ceremonies but also in matters of faith"—a plain declaration against the infallibility claimed by the Church of Rome; the twenty-first of the authority of general councils declares "they may err, and sometimes have erred, even in things pertaining unto God. Wherefore things ordained by them as necessary to salvation have neither strength nor authority, unless it may be declared that they be taken out of holy scripture." Here is a direct and positive reaffirmance of that which is laid down in the former part of the sixth article. Can there be a [355] more marked and decided difference between the two Churches? There is no room for cavil or dispute. What possible mental reservation can Mr. Oakeley here entertain, when he subscribed willingly and ex animo to these

articles? It is to my mind impossible "to extort the most Catholic [i.e. Roman] meaning" from these articles. The passages which I have cited from these articles supply an answer to that part of Mr. Oakeley's letter where he claims equal authority for the Councils of Nice and Trent. The four first general councils are not received by us simply because they are general councils, but on the ground that their decrees are consistent with and deducible from holy writ, which we do not admit to be the case in respect of later councils.

I pass over the ninth and fourteenth articles on original sin and works of supererogation, not because there is not a direct opposition between the two Churches on these points, but because there are other articles which on the face of them mark that opposition more stringently. The twenty-second, of purgatory, declares, "The Romish doctrine concerning purgatory, pardons, worshipping, and adoration, as well of images as of reliques, and also invocation of saints, is a fond thing vainly invented, and grounded upon no warranty of scripture, but rather [not in some degree, but especially] repugnant to the Word of God." What room is there here for mental reservation, or doubt as to the meaning of this declaration? Is purgatory the doctrine of the Church of Rome, or is it not? The article itself affirms that it is. Then am I to travel out of this article to prove that pur-[356]-gatory does constitute a part of the Romish doctrine? That would be indeed to weaken the force of the article, and to open the door to cavil. I am bound, sitting here, to take it that it is a part of the Romish doctrine, and that Mr. Oakeley, by maintaining all Roman doctrine, holds in opposition to the article that the Romish doctrine of purgatory is not a fond thing vainly invented, and that it is not repugnant to the Word of God. The doctrine of purgatory does not rest on the decree of the Council of Trent alone; it was broached many centuries before, and was recognised in the tenth session of the Council of Florence, which began in the year 1439; we find it too in Lyndwood, who flourished about that time, lib. 1, tit. 1, p. 7: "Et supra hunc locum est Purgatorius, in quo est pœna sensus et damni ad tempus."

I now proceed to the twenty-fifth article on the sacraments, which declares that "there are two sacraments ordained of Christ our Lord in the Gospel, that is to say, baptism, and the Supper of the Lord. Those five commonly called sacraments, that is to say, confirmation, penance, orders, matrimony, and extreme unction, are not to be counted for sacraments of the Gospel," &c. The doctrine of the Church of Rome on this head is to be found in the seventh session, held in 1547, of the Council of Trent; the first canon runs thus: "Si quis dixerit Sacramenta novæ legis non fuisse omnia a Jesu Christo Domino nostro instituta; aut esse plura vel pauciora quam septem, videlicet, Baptismum, Confirmationem, Eucharistiam, Pœnitentiam, Extremam-Unionem, Ordinem, et Matrimonium; aut etiam aliquod horum septem non [357] esse vere et proprie Sacramentum, anathema sit." The same doctrine is to be found at a much earlier date in a constitution of Peccham, Lynd. lib. 1, tit. 7, p. 42: "Septem sunt Gratia Sacramenta, quorum Dispensatores sunt Prælati Ecclesiæ, quorum quinque ab omnibus debent recipi Christianis; utpote Baptismus, Confirmatio, Pœnitentia, Eucharistia suo tempore, et Extrema Unctio. . . . Sunt et alia duo Sacramenta, scil. Ordo et Matrimonium." Here again is a direct and positive contradiction between the two Churches.

The twenty-eighth article declares that "Transubstantiation (or the change of the substance of bread and wine) in the Supper of the Lord, cannot be proved by holy writ, but is repugnant to the plain words of scripture, overthroweth the nature of a sacrament, and hath given occasion to many superstitions." But the Council of Trent, in the thirteenth session, held in 1551, c. 4, says: "Quoniam autem Christus redemptor noster corpus suum id, quod sub specie panis offerebat, vere esse dixit, ideo persuasum semper in ecclesia Dei fuit, idque nunc denuo sancta hæc Synodus declarat, per consecrationem panis et vini conversionem fieri totius substantiæ, panis in substantiam corporis Christi Domini nostri, et totius substantiæ vini in substantiam sanguinis ejus; quæ conversio convenienter et proprie a Sancta Catholica Ecclesia Transubstantiatio est appellata." In the canons which are annexed, the first is: "Si quis negaverit, in sanctissimæ Eucharistiæ Sacramento contineri vere, realiter, et substantialiter, corpus et sanguinem una cum anima et divinitate Domini nostri Jesu Christi, ac proinde totum Christum; [358] sed dixerit tantummodo esse in eo ut in signo, vel figura, aut virtute, anathema sit." Again, the fourth canon says: "Si quis dixerit, peracta consecratione, in admirabilis Eucharistiæ Sacramento non esse corpus, et sanguinem Domini nostri

Jesu Christi, sed tantum in usu dum sumitur, non autem ante vel post et in hostiis seu particulis consecratis, quæ post communionem reservantur vel supersunt non remanere verum Corpus Domini, anathema sit." The latter part of the article declares that "the Sacrament of the Lord's Supper was not by Christ's ordinance reserved, carried about, lifted up, or worshipped." On the contrary, the sixth canon says: "Si quis dixerit in sancto Eucharistiæ Sacramento Christum uni-genitum Dei filium non esse cultu latriæ, etiam externo, adorandum; atque ideo nec festiva peculiari celebritate venerandum, neque in processionibus, secundum laudabilem et universalem Ecclesiæ Sanctæ ritum et consuetudinem, solemniter circumgestandum, vel non publice, ut adoretur, populo proponendum, et ejus adoratores esse idolatras, anathema sit." Also the seventh: "Si quis dixerit, non licere sacram Eucharistiam in sacrario reservari, sed statim post consecrationem adstantibus necessario distribuendam, aut non licere ut illa ad infirmos honorifice deferatur, anathema sit." These decrees and canons, it may be observed, did not for the first time teach the doctrine of the Church of Rome respecting the Sacrament of the Lord's Supper. The same will be found in the fourth Lateran Council, in 1215, in the Council of Constance, in 1415, and also in the Decretals. Lyndwood too, lib. 1, tit. 10, p. 49, in his gloss on "Canon Missæ," says, "Canon Missæ vere dicitur [359] regula illa, per quam Eucharistia consecratur; hoc est, illorum verborum per quæ panis in corpus et vinum in sanguinem Transubstantiantur." Again, in a constitution of Langton, lib. 3, tit. 23: "Verba quoque Canonis, præsertim in consecratione Corporis et Sanguinis Christi, plene et integre proferantur." Then in the gloss on the word "Consecratione." "In verbis Consecratoriis in quibus proprie consistit Canon Missæ. Forma enim verborum quoad corpus est talis; Hoc est enim corpus meum, hæc tamen conjunctio enim non est de substantia Formæ, sed de bene esse, unde non debet omitti. Aliud namque est Forma necessaria, sine qua non potest fieri Transubstantiatio." Again, in opposition to our Church, Lyndwood in the same book and tit. p. 231, says on the word "elevatione," "Quæ fit, ut populus illud adoret." Again, tit. 26, p. 249, in a constitution of Peccham, "Statuimus ut Sacramentum Eucharistiæ circumferatur cum debita reverentia ad ægrotos, sacerdote saltem induto superpellicio, gerente orarium cum lumine prævio in lucerna cum campana, ut populus ad reverentiam debitam excitetur," &c. Upon the word "Adorandum," he says, "Cum inclinatione capitis et cordis devotione, et manuum expansione, sive etiam elevatione, cum orationis devotæ vocali expressione."

To whichever then of these authorities of the Romish Church we turn, we find the doctrines of that Church in direct opposition to our twenty-eighth article: it seems to my mind quite impossible to raise a single doubt upon the construction of that article. The article is not couched in vague, unintelligible language, it is positive and direct, that [360] transubstantiation is not warranted by scripture, and that the Sacrament of the Lord's Supper was not by Christ's ordinance reserved, carried about, lifted up, or worshipped.

The thirtieth article on the reception of the sacrament in both kinds declares that "the cup of the Lord is not to be denied to the lay-people." But what says the Council of Trent in its twenty-first session, held in 1562? "Sacrosancta œcumenica et generalis Tridentina Synodus in Spiritu Sancto legitime congregata, præsentibus in ea eisdem Apostolicæ sedis legatis, cum de tremendo et sanctissimo Eucharistiæ Sacramento varia diversis in locis errorum monstra nequissimi dæmonis artibus circumferantur, ob quæ in nonnullis provinciis multi a Catholica Ecclesiæ Fide atque obedientia videantur discessisse, censuit ea, quæ ad communionem sub utraque specie, et parvulorum pertinent, hoc loco exponenda esse. Quapropter cunctis Christi fidelibus interdicit, ne posthac de iis aliter vel credere, vel docere, vel prædicare audeant, quam est his decretis explicatum atque definitum." Then the first canon declares—"Si quis dixerit ex Dei præcepto vel necessitate salutis, omnes et singulos Christi fideles utramque speciem Sanctissimi Eucharistiæ Sacramenti sumere debere anathema sit." Here again the two Churches are at variance.

I now turn to the thirty-first article, which declares, "The offering of Christ once made, is that perfect redemption, propitiation, and satisfaction for all the sins of the whole world, both original and actual, and there is no other satisfaction for sin but that alone." But the first canon of the twenty-[361]-second session of the Council of Trent says, "Si quis dixerit, in Missa non offerri Deo verum et proprium sacrificium, aut quod offerri non sit aliud, quam nobis Christum ad manducandum dari, anathema sit." The article proceeds—"Wherefore the sacrifices of masses, in the which it was

commonly said, that the priest did offer Christ for the quick and the dead, to have remission of pain or guilt, were blasphemous fables, and dangerous deceits." But the third canon of the same session declares—"Si quis dixerit, Missæ sacrificium tantum esse laudis, et gratiarum actionis, aut nudam commemorationem sacrificii in Cruce peracti, non autem propitiatorium; vel soli prodesse sumenti; neque pro vivis et defunctis, pro peccatis, pœnis, satisfactionibus et aliis necessitatibus offerri debere, anathema sit." Again, the fourth canon—"Si quis dixerit, blasphemiam irrogari sanctissimo Christi sacrificio in Cruce peracto, per Missæ sacrificium, aut illi per hoc derogari, anathema sit." Can any thing be more clear than the opposition between the two Churches on this article?

It cannot be necessary to enter into a further comparison of the doctrines of the Church of England and of the Church of Rome. I have adduced, I think, enough to satisfy any reasonable mind that the two Churches are directly opposed, in some essential particulars at least, the one to the other; and consequently that Mr. Oakeley, by publishing and proclaiming that he holds all Roman doctrine, does maintain and affirm doctrines repugnant to the articles of that Church of which he is a minister. The general complexion of this letter must satisfy any candid mind that Mr. Oakeley is [362] in his heart a professed believer of the distinctive doctrines of the Church of Rome. I have no hesitation in pronouncing that the promoter of the office of the Judge has fully and sufficiently proved the articles admitted in this case; and that Mr. Oakeley is, therefore, liable to ecclesiastical censure. Had this case been framed under the statute of Elizabeth, Mr. Oakeley would be called upon to retract his errors, but the present proceeding is under the general law, which leaves the punishment to the discretion of the Court. It must, therefore, in duty to the public inflict such a punishment as may have the effect of deterring others from committing a like offence. The decision which I have come to is, in the first place, to revoke the license of Mr. Oakeley to perform the ministerial office in Margaret Chapel; secondly, to inhibit him from the performance of any ministerial office or duty, within the diocese of London; and thirdly, under the authority of this Court from performing any ministerial office or duty whatever, within the province of Canterbury, until he shall repent himself of his errors, and declare his readiness to retract, and does retract, those errors. I condemn Mr. Oakeley, as a matter of course, in the costs occasioned by this proceeding; and I direct that notice of this sentence may be published in the usual manner at Margaret-street Chapel on Sunday next, which will be the sixth of July.

[363] SKINNER *against* OGLE. Prerogative Court, May 7th, 1845.—A codicil executed in 1839 to a will of 1818 held to be a republication of that will, and to have the effect of bringing a bequest in the will to a deceased daughter under the operation of sect. 33 of the Wills' Act, as no intention to the contrary appeared on the face of either instrument.

[S. C. 4 Notes of Cases, 74; 9 Jur. 432.]

On petition.

William Ogle Wallis Ogle died on the 14th of August, 1844, leaving a will, bearing date the 10th of July, 1818, and a codicil, bearing date the 2nd January, 1839.

By his will the testator bequeathed a legacy of 100l. to Emma Burnham, and the residue of his property to his daughter, whom he appointed executrix. After the execution of the will, the daughter married, and eventually became the widow of the Rev. J. C. Wright. By that marriage she had two children, and died on the 1st of March, 1844, leaving her children surviving. Mrs. Wright, by her will, which was duly proved, appointed Mrs. Skinner, widow, her executrix.

The codicil to the will of Mr. Ogle, written at the end of the will, was in the words following:—

"Whereas I have, by my above will, given and bequeathed to Emma Burnham a legacy of one hundred pounds sterling, now I do by this codicil to my said will wholly and entirely revoke and annul the said legacy. In witness whereof I have hereunto set my hand and seal this second day of January in the year of our Lord, 1839."

[364] The question raised on behalf of the son of Mr. Ogle was whether the above codicil worked a republication of the will. If it did, the bequest under the will to the daughter deceased would not lapse, but devolve on her children under sect. 33 of

the Wills' Act; whereas, if the codicil did not republish the will, the bequest to the daughter would lapse, and the son would share in the property.

It was argued for the son that this codicil was not sufficient to republish the will; that it has one specific object, namely, to revoke a legacy; that the scope of the Wills' Act is that the intention of a testator should be expressed and not implied.

Sir Herbert Jenner Fust, however, resolved that the codicil did republish the will; that every codicil, *prima facie*, has that effect, unless an intention be shewn to the contrary; and that in this respect the law is not altered by the Wills' Act.

MAAS against J. AND H. SHEFFIELD, Executors of Jens Wolff, Deceased. Prerogative Court, Dec. 16th, 1845.—A husband, having been a witness to his wife's will, and after her death having given his written consent to that will, is not afterwards at liberty to withdraw his consent.

[S. C. 4 Notes of Cases, 350; 10 Jur. 417.]

Susan Wolff died on the 6th of March, 1844, leaving a will bearing date the 24th August, 1834, witnessed by her husband Jens Wolff, who died on the 26th of May, 1845. In addition to this implied assent to the will of the wife by the husband, it was pleaded in the third article of the allegation propounding the will that he on the 24th of May, 1844, wrote and gave to Mrs. Maas (the party in whose [365] favour the will was propounded) the memorandum or declaration following:—

"I hereby declare that the annexed will, dated ——— 1834, was made at that period by my wife, Susan Wolff, at my express recommendation in favour of her daughter, Amelia Susan Maria Wolff, now Maas, and that I have not since that period done anything to revoke it, that it continues to have my sanction, and that I now in every respect adopt it. Given under my hand, &c., this 24th of May, 1844.

"JENS WOLFF."

Notwithstanding this consent, which was admitted on the part of the husband, to the will, he in July, 1844, took out administration to his wife as dead intestate. These letters of administration were in an early stage of this suit brought in by order of the Court.

The admission of the allegation pleading the above, with other particulars not material to the point for which this case is reported, was opposed.

Addams against the admission of the allegation. The question is whether it was not competent to the husband to retract and revoke before probate his assent, as pleaded, to the will of his wife. There appears to be a conflict of opinion on the point. Williams on Executors, part 1, bk. 2, c. 1, s. 2, citing Swinburne and other authorities, says the husband "may revoke his consent at any time during the wife's life, or after her death before probate;" to these authorities may be added the case of *Chiswell v. Blackwell* (2 Freem. 70), which carries the doctrine still further. On the other hand, Gibson, p. 461, citing *Brook v. Turner* (2 Mod. 172), says, "if after her death he [the [366] husband] doth consent, he can never afterwards dissent." It was further contended that, until probate, the transaction is incomplete; that the husband could not for want of a consideration be compelled; and that, though the consent was given, as pleaded, it may, like all proxies, be revoked before acted upon.

Bayford, in support of the allegation propounding the will, contended that, after the very formal and continuous assent given by the husband in this case, the assent could not be withdrawn; he cited 1 Roper on Husband and Wife, 170.

Judgment—Sir Herbert Jenner Fust. It is impossible to conceive a case in which stronger circumstances could be pleaded. The simple question is whether, after such a formal consent, a husband is entitled to withdraw. In the absence of any recent authority for permitting a husband, under the circumstances pleaded, to retract his consent, I am not disposed in this instance to create a precedent. Whatever may be said of the case in Freeman or any other old authority, it is clear that modern authorities are the other way. The understanding of Williams and Roper evidently is that, when a husband after his wife's death has once consented to the will, he cannot afterwards retract and oppose probate. I, therefore, admit this allegation to proof whatever may be the effect of it.

On the 30th June, 1846, the Court pronounced for the will.

[367] *BLUCK against RACKHAM*. Arches Court, Feb. 18th, May 10th, 1845.—A suit to recover a penalty against a beneficed clergyman, under 1 & 2 Vict. c. 106, for non-residence, held not to be a criminal suit or proceeding.

[S. C. 4 Notes of Cases, 85: affirmed, 1846, 5 Moore, P. C. 305.]

On appeal from the Consistorial Court of Norwich.

This was originally a proceeding in the Episcopal Court of Norwich, by Matthew Rackham, as a person authorized for that purpose by the bishop, in writing under his hand and seal, wherein a citation was issued on the 12th of September, 1843, against the Rev. John Bluck, citing him to appear in the said Court, and “to shew cause why he should not be pronounced to have forfeited one-third of the annual value of his benefice of Walsoken, by reason of his having been absent therefrom, for a period exceeding the space of three months, and not exceeding six months, in the year ending 31st of December, 1842, without any such license or exemption as is allowed for that purpose by 1 & 2 Vict. c. 106, and without having been resident at some other benefice of which he was possessed, and why the payment of such forfeiture, together with the expense incurred in recovering the same, should not be enforced by monition and sequestration, under the provisions of the said statute.”

The citation was personally served on Mr. Bluck, and on not appearing he was pronounced in contempt, and a significavit was decreed, but ultimately an appearance was given for him.

[368] An allegation was admitted on behalf of the promoter, to which a negative issue was given. Answers were called for, and an appearance was then given under protest, which alleged “that inasmuch as the proceeding is a criminal one against the defendant, he ought not to be called upon to give in his answers on oath; and it was further alleged that the whole proceeding was null and void, and it was prayed that the defendant might be dismissed with costs.” That protest and allegation of nullity were rejected, but the answers were not enforced: the proctor for Mr. Bluck still dissented and protested, but that protest was not followed up to the end of the cause. The cause proceeded, witnesses were examined, and the Judge, on 1st of July, 1844, pronounced the allegation to be proved, and condemned Mr. Bluck to pay one-third part of the annual value of the benefice—“the amount of such value to be ascertained in the usual and accustomed manner by the registrar,” and further condemned Mr. Bluck in the costs.

From this sentence the Rev. Mr. Bluck appealed.

Curteis for the appellant. The principal ground for the appeal is that the proceedings ought to have been according to the provisions of the statute 3 & 4 Vict. c. 86, commonly called the Church Discipline Act. The promoter has in effect admitted that by not insisting on answers called for to his allegation. The 3rd section of that statute enacts—“That in every case of any clerk in holy orders of the United Church of England and Ireland, who may be charged [369] with any offence against the laws ecclesiastical, &c., it shall be lawful for the bishop of the diocese within which the offence is alleged to be committed” to proceed in a certain manner pointed out by the statute; or he may send the case in the first instance to the Arches Court; and the 23rd section of the act enacts—“That no criminal suit or proceeding against a clerk in holy orders of the United Church of England and Ireland, for any offence against the laws ecclesiastical, shall be instituted in any Ecclesiastical Court, otherwise than is herein-before enacted or provided.”

The question, then, is whether an offence against the laws ecclesiastical is charged to have been committed by Mr. Bluck; and if so, whether this is a criminal proceeding, or ought to have been a criminal proceeding.

As to the first point: it is not denied that non-residence is an offence against the laws ecclesiastical; but it is said, this is not a criminal proceeding but a civil suit to recover a penalty. It is, however, submitted on behalf of the appellant that this proceeding is essentially criminal. It cannot be denied that he is charged with an ecclesiastical offence, and with the view of being punished for that offence.

The distinction between civil and criminal suits, as I understand, is this, that the object of the one is private interest, of the other, punishment for an offence. The principle is laid down by the learned Judge of the Consistory Court in *Ray v. Sherwood* (1 Curt. 184).

In *Middleton v. Crofts* (2 Atk. 671-3) Lord Hardwicke considers a proceeding for a penalty a criminal proceeding.

[370] The language also of Lord Denman, in giving judgment in *The Dean of York's case* (2 Q.B. 33), seems clearly to comprehend the present proceeding.

It appears, therefore, that where punishment is the object, and a crime or offence is charged, the proceeding is essentially a criminal one.

It is submitted further that a criminal proceeding was contemplated by the Legislature, under the 114th section of the statute 1 & 2 Vict. c. 106, which limits the right to proceed to a party nominated by the bishop. This is intelligible if criminal proceedings be contemplated, as without this enactment any one might prosecute; while, if a civil suit be meant, the enactment is perfectly without an object, inasmuch as no person can institute a civil suit except for his own interest, and here no part of the penalty is given to the party who may sue for it.

The intention of the Legislature appears to be that the bishop only should have the power of prosecuting, as he is the most competent person to judge of the propriety of so doing. It is submitted for these reasons that the present proceeding is essentially a criminal one, and that consequently it ought to have been conducted as required by the statute 3 & 4 Vict. c. 86, and not having been so, that the whole proceeding is null and void.

But granting for argument sake that it is competent to the bishop to proceed under 1 & 2 Vict. c. 106, it is submitted that the present case cannot be sustained.

In the first place, there is no proxy appointing Mr. Skipper, the proctor, in the cause, who is the dominus litis, and the statute limits the right of [371] proceeding to a party "duly authorized" by the bishop.

Secondly. The offence charged is that Mr. Bluck absented himself from his benefice, and did not keep residence there for a period exceeding three months, and not exceeding six months, &c.; but the proof is limited to his not being resident at the house, at one time occupied by him; and there is no proof, and indeed no averment, that there is a parsonage or house of residence in the parish—nor is there one.

Again, the party is pronounced to have forfeited one-third of his living, but no value is found, and the amount is referred to the registrar—yet the decree is a final decree, having the force and effect of a definitive sentence in writing.

It is submitted, therefore, that the sentence of the Court below ought to be reversed.

Nicholl, H. J., on the same side.

Addams for the respondent contended that the opposite side had failed to prove that a proceeding for a penalty is a criminal proceeding. It was covertly argued that the 1 & 2 Vict. c. 106 was repealed by the 3 & 4 Vict. c. 86, but how that was made out he was at a loss to understand.

Phillimore, R. J., on the same side.

Cur. adv. vult.

May 10th.—*Judgment*—*Sir Herbert Jenner Fust*. That non-residence is an offence against the law [372] ecclesiastical, and may be punished by the common law ecclesiastical of this realm, there can be no doubt. In this instance the promoter in the Court below, with the authority of the bishop, proceeded against Mr. Bluck, by virtue of 1 & 2 Vict. c. 106; and the question is, whether by so doing he adopted the right course?

In the argument on behalf of the reverend appellant, which was not without some display of ingenuity, it was contended that the proceeding ought to have been conducted in conformity with the provisions of the 3 & 4 Vict. c. 86, commonly called "The Church Discipline Act," on the ground that the proceeding is of a criminal nature. Undoubtedly, if such a suit as this is a criminal one, Mr. Bluck would be entitled to be dismissed; for the 23rd section of that statute provides "that no criminal suit or proceeding against a clerk in holy orders" . . . "shall be instituted" . . . "otherwise than is herein before enacted and provided," and it is not for a moment contended, on behalf of the promoter, that the proceedings in the Court below were regulated by that statute.

The first point, then, to be considered is whether a proceeding to recover a penalty constitutes the suit "a criminal suit or proceeding." That position was endeavoured to be maintained in the argument for Mr. Bluck, but I must say it was not made out to my satisfaction. One of the reasons adduced was that the answers to the allegation of the promoter, though called for, were refused and not afterwards insisted on.

That, however, alone will not constitute the proceeding to be criminal, for in cases beyond all doubt of a civil nature, answers are constantly waved.

[373] It is clear to my mind that the Legislature never intended that a proceeding of this nature should be deemed a criminal one; there are other offences besides that of non-residence, for which pecuniary penalties are prescribed by 1 & 2 Vict. c. 106; and with respect to the mode of recovering such penalties I find this provision under sec. 117, "that all penalties and forfeitures under this act incurred by" . . . "spiritual persons not holding benefices, shall be sued for and recovered by any person, who will sue for the same by action of debt in any of Her Majesty's Courts of Record at Westminster." I have never yet heard it maintained that an action of debt is a criminal proceeding. The mere circumstance of a party holding or not holding a benefice cannot entirely change the character of the suit. Under the earlier statute for enforcing the residence of spiritual persons 57 Geo. 3, c. 99, the bishop had not the power to proceed for the penalties prescribed; they were to be recovered by an action of debt, s. 5; the bishop is now empowered to proceed in his own Court, but the change of forum cannot, I consider, convert that which was before a civil suit into a criminal one.

The argument for the appellant was pressed too far; it came to this, that whenever a suit is instituted in the Ecclesiastical Courts against a clergyman for an offence, the proceedings must be conducted under the provisions of the Church Discipline Act; for instance, were a married clergyman sued by his wife for a divorce by reason of his adultery, the ordinary mode of proceeding must be abandoned. The question involved in the first objection resolves itself into this, is the 1 & 2 Vict. c. 106 repealed by [374] 3 & 4 Vict. c. 86? I am clearly of opinion it is not; I am at a loss to discover where words are to be found which directly, or impliedly, have that effect.

I am of opinion that the first objection is not maintainable.

In respect to another branch of the argument that no proxy appointing the proctor of the promoter in the Court below has been transmitted with the process, I will observe it was open to the appellant, whose duty it is to supply the process, if this is any real ground of objection, to have remedied the defect himself by requiring the production of it: that the proxy was exhibited in the Court below appears by the minutes.

There is nothing then, according to my opinion, which renders the proceedings null and void. The remaining inquiry is one of fact, whether there is sufficient proof to establish the charge against Mr. Bluck within the terms set forth in the citation and allegation.

As a negative issue was given on the admission of the allegation, and as the answers thereto were ultimately waved, it may be right to mention there is ample proof that Mr. Bluck was lawfully instituted and inducted to the rectory of Walsoken—that he had no license of non-residence from that living—that he was not resident at another benefice—and that the promoter of the original suit was duly authorized by the bishop to institute proceedings against him; of these facts there is no question. The point in dispute is whether there is sufficient evidence that Mr. Bluck did not keep residence for a period exceeding three, and not exceeding six, months in the year 1842.

[375] It seems to be admitted in this case that there is no house of residence belonging to the benefice, though this living is upwards of £1000 a year in value; but according to sec. 32 of the statute, if there is evidence to shew the incumbent was not resident within the parish for the period alleged, that will be sufficient to substantiate the charge.

Richard Worth deposes on the 3rd article of the allegation—"On the 28th August, 1842, the Rev. John Bluck told me he was about to leave home, and asked me if I would take care of his house during the night whilst he was absent. On the following day I went to his house of residence; in the afternoon of the same day a fly came to his house, into which he got, and was driven away. I slept in the said house that night, and every night from that time until the 9th of March, 1843. The Rev. J. Bluck did not return to his house or to the parish until the 8th March, 1843. I officiated as parish clerk during the whole period, and I am able to state positively that he did not keep residence during any part of that period."

James Watts, a police constable, deposes on the same article—"The Rev. John Bluck, on the 26th August, 1842, told me he was going to leave Walsoken for six or

seven weeks, and requested me to keep a look-out on his house during his absence. Three or four days after that I saw him on the road to Wisbeach, in a carriage with luggage. Almost every day, and frequently during the day, and every other night, I visited the house. I continued this watching from the 29th August, 1842, until March, 1843. With the exception of two days in the month of January, 1843, the Rev. J. Bluck was absent from the [376] parish of Walsoken from about the 29th August, 1842, until March or April, 1843."

If more evidence were required there is the evidence of the Rev. George Thompson, who performed the greater portion of the clerical duty in the parish during the period alleged.

It was, however, said in argument that the evidence amounts only to this—that Mr. Bluck was not resident in a particular house—that there is no evidence to shew he was not elsewhere within the limits of the parish. Stricter proof than that which is here adduced cannot, I think, in reason be required; here is, to say the least, a strong *prima facie* case made out against Mr. Bluck, which he ought to have disproved, or he ought to have shewn that he comes within some one of the exemptions from residence specified in the statute; but he has attempted neither.

I am of opinion there is sufficient evidence to establish a charge against Mr. Bluck, and that the Judge, in the Court below, acted rightly in pronouncing that the party had incurred the forfeiture to the amount of one-third of the annual value of his benefice; I, therefore, pronounce against the appeal; remit the cause, and condemn the appellant in the costs of the appeal.

This sentence was affirmed on appeal to the Judicial Committee of the Privy Council on the 15th May, 1846. Subsequently to the judgment of the Judicial Committee, a rule nisi for a prohibition was applied for and granted; cause was shewn against the rule; and after deliberation, the Court of Queen's Bench, on the 17th December, 1846, discharged the rule with costs.

[377] THE OFFICE OF THE JUDGE PROMOTED BY CLARKE *against* H——. Arches Court, June 30th, Dec. 12th, 1845; Feb. 12th, 1846.—A priest in holy orders, without preferment, having been convicted at a Quarter Sessions of attempting a nameless offence, was subsequently articled against, and a sentence was prayed against him of degradation. That prayer was refused, but a sentence of unlimited suspension was pronounced.

[S. C. 4 Notes of Cases, 321.]

This was a cause, by letters of request from the Lord Bishop of Gloucester and Bristol, in which the office of the Judge was promoted against the Rev. Henry H——, on account of his having been tried and convicted at the Quarter Sessions, held at Bristol on the 8th April, 1844, of having assaulted and endeavoured to persuade a person to suffer him to commit a nameless offence, for which he was sentenced to pay a fine and be imprisoned for twelve months. The party proceeded against was in priest's orders, but held no preferment or benefice. An affirmative issue was given to the articles, and the prayer of the promoter was that the defendant be "degraded, deprived or suspended from the ministry, and from all clerical functions throughout the province," &c.

Phillimore for the promoter, called on the Court to pronounce the sentence of degradation prayed.

Per Curiam. No doubt there is power somewhere lodged to pronounce a sentence of degradation, but has the official principal of this Court such power in the absence of the archbishop himself? Assuming, even, that the bishop from whom the letters of request came has; can he delegate such power? Undoubtedly I have authority to deprive, but am doubtful as to degradation.

Phillimore. Where the power is lodged I am [378] not aware. I have made some search without effect for a case where the sentence has been pronounced without the intervention of a bishop. This Court cannot remit the cause; there has been a conviction in a Temporal Court; and by the Church Discipline Act I submit this Court has power.

Per Curiam. I have authority to try the cause, but I must "determine it according to the law and practice of the Court."

Phillimore. I cannot see, on principle, why, as the Court can deprive, it cannot degrade.

Phillimore, R. J., on the same side. The offence in the present instance calls for degradation. We do not call on the Court to decide what the effect would be of such a sentence, for that would involve a mooted question—the indelibility of orders. Deprivation and degradation are classed together by some writers, for instance, Ayliffe,^(a) and where there is the power to pronounce the one, I submit there is to pronounce the other.

Per Curiam. Is degradation, then, to be understood to be used synonymously with deprivation?

Phillimore, R. J. Not exactly so, though it seems impossible to distinguish the two powers.

The cause was ordered to stand over for further information. On the 12th December the counsel stated no precedent was found of a sentence of [379] degradation having been pronounced by the official principal alone; but it was suggested that this was a proper case for invoking the assistance of the archbishop. The Court inquired of counsel what they understood by the words of the 122nd canon, “deposition from the ministry.” It was answered, “deposition from the offices of the ministry, but degradation from orders would seem to follow.”

Judgment—*Sir Herbert Jenner Fust*. I am not prepared to say that this is a case for a sentence of degradation; or, were it so, that I have the power alone, or even the archbishop alone, to pronounce such a sentence; for, according to Ayliffe and other authorities, there should be, according to the station of a defendant, a certain number of bishops present. I think the justice of this case will be fully satisfied by a sentence of deposition which I can pronounce; though at present I have not that prayer before me. When a sentence is corrected—to depose Mr. H. from the ministry, that is, from all authority to officiate, for he has nothing to be deprived of, I shall be prepared to sign it.

Feb. 12th, 1846.—The following sentence was signed:— . . . “Therefore we, the said Herbert Jenner Fust, Kt., Doctor of Laws, . . . having maturely deliberated upon the proceedings had in the said cause, and the offences sufficiently proved, exacting by law inhibition from the exercise of the ministry, and all discharge and function of his clerical office, and the execution thereof, within the province of Canterbury, have thought fit to pronounce, and do accordingly hereby pronounce, decree, and declare [380] that the said Rev. Henry H——, clerk, ought by law to be inhibited from the exercise of the ministry, and from all discharge and function of his clerical office and the execution thereof; that is to say, from preaching the Word of God, and administering the sacrament, and celebrating all other duties and offices whatsoever within the province of Canterbury, and we do strictly inhibit him therefrom accordingly, under pain of the law and contempt thereof by this our definitive sentence,” &c.

The editor submits for consideration the following note in reference to some of the points involved in the above case:—

In the patent of appointment of a Judge of the Arches Court are these words: “We do for ourselves and successors give and grant to you the said A. B. our power and authority legally to inflict any ecclesiastical censures whatsoever.”

What is the meaning of the words “any ecclesiastical censures whatsoever?”

It is somewhat remarkable, considering how often the authority and power of the Ecclesiastical Courts have in the Temporal Courts been called in question, and the many statutes in which the term “Censures of the Church” is to be found, that, as far as the editor is aware, there has never yet been a question or determination in a Temporal Court of what the censures of the Church consist.

By the general canon law of Europe “ecclesiastical censures” are commonly held to be confined to interdict, suspension, and excommunication, X. 5, 40, 20; Lynd. 11, 1; “Excussis” v. “Censuræ,” p. 91; Van Esp. pars. iii. tit. xi. c. iii. But the word *censura* has not always this circumscribed meaning; it is sometimes used in the sense of *severitas canonica*, which term denotes every other punishment of the Church, Lynd. v. 15; “Item” v. “Censuram Canonicam,” p. 322. Moreover, our statute law would

(a) The chapter on this subject in Ayliffe is probably one of the least perspicuous in his learned work.

seem impliedly to recognize the use of the word "censure" in the larger acceptance as explained by Lyndwood. See 1 Eliz. c. 2, s. 23, and 29 Car. II. c. 9, s. 2.

In the next place, the word "whatsoever," to which some meaning must be assigned—it is a word of amplification—will [381] probably lead to the conclusion that the term "censures" in the patent is used in the larger sense. It would be difficult, too, to understand on what principle the Judge of the Arches Court has the authority, which is definitely settled, to deprive, if the patent is not so to be construed; for though it is clear, according to all strict principles of construction, the Judge of that Court is not included with chancellors and others mentioned in canon 122, still it is equally clear no Judge can exercise a greater authority than is delegated to him.

If it be conceded, then, that the term in the patent "any ecclesiastical censures whatsoever" is, as the writer of this note submits, to be taken in the wider sense, the question next to be answered is, Has the Judge of the Arches Court authority to pronounce a sentence of degradation? The answer is, No; and for this only reason—an archbishop or bishop has not alone power to degrade one in the higher orders of the Church. The power to inflict degradation originally appertained to a synod or convocation, and that authority has never yet been delegated lower than to a certain number of bishops, proportioned to the rank or order of a defendant, except, perhaps, in a case of heresy, X. in sexto. 5, 9, 2; Van Esp. pars. iii. tit. xi. c. 1; 12 Rep. 57.

On reference to the sentence as signed by the learned Judge in the present case, it would seem to be an unlimited suspension, which is by some learned canonists termed a deposition negative. Had he thought fit, it is submitted, for reasons which are deducible from above, he might have pronounced a sentence of positive deposition, without regard to what would have been the effect of such a sentence; a point which was not then to be discussed, and which could rarely arise in any Court.

The distinction between degradation, deposition, and suspension is given by J. de Athon, Otho. "Licet" v. "Suspensi," p. 45, in these words: "Depositus dicitur, qui privatus est beneficio et officio, licet non sollemniter. Degradatus dicitur, qui utroque est privatus sollemniter, insigniis sibi ablatus. . . . Suspensus autem dicitur, qui est privatus utroque ad tempus, non in perpetuum." The difference in the effect between deposition, in the sense of the word, as used by J. de Athon, and suspension, limited or unlimited, will be found more fully considered by Van Esp. pars. iii. tit. xi. c. xi.

[382] THE OFFICE OF THE JUDGE PROMOTED BY BARNES *against* SHORE. Arches Court, June 19th, August 5th, 1845; June 20th, 1846.—Articles against an ordained minister of the Church of England for officiating in an unconsecrated chapel after the revocation of his license by the bishop sustained. An allegation responsive to the articles pleading he had, prior to the service of the citation, seceded from the Established Church, and had taken certain oaths, &c. prescribed by the Toleration Acts, rejected, on the ground that those Acts do not apply to a minister of the Established Church, and that one in holy orders cannot divest himself of such orders.—An unconsecrated proprietary chapel, into which strangers are admitted, is not a "private house" or "chapel," within the meaning of the 71st canon; consequently to read the service of the Church in such a building is publicly to read, &c.—To found a sentence under the general ecclesiastical law, it is not necessary that all the offences charged be proved.

[S. C. 4 Notes of Cases, 593; 10 Jur. 688, 887: in Queen's Bench, 8 Q. B. 640; 115 E. R. 1013 (with note): in Privy Council, Br. & Fr. 44.]

This was a cause of office, in virtue of letters of request under the hand and seal of the Lord Bishop of Exeter, promoted by Ralph Barnes, of the city of Exeter, against the Rev. Jas. Shore, of Bridge Town, in the parish of Berry Pomeroy, in the county of Devon, diocese of Exeter, and province of Canterbury.

On the 21st of November, 1844, a decree or citation was issued, by which Mr. Shore was called on to answer to certain articles touching his soul's health, &c., "and more especially for having, within the said diocese of Exeter, offended against the laws ecclesiastical by publicly reading prayers, preaching, administering the holy sacrament of the Lord's Supper, and performing duties and divine offices, according to the rites and ceremonies of the United Church of England and Ireland, in a certain unconsecrated chapel or building, situate in the said parish of Berry Pomeroy, without

any license or authority for so doing, and contrary to, and in spite of, the injunction or monition of the said bishop of Exeter."

On the 21st of January, 1845, an appearance was given for Mr. Shore under protest. The protest is not here set forth, as the objections therein contained were afterwards embodied in a defensive allegation. The protest was overruled. An absolute appearance [383] was given on the 3rd of May, on which day articles were brought in to the substance following:—

First article pleaded the law, that no clergyman of the Church of England can lawfully officiate without the authority of his diocesan.

Second and third articles pleaded the orders of Mr. Shore.

Fourth, fifth, and sixth pleaded that the bishop of Exeter did, by an instrument in writing under his hand and seal on the 7th March, 1844, revoke a license previously granted to Mr. Shore to perform the office of minister in the aforesaid chapel, and did strictly enjoin him to abstain from officiating therein, and that such instrument of revocation of his license was personally served on Mr. Shore on the 13th March, 1844.

Seventh pleaded that, notwithstanding the personal service of the revocation of the license, Mr. Shore did, on Sunday the 14th of April, 1844, perform the service of the Church, and in addition to the service did, on the 28th of July, 1844, administer the sacrament of the Lord's Supper, without any license for so doing, and in spite of the injunction aforesaid.

Eighth, ninth, and tenth pleaded the usual concluding articles.

The articles were admitted without opposition.

So much of the second article, as pleaded that Mr. Shore was admitted into priest's orders, was admitted to be true, and also the third, fourth, fifth, and sixth were admitted. Witnesses were examined, and subsequently a defensive allegation was brought in on behalf of Mr. Shore to the effect following:—

[384] First and second articles pleaded, "That the unconsecrated chapel mentioned in the libel is a place of meeting for religious worship of Protestant dissenters, and that on the 26th of February, 1844, in pursuance of the 52 Geo. 3, c. 155, the said chapel was duly certified to the Court of the archdeacon of Totness, in which archdeaconry the chapel is locally situate, as intended to be used as a place for worship, and that the said chapel was duly registered."

Third and fourth pleaded, "That the Rev. J. Shore has, on conscientious grounds, seceded from and ceased to conform to the Church of England, and was, at the time of the service of the citation, and is now, a Protestant dissenting minister in holy orders, and is now a preacher and teacher of a congregation of Protestant dissenters accustomed to assemble for worship in the aforesaid chapel; that on the 16th of March, 1844, in the presence of a magistrate for the borough of Totness, wherein the chapel is situate, and Mr. Shore resided, he took the oaths, and made and subscribed the declaration specified in the aforesaid act. And it was expressly alleged that Mr. Shore having taken the said oaths, and made and subscribed the declarations aforesaid, was and is entitled to all the exemptions, benefits, privileges and advantages granted to Protestant dissenters by 1 Wm. & Mary, c. 18, and according to the provisions of that statute is not liable to be prosecuted in any Ecclesiastical Court for not conforming to the Church of England."

Fifth pleaded, "That Mr. Shore has not at any time since the service of the monition or injunction mentioned in the citation and articles, and more especially did not either on Sunday the 14th of [385] April, 1844, or on Sunday the 28th of July, 1844, officiate as a priest or minister in holy orders of the United Church of England and Ireland contrary to, or in spite of, the aforesaid injunction, but has constantly since the service of the injunction conducted the religious worship of the congregation, accustomed to assemble in the said certified chapel, as a Protestant dissenting minister; that although he, Mr. Shore, did, on the occasion above pleaded, avail himself, as many other Protestant dissenting ministers are accustomed to do, of some of the forms set forth in the Book of Common Prayer, yet he did make variations therein as not conforming to the Church of England."

Sixth pleaded the concluding article.

The admission of this allegation was opposed.

June 19th.—Addams in opposition to the admission. The appearance of Mr. Shore in the first instance under protest may have been pardonable, but a repetition

of the same line of defence is monstrous. The defendant, to justify a minor crime, that of disobedience to his diocesan, proclaims himself guilty of a greater; he avows himself now to be a professed schismatic. Even if he could divest himself of his orders, which he cannot (see can. 76), that would not avail him in the present instance; for by his own admission he was served with the monition on the 13th of March, and it was not till the 16th of March he took certain oaths to qualify himself as a dissenter, which are in themselves no test whatever. He denies he performed the service in the chapel, on the [386] occasions specified in the articles, according to the prescribed form of the Book of Common Prayer; but he admits he varied it. That makes the case worse, as he must have previously subscribed the three articles of canon 36 (see can. 38). The Toleration Acts have no bearing on such a case as this; see 52 Geo. 3, c. 155, s. 13, and *Trebec v. Keith* (2 Atk. 498). Were a clergyman guilty of immorality, or of offending against the provisions of 1 & 2 Vict. c. 106, he would, if Mr. Shore's defence is good, only have to take the oaths Mr. Shore has taken, and then set the ordinary at defiance. The defence set up is utterly subversive of all ecclesiastical order and discipline. For the reasons assigned the allegation is wholly inadmissible.

Robinson, on the same side, cited *Carr v. Marsh* (2 Phill. 203-4).

Dodson, Q. A., in support of the allegation. The allegation is a valid defence. The offence laid in the articles is confined to two days, which are subsequent in date to the time at which Mr. Shore ceased to be a minister of the Church of England. The building was licensed in February, 1844, as a place of worship for dissenters, and Mr. Shore qualified himself as a dissenting teacher, 16th of March, 1844. The canons which have been cited have no bearing on the present case; they apply to the case of those who are in the Church; besides, they are previous to the Toleration Acts on which we rely. The case of *Trebec v. Keith* is not in point; that was a proceeding against a clergy-[387]-man of the Established Church; we plead that Mr. Shore was, at the time the offence is alleged to have been committed, a dissenter; that averment the Court must take as true. The Queen's advocate referred to the Toleration Acts of 1 Wm. & Mary, c. 18, 19 Geo. 3, c. 44, and 52 Geo. 3, c. 155, and argued therefrom that Mr. Shore is not now amenable to the Ecclesiastical Courts.

Twiss on the same side. The case of *Carr v. Marsh* is clearly distinguishable from the present; in that case the building was used as a place of worship for members of the Church of England, of which Church Mr. Marsh was a minister; whereas, in the present instance, the building was duly certified as a place of worship for dissenters, and Mr. Shore has qualified as a dissenting minister. It is true Mr. Shore derived his orders from the Church of England, but I know not what there is to prevent him from seceding from that Church. The Toleration Act, 1 Wm. & Mary, c. 18, s. 8, contemplates persons in "holy orders" seceding from the Church. The clergy of the Established Church only are amenable to this Court.

Addams in reply. Mr. Shore has, by appearing in this Court, acknowledged himself a minister of the Church of England. To have given a colour to that which has been contended for on the other side, he ought to have appealed on the rejection of his protest.

Cur. adv. vult.

[388] August 5th.—*Judgment*—*Sir Herbert Jenner Fust*. The allegation now before the Court purports to be responsive and defensive to certain articles, which were admitted without opposition, charging Mr. Shore with performing divine service in an unconsecrated building, without the license of his ordinary.

To the libel certain admissions were made in acts of Court, which are not without their importance in this case. Mr. Shore admitted he was regularly ordained a priest of the Church of England, and duly licensed to perform divine service in the chapel or building in question.

It appears from this allegation that subsequently, namely, on the 26th of February, 1844, this building was certified as a place of worship for dissenters, and that it is to be presumed in consequence thereof the bishop of the diocese withdrew his license from Mr. Shore. The instrument of revocation was personally served on this gentleman on the 13th of March, 1844; but, notwithstanding that, he continued to perform his ministerial duties, and now attempts to justify his conduct by pleading that he did, on the 16th of March, 1844, qualify himself as a dissenting teacher, and to claim the benefit of certain statutes called the Toleration Acts, passed for the purpose of giving

ease to scrupulous consciences, and exempting from certain penalties Protestants dissenting from the Established Church.

To read in this allegation of Mr. Shore's "conscientious grounds" for seceding from the Established Church, seems to me palpably absurd, when it appears his conscience remained quite un-[389]-disturbed till after the bishop revoked his license. He claims, however, the benefit of the Toleration Acts, and says that, although he is in "holy orders," he is no longer subject to the diocesan.

This claim involves two considerations: whether the Toleration Acts are applicable in such a case, and whether a clergyman can divest himself at pleasure of his orders? This is a line of defence which surely ought to have been made good in argument, but it was rather assumed than proved, for no authority certainly coming up to the point was adduced. On the other hand, there is authority for saying that the Toleration Act of Wm. & Mary is not applicable to a clergyman of the Church of England. Such was the opinion of Lord Hardwicke in *Trebec v. Keith* (2 Atk. 498), and also of Sir John Nicholl in *Carr v. Marsh* (2 Phill. 203-4).

Mr. Shore admitted he received the order of priest from the Church of England, and he even now pleads he is in "holy orders." From what source can these orders be, but from that whence he derived them? Here, again, it was to be proved that a clergyman can divest himself at pleasure of his orders; but I heard nothing to establish that position. The spirit of the canons is certainly at variance with such a position, as well as common sense. I should like to be informed on what principle it can be contended that one, who has been ordained in the Church of England, and promised canonical obedience, is not amenable to its discipline. Is it meant to be said that such a one being guilty of immorality can exempt himself from the censures of the Church, by saying he has taken [390] certain oaths, and qualified himself as a dissenting teacher? Were that so, there would be an end to all Church discipline; the notion is too preposterous. The case seems to me to be so clear that it would be useless to add more. The facts pleaded in this allegation, if proved, would be no valid defence; they would not exempt Mr. Shore from censure. It is therefore better I should reject the allegation at once, which I accordingly do.

On the 11th of November, 1845, a rule nisi for a prohibition was granted by the Court of Queen's Bench, and in January, 1846, cause was shewn against the rule. The Court took time to deliberate, and eventually, on the 4th of May, 1846, discharged the rule.

June 20th, 1846.—On this day the cause was heard on the evidence taken on the articles.

Addams and Robinson for the promoter contended there was sufficient proof of the charges against Mr. Shore to warrant a sentence against him; though it was not legally established that the sacrament of the Lord's Supper was administered on the 28th of July, 1844. In respect to the punishment to be inflicted, it was submitted that, without reference to the original prayer, Mr. Shore, by reason of his subsequent conduct and declaration, that "he is now a dissenter," ought to be deposed from the ministry.

Dodson, Q. A., and Twiss for Mr. Shore. There is not evidence sufficient to found a sen-[391]-tence against Mr. Shore. He is charged with having "offended against the laws ecclesiastical, by publicly reading prayers," &c.

In the first place, it is not proved he performed the service publicly. The chapel in which the service was read is not a public chapel; it is to be deemed, in reference to the seventy-first canon, a private house; consequently, as the evidence does not establish the whole charge, the case fails, *Titchmarsh v. Chapman* (ante, p. 175).

Secondly, the evidence establishes only that Mr. Shore read the morning service contained in the Book of Common Prayer, which every clergyman, by direction of the rubric, is bound to do; consequently, in this respect, no ecclesiastical offence has been committed.

Lastly, there is not full proof of the identity of Mr. Shore, which ought to have been established by two witnesses, *Hutchins v. Denziloe* (1 Hagg. Con. 181).

Judgment—Sir Herbert Jenner *Fust*. The point to which I must, in the first place, direct my attention, is to see whether the assertion of the counsel for Mr. Shore, "that his identity is not established," is well founded; for, unless I am satisfied, from the evidence and proceedings in this cause, that Mr. Shore, the party here proceeded against, and Mr. Shore who officiated in the chapel, is one and the same person, it

would be a waste of time to enter into any other part of this case. There are two witnesses, to whose evidence I shall presently advert, who say they were present on certain [392] occasions when Mr. Shore officiated; but supposing, on examination, I should consider their evidence not sufficient to establish the identity of Mr. Shore, there are other means by which it can be established. In the first place, there is the service of the citation upon "the Rev. James Shore," the party accused, which was served by one of the witnesses, who has deposed to his having officiated at the chapel; in the next place there is the proxy of "the Rev. James Shore," by virtue of which a proctor appeared for him, as one of the parties in the cause, to defend him, and who offered, in the first instance, a protest to the jurisdiction of the Court, which was overruled; then there are interrogatories addressed to the witnesses by "the Rev. James Shore, one of the parties in this cause," and the form and substance of the interrogatories go to establish himself as the party proceeded against, on whom the citation was served, against whom the articles were admitted, and by whom the interrogatories were addressed to the witnesses to be cross-examined on his behalf, as one of the parties in this cause, and as the officiating minister at the chapel. Every thing, therefore, is concurring to prove this preliminary point, namely, the identity of the party.

But this is not all; Mr. Shore has thought proper to make certain admissions, which I think are not altogether without a bearing on the question of identity. He has dispensed with proof of the 3rd, 4th, 5th, and 6th articles, by admitting in acts of Court the facts in those articles pleaded, and also so much of the 2nd article as pleaded that he was admitted into holy orders. To talk then of a failure of proof of the identity of the party is to [393] carry an objection infinitely beyond anything I ever heard before. The proof, however, does not rest upon these admissions, or the other points to which I have adverted, for there are witnesses who do prove that he was the party who did officiate at the chapel on the two Sundays specified in the articles.

The first witness is George Huxham; he served the citation upon Mr. Shore, who appeared thereto as party in the cause. He says, "I first saw the Rev. James Shore on the 14th April, 1844, on which day, being Sunday, I attended in the forenoon, at Bridgetown chapel." . . . "On that day the said Mr. Shore performed the whole of the morning service, agreeably to the liturgy of the Church of England as set forth in the Book of Common Prayer, without any deviation, as far as I could perceive, and I followed him with a Prayer Book. He read the communion service, and he preached a sermon." . . . "On Sunday, the 28th July, in the same year, I again attended at the same chapel, and was present when Mr. Shore again performed the morning service by reading the prayers as before. I left the chapel at the end of the usual morning service. The table was spread as for the administration of the sacrament of the Lord's Supper; but I was not present when it was administered, if it were so. There was no sermon preached while I was there. I discovered no deviation then, except the addition of a few explanatory words in the epistle, which Mr. Shore put in after the word 'Abba,' which, he said, being interpreted, means 'Father.'" An interrogatory is put to this witness whether there were not deviations [394] from the Book of Common Prayer, for the purpose of shewing that Mr. Shore was not officiating as a minister of the Established Church. The witness, however, in reply, says, "I perceived no deviation from the appointed service other than I have deposed." This witness says, on the eighth article, he knows Mr. Shore to be "a priest in holy orders of the Church of England, by having seen his letters of orders, which he shewed at the sitting of the commission of inquiry at Totness respecting what is the subject of these proceedings." No witness could have been produced to prove more satisfactorily the identity of the party.

John Blatchford Gould, who had known Mr. Shore for some years by sight, attended the chapel on the 14th April, 1844, and deposes that Mr. Shore did, on that occasion, "perform the morning service of the Church of England in the usual way throughout; he read the whole of the prayers, including the litany and the communion service, and he preached a sermon from the pulpit;" . . . "he officiated in all respects as if he had been then the licensed minister, according to the rites and ceremonies of the United Church of England and Ireland." He attended again on the 28th July, 1844, when Mr. Shore officiated in the same manner. On this second occasion he says "no sermon was preached; the communion table was prepared for the adminis-

tration of the Lord's Supper, but I did not remain, and cannot depose of my own knowledge that it was administered." He says the chapel in question was licensed by the bishop of the diocese in November, 1832, and Mr. Shore was licensed to officiate therein in April, 1833, which [395] license was revoked on the 7th of March, 1844. He also was present when Mr. Shore produced his letters of orders to the commissioners at Totness.

A third witness, William Field, a gardener, says, since March or April, 1844, when the chapel was re-opened, "I have been the chapel keeper and pew opener, that is, when I see any strangers come to the chapel I put them into a vacant seat, both above and below." This, therefore, was a chapel to which, at least occasionally, strangers resorted, not merely the members of Mr. Shore's family. He says, "I cannot depose to any particular days or Sundays of the last year [1844] as to who performed the service in the chapel, because Mr. Shore has had ministers to assist him." He says he remembers the witness Gould coming to the chapel on two Sundays, and "most likely Mr. Shore performed the service on each of those days, but he cannot speak to it of a certainty." He says that "whenever the sacrament has been administered the table has been prepared beforehand, with a white cloth spread, which is never done on other days; that he cannot depose whether the service is regularly performed according to the Book of Common Prayer, but he has not noticed any departure from it by Mr. Shore."

This evidence appears to me quite sufficient to establish the facts that Mr. Shore, the party proceeded against, did, after the revocation of his license by the bishop of the diocese, and after a monition to abstain, officiate in this chapel; that he did perform divine offices on two Sundays, by reading prayers, and by preaching, though it is not proved that he administered the sacrament. [396] The question then arises, whether these acts do not constitute an ecclesiastical offence? I think it can hardly be contended that the reading of the service of the Church is not an offence by the common law of the land, after the revocation of the license given to him as a minister of the Church of England to officiate in this chapel, *pro hac vice*, as a church, after a full knowledge of the revocation of the license, and of the measures taken against him by the bishop. It was said by the learned counsel for Mr. Shore that he did no more than his duty, as according to the rubric of the Book of Common Prayer every priest of the Church of England is bound every day to read the form of prayer, publicly or privately, and that Mr. Shore, as a minister of the Church of England, in doing so in such a place, committed no offence. This is the first time I ever heard such an interpretation put upon the words of the rubric. It is right and proper, no doubt, that a minister in holy orders of the Church of England should read the prayers in the proper discharge of the public services, or if not, privately; but to say that he has a right to go to a place of this description—a building which had been severed from that Church—and read the prayers there, is neither more nor less than to say that any and every clergyman (for it applies to every clergyman) may read the services daily in public, if he please, any where; this is a proposition to which I cannot assent. It was said that it has not been specifically proved that there was a congregation present, or that the reading of the service was in public. What is necessary to constitute a congregation has not been very strictly [397] defined; but it has been commonly considered that "where two or three are gathered there together" is a sufficient number to constitute a congregation. By "publicly reading," I understand a reading to those who are present in a church or chapel. That strangers were admitted into this chapel appears from the evidence of Field, Huxham, and Gould; the two latter, as strangers, attended the service. I say, then, that Mr. Shore did publicly read the prayers to those present in the chapel—that this was not a reading in a private house, within the meaning of the 71st canon, as contended by Dr. Twiss. It was not the intention of the canon that any place, not consecrated or allowed by law, should be considered a private house; by "private house" is meant a dwelling-house, where a family reside. I am well satisfied that this chapel was not a private chapel. It is clear from the evidence in the cause that the chapel was open to any one who thought fit to attend the services. It appears then to me that so much of the charge against Mr. Shore has been established as proves that this gentleman publicly read prayers according to the Book of Common Prayer on two separate occasions, and preached a sermon on one, though there is not sufficient proof that he administered the sacrament. It was, however, contended in argument that, because the offence charged consists of

an aggregate of three or four offences, and all have not been proved, the offence charged fails. I should like to have had some authority in this Court for the assertion that, unless all the offences charged be proved, the party is entitled to be dismissed from the whole of the charge. I am [398] of opinion that there is no authority upon which such a position can be maintained, and I have no doubt I could find cases over and over again in which, where only one part of the charge has been made out, the party has been pronounced guilty. The case of *Hutchins v. Denziloe* (1 Hagg. Con. 181), referred to, was a proceeding under a statute where there are different offences subjecting the party to different degrees of punishment. The case of *Titchmarsh v. Chapman* (ante, p. 175) was a proceeding under a particular canon for not reading the burial service: the canon requires that convenient notice should have been given to the clergyman, which was not proved; and without that proof no offence is committed.

I am of opinion that quite sufficient is proved against Mr. Shore to render him liable to ecclesiastical censure and punishment. When the case came originally before the Court, the prayer at the conclusion of the articles was, that he should be admonished to abstain from performing ecclesiastical duties or divine offices in the chapel in question, be canonically punished according to the exigency of the law, and be condemned in the costs. As I understand, the prayer now made to the Court is not to the same effect; but I confess I am not prepared to go beyond that which is a canonical punishment; for however vexatiously Mr. Shore may have conducted himself here and elsewhere, I do not consider that I can take such conduct into the account. He is not called on to answer for the offence of seceding from the Church; for such an offence there must be other proceedings, in order to procure additional punishment; nor do [399] I think it by any means clear that, under the circumstances of this case, I can refer to the protest, which was overruled, or to the allegation of Mr. Shore, which was rejected; though, had that allegation been admitted, and the proof thereof failed, I might have taken a different course, for I do not know that the Court is bound by the prayer; it might be in itself illegal. On a consideration of the whole case, I am of opinion that the proctor for the promoter has proved the articles charging Mr. Shore with having been guilty of publicly reading prayers, according to the form prescribed by the Book of Common Prayer, and of preaching in an unconsecrated chapel without a license (leaving out administering the sacrament); that he has thereby incurred ecclesiastical censure; and that he must be admonished to refrain from offending in like manner in future. Should he be guilty of a repetition of this offence, it will be one not only against his diocesan, but against the authority of this Court. Though this gentleman is at this moment a minister of the Established Church of this land, from which office he cannot of his own authority relieve himself, still I do not think I am entitled to depose him from the ministry. I content myself by pronouncing that the articles have been sufficiently proved. I admonish Mr. Shore to abstain from offending in like manner in future in the parish of Bury Pomeroy, and in the diocese of Exeter, and elsewhere in the province of Canterbury; and I condemn him in the costs.

From this sentence an appeal to the Judicial Committee of the Privy Council is now pending.

[400] *TAPLEY against KENT*. Prerogative Court, Nov. 27th, 1845; March 24th, 1846.—A party propounding a paper as testamentary, containing on the face of it various memoranda of the property attested by witnesses, is not bound to examine more than those witnesses who attest that portion of the paper which is testamentary.—A paragraph in a paper in the following words—"the above named bonds were restored by A., and are placed in the hands of B. in trust for the use of C. after my decease," held to be testamentary, notwithstanding a delivery of the bonds had taken place, and in the donor's last illness.

[S. C. 4 Notes of Cases, 292; 9 Jur. 1041.]

William Tapley, M.D., died on the 6th of November, 1844, a widower, leaving an only child, Rosetta Philadelphia Tapley, spinster, surviving him.

In addition to freehold and leasehold property of the value of about 2000l., and other personalty of the value of about 500l., he held at the date of his death from the corporation of the borough of Queenborough certain bonds of the value of about 5000l.

Mrs. Kent, the sole party benefited, propounded, in the form of a condidit, the

following as a will, which was written on one sheet of paper; all the occurrences related on the face of the paper took place during Dr. Tapley's last illness.

"The under dated bonds of the mayor, jurats, bailiffs and burgesses of Queenborough to Wm. Tapley, Esquire, being his property, were placed, at his request, in the hands of Dr. H. Hawkins, to be taken care of by him until he, Wm. Tapley, Esquire, wishes to resume the possession of them."

Then followed a list of the bonds, eighteen in number, and immediately after the last:—

"The above named bonds were placed in my [401] care by Dr. Wm. Tapley, to be restored to him whenever he may wish for them.

"August 8, 1844.

"HENRY HAWKINS, M.D.,

"Home Mead, Milton, next Gravesend, Kent.

"Witnesses, Jane Kent, Milton House, Milton, next Gravesend; John Brown, No. 38 East Terrace, Milton, next Gravesend."

"The above named bonds were restored by Dr. H. Hawkins, and are placed in the hands of Mr. Thomas Burford, my brother-in-law, in trust for the use of Mrs. Jane Kent after my decease.

"WILLIAM TAPLEY, M.D.

"Witnesses, William Ransom, Jemima Nash Jenkins, Milton House, Milton."

"I hereby acknowledge the receipt of a parcel containing the before mentioned bonds from the hands of Dr. W. Tapley.

"THOMAS BURFORD.

"Witnessed by Jemima Nash Jenkins, August 8th, 1844, William Ransom."

On the allegation or condidit two witnesses only were examined, the above named William Ransom and Jemima Nash Jenkins.

[402] On the 1st Session of Michaelmas Term, 1845, publication was prayed, when an allegation was asserted in behalf of Miss Tapley, the next of kin. On the 3rd session, 27th November, a motion was made to the Court to direct the party propounding the alleged will to produce all the persons whose names appear on the paper, in order that they might be examined on interrogatories on behalf of the next of kin.

Addams in support of the motion contended that, on the face of the paper propounded, all the transactions in respect thereto were contemporaneous, and consequently that all whose names appear thereon ought to have been in the first instance examined. As that had not been done, the party propounding the paper ought now to produce the remaining persons.

Jenner and Harding *contra*. 1st. This application is made too late; when publication was prayed on our side, then was the time, if at all; for that was a sufficient notice to the opposite party that we did not intend to examine more than the two witnesses.

2ndly. The motion is novel and extraordinary. A party cannot be compelled to produce more than the attesting witnesses. Who are to be deemed attesting witnesses is settled beyond all doubt in a long series of decisions. *Doe dem. Bank of England v. Chambers* (4 A. & E. 410), Mr. Justice Patteson's observations in *Burdett v. Spilsbury* (10 Cl. & F. 394), and *Hudson v. Parker* (*ante*, p. 26), were cited.

[403] *Judgment*—*Sir Herbert Jenner Fust*. The present application arises from the peculiar character of the paper propounded. The only part which seems to me to be of a testamentary import is the following:—"The above named bonds were restored by Dr. H. Hawkins, and are placed in the hands of Mr. Thomas Burford, my brother-in-law, in trust for the use of Mrs. Jane Kent after my decease." This is signed by Dr. Tapley, and attested by two witnesses, who have been produced and examined. Assuming that other persons, whose names appear on other parts of the paper, were present at the execution of the above, or that all the transactions recorded on this paper were contemporaneous, of which there is no proof, for they might have occurred at different times of the day, I know of no rule by which I can compel the production of those persons for the purpose of being examined. To produce other in addition to the attesting witnesses is a matter entirely in the discretion of a party propounding a will. I am, therefore, under the necessity of refusing this application.

On the 4th session, 8th of December, the allegation asserted on behalf of the next of kin was waved, and publication passed. On the 24th of March, 1846, the cause came on for hearing.

March 24th, 1846.—Jenner and Harding for Mrs. Kent, argued that the paper was intended to operate only after Dr. Tapley's death. Though the bonds were delivered to Mr. Burford, that was done for a definite purpose, in order that they

might be safely kept; they [404] did not pass by the act of delivery—there was no trust which a Court of Equity could enforce.

Addams and Robertson for Miss Tapley. The document in question is not testamentary. There is no executor, no residuary legatee, no order in respect of the funeral, no direction for the payment of debts; in short, no ingredient which can necessarily make the paper testamentary. The words “after my decease” are in themselves equivocal, and are equally applicable to a gift of a totally different nature. It is proved the donor was in his last illness. It is incumbent therefore on the party propounding this paper to shew beyond a doubt that it is testamentary, that the writer had an animus testandi.

The very words amount to a declaration that the bonds were actually delivered over prior to the donor's signature; and to that fact there is the written declaration of Mr. Burford. Out of that declaration the Court cannot travel; it must take it that the delivery had actually taken place. The paper proceeds: “In trust for the use of Mrs. Jane Kent after my decease.” These words imply no more than that Mr. Burford was to hold the bonds till the donor's death; they mark the duration of the trust. The paper is a mere memorandum of a previous occurrence, and is a recital of what had been already done. It is evidence of a trust. Neither attesting witness in relating what had passed, either prior or subsequent to the execution, pretends to say Dr. Tapley spoke of, or intended to make, a will.

[405] *Judgment*—*Sir Herbert Jenner Fust*. The only question for consideration is whether the paper propounded is of a testamentary character; for that the portion of the paper alleged by the learned counsel, who appear for Mrs. Kent, to be testamentary was executed and attested in conformity with the law, and that Dr. Tapley was, at the time of the execution, *compos sui*, I am satisfied from the evidence before me.

At the first impression a trust appears to have been created in favour of Mrs. Kent in the following words:—“The above named bonds were restored by Dr. H. Hawkins, and are placed in the hands of Mr. Thomas Burford, my brother-in-law, in trust for the use of Mrs. Kent;” had this been all, the gift would have been of the nature of a *donatio inter vivos*, or, perhaps, a *donatio mortis causâ*, for it is proved Dr. Tapley was in his last illness; but then follow the words—“after my decease.” Dr. Tapley has then, I think, determined the matter for himself. It seems to me that Mrs. Kent was not to have any immediate benefit—that it was not to come into operation till after Dr. Tapley's death. Notwithstanding the delivery of the bonds, I think Dr. Tapley might have revoked the gift, and that had Mrs. Kent pre-deceased him, there would have been an end of the document in question. If that be so, there is clearly a testamentary bequest, and in that light I am disposed to regard it. I, therefore, pronounce for the paper propounded.

[406] HARRISON *against* HARRISON. Jan. 23rd, Feb. 21st, 1846.—A testatrix appointed two executors; one took probate, the other renounced by proxy, and, in addition, executed a deed of disclaimer of the trusts of the will. The executor, who proved, died, leaving goods unadministered; administration was granted to a residuary legatee; the surviving executor was not cited previously to the grant.—On question raised whether the administration ought not to be revoked, it was held that the grant had been made in conformity with the invariable practice of the Court, and that, though the surviving executor might have claimed probate prior to the grant, the Court was not bound to cite him. The administration was, therefore, confirmed.

[S. C. 4 Notes of Cases, 434; 10 Jur. 273.]

On petition.

Elizabeth Harrison died on the 28th of February, 1839, having by her will appointed her brother S. W. H., and her nephew W. H. executors. The brother on the 6th of April, 1839, proved the will, and the nephew previously thereto renounced the probate and administration by proxy duly recorded. On the 3rd August, 1839, the nephew, in addition, executed a deed of disclaimer of the trusts both of the real and personal estate. The brother on the 6th of March, 1842, died, leaving some of the goods of Elizabeth Harrison unadministered, and the nephew his co-executor surviving. On the 1st of February, 1843, administration of the unadministered effects was granted to W. B. H., one of the residuary legatees for life named in the will of Elizabeth Harrison.

In March, 1843, the said administrator gave notice of his intention to exercise the power of sale of certain premises which had been conveyed by way of mortgage, in 1829, to the said Elizabeth Harrison, and such sale took place. A question was subsequently raised whether the power of sale was properly exercised, on the supposed ground that the administration was void from the fact that the surviving executor was not called upon again to renounce the probate, &c., after the death of his co-executor, before the administration was granted to the residuary legatee.

In behalf of the administrator it was alleged in [407] the act on petition, after setting forth the facts that the letters of administration were granted in accordance with the usual and invariable practice of the Court, that such was a good and valid grant, and ought not to be disturbed, and that the renunciation of the executor was absolute and without reservation. In answer, it was replied for the surviving executor that, notwithstanding he had in the lifetime of his co-executor renounced probate, and administration of the goods of the deceased, yet upon the death of the said co-executor he became entitled to retract his renunciation, and to take upon himself the probate, and that until he had again renounced such probate, or had been duly cited and had refused, the Court had no jurisdiction to grant the said letters of administration.

Dodson, Q. A., for the administrator observed that he started with this favourable position, that the grant had been made in conformity with the invariable practice of the Court, and he defied the opposite side to produce a single instance to the contrary. He admitted certain dicta, in some common law and equity cases, are to be found to the contrary. He then proceeded to consider those cases (a) *seriatim*, and concluded by observing that they do not bear out the position contended for on the opposite side; and therefore, he submitted, the administration ought not to be disturbed.

Phillimore, R. J., for the surviving executor observed that the question now raised was, in these [408] Courts, one *primæ impressionis*, that the ancient practice was broken in upon in the middle of the last century, that as it is now acknowledged an executor may retract his renunciation, it is the duty of the Court to see that he exercises his election by citing him. The learned counsel examined some of the cases cited by the Queen's advocate, and contended they were not so decidedly against him as represented. In addition, he cited the following text writers:—Wentworth, Godolphin's Orph. Leg., Fonblanque's Equity, and Mr. Justice Williams on Executors, pt. 1, bk. 3, c. 6, s. 2, in which section all the authorities with their references cited on each side will be found.

Cur. adv. vult.

Feb. 21st.—*Judgment*—*Sir Herbert Jenner Fust*. The facts on which I have to determine this case are stated in the act on petition; and the question is whether the administration has been rightly or wrongly granted.

It was not denied by the learned counsel, whose duty it was to contend that the administration is null and void, that the grant was made in conformity with the invariable practice of the Court. I must add my testimony to this admission, for, though such has always been my opinion as to the present question, I have, in the interval between the argument and this day, been at some pains to investigate the matter, and the result is I cannot learn, either from those who are skilled in the daily practice of the Court, or from cases which have been handed down to me from my predecessors, [409] that such a grant of administration as the present was ever before in this Court called in question.

As this is so, I must observe it seems somewhat extraordinary, after the generations which have elapsed, that the question should at this day be raised. I certainly expected that my attention would have been directed, in the course of the argument, to some case in which the point had been directly raised and decided, or to some statute which had escaped my observation. It turns out, however, that so far from the learned counsel, who called in question the administration, having been able to cite any direct authority in support of his position, he plainly admitted his inability so to do, but referred the Court to certain dicta at common law and equity, which are by some, who perhaps have not given themselves the trouble to investigate those authorities, considered to be conclusive against the present usage.

It must, I presume, be allowed that when a practice which is the law of a Court

(a) The editor has not deemed it necessary to set out the cases here, as most of them are mentioned in the judgment.

has for generations prevailed, such practice ought not hastily to be departed from. To do so in any instance, and particularly in the present, would produce incalculable mischief; for it is not the present administration merely which is put at issue, but it is the principle involved in the grant; the alteration of which would unsettle many things heretofore done, would render questionable an infinity of titles, and, in short, be productive of inconvenience and mischief, the extent of which it is impossible for me clearly to foresee.

It has always been my understanding of the practice of the Ecclesiastical Courts, to which the ex-[410]-clusive jurisdiction on matters testamentary belongs, that, when one of more executors has renounced his right to a probate without any reserve, and that renunciation has been recorded against him, and not retracted, it is not necessary to cite him to refuse again, or to accept or shew cause why the grant should not be made to another person. Undoubtedly, by the ancient usage, when once a renunciation was recorded against him, he was held to be absolutely precluded, and was not, under any circumstance, permitted to retract. At the present day, however, the law is not so strict; he is permitted, if he think fit, to retract and claim the grant; but it is a totally different thing to say that it is incumbent on the Court, which is now contended for, to cite him to accept or refuse again, or to shew cause why the grant should not be committed to another. If the present grant has been rightly made, I have, I conceive, no power to revoke it. Before, therefore, I attempt to disturb the law, or make any alteration, I must be fully satisfied that that which has been deemed law for generations is decidedly erroneous; and, with a view to ascertain that point, I will now review the principal cases at common law and equity which have been cited; but, in so doing, it will be my duty to ascertain the actual point raised and decided in each case.

The first case referred to, in order of time, is an anonymous one in Dyer, 160 b., 4 & 5 Ph. and Mary. "Brown moved this case at the Bar:—A man made two his executors, and died, and one of them proved the will, and the other refused before the ordinary, and he committed the administration only to the other, and he made his executors and [411] died, and the executors brought debt against a debtor of the first testator. Whether the action lies or not? And it seemed to Brooke, Chief Justice, that it did, inasmuch as although the refuser might, at his pleasure, have administered notwithstanding his refusal in the lifetime of his companion who proved, &c., yet after his death his election is gone, and the ordinary may sequester the goods of the first testator, or administer if he choose, for now, in law, the first testator died intestate, &c." This case, then, if rightly decided, tends to shew that at this time the renunciation of an executor was considered peremptory. The reporter, however, adds a note, which throws some doubt on the decision, referring to an earlier case in the Year Books.

The next is *Hensloe's case*, 42 Eliz. (9 Rep. 36 b.). "Hensloe brought an action of debt against Gage and others, as executors; the defendant pleaded in abatement of the writ that the testator made one Hillesley co-executor with them, who had administered, not named in the writ. To which the plaintiff said that, before any administration, &c., the said Hillesley, being cited with the others to prove the will before the ordinary, refused" [having intermeddled he might have been compelled to prove] "and the defendants only proved the said will, &c., upon which the defendants demurred in law. But it was resolved without open argument," says the reporter, "that the plaintiff's replication to maintain his writ was not sufficient, for, notwithstanding the refusal of Hillesley in this case, he might administer after at his pleasure." The distinction is then laid down on the effect between some only and [412] all of the executors renouncing; but all that can be extracted from this long case, in reference to the present inquiry, is that, though an executor has renounced, he may afterwards prove the will. This case, then, will not establish the point contended for.

The next case is *Pawlet v. Freak* (Hard. 111); it occurred in 1658, and is evidently not well reported. "Upon English bill the case was that several executors were made, and one proved the will and the rest refused; and he that had proved the will died, and another person took out letters of administration, and preferred his bill in this Court; and the Court held clearly that by the proving of the will by one, they are all executors; and although he that proved the will die, yet no other person can administer during the lives of any of the rest; and it does not appear that they who refused are dead. Whereupon the bill was dismissed." This is the whole of that case, and as

the Queen's advocate observed, if it is to be taken literally, it certainly proves too much, for the dictum goes to this length, that under no circumstance can this Court grant an administration when there is an executor surviving; but it may be doubtful in what sense the reporter used the word "refused," whether there was strictly a refusal.

The next in point of date is the case of *House and Downs v. The Lord Petre*, 19th December, 1700 (1 Salk. 311). This purports to be a report of what occurred in the Court of Delegates; but to all who are conversant with the practice which obtained in that Court, it is well known the reporter must have [413] been indebted to another for all the information he had in respect of the decision. The abstract of the case, as reported, is—"Where there are two executors, and one proves the will and dies, the executorship survives to the other, but if he then renounces the testator is dead intestate." The case itself is thus stated: "Robert Lord Petre died in the year 1638, and made William Petre, Esq., his brother, his executor: William Petre died, and left Lucy, his wife, and one Henry Todd, his executors: Lucy only proved the will: she died, and left House and Downs her executors. Afterwards Henry Todd renounced the executorship of the will of William Petre, and administration was granted to the Lord Petre, now defendant, of the goods and chattels of Robert Lord Petre. House and Downs, being executors of Lucy, insisted that this administration belonged to them; and it was agreed by the whole Court, as well civilians as common lawyers, that Henry Todd, being a joint-executor with Lucy, and surviving her, the sole right of executorship to William Petre did accrue to him by survivorship, though he never concurred in proving the will, nor acted as executor, and this right was not divested out of him till he receded from it by actual renunciation" [there must, I think, have been a renunciation on the part of Todd, though that is not actually stated, otherwise I cannot understand the resolution I have just read]; "by which both William Petre and Robert Lord Petre as from that time died intestate, so as to entitle the ordinary to grant administration of the remaining personal estate; but not so as by relation to render effectual the will of Lucy, and transmit those ex-[414]-ecutorships to the plaintiffs." The report proceeds: "But in another matter the common lawyers and the civilians disagreed; and the common lawyers held that, where there are several executors, and one renounces before the ordinary, and the rest prove the will, by the common law, he who renounced may at any time afterwards come in and administer, and though he never act during the life of his companions, may come in and take on him the execution of the will after their death, and shall be preferred before any executor of his companions." . . . "But the civilians held that, by the civil law, a renunciation is peremptory."

To have authorized a decision in this case there must have been, in the majority of the Judges Delegate, at least one common law Judge; but it seems doubtful to me, from the statement in the latter part of the report, whether there was an actual decision.

The case of *Wankford v. Wankford*, though later in date, is reported in earlier pages of the same volume; and in the decision of that case the Lord Chief Justice Holt, at page 307, is reported, in referring to the preceding case, to have stated it thus: "In my *Lord Petre's case* . . . the case was that several executors were named in the will, and one refused and the others acted, and those that acted died, and administration was committed before any refusal by the surviving executor to J. S., the administration was held to be void, because the refusing executor surviving might, notwithstanding his former refusal, have taken upon him the executorship; and afterwards on another refusal of the surviving executor before the ordinary [415] administration was committed to the Lord Petre, and was held to be good, and upon that title he maintained in this Court an action of trover for a jewel."

This is a somewhat different representation, as the Queen's advocate observed, of *Lord Petre's case*; yet difficult as it is to say which is the correct one, it is clear that the question involved in *Wankford v. Wankford* was one of a totally different character from that which I am called on to decide. In *Wankford v. Wankford* the point determined seems to be that a debt is extinguished or released from the circumstance of an obligee making his obligor his executor, who acted; though he died before he took probate of the will.(a)

(a) In consequence of the case of *House and Downs v. The Lord Petre* being frequently cited, and some doubt raised as to the correctness of the report in Salkeld,

[416] The following question arose in the Court of Chancery, ann. 1734:—Whether an executor, who had renounced, but had assisted in the trust at the request of the testator, should have any additional consideration, when he had an express legacy for such his assistance. Such was the case of *Robinson v. Pett* (3 P. Wms. 249), which can have no bearing on the present question, though it was cited for a dictum, appearing in the judgment, that the [417] executor, who had renounced, might any time before a grant of administration retract his renunciation. That point is not here in dispute.

The next case in order of time, ann. 1764, which was cited, is *Rex v. Sir Edward Simpson* (3 Burr. 1463; 1 Black. 456), then Judge of the Prerogative Court. That case arose on an application for a mandamus. The Judge was called on to shew cause why a mandamus should not issue, requiring him to admit one of the executors under a will, who had renounced upon oath, to retract, and to grant probate of the will and codicils to him and another, who were the surviving executors.

the editor has, after some considerable labour, ascertained from the registries of the Court of Appeal and Prerogative Court the following particulars:—

Robert Lord Petre died in 1638, and by his will appointed his brother, William Petre, Esq., and two others his executors. W. P. alone took probate, and survived the other two executors. He died, and appointed Lucy, his wife, and Henry Todd his executors. Lucy alone proved the will in January, 1678; a power was reserved to H. T., who survived Lucy, but he renounced by proxy, 18th June, 1700, all right and title to the wills of W. P. and Robert Lord P. Lucy appointed by her will, not "House and Downs," but her son John Petre, Esq., and Francis House, her executors. Francis House alone at first took probate, 8th May, 1680, and a power was reserved to J. P., who proved 15th November, 1700. In June, 1700, subsequently to the renunciation of Todd, the right to the administration of the unadministered effects of Robert Lord P. was disputed between Thomas Lord Petre, the son, and Maria Heneage, the granddaughter ["nepotem ex filia"] of Robert Lord P. An act on petition was entered into on the 28th June in the Prerogative Court, and after argument the Judge, Sir Richard Raines, decreed the administration with the will annexed to the son, Thomas Lord P., and on the 1st July he was sworn administrator. A few days afterwards an appeal was commenced in the Court of Delegates, and the appellants were Edward Downs and Valentine House; the cause proceeded, and finally, on 19th December, 1700, the Court pronounced against the appeal, and condemned the appellants in the costs.

Who these appellants were the editor regrets he has not been able to discover. Their names do not appear in the act on petition. The assignation book of the Prerogative Court, which might supply the information, is at Lambeth Palace, and the papers in the cause in the Court of Delegates are not accessible; but thus much is clear, they were not the executors of Lucy, as stated by Salkeld.

The editor has read through the "process" of Thomas Lord P.'s case, and he must say it is impossible that the point of dispute between the common law Judges and the civilians, mentioned by Salkeld, could have arisen in reference to that case; whence he obtained any information of what passed amongst the Judges it is difficult to say.

The Judges who sat on the commission were the Chief Justice Holt, Mr. Justice Powell, Mr. Baron Hatsell, Sir Thomas Penfold, King's advocate, and Drs. Lane and Pagett.

The substance of Lord P.'s case, as given in *Wankford v. Wankford*, 1 Salk. 307, is not correct, for the editor has ascertained that, between the 8th May, 1680, when Lucy P.'s will was proved, and the 1st July, 1700, when administration was granted to Thomas Lord P. of the unadministered effects of Robert Lord P., no administration passed either of the will of Robert Lord P., William P., or Lucy P. If the Chief Justice did in *Wankford's case* make the statement attributed to him respecting Lord P.'s case, he must have spoken merely from memory after a lapse of more than two years from the decision: the report of the case was not published till 1717.

Wankford v. Wankford is reported also in *Cases temp. Holt*, 311; *Freem.* 520, and 11 *Mod. Rep.* *[38]. In the last report *Lord Petre's case* is stated to have been mentioned by Holt, C. J., in his judgment in support of the proposition—that an executor is an executor until actual refusal, though he die before probate.

There was no judicial determination in this case; a mandamus was not issued; and the case ended in a compromise between the parties. It would appear from the argument of Dr. Collier, who shewed cause against the rule, that at that time the oath of renunciation was absolute; and it is probable that, not long after this, the more qualified form of oath, which now obtains, was introduced. In the report of this case by Blackstone I find this question put by Lord Mansfield: "Is there any case where the Ecclesiastical Court has granted, or this Court has compelled them to grant, a new probate to an executor, who has formerly renounced?" The Attorney General, who argued for a mandamus, answered, "None; but here we come before any probate granted. Had probate been granted without a reservation for the others to come in (which in common cases is the usual course), we might have been too late." This is certainly a very important admission.

[418] The case of *Arnold v. Blencoe* (1 Cox, 426), which was before the Master of the Rolls in 1788, was cited; had that case been decided, it might have had some bearing upon the present question, but it was ordered to stand over for want of parties, and there is no further report of it.

I before observed that the ancient practice in the Ecclesiastical Courts was not to allow an executor, against whom a renunciation was recorded, to retract; that that practice prevailed in the last century I can shew by manuscript cases in my possession to which I will now advert.

Swinburne v. Richardson occurred in 1727. The testator made a will and appointed three executors; two renounced, the other, the widow, took probate and died, leaving part of the effects unadministered. The two executors, who had renounced, survived, but the grant was made to the executrix of the widow.

Again, *In the Goods of Bosley, Deceased*, in 1743. The testator made a will and appointed three executors; two renounced, the third was cited, but did not appear; the residuary legatee was an infant; the mother was appointed guardian of the infant, and, as such, administration was granted to her; she died; the Court refused the grant to the two surviving executors who had renounced, but, before decreeing the administration to an aunt as guardian, required the third executor, who had neither renounced nor appeared, to be cited again.

There is another case of later date (I forget at this moment the name and precise year) of some importance, though it was one of an intestacy. A [419] man died, leaving four sons, three of whom resident in this country renounced, the fourth was abroad; administration was granted to a creditor. Shortly afterwards the son, who had been abroad, returned, and called in the administration. The Court was of opinion that that administration was void, as he had not been cited, and granted it to him; but refused to join the other brothers, who had previously renounced, though they then prayed for the administration, and had a majority of interests.

As far as my information and recollection extend, this practice was uniform, and prevailed, till about the middle of the last century; after that, however, the rule appears to have been relaxed, and it was then held that a renunciation might be retracted if an executor thought fit to claim it, any time before the grant of administration passed the seal; though I know my learned predecessor entertained some doubts of the principle of allowing an executor, who had renounced for the purpose of becoming a witness in a cause, afterwards to retract his renunciation. *McDonnell v. Prendergast* (3 Hagg. Ecc. 216).

In direct affirmance of the present practice the case of *Williams v. Goude* (1 Hagg. Ecc. 577), as far as some of its incidents are concerned, is of an important bearing on the inquiry now before me. A testator appointed his widow and two others his executors; the widow took probate, and a power was reserved to the two to join at pleasure in the grant. They about six months after such grant of probate renounced and the widow continued to act for a period of two years, when, in consequence of [420] a dispute with some members of the family, she brought in the probate, but refused to propound the will.

The will was propounded by a substituted residuary legatee, which the learned Judge never would have permitted had he considered the renunciation of the two executors a nullity, or, in other words, that he was bound to cite them; they were not cited to become parties to the suit; and, ultimately, administration with the will annexed was granted to the residuary legatee.

Finding then that this recent case, as well as others which might be adduced,

supports my view, that the present practice is correct, and that the cases adduced from common law and equity do not make good the proposition contended for—that the Court is bound after an absolute renunciation of an executor to cite him before granting the administration to another—I shall, till better informed, hold, that as the party did not think fit to retract before the grant of administration, that the grant was properly made, and I do therefore confirm it accordingly.

No author of repute has probably expressed his opinion more decidedly of the necessity of calling on a surviving executor, who had renounced in the lifetime of his co-executor, to accept probate or renounce again, previously to a grant of administration of effects left unadministered, than Mr. Preston. See his *Essay on Abstracts of Title*, vol. i. p. 187, and also his edition of the *Touchstone*, p. 462. That learned writer does not give any authority for his position. He probably considers it to follow as a [421] necessary consequence from the right being admitted to exist: for that possessing the right, the executor is entitled to that notice, which is involved in a citation, of the fact of a claim being made to letters of administration; without which notice he might, from ignorance of the fact that a claim was made, be deprived of a fit and proper opportunity of asserting his own superior title.

IN THE GOODS OF ESTHER POWELL, Widow, Deceased. Prerogative Court, Jan. 15th, 1846.—The signature of a testatrix held to be at the end of her will as required by the statute, though a clause, written previously to the execution, ran partly opposite to and partly beneath the signatures of the testatrix and the attesting witnesses.

[S. C. 4 Notes of Cases, 391.]

Motion.

Esther Powell died on the 12th of December, 1845, leaving a brother, and several nephews and nieces. She executed her will on the 18th of September, 1844, which concludes thus:

“In witness whereof, I have hereunto set my hand (by making a mark) this the 18th of Septem^r one thousand eight hundred and forty-four, and if any money remains after the legacies ar paid, to be equally divided betwixt my appointed executors, and

X

of ESTHER POWELL.

Witnesses, Thos. Atkinson, John Freeman.
Thomas Goodge, of Notting Hill.”

The will completely filled two sides of a sheet of paper. The writer of it swore that the whole [422] of the will, including the clause, “and if any——. Notting Hill,” was written previously to the execution.

Harding moved for probate of the entire paper, and submitted that it was executed “at the foot or end,” though he allowed he could not refer to a case with a concluding clause written as above.

Judgment—*Sir Herbert Jenner Fust*. This paper appears to have been written according to instructions, entirely at one time, as far as and including the testimonium clause, with which it would seem it was, in the first instance, intended to be concluded; but prior to the execution, the addition, as seen above, was made. The question is whether the paper is duly executed by being signed “at the foot or end.” Had the deceased put her signature on the third page of the paper, that would have been clearly sufficient. The addition is made after the testimonium clause, which is in itself unnecessary, and is the means of there not being space left for the signature immediately under the additional clause. The signature is not at the foot, but I will not say it is not at the end of the will. I am of opinion that there is a sufficient compliance with the provisions of the statute, and I decree probate of the paper as it stands. All these cases depend much upon their own peculiar circumstances.

[423] IN THE GOODS OF GEORGE WARTNABY, ESQ., Deceased. Prerogative Court, March 10th, 1846.—Libellous passages, unconnected with the testamentary dispositions in a will, on a stranger allowed to be omitted in the probate copy.

[S. C. 4 Notes of Cases, 476. Referred to, *In the Estate of White*, [1914] P. 153.]

Motion.

George Wartnaby, late of Market Harborough, in the county of Leicester, Esq.,

deceased, died on the 6th day of December, 1845, leaving a will dated in the year 1839, and a codicil dated in 1841, both duly executed and attested, to which his widow and a nephew were appointed executors.

Addams moved the Court at the desire of the widow, who alone was about to take probate, to permit a passage contained in the first sheet of the will, and a long paragraph in the second and third sheets, to be omitted in the probate copy, as they contained (in the words of the learned counsel), "a purely voluntary and atrocious libel on a mere stranger, unconnected with the testamentary disposition of the deceased." In support of the prayer, it was urged that there was nothing in the paragraphs required to be struck out in the slightest degree testamentary; that it cannot be the law that an instrument partly dispositive should be made the vehicle for introducing libellous matter; that there was no precedent for refusing the prayer, which is in this case *primæ impressionis*, for though the Court, in *Curtis v. Curtis* (3 Add. 33), refused to expunge a passage from the will itself, reflecting on the character of a wife, still there was no application, as here, to omit the objectionable clauses in the probate [424] copy only, allowing them to remain in the original will.

Sir Herbert Jenner Fust. I should be most happy to grant the prayer if a precedent could be adduced for so doing; but I fear I have no authority for taking such a step, nor do I see where to stop if I accede to the motion.

After deliberation, the learned Judge, on a subsequent day, permitted the probate copy to go out with the omission of the passages as prayed.

IN THE GOODS OF MARY ANN JONES, Spinster, Deceased. Prerogative Court, May 12th, 1846.—A will written, executed and attested on two sides of a sheet of paper, but containing on the third side a clause, written before execution opposite to a bequest of a legacy, qualifying that bequest, held not to have been signed "at the foot or end," in respect of the addition on the third side.

[S. C. 4 Notes of Cases, 532.]

Motion.

Mary Ann Jones died in January, 1846, leaving a holograph will, dated 11th of May, 1840; it was written, executed and attested on two sides of a sheet of letter paper, and contained some alterations and interlineations, unexecuted and unattested, of which no explanation as to the time at which they were made could be given; but in respect of them no important question was raised. In the body of the will, partly on the first side of the sheet, and partly on the second, there was the following bequest:—"The interest of the whole of my property I wish dear Margaret to enjoy, and at her death the principal to be divided into four shares," &c. Opposite to the latter words of this bequest the following clause was written by the testatrix on the third side [425] or page:—"In the event of dear Margaret's marriage I should wish half the interest of my property to be enjoyed by Harriet Lloyd." This addition was not executed or attested; but both of the attesting witnesses to the will swore they observed it prior to the execution of the will, and one of them moreover swore "that she thought that she was to put her name at the foot of the third side of the said will underneath the said addition, until the deceased directed her to sign her name on the second side thereof, which she accordingly did."

Robinson moved the Court to decree letters of administration with the will annexed, as there was no executor appointed, with the aforesaid clause written on the third side of the paper, as being a part of the will, and cited the decision *In the Goods of Esther Powell, Deceased* (ante, p. 421), shewing the Court has not rigidly interpreted the words of the Wills' Act, which requires the signature to be made at the foot or end of the will.

Judgment—Sir Herbert Jenner Fust. An important question is here involved whether the addition on the third side of the paper is to be included in the will. The intention of the testatrix is perfectly clear, the object is to qualify the interest of Margaret Jones. If I could embody this addition in the will, I would do so; but it stands as an independent clause; there is no reference made to it on the second side of the paper. The case of *Esther Powell* is to my mind different; there I went as far [426] as I could, and I decided that motion on the ground that though the signature was not at the foot, still that it was at the end. I am afraid of straining the principle and going further. I must, therefore, reject this addition, and though I ought not, in the absence of Harriet Lloyd, properly to decree the administration with the will annexed without this clause,

yet as there is no probability that she will propound the paper with the addition, I shall venture to make such decree.

IN THE GOODS OF THOMAS NEWTON PENNY, Deceased. Prerogative Court, July 15th, 1846.—A next of kin having renounced his right, and consented to the grant of an administration for a limited period, is not entitled, on retracting his renunciation, on the death of the administrator leaving goods unadministered, to a *de bonis non* grant, but must take the administration limited as before, until the event happen for which the original grant was made.—Justifying security in the second grant is to be regulated by the amount of the estate left unadministered, and in addition the ordinary security is to be given to the amount of the original estate.

[S. C. 4 Notes of Cases, 659.]

Motion.

Thomas Newton Penny died in the month of October, 1826, intestate, leaving behind him Sarah Penny, his relict, a lunatic, and seven children, the only persons entitled in distribution to his personal estate.

In the month of March, 1827, letters of administration of the goods of the said deceased were granted to a creditor of the said deceased, for the use and benefit of the said relict during her lunacy, upon exhibiting an inventory and the sureties justifying. The relict was not found by inquisition a lunatic, and was not served with a decree. Six of the children renounced their right to the administration, and consented that the same might be granted [427] to the creditor; the other child, James Penny, was duly cited, being beyond the seas, but no appearance was given for him. The property was sworn under 14,000*l.*; the administrator died, leaving the sum of 834*l.* unadministered. At the above date of the motion it was sworn that the relict still continued a lunatic; and John Penny, one of the children, who had consented to the grant to the creditor, retracted his renunciation, and applied for the administration of the unadministered effects. Some doubts were entertained in the registry of the nature of the grant to be made, and particularly of the amount of the security to be taken for the due administration.

Robertson submitted—Firstly. That the son was entitled to a *de bonis non* grant in his own right; for, though it is the law of the Court to give the administration in the first instance to the widow, still, for reason shewn, the Court exercises the discretion with which it is invested by the statute, and gives the administration to the next of kin. In the present instance there is sufficient reason for so doing; the widow still continues a lunatic. Secondly. Supposing the Court should be of opinion that the son cannot take a *de bonis non* grant, he ought not to be called on to give justifying security to the amount of 28,000*l.*, for that would be unreasonable and unjust, and contrary to the letter and spirit of the statute, which provides that the surety “shall have respect to the value of the estate” to be administered, which, in the present instance, does not exceed 834*l.*

[428] *Judgment*—*Sir Herbert Jenner Fust.* It is impossible that I can allow the son a *de bonis non* grant. He consented to the former grant being made for the use and benefit of the widow during her lunacy, which is still continuing. The former grant is not a cessat. He must take the administration subject to the same restriction as before, but it will be sufficient that the usual security be given, justifying to double the amount only of the estate now remaining to be administered.

NOVERRE *against* NOVERRE. Consistory Court of London, June 27th, July 7th, 1846.—Extreme familiarities of a wife with an articulated pupil of the husband inconsistent with the relative position of each, coupled with confessions of the wife of her criminality, held sufficient to found a sentence of divorce by reason of adultery.

[S. C. 4 Notes of Cases, 652; 10 Jur. 622.]

This was a suit for a divorce brought by the husband, a surgeon, against his wife, by reason of adultery, alleged to have been committed by her with Mr. Charles Caulfield Moore, an articulated pupil, who resided with the family in that capacity from March, 1843, to April, 1845. The parties to the suit were married the 29th of January, 1839, and cohabited together until August, 1845, in which month Mrs. Noverre left her husband's roof. The issue of the marriage was the birth of two

children. On the libel, which consisted of fifteen articles, five witnesses, independent of one who proved the marriage, were examined; the Rev. W. Moore, the father [429] of the paramour, three female servants, and Mr. Richard Ratcliffe. The principal part of the Rev. W. M.'s evidence in reference to Mrs. N.'s confession of her guilt is embodied in the judgment. The evidence of the other witnesses on the important articles is as follows:—

Esther Catmore, who lived as housemaid with Mr. N. from September, 1844, until August, 1845, deposed on the fifth article: "During the time I was in Mr. Noverre's service he went out regularly soon after breakfast to visit his patients, and did not return, usually, until four or five o'clock in the afternoon; that was his habit; he sometimes returned in the middle of the day for a short time, but he was generally out from breakfast until four or five o'clock in the afternoon."

On the sixth article: "Not quite as soon as Mr. Noverre went out to visit his patients, but not long afterwards, when Mr. Moore had nothing to do in the surgery and was at leisure, he used to go to the dining or drawing-room where Mrs. Noverre might be. And he would remain there half an hour or so, sometimes before luncheon and sometimes afterwards. I do not recollect any occasion on which he was alone with Mrs. Noverre for hours; it was for half an hour or so, sometimes possibly for an hour, sometimes for ten minutes, just as he might not be wanted in the surgery. Sometimes, after luncheon, Mrs. Noverre would tell me to draw the blind down as she wished to lie down and try to sleep, and after that I used to hear Mr. Moore go into the room; there was no secrecy about it; sometimes when I went into the room where they were, I found them standing together at the fire-place, and sometimes [430] at different parts of the room, but never sitting or standing close to each other, nor ever in confusion but once, when I went into the room quickly, and he was standing at the fire-place, and she was sitting on the sofa, he coloured up very much and so did Mrs. Noverre; but there was nothing to call for it as I saw. When Mr. Noverre returned, as soon as his gig was heard, if Mr. Moore was with Mrs. Noverre, he used to go down quickly to the surgery and get there before Mr. Noverre; Mr. Moore was generally with Mrs. Noverre about the time Mr. Noverre came home, and he used then to go to the surgery sometimes to get there before Mr. Noverre, and sometimes he did not. I can't say that he tried to get there before Mr. Noverre. I never observed anything on these occasions of Mr. Noverre's absence from home to lead me to say that Mr. Moore and Mrs. Noverre had been guilty of adultery."

On the seventh article: "Mrs. Noverre always retired to her bed-room before Mr. Noverre, but I cannot say how long before him, for when she went to her room the servants went to bed shortly afterwards, and Mr. Noverre remained up reading, but whether to a late hour I cannot say. When I have been going to bed I have several times seen Mrs. Noverre on the stairs in her dressing-gown talking to Mr. Moore; the stairs were so formed that I did not see Mrs. Noverre, and she could not see us, until we came almost close upon her; her dressing-gown on these occasions was fastened round the waist, but I observed it was opened so as to expose part of her bosom. I can't say how long she stood talking in this way, we passed on by them; she was generally standing with her back to the wall, and he with his [431] candle in his hand, as if they were saying 'good-night;' there was no secrecy about it, and I never saw any familiarity pass between them."

On the eighth article: "Mr. Moore's bed-room was on the floor above Mrs. Noverre's; I have seen her go into his bed-room, and heard her go when he has been there, but never to remain there with him. She has gone in for household purposes, and sometimes when he has been there and she did not know it. I never knew her go into his bed-room knowing he was there; I have seen her at his bed-room door talking to him in the room; I had nothing to do with the nursery; I saw Mrs. Noverre sometimes in the surgery with Mr. Moore, sometimes he was alone there with her, and sometimes the boy was there; they did not walk in the garden much together; they did sometimes; I did not observe that they conducted themselves towards each other in a fond or familiar manner; I never saw any impropriety between them."

Eliza Thompson, who lived as nurse for two years and three months, and quitted in May, 1845, deposed on the fifth article: "During the time I was in Mr. Noverre's service it was his habit to go out soon after breakfast to visit his patients; he came home about the middle of the day for a short time, and again about four o'clock or so,

and then he did not come home until about dinner time, seven o'clock, and sometimes he kept that waiting; he was out almost all day and his return was uncertain."

On the sixth article: "As soon as Mr. Noverre left home in the morning, Mr. Moore used to go to the dining-room where Mrs. Noverre was; he generally did so, and there he passed the greater part of the day whilst Mr. Noverre was absent; it was [432] generally in the dining-room, but sometimes in the drawing-room, and always with Mrs. Noverre alone. I never observed that the window blind was drawn down on such occasions; it might have been, but I did not notice it. I several times, when I went into the room where they were, found them sitting or standing close to each other; I can't say that I ever observed them in a state of confusion, but my going into the room seemed on several occasions to take them by surprise, and there was a moving and rustling of Mrs. Noverre's dress; I never observed them whispering with their faces close to each other. On Mr. Noverre's return home Mrs. Noverre used to go up stairs into the nursery, and Mr. Moore used to go to the study or surgery, and so as that Mr. Noverre should not see him, as if he did not wish Mr. Noverre to know that he had not been remaining in the surgery. I never saw anything from which I could say, or from which I believed, that anything improper passed between Mrs. Noverre and Mr. Moore; they were very intimate and almost always together, but I never saw anything improper."

On the seventh article: "Mrs. Noverre used generally to go to her bed-room about ten o'clock; Mr. Noverre used to sit up reading down stairs until late—as late as one o'clock. Mrs. Noverre used frequently, as Mr. Moore was going to his bed-room at night, to come out of her room, or out of the nursery, if she happened to be there, to speak with him, and they would remain talking on the landing place together for five or ten minutes; Mrs. Noverre on these occasions would be in her dressing-gown, but not unfastened, that I observed, so as to expose her neck or bosom; where they stood talking they [433] could not be seen until a person came close to them, but they could hear people coming; I never witnessed any familiarity pass between them."

On the eighth article: "I have known Mrs. Noverre to go into Mr. Moore's bed-room, when he has been there, two or three times; his bed-room was on the floor above her's; she remained there with him five or ten minutes; Mr. Moore's room being directly over the nursery, I could hear them together there; Mr. Moore sometimes came into the nursery with Mrs. Noverre whilst I was there. I don't know whether he was ever there with her when I was absent; they often walked alone together in the garden. I never observed that they walked particularly in the retired parts; they conducted themselves towards each other in a fond manner. I considered from what I saw that Mrs. Noverre was very fond of Mr. Moore, but I never saw anything improper between them, though they were very fond of each other's company and almost always together."

Eliza Holland, who lived as cook for a year and a half, and quitted in January, 1845, deposed on the fifth article: "Mr. Noverre went out to see his patients soon after breakfast, and was away from home the greater part of the day; he came home about lunch time, and then not again until dinner time."

On the sixth article: "Whilst my master (Mr. Noverre) was from home, Mr. Moore and Mrs. Noverre were almost always together. As soon as Mr. Noverre went out, Mr. Moore would go to the dining-room where Mrs. Noverre was, or if he went into the garden, Mrs. Noverre joined him there; they were together as much as they possibly could be all day long whilst Mr. Noverre was out. I [434] never observed that the blind of the room in which they were together was drawn down. I have several times, when I have gone into the room, found them sitting or standing close to each other, but I did not notice that they were particularly confused. I used to notice that they talked very gently to themselves, but not with their faces close to each other; I did not see that. As soon as Mr. Noverre came home, Mr. Moore left Mrs. Noverre directly, and went to the surgery, to get there before Mr. Noverre could see him; I noticed that always, and we could not help all of us noticing that Mr. Moore and Mrs. Noverre were always together whilst Mr. Noverre was absent; and we all spoke of it as strange and wrong; but I never saw any actual impropriety, or familiarity, to make me believe that they committed adultery together."

On the seventh article: "Mrs. Noverre used always to go to her bed-room a long time before Mr. Noverre, who sat up reading: I have often seen her afterwards on the stairs (or rather the landing) talking to Mr. Moore; she would stand talking

to him with nothing on but her dressing-gown for ten minutes, or a quarter of an hour; her dressing-gown was not unfastened, but it was loose upon her, and exposed her neck and bosom a little; where she stood talking with Mr. Moore she could not be seen until we were close to her, but she did not mind being seen by us girls; she remained there whilst we passed, and we could hear her afterwards in conversation with Mr. Moore after we had gone to our room; I never saw any indecent familiarity pass between them."

On the eighth article: "I have seen Mrs. Noverre many times just standing within Mr. Moore's [435] room whilst he was washing his hands or brushing his hair; she would remain taking with him five and ten minutes, and sometimes half-an-hour; it is difficult to say how long, for they were always together almost, sometimes in the passage, sometimes in his room, sometimes in the nursery, often in the garden in the arbour by themselves; in fact, they were like lovers, and always together, when they could be; but I never saw anything improper or anything of that kind between them; and, as to us girls, they did not seem to care about being seen by us; but they did not like to be seen by Mr. Noverre, for, as soon as his chaise drove up, Mr. Moore used to run to the surgery; and we used to say, as soon as we heard the chaise—'Now Mr. Moore will be down into the surgery.' I was not married when I was in Mr. Noverre's service; my husband is a bricklayer."

Mr. Richard Ratcliffe deposed on the twelfth article: "I know Mr. and Mrs. Noverre, the parties in this cause. I have known him many years; Mrs. Noverre I did not know until shortly after their marriage; since their marriage I have known them both well; they frequently came to see me; in August last I received a letter from Mrs. Noverre, from Cheltenham, where she then was; she soon afterwards returned to the neighbourhood of London, and I saw her at her half-brother's in Park Street, Camden Town, where she had written to me to say she was going; her letter had informed me of her infidelity to her husband; and, at this interview, she told me that Mr. Moore was the person with whom she had been guilty. I did not know Mr. Moore, except by name, as a pupil of Mr. Noverre; she told me that under pretext of going to London [436] she had gone to Cheltenham, where she had written to Mr. Moore to come to her, but that instead of coming himself, he had sent his father, and that he had refused to come to her; and she told me that she should never return to her husband in consequence of her infidelity to him. I wrote immediately to Mr. Noverre, to inform him of the communication Mrs. Noverre had made to me; and since that time they have never seen each other. Mrs. Noverre has been living since with her half-brother. There was no other person present when Mrs. Noverre made this communication to me; she made the communication to me, consulting me as the only person she could go to, as to what she should do, as Mr. Moore would not receive her, and her father would not either; she was in great distress, and made no secret of her guilt."

The witnesses were not cross-examined, and there was not any plea given in on behalf of the wife.

The Queen's advocate and Jenner for the husband. Confession, made without a fraudulent purpose, is very stringent. It is true the 105th canon prohibits the Court from pronouncing a sentence for a divorce on the sole confession of the parties; but, perhaps, a question might be made whether that canon has not reference to a divorce a vinculo, and not to a divorce a mensa et thoro.^(a) Be that as it may, there is in this case something more in the evidence of the three servants, particularly on the eighth article. Proof of familiarities and opportunities [437] for guilt are sufficient; it is not necessary the witnesses should depose to an act of adultery. The nature of the familiarities and opportunities deposed to makes it morally clear that adultery was committed.

Curteis for the wife contended that the facts deposed to by the servants were insufficient to found a sentence of separation; there was not judicial proof of guilt, and that the confession of Mrs. N. could not be considered.

Cur. adv. vult.

July 7th.—*Judgment*—Dr. Lushington. The sole question in this case is whether the adultery charged against Mrs. Noverre is established by legal proof; for I think

(a) See the observations of Lord Stowell in *Mortimer v. Mortimer*, 2 Hagg. Con. 316.

it is impossible to peruse the evidence without being morally satisfied that the accusation is founded in truth.

The facts lie in a very narrow compass. Mr. Noverre is a surgeon resident at Stanmore. In March, 1843, the son of the Rev. Mr. Moore went to reside with him as a pupil, being then about eighteen years old, and remained till the beginning of April, 1845. During this period, but at what time, or on what occasion, it is neither alleged nor proved (nor is it necessary), Mrs. Noverre is accused of having committed adultery with this young man.

It has not been contended, and indeed could not be, that the evidence of the three servants, who alone speak to what passed between the parties, could, unassisted, establish a fact of adultery. The [438] question is whether, in conjunction with certain confessions of Mrs. Noverre, there is sufficient to satisfy the exigency of the law?

It appears that about three or four months after Mr. C. C. Moore left Mr. Noverre, Mrs. Noverre was at Cheltenham; but on what day she quitted her husband's house, or for what reason, there is no evidence. The Rev. Mr. Moore had an interview with her at Cheltenham, and the circumstances which occurred on that occasion are set forth in his evidence on the tenth article. In allusion to a letter mentioned in the preceding article, purporting to be written at the end of July or the beginning of August, 1845, from Mrs. Noverre to Mr. C. C. Moore, he says, "In consequence of the letter which as I have said my son shewed to me, I went over to Cheltenham, a distance of about seven miles from my residence at Brimsfield, and called on Mrs. Noverre, whom I had ~~never~~ (sic) before seen." [The word "never" being in the original struck through, it is not clear to my mind, said the learned Judge, with what intention that was done, but I am of opinion that the identity is sufficiently proved by Mr. Ratcliffe.] "I did not state to her that my son had informed me of the connexion which had subsisted between them; for I was not then aware of it. I was only aware then of an attachment between them, which my son had informed me of, and my object was, with my son's authority, to tell her, as I did, that the acquaintance between her and my son must cease." [I must observe that what comes from the son cannot be evidence against Mrs. Noverre, for it is merely hearsay, and accounts only for his visit.] "If I had known of a [439] criminal intimacy between them, I should not have gone to her. In consequence of something that fell from her at the interview, and her informing me that she was separated from her husband, I asked her whether the cause of that separation was her infidelity, and she answered me that it was. That led me to ask her whether my son was the party, and she told me he was: I, therefore, took my hat and left her at once."

I must say that the evidence of this gentleman is not given with that detail which would have been more satisfactory to the Court; yet I see no reason to entertain a doubt that Mrs. Noverre had had a criminal connexion with this young man, and that she in substance admitted the fact.

The greater part of the deposition of this witness on the next article is not evidence; it relates to a letter not produced, a letter said to have been written by Mrs. Noverre, in which, it is said, she admits the offence charged. The Court has every reason to complain of the absence of that letter. The withholding that letter has led to the introduction of matter which could not be received as evidence in any Court. The witness purports to set forth the contents of a written instrument, admitted to be in existence, and yet declines to produce that instrument. Now I must say the Court has great cause of complaint that the Rev. Mr. Moore, a clergyman of the Church of England, should, particularly in an Ecclesiastical Court, have thought fit to interpose an obstacle to the administration of justice. I entertain not a shadow of a doubt that, had the Court been applied to, it has the power to compel, and would have compelled, the production [440] of a letter or any other document essential to the investigation of truth, and the due administration of justice; lamentable indeed it would be were a Court left without such power.

The next evidence to which I shall advert, but I do not think it necessary to read it, is that of Mr. Ratcliffe respecting the confession of Mrs. Noverre. The substance is, she admitted to him her guilt, and the partner of it to be Mr. C. C. Moore. There are two requisites to a confession; one, that a witness truly state that which purports to be a confession; the other, that the party making the confession speak the truth.

I am satisfied with the entire veracity of the witness, and I am equally satisfied with the genuineness of Mrs. Noverre's confession.

I am, however, forbidden by the 105th canon to pronounce a separation on confession alone; and the reason obviously is this—no tribunal is to be trusted with the power to determine that which is impossible, namely, whether such a confession be genuine or false. Still it is evidence of the highest character, and I well recollect, in the case of *Mortimer v. Mortimer* (2 Hagg. Con. 315), it was strongly relied on by Lord Stowell. There must be other evidence then, though I am not aware of any case in which the quantum or description, as auxiliary to a confession, has been the subject of discussion.

The evidence of the servants may be summed up in very few words. They prove that there were most ample opportunities for the commission of adultery, provided the inclination existed on both sides; but [441] in this case such opportunities are not sufficient. I must not forget the relation in which Mr. C. C. Moore was placed; he was a pupil of Mr. Noverre, living in the same house with Mrs. Noverre; and Mr. Noverre himself, a practising surgeon, was necessarily much from home. That an intimacy should, therefore, have existed between Mr. C. C. Moore and Mrs. Noverre is not at all extraordinary; and on that alone I could not arrive at the conclusion that the parties had been guilty of the offence charged. The evidence, however, goes further; it shews that they did avail themselves of those opportunities to an extent inconsistent with the relative duties of each; that their intercourse, though no act of criminality is deposed to, was more frequent, more intimate, and fuller of suspicion than was to be expected from their positions.

Having no moral doubt as to the truth of the case, being perfectly convinced that the confessions are genuine, and that the foundation for them are laid in the evidence, namely, extreme familiarity, and most ample opportunities, I have come to the conclusion that I shall not be violating the spirit of the canon by pronouncing for the separation. At the same time I will add I have felt some difficulty in coming to this conclusion, and regret I have had to act, from an anxiety not to cause additional expense in calling for the letter which has been withheld, without better evidence. I pronounce for the prayer of the husband.

[442] FRERE *against* PEACOCKE. Prerogative Court, August 6th, 1846.—Moral insanity, or the perversion of the moral feelings, not accompanied with insane delusion, which is the legal test of insanity, held to be insufficient to invalidate a will.

[Referred to, *Davis v. Gregory*, 1873, L. R. 3 P. & D. 31.]

Sir Thomas George Apreece, Bart., died by his own hands on the 30th December, 1842, aged fifty-one, possessed of realty to the amount of between 200,000l. and 300,000l., and personalty to the amount of 20,000l.

By his will, executed in June, 1836, the whole of his property, save 100l. to each of his executors, Messrs. Frere and Foster, was devised and bequeathed to trustees for sale for the benefit of St. George's Hospital.

The will was propounded by Mr. Frere, and opposed by Mrs. Peacocke, the sister, and only next of kin of the deceased.

Four allegations were admitted in the cause, on which ninety-one witnesses were examined, and, in addition, there was an almost countless number of exhibits.

The general purport of the case, as set up against the will, was to shew that the deceased was, if not from the date of his birth, yet at least from a period shortly after commencing, of unsound mind, and that he continued in that state through life.

The eleventh article of Mrs. Peacocke's allegation pleaded: "That at all times, but more particularly after the death of his [Sir T. G. Apreece's] mother [in 1823, he] the deceased evinced evident [443] gratification in causing inconvenience and annoyance to others. That he took an insane delight in inducing poor people whom he met on the road, and in particular the aged and infirm, to get into his carriage as if for the benevolent purpose of helping them on their way, but, as soon as they were therein, driving at a rapid pace for several miles, and, as long as the horses could be kept at their speed, far beyond their place of destination, refusing them any assistance in the way of money or otherwise for their conveyance back, and insanely rejoicing in the suffering he had caused them. That in like manner he had an irrational pleasure in teasing and tantalizing his inferiors by insincere offers of gifts,

whether of raiment or money. That he also took an unnatural and childish pleasure in speaking and hearing of the pain or suffering of his fellow-creatures, rubbing his hands, grinning, and otherwise evincing an irrational gratification at any evil tidings respecting them."

The thirty-sixth article pleaded: "That the said deceased never appeared to have any sense of religion, or ever attended any place of divine worship, and was eminently uncharitable all his life, and generally so known to be by all his acquaintances, and that neither St. George's, nor any other hospital, nor any such or similar institution, was either subscribed to by, or even apparently any object of interest to, the deceased at any period of his life."

The case was argued in the sittings after Trinity Term, 1845, by Phillimore and Jenner for the executor, and by Dodson, Q. A., Addams and Harding for Mrs. Peacocke.

[444] *Judgment (a)*—*Sir Herbert Jenner Fust.*

The present is a case undoubtedly of very peculiar difficulty, and requires to be well considered; for, though the principle, by which insanity is tested, has long been recognised in Courts of Law, a great part of the argument turned upon a re-examination of the principle itself. In addition to the decided cases of this and other Courts, medical writers were referred to, who have of late years, since the commencement of the present century, in very learned treatises introduced a new doctrine (for that they admit) on the subject of insanity. By them insanity is now considered to be twofold—moral and intellectual. In the former, the intellect may remain undisturbed—free from delusion; whereas, in the latter, the brain is disordered and the intellectual faculties impaired, though sometimes after death the brain does not betray disease.

Before making further inquiry into this novel doctrine, it may not be amiss briefly to call attention to what has hitherto been considered in Courts of Law the test of insanity.

In the well known case of *Dew v. Clark* my [445] learned predecessor expressly stated his opinion, founded on his own observation, as well as that of medical writers of repute in his day, and guided by what had occurred in this and other Courts, that the true criterion is, where there is delusion there is insanity; or, as the learned Judge, referring to the arguments of one of the counsel, who contended that the will was valid notwithstanding the insanity of the deceased, said, "It is only a belief of facts which no rational person would believe that is insane delusion;" and then fortifying that opinion by authorities, medical and legal, observed, as Lord Erskine said, "Delusion, therefore, where there is no phrenzy or raving madness, is the true character of insanity."

I am not aware that this test has ever been varied or departed from in these Courts. Dr. Prichard, "on the different forms of insanity in relation to jurisprudence," himself admits (p. 16), "It seems on the whole to be settled doctrine of English Courts at present that there cannot be insanity without delusion, or, as it is otherwise expressed by physicians, without illusion or hallucination, that is, without some particular erroneous conviction impressed upon the understanding, the affected person being otherwise in possession of the full and undisturbed use of his mental faculties."

It is not here necessary to observe upon the distinction, long since taken, between the legal effects of delusion in civil and criminal cases. The law in civil cases, which is established, is all the Court is called on to notice. "The law voids every act of the lunatic during the period of lunacy, although the delusion may be extremely circumscribed, [446] although the mind may be quite sound in all that is not within the shades of the very partial eclipse, and although the act to be voided

(a) The entire judgment, from which there was an appeal asserted, was settled some time ago for the Judicial Committee of the Privy Council, and occupied in print sixty pages large folio; the delivery took nine hours; since then the suit has been compromised. Such portions only of the judgment as respect the question of moral insanity are here given. It will be seen that though the Judge of the Prerogative Court was of opinion there was not proof of intellectual insanity, still he admitted, in substance, the existence of moral insanity to have been proved by the evidence.

can in no way be connected with the influence of the insanity." Such is the law as stated: wherever there is delusion existing at the time of the execution of the act, whatever it may be, the act will be invalid as a civil act, provided the delusion is continued permanently fixed on the mind, whether it has any relation to the particular act to be considered or not. The mind is in such a case insane, although it may display soundness with reference to particular circumstances, and for the most part seemingly act in a rational and sensible manner.

The argument of counsel, as I before observed, was not confined to the question whether there was delusion or not in the case of the deceased. It was contended that insanity is moral, as well as intellectual, and that he laboured under the disease in both its forms. Dr. Prichard, in giving his definition of moral insanity, states it thus (p. 19): "I mean to denote by it a disorder which affects only the feelings and affections, or what are termed the moral powers of the mind, in contradistinction to the powers of the understanding or intellect." In a chapter devoted to the consideration of this particular subject he more fully explains the nature and characteristics of this disorder. In section 5, page 30, he says, "Moral insanity is a disorder of which the symptoms are only displayed in the state of the feelings, affections, temper, and in the habits and conduct of the individual, or in the exercise of those mental faculties which are termed the active and moral powers of the mind. There is in this [447] disorder no discoverable illusion or hallucination, or false conviction impressed upon the belief, similar to the delusive or erroneous impressions which characterise monomania. It is often very difficult to pronounce with certainty as to the presence or absence of moral insanity, or to determine whether the appearances which are supposed to indicate its existence do not proceed from natural peculiarity or eccentricity of character. The existence of moral insanity is palpable and easily recognised only in those instances in which it comes on, as it often does, after some strongly marked disorder affecting the brain and the general state of health, such as a slight attack of paralysis, and then it displays a state of mind strikingly different from the previous and habitual or natural character of the individual. If a person of quiet sedate temper, little subject to strong emotions, becomes excitable, violent, impetuous, thoughtless, and extravagant, to such a degree as to surprise his friends and relatives, a suspicion is often produced that this change may depend upon a disordered state of mind. There are many individuals who are subject to alternate fits of excitement and depression; the contrast renders the peculiarities of such persons apparent. The fact that they are so affected is always known to their families, but they are not suspected of insanity unless the affection is very strongly marked." The doctor then refers to many cases that have occurred in his practice in support of that opinion which he has formed as to the existence of moral insanity, his object being, as he states in section 6, "to convince his readers that there really exists such a disorder as that which he has termed moral insanity, mean-[448]-ing, by that expression, a morbid state of the mind, which consists merely in moral perversion, without any illusion, or the belief of any unreal and imaginary fact."

This is the account which Dr. Prichard gives of "moral" insanity, that the intellectual faculties are not necessarily in any degree affected, that they may exist in perfect integrity; but still the feelings and affections of the individual be so perverted as to constitute him as insane, as if the intellectual faculties had been affected. However well founded this opinion may be in a medical point of view, and proper for physicians and surgeons, who are consulted in cases of this description, to consider whether moral perversion may not eventually end in that disturbance of the intellectual faculties which is usually called insanity, still I am not aware of any case decided in a Court of Law where moral perversion of the feelings, unaccompanied with delusion, has been held a sufficient ground to invalidate and nullify the acts of one so affected.

In the early stage of *Dew v. Clark* an allegation was given in, and the learned Judge made some observations on its admission not unworthy of attention. After having stated the nature of the plea set up, a case of partial insanity, which afterwards turned out one of general insanity, or insanity upon many points, he said (1 Add. 283): "Now the possible occurrence of such a case of partial insanity, and that proof of it may invalidate a will, which is fairly presumable to have been made under its direct and immediate operation, must be admitted on the authority of

[449] *Greenwood's case*, though the last verdict in that case, if I remember, established the will.

"This being so, I am by no means prepared to say that no case made out in evidence, taken as upon plea now tendered, could induce me to relieve the party who tenders it against the operation of the will sought to be impeached. At the same time, I must observe, first, that the plea is one of that sort to which it is not very likely that the proof will come up; and secondly, that even if it does, I by no means pledge myself to pronounce against the will.

"Being a case, however, which I cannot determine satisfactorily to my mind against the party who sets it up in this stage of it, I think I am bound to admit the allegation, as by so doing I give her the option of proceeding with the cause if she thinks proper. She must be apprised, however, as well that the burden of proof rests with her, as that this burden, in my judgment, is, from the very nature of the case, a pretty heavy one.

"The present, indeed, may be less difficult to make out than *Greenwood's case*, in one respect, as the delusion under which this deceased is charged to have laboured towards the complainant is alleged to have been coupled with something of insane feeling in other particulars, especially on the subject of religion; although here, as in *Greenwood's case*, the general capacity is in substance unimpeached. But she must understand that no course of harsh treatment, no sudden bursts of violence, no display of unkind or even unnatural feeling merely, can avail in proof of her allegation. She can only prove it by making out a case of antipathy, clearly resolvable into mental perversion; and plainly [450] evincing that the deceased was insane as to her, notwithstanding his general sanity."

Such are the observations which the learned Judge made in the early stage of *Dew v. Clark*. Several other circumstances were subsequently alleged in confirmation of the case originally set up; and eventually it turned out to be one in which proof of incapacity was most clearly and satisfactorily established.

The case of *Greenwood*, recently reported (3 Curt. Appendix), has often been mentioned in this Court, and I shall now refer to the dicta of the learned Judge who tried that case, not, however, so much in respect to the particular principles applying to monomania, as to the general case of the disposition of property contrary to the feelings natural to mankind.

Lord Kenyon, after stating the case, proceeds in his summing up thus: "But though all this be so, yet if, in further canvassing the business, it should appear to you that there was something about this testator which put him in a situation, in which the law of this country, and the law of reason too, say that he should not dispose of his property, the will, however formally made upon the face of it, however fairly made at the time, ought not, and therefore will not, by your verdict prevail." . . . "There is nothing that is more apt to seduce one than one's wishes respecting the propriety of a measure, and therefore there is nothing upon earth that one ought to be more careful to get rid of, when one applies one's mind to judge of a question, than all those circumstances which might lead one's [451] wishes, and, therefore, debauch and seduce one's judgment."

"In this case, considering the relation and the happy harmony that has existed between them for many years, it is impossible that a man should not, at the first blush of the business, wish that the property of the deceased brother had devolved on the defendant; but that ought not to weigh a feather in the scale, it ought to have no influence upon your judgment." [So here I say no person who has read the will now in question would not wish that a different disposition had been made, to a certain extent at least in favour of Mrs. Peacocke, as well as of his other natural relations. Every one who has heard this case must wish that such a disposition of the property had been made; but, as Lord Kenyon says, "This ought not to weigh a feather in the scale, it ought to have no influence upon the judgment of the jury;" and consequently not upon the Judge who is called to decide the present case.] "We ought not to look to the right hand or to the left, but to see what the disposition is, provided we are convinced that the disposition was correctly made; and it would be of the most dangerous consequence upon earth if every man was to look at the disposition made, and form his own ideas of the propriety or impropriety of it; whether it suited what his wishes were that the testator should have done, and thence judge whether the testator should have done it or not.

"Mankind are as capricious as they are many in number, and every body knows that there is hardly a will made but goes some way to vary the succession appointed by the law of the land. Many great [452] estates held by the first characters in the country, the first in virtue, have come to them through a disinherison of the heirs-at-law. If no fraud was committed, but the faculties of the testator were in a situation in which they could exert themselves, the will is not to be tripped up because you, or I, or other persons would not have made the like disposition in the like circumstances."

These are words of general application to all cases which are called moral perversions of the natural affections. Where there is no fraud, however, these may be perverted; they are not enough to "trip up," as Lord Kenyon expresses it, a will made under such circumstances, unless they can be coupled with facts of delusion which may have led to the disturbance of the intellectual faculties. In other words, as far as I understand Lord Kenyon, if the party knows what he is about, if he has sense and knowledge of what he is doing, and the effect his disposition will have, whatever his feelings may be, whether they are founded upon a reality or a notion he has taken up in his own mind, unless they are delusions the will must stand and have effect. "We must see whether the will is or is not the will of the testator."

"It is expedient," continued Lord Kenyon, "upon this case, as upon all other cases, to state the question accurately before one applies oneself to decide it; and I am not sure it was stated with perfect accuracy, though at the first blush of it not much receding from accuracy, by the learned serjeant" [Adair], "but with not perfect accuracy; I think, in some view of it, there is a possible fallacy. He stated that the question was whether the disposition was the effect of madness or of sound mind. I [453] am rather inclined to believe that some persons, in judging of it, would look first to the act done, and argue up from that to the sanity or to the insanity of the mind, instead of looking at that which is the real question, and which the law ever considers to be the question, namely, whether the testator was of sound and disposing mind and understanding when he made his will? That is the question which the wisdom of ages has framed, and, which as often as the question arises in Courts of Justice, and is put into form, in those words it is put into form."

Lord Kenyon then proceeded to detail the evidence upon the one side and the other, and after commenting upon the evidence, he thus concluded his summing up: "This long account is the evidence on one side or the other, and the question now is for you to draw the fair result that ought to be drawn from this evidence; and I can only leave off where I began, by stating to you that the inquiry, and the single inquiry, in the cause is whether he was of sound and disposing mind and memory at the time he made his will; however deranged he might be before, if he had recovered his reason at that time, he was competent to make his will. And I take it a mind and memory competent to dispose of his property, when it is a little explained, perhaps may stand thus; having that degree of recollection about him that would enable him to look about the property he had to dispose of, and the persons to whom he wished to dispose of it. If he had a power of summoning up his mind, so as to know what his property was, and who those persons were that then were the objects [454] of his bounty, then he was competent to make his will.

"The conduct which he held to his brother certainly is considerably unaccountable; if, whenever his brother's name occurred, instantly a fit of delirium had seized him, then I should conceive he was not competent to make his will; but if his mind remained entire, if he had new raised up prejudices against his brother, though upon improper grounds, yet if they were such prejudices as might reside in a sound mind, it is hard that those prejudices should lead to conclusions unfavorable to his brother; but hard as the case may be, it is better that a thousand hard cases should take place than that we should remove the landmarks by which man's property is to be decided.

"It is for you to look at that conduct to his brother to see whether it is evidence of a derangement of mind, or whether only an unreasonable prejudice which he indulged against his brother; if it be the last, that did not unfit him to make his last will and testament.

"A multitude of instances there have been where men have taken up prejudices against their dearest and nearest relations; it is the history of every week in the year, and the history of almost every family at one time or other, that harsh dispositions have been made, that unreasonable prejudices have taken place, that one child standing equally near in blood has been preferred to another; and if once we get into digres-

sions of that kind, then we get upon a sea without a rudder. Where will you stop? What partiality will be enough to set aside a will, and [455] what partiality will you give way to, and say the will is good? These are questions which the most correct and acute mind that ever addressed itself to the consideration of questions will not be able to settle.

"You are to consider whether his mind was entire to make the disposition; not whether the disposition was whimsical, cruel, what none of you retiring to your own bosoms and collecting your own feelings would have made, but to see whether it was the disposition of this man's mind, exercising the faculties of his mind at a time when in possession of those faculties. If you think that whenever that topic occurred to him it totally deranged his mind, and prevented him from judging who the objects of his bounty should be, according to his own will, then the will cannot stand, and then you will find for the defendant; but if you think he was of competent mind to make his will to exercise his judgment, however that might be disturbed by passions which ought not to be encouraged, then the will ought to stand. It is for you to decide, and the care and attention you have paid have made it unnecessary for me to say so much as I have said in addition to the evidence."

Such was the opinion of Lord Kenyon in the year 1790, certainly before this doctrine of moral insanity was broached; a doctrine, however, which none of the eminent writers, in upholding, ventures to say has yet found its way into our Courts of Law. Indeed, Dr. Prichard expressly complains of the slowness with which this new species of insanity has been recognised in this country; and his opinion, as well as that of Dr. Ray and others, is [456] rather to shew what, according to their view, the law should be, as distinguished from that which it is; for they admit the legal test to be the existence or non-existence of delusion.

[The learned Judge commented on the general evidence in the cause with minute detail, and then observed]: Upon the whole of the case, I am of opinion that the next of kin has not established the insanity of the testator at the time when the instrument before the Court was made and executed. There is full satisfaction to my mind that, though this gentleman was eccentric to an extraordinary degree, he was not of unsound mind. I am of opinion that no insane delusions are proved to have existed. There is, perhaps, established an unfounded dislike on the part of the testator to his sister and other members of his family, but it is not an insane dislike; it is not founded upon circumstances of the non-existence of which it was impossible in any way to satisfy him. Because a man does not duly appreciate the acts or feelings which generally influence mankind, that, therefore, he is to be considered mad, and unfit to make a disposition of his property, is not the law of this country. I am of opinion that perversion of moral feeling does not constitute unsoundness of mind, so as to render an act performed per se invalid. Under these circumstances, I am of opinion that I am bound to pronounce for the validity of the will, and I do so with this addition, that the costs on each side be paid out of the estate.

[457] IN THE GOODS OF MARY HESLOP, Spinster, Deceased. Prerogative Court, Nov. 6th, 1846.—An administration being in the possession of one of the next of kin cannot, though no act may have been done by virtue of that administration, and all parties interested may be consenting, be revoked on a suggestion of convenience (ex gr. to avoid the expense of a Chancery suit), and a new administration granted to another of the next of kin.

[S. C. 5 Notes of Cases, 2; 10 Jur. 953. Applied, *In the Goods of Mooney*, 1879, 3 L. R. Ir. 281.]

Motion.

Mary Heslop died on the 25th of December, 1844, intestate, without a parent, brother, sister, uncle, aunt, nephew, or niece, leaving behind her Mary Frances Partridge (wife of Henry Samuel Partridge, Esquire), John Ralph Heslop, Esquire, with seven other persons, her lawful cousins german, and only next of kin.

In January, 1845, the said Mary Frances Partridge obtained letters of administration of the goods of the said deceased, at such time believing herself and her brother, the said John Ralph Heslop, to be the only next of kin of the deceased. Subsequently to the grant of the administration the said Mary Frances Partridge discovered seven other persons equally related with herself and brother to the deceased. The amount of the personal estate was about £200l.

In consequence of the discovery of the seven other cousins, Mrs. Partridge was

advised not to take upon herself the risk of dividing the property, except under the sanction of a Court of Equity. To this the other next of kin objected, on the score of expense, to save which, Thomas Heslop, one of the next of kin, was willing to take upon himself the responsibility of administering the estate without going to a Court of Equity, and all parties interested, including Mrs. P. and her husband, executed proxies of consent to allow the administration granted to Mrs. P. to be revoked, and a new grant [458] to be made to the said Thomas Heslop. No act had been done to affect or prejudice the revocation of the administration granted to Mrs. P.

Addams, on an affidavit of the above statement, moved the Court to revoke the administration granted to Mrs. P., and to decree administration to the said Thomas Heslop on justifying security being given, and a declaration instead of an inventory exhibited.

Judgment—*Sir Herbert Jenner Fust*. I have great doubt as to my authority to grant this motion. What reason am I to assign for the revocation of the existing administration? It is admitted by the learned counsel that he knows of no precedent, and I should be very sorry to introduce one unless on very strong ground. In this instance the ground assigned is, simply, the party did not know her own rights. I cannot, under a mere suggestion of convenience to avoid a Chancery suit, grant her prayer.

[459] IN THE GOODS OF JANE RANDOLPH GUNNING, Spinster, Deceased. Prerogative Court, Dec. 3rd, 1846.—A will, with the following testimonium clause, entirely in the handwriting of the testatrix—"In witness hereof I have hereunto set my hand and seal, Jane Randolph Gunning, this twenty-fifth day of September, eighteen hundred and forty-five," but no other subsequent signature by her, held to have been signed in conformity with the statute.

[S. C. 5 Notes of Cases, 75.]

Motion.

Jane Randolph Gunning died on the 19th May, 1846, leaving a testamentary paper entirely in her own handwriting, with the exception of the names of the subscribing witnesses, bearing date the 25th September, 1845. The dispositive part occupied two sides of a sheet of letter paper, but there was space sufficient for the signatures of the testatrix and subscribing witnesses left on the second side of the paper. Instead, however, of any signature on that portion of the paper, the third page commenced with a testimonium clause, occupying the entire width of the page, in the following words:—"In witness hereof I have hereunto set my hand and seal, Jane Randolph Gunning, this twenty-fifth day of September, eighteen hundred and forty-five."

L. S.

Under this testimonium clause was written a full attestation clause. The attesting witnesses swore, "that on the 25th September, 1845, the testatrix produced the said paper to them, being at the same time present together, and told them that it was her will, and requested them to attest it, although she did not, in express words, declare the name Jane Randolph Gunning, in the testimonium clause, to be her signature."

[460] Harding submitted that the paper was duly signed by the testatrix.

Judgment—*Sir Herbert Jenner Fust*. The strong feature of this case is the particular character of the testimonium clause, and the form in which the signature of the deceased appears. It is a stronger case than that of *Woodington, Deceased* (2 Curt. 324), and other cases which followed it, in which the signature of the testator appeared only in the attestation clause. I, therefore, grant probate as prayed.

SANDERS *against* WIGSTON AND OTHERS. Prerogative Court, Nov. 14th, Dec. 3rd, 1846.—Two persons, against whom a cause was carried on in poenam, not having appeared to a citation, held to be a party in that cause, and that their evidence could not be received till they were dismissed from the cause.—The 6 & 7 Vict. c. 85 probably applies to the Ecclesiastical Courts.

[S. C. 5 Notes of Cases, 78; 10 Jur. 1040.]

On petition.

Jessie Wigston, who died on the 15th of September, 1844, a spinster, without a parent, bequeathed the whole of her funded property to Charles Oakley Sanders, Esq., by her will dated September 1st, 1844, to which neither an executor nor residuary

legatee was appointed. At the instance of Mr. Sanders a decree, with the usual intimation, was taken out against the brothers, sisters, and children of a deceased brother, being the persons entitled to the personal estate of the deceased, had she died intestate, calling on them to accept or refuse administration, with the will annexed, or to shew cause why the same should not be granted to Mr. Sanders, the sole legatee [461] named in the will. The decree was served; but an appearance was given in behalf of one only of the next of kin, namely, Mrs. Clark; the suit was carried on against the others cited in pœnam. The cause proceeded, and on an allegation in behalf of Mrs. Clark, responsive to the one in which Mr. S.'s case was set out, two of the parties cited, namely, Miss Charlotte Wigston and Miss Mary Wigston, were examined as witnesses de bene esse, having previously released all their interest in the personal estate of the deceased. The evidence of these ladies was objected to; and an act on petition was entered into, setting forth the above particulars, and stating further, that in consequence of these releases, these ladies had no interest whatever in the present suit—that their evidence was absolutely necessary for the purposes of justice—that by the 6 & 7 Vict. c. 85 any one may be a witness who is not a party named in the record, &c. There was no reply to this petition: the proctor for Mr. Sanders merely dissented, and submitted the question at issue to the judgment of the Court.

Bayford for Mrs. Clark, one of the party cited. The object of the 6 & 7 Vict. c. 85 is to let in evidence not before admissible. It is an enabling not a disabling statute, but it does not specifically mention these Courts. It would seem to refer to proceedings in Courts of Record, which this Court is not.

Per Curiam. My impression at this moment is, that the act is not applicable to proceedings here, but then the question is, whether by the law of this Court a party who has been cited is a competent witness?

[462] Bayford. I am not aware that this question has been before raised: if it has arisen, it must have been in reference to the effect of a party being in contempt for not appearing to a decree. It is clear that in such a case the effect is of a limited nature. (a) The intimation in the decree goes only to this, that if the party cited did not appear, the judge would proceed to adjudicate. *Arnold v. Earl and Newbee* (2 Lee, 380) is a most favorable case for us. The Misses Wigston might, had they thought fit, have appeared and declared they would not proceed, on which they would have been dismissed from the suit; but there are no means by which one defendant can enforce the appearance of a co-defendant. On the other hand, a party taking out a decree may cite or omit whom he pleases, as it may suit his interest, with the view to obtain or exclude evidence. To exclude the evidence of the Misses Wigston, after they have released all their interest, would work great injustice to the party for whom we appear.

Phillimore, R. J., on the same side argued that the intimation in the decree tends rather to shew that a party cited to see proceedings is not strictly a party to the suit.

Addams for Mr. Sanders. The opposite side professed to rest their case, in the act on petition, on the 6 & 7 Vict. c. 85, but have abandoned it in the argument. There is an important question of construction on that statute—whether these ladies are “named in the record,” [463] but that has not been argued. As the statute has been given up, there’s an end to the question; for, before the passing of that Act, it is certain that these ladies, having been cited, could not have been examined, unless dismissed from the suit.

Twiss on the same side cited for the general principle the dictum of the Court in *Sinclair v. Sinclair* (13 M. & W. 646); also in support of the usage in this Court, *Lovgrove v. Lycett*. (b)

Cur. adv. vult.

Dec. 3rd.—*Judgment*—*Sir Herbert Jenner Fust*. This cause, at its present stage, presents two questions for the consideration of the Court: 1st. Whether two ladies of the name of Wigston, who have not appeared to a citation calling on them to accept or refuse an administration with a will annexed, or to shew cause to the contrary why

(a) Oughton, tit. 37, Obs. (f.) 7; *Harrison v. Sparrow*, 3 Curt. 1; 53 Geo. 3, c. 127, s. 3.

(b) Prerog. February, 1765. This case was cited from a collection of cases by Sir James Marriott now, with many other manuscripts, which belonged to that Judge, in the possession of Dr. Twiss.

such grant should not be made to Mr. Sanders, the individual taking out the decree, are a party to the suit, which has been carried on against them in pœnam. 2nd. If they are a party, whether they should not have been dismissed from the suit before they were examined as witnesses.

The act on petition sets forth the ground on which it was intended to be relied, that the Misses Wigston are not a party to the suit, and to support that position the statute of the 6 & 7 Vict. c. 85 was [464] relied upon. In the course of the argument I threw out a doubt as to the applicability of that statute to causes in these Courts; but on further consideration, though there is no necessity in this instance to determine the point, which is not without its difficulties, I am inclined to the opinion that the statute does apply, admitting, as I must, that the Ecclesiastical Courts are not Courts of Record, and that they are not mentioned in the statute.

It appears from the proceedings in this case that the Misses Wigston have renounced all their interest in the estate of the deceased; therefore, unless it should turn out on examination that by the practice of the Court a party, circumstanced as they are, are competent witnesses, I may lay the statute entirely out of my consideration; for in substance it provides that a party to the suit shall not be examined as a witness. Laying, then, the statute aside, the questions proposed I can, by reference to adjudged cases, dispose of without much difficulty.

This cause is entitled *Sanders against Wigston and Others*, in other words the defendants are, according to the decree, all the brothers, sisters and representatives of a deceased brother, who would have been entitled to the estate of the deceased had she died intestate. An appearance was given, it is true, for one only of the number cited, and the proceedings have been carried on against the rest in pœnam, of which number are the ladies whose evidence is objected to; but though they have not given an appearance, and consequently have not taken any step, still they are a party to the suit and will be bound by the decision of the Court, and, so being, are precluded from being witnesses. This [465] position will be found in *Gascoyne v. Priddle* (2 Lee, 48), a case which is in every essential particular the same as the present; and also in the case of *Lovegrove v. Lycett*, cited by Dr. Twiss.

As it is then settled law that these ladies are a party to the suit, the remaining inquiry is, whether they ought not to have been dismissed from the cause before examination?

The solution of this question is, if anything, easier than the former, for I do not find there was ever a doubt of the matter. I shall, however, refer to a few cases on this head, but in all of them the point that a party to a suit cannot be a witness is taken for granted; the only question appearing to be raised is whether, under the peculiar circumstances involved in each case, the party ought to be dismissed in order to be made a witness. On reference to the case of *Arnold v. Earl and Newbee* (2 ib. 380) this will be clearly seen; and to the same effect the inquiry was in *Pardoe v. Thompson*, in this Court in 1737, in which case a person who had entered a caveat and had not subducted it was held to be a party in the suit and rejected as a witness, and from the particular circumstances of that case was not allowed to be dismissed. In addition I may mention the cases of *Waye v. Ewens* before the Delegates in 1737, *Wilson v. Hayward* in this Court in 1740, *Beaumont v. Sharp* before the Delegates in 1751.(c)

[466] The cases to which I have referred, and I know of no one to the contrary, make good the position that these ladies are a party to the suit, and also that their evidence, while they so remain, cannot be received. I cannot, therefore, allow their evidence, as taken, to be used, but I see no reason why they may not be dismissed from the cause, in order to their being re-examined as witnesses; were an application made to the Court for their dismissal I should probably grant the prayer.

AYRES against AYRES. Prerogative Court, May 7th, 1847.—A will dated in 1844, in which there was a space in blank between the dispositive part and the attestation clause, and the residue not disposed of, and the attesting witnesses were unable to depose to any thing beyond having seen the testator's signature, which stood

(c) The learned Judge stated this and the three preceding cases in detail from the "Repertorium" of Sir Edward Simpson, which is a manuscript collection of cases in his custody. The correctness of the notes in these four cases, the Judge stated, was confirmed by the notes of Dr. Audley.

under the attestation clause, at the time of the execution, held not to be signed "at the foot or end."

[S. C. 5 Notes of Cases, 375; 11 Jur. 417. Referred to, *Smee v. Bryer*, p. 623, post.]

William Ayres died on the 10th of April, 1846, leaving a will, bearing date in August, 1844. The will was pleaded to be entirely in the handwriting of the testator. It was written on two sides of a sheet of paper; the first side ended with the appointment of executors, and then a space remained, where three lines more might have been written. Rather more than half of the upper part of the second page was in blank; and then appeared an attestation clause, occupying five lines; and under that were subscribed the names of the testator and three witnesses. On the first page there were many obliterations and interlineations; on the second page the day of

twentieth six

the month on which the will was executed stood thus:—"The ~~nineteenth~~ day of August." No evidence could be obtained when [467] any of the alterations was made. There was no disposition of the residue. The will in question had been previously before the Court on motion; and in an affidavit, exhibited on that occasion, two of the attesting witnesses, the other being dead, swore that, "save as to the testator's signature, they took no notice whatever of the said paper, and that no person besides themselves and the said James Wall" [the attesting witness, who was dead] "was present with the said deceased at the time of the execution." They were unable to depose on what day in August the will was executed.

The will was propounded, and the admission of the allegation was opposed.

Robinson, in opposition to the admission, observed that the allegation did not set forth any circumstance to shew a due execution of the instrument in accordance with the provisions of the 9th section of the Wills' Act. He argued that the rule, by which the words of the statute are to be construed, is laid down in *Hudson v. Parker* (ante, p. 22), that, by applying that rule to the present case, it could not be contended the will was signed "at the foot or end." That the execution by the testator did not come within either the letter or the spirit of the law. There was space for a due execution at the foot of the first page. The spirit of the statute is to prevent any addition or alteration being made after execution. With the exception of that which is written on the second page, the rest of the sheet of paper might have been, for anything that appears to the contrary, at the time of execution, blank. [468] Even had the first page been previously written, the testator might, by leaving the blank, have intended afterwards to dispose of the residue, or make some other alteration. If the present be held to be a due execution, there can be no limit fixed on the words "foot or end."

Phillimore, R. J., in support of the allegation observed that, were it the due construction of the 9th section of the Act that the attesting witnesses must see the will, there would be an end of the present case; it has, however, been held that that is not required. On the statement of facts, as pleaded in the allegation, there is nothing to lead to the supposition that the testator intended to do more than he has done. Executors are appointed, and there is nothing to shew that there will be a residue after the payment of debts. There is not sufficient space on the first page for the attestation clause as written. The obliterations and interlineations are in themselves invalid—they cannot be deemed additions. In cases (a) already decided on motion, where there was a greater space intervening between the body of the will and the signature of the testator, the Court granted probate of the papers. If the Legislature intended to prevent that which was suggested, as an inconvenience, namely, that a will may be written after the signature of a testator and witnesses, it has not carried its intention into effect.

[469] *Judgment*—*Sir Herbert Jenner Fust*. The paper in question, upon the face of it, is not signed at the foot or end. Though the Court has in some instances decreed probate of papers on motion signed in places, where one would not have expected to find the signatures, yet in all these cases there was a disposition of the entire property, which is not the case in the present instance. There might be here, after the payment of debts, a residue; and the testator might have intended, at some time subsequently to the execution, even if the first page was written before execution

(a) *In the Goods of William Carver, Deceased*, 3 Curt. 29; *In the Goods of John Gore, Deceased*, 3 Curt. 758.

of which the attesting witnesses know nothing, to make an addition by disposing of any residue that might arise. One object of the present statute is to alter the construction put upon the Statute of Frauds in respect of the place for the signature of a testator; another object is to prevent additions being made to a will after execution. For anything that appears to the contrary, the whole of the first page might have been written after the signature of the testator and witnesses. I have gone to the fullest length, in the opinion of the Judicial Committee of the Privy Council, in my endeavours to give effect to the intentions of testators; further I cannot go. I cannot say that this will is executed in due compliance with the requisites of the Act: it would be useless, therefore, to allow this allegation to go to proof; under these circumstances I feel bound to reject the allegation.

[470] THE RIGHT HON. MARIA ELIZABETH, COUNTESS OF DYSART *against* THE RIGHT HON. LIONEL WILLIAM JOHN, EARL OF DYSART. Arches Court, March 2nd, 1847.—An allegation was admitted on behalf of a wife, responsive to a libel for a restitution of conjugal rights, pleading, in bar thereto, cruelty, and praying a divorce.—Held, reversing the decision of the Court of London, that the facts, as detailed in evidence on that allegation, did warrant the conclusion “that she could not return home with safety and without a reasonable apprehension of a repetition of the violence deposed to.” In consequence, a sentence of divorce in favour of the wife was pronounced.

[S. C. 5 Notes of Cases, 194, 261; 11 Jur. 490, 565. See p. 106, ante (with note).]

On appeal from the Consistorial Court of London.

Judgment—Sir Herbert Jenner Fust. In the Episcopal Court of London a suit for the restitution of conjugal rights was promoted by the Earl of Dysart against the countess, his wife. The usual proceedings took place. A libel was given in, in which it was prayed that the wife might be assigned to return home and render conjugal rights to her husband. The marriage, which occurred in the year 1819, was confessed, but in other respects the libel was contested negatively. A long allegation was admitted on the part of the countess, pleading circumstances under which it was contended the earl was not entitled to succeed in his prayer, charging him with various acts of cruelty which, if proved, would entitle her not only to be dismissed from the suit, but in fact to have a sen-[471]-tence of separation in her favour. By way of answer, an allegation of considerable length, with many exhibits annexed, was admitted on behalf of the earl, denying the cruelty alleged, and charging the countess with provoking, irritating, and abusive conduct. The result of the evidence taken on these pleas was, in the opinion of the learned Judge in the Court below, that Lady Dysart had failed in establishing her case, and that the husband was entitled to the sentence he prayed.(a) From that decision an appeal has been prosecuted in this Court.

Independently of the high rank and station of the parties, there are circumstances of peculiarity which render this case not only a most painful one to discuss, but also one of considerable difficulty. Many of the transactions are pleaded to have occurred full twenty-five years ago, and many at considerable intervals. Moreover the parties, it would appear, lived many years apart, and when they did cohabit they passed their time almost in a state of seclusion from society; the consequence of which has been that the only persons, with few exceptions, capable of speaking to the terms on which the earl and countess lived are immediate dependants—a class of persons amongst whom, particularly in suits of this nature, it has been frequently observed there generally exists some bias.

The marriage of the parties, who were first cousins, and ought to have known something of each other's character and disposition, took place in September, 1819, and the fruit of that marriage was the birth of a son in July, 1820. For some months after [472] the marriage they cohabited together at the residence of Colonel Toone, the father of the countess, and afterwards, at considerable intervals, at different residences engaged by the earl, but altogether, it would seem, at no house belonging to him, within the interval which took place between the marriage in 1819 and the final separation in 1837, for a longer space of time than three years. With whom the fault in this respect lay was the point discussed in the argument of counsel both in this and the Court below: the counsel for the earl contended it was the duty of the

(a) The judgment is given, ante, pp. 106-144.

countess to continue her cohabitation under almost any circumstance; while on the other side it was insisted that the earl's mode of living, his extraordinary habits, and his ill-treatment of her ladyship rendered it impossible for her to perform her conjugal duties without imminent danger to her person and health.

This, then, is the point which I have to determine. There was no dispute as to the relative duties of husband and wife; she is undoubtedly bound to conform to the tastes and habits of her husband; but at the same time it was and must be allowed this general rule must have its limits and qualifications. The rule can only be understood to apply where there is no actual ill-treatment—where there is no danger to the life or health, or a reasonable apprehension thereof from the conduct of the husband.

In dealing with a case of this description, the difficulty is frequently found to be, not in ascertaining what the law in the abstract is, but in applying the law; for though general principles may be found [473] to be laid down, it may be seen that most of the cases have been decided in reference to their peculiar circumstances. Hence, in the present instance, arises the necessity for me to consider with a degree of minuteness and care some of the cases which have been referred to; but in making my selection I shall have regard principally to those which seem to me to bear on the principal points which have been raised in argument.

The earliest case on the subject to which we are in the habit of referring is that of *Evans v. Evans* (1 Hagg. Con. 35), in which Lord Stowell lays down some general principles. After stating his disinclination to give a direct definition of cruelty, as, in his opinion, that case did not call for it, he states: "It is the duty of Courts, and consequently the inclination of Courts, to keep the rule extremely strict. The causes must be grave and weighty, and such as shew an absolute impossibility that the duties of the married life can be discharged. In a state of personal danger no duties can be discharged; for the duty of self-preservation must take place before the duties of marriage, which are secondary, both in commencement and in obligation; but what falls short of this is with great caution to be admitted." . . . "What merely wounds the mental feelings is in few cases to be admitted, where they are not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty."

[474] After stating that that which merely wounds the acquired feelings, arising from particular rank and station, is much less cruelty, and giving some illustrations of his meaning, the learned Judge observes, "These are negative descriptions of cruelty; they shew only what is not cruelty, and are yet perhaps the safest definitions which can be given under the infinite variety of possible cases that may come before the Court; but if it were at all necessary to lay down an affirmative rule, I take it that the rule cited by Dr. Bever from Clarke, and the other books of practice, is a good general outline of the canon law—the law of this country upon this subject. In the older cases of this sort, which I have had an opportunity of looking into, I have observed that the danger of life, limb, or health is usually inserted as the ground upon which the Court has proceeded to a separation. This doctrine has been repeatedly applied by the Court in the cases that have been cited. The Court has never been driven off this ground. It has been always jealous of the inconvenience of departing from it, and I have heard no one case cited in which the Court has granted a divorce without proof given of a reasonable apprehension of bodily hurt. I say an apprehension, because assuredly the Court is not to wait until the hurt is actually done; but the apprehension must be reasonable; it must not be an apprehension arising merely from an exquisite and diseased sensibility of mind. Petty vexations, applied to such a constitution of mind, may certainly, in time, wear out the animal machine, but still they are not cases of legal relief."

[475] These dicta have not only been laid down in the case to which I have just referred, but they are also to be found in nearly the same terms, or rather to the same effect, in several other cases. In the case of *Oliver v. Oliver* (1 Hagg. Con. 361), which was a suit brought by the husband for the restitution of conjugal rights, the wife pleaded in bar cruelty. Lord Stowell, at page 364, observes: "The charges brought by the wife against the husband consist partly of words of abuse and reproach, and partly of acts of a harsh and oppressive nature. Of words, it is

sufficient to say that, if they are words of mere present irritation, however reproachful, they will not enable this Court to pronounce a sentence of separation." . . . "Words of menace, importing the actual danger of bodily harm, will justify the interposition of the Court, as the law ought not to wait till the mischief is actually done."

Again, in *Holden v. Holden* (1 Hagg. Con. 453), his Lordship, at page 458, observes: "That every thing is, in legal construction, *sævitia*, which tends to bodily harm, and in that manner renders cohabitation unsafe; whenever there is a tendency only to bodily mischief, it is a peril from which the wife must be protected. . . . The law does not require that there should be many acts. . . . If one act should be of that description which should induce the Court to think that it is likely to occur again, and to occur with real suffering, there is no rule that should restrain it from considering that to be fully sufficient, to authorize its interference." Again, with respect to the conduct of the wife, the com-[476]-plaining party, his Lordship lays down, or rather expresses his approbation of, a rule which is immediately applicable to the present case, as it was said the conduct of the countess was frequently provoking and irritating, and led to the violence of which she now seeks a remedy at the hands of the Court. . . . "It is not necessary that the conduct of the wife should be entirely without blame; for the reason which would justify the imputation of blame to the wife will not justify the ferocity of the husband."

After mentioning the case of *Harris v. Harris* (2 Hagg. Con. 148), the learned Judge observed, "With reference to the alleged provocation of the wife, I must refer to what fell from Dr. Swabey in the case of *Best v. Best* (1 Add. 411). It was a suit in which the wife failed in obtaining her prayer; in the course of his judgment the learned Chancellor of Rochester remarks, page 423, 'It has been repeatedly laid down in these Courts that no wife can solicit their interference with effect to protect her from (even from ill) treatment which she has drawn upon her by her own misconduct; she must first, at least, seek a remedy in the reform of her own manners. If, however, it should appear that even misconduct on the wife's part has produced a return from the husband wholly unjustified by the provocation, and quite out of proportion to the offence, it might still be the duty of the Court to interfere judicially, notwithstanding such, the wife's positive misconduct.'"

Sir John Nicholl in the case of *Westmeath v. [477] Westmeath* (2 Hagg. Ecc. Supp. 72), after stating that to entitle a wife to a separation there must be ill-treatment and personal injury, or the reasonable apprehension of personal injury, observes, "What must be the extent of injury, or what will reasonably excite the apprehension, will depend upon the circumstances of each case. So likewise, what may aggravate the character of ill-treatment must be deduced from various considerations—in some degree from the station of the parties—in some degree from the condition of the person suffering at the time of the infliction. The complexion of individual acts may be heightened; nay, the acts may almost change their very essence by the accompaniments. Not only particular stations and situations, and the feelings almost necessarily arising out of them, but even acquired feelings may be entitled to some attention."

I have already stated that many of the transactions in the present suit are pleaded to have occurred several years ago, and many at considerable intervals, owing to the earl and countess having lived many years apart. With respect to the effect of the evidence on such isolated particulars, I find some remarks of my Lord Stowell, in the case of *D'Aguilar v. D'Aguilar* (1 Hagg. Ecc. Supp. 781), which tend to remove all difficulty in dealing with this particular feature in the present case. In that case there had been an interval of twenty years before the cohabitation was renewed, and Lord Stowell observes: "The separation lasted for nearly twenty years; and this has at least one effect; viz. that it approximates the [478] two periods of cohabitation. If they had lived together, the Court would have considered the former acts as pretty much obsolete, and that the husband was *emendatus moribus*; but as there was a separation, it is to be considered as if the intermediate years had not elapsed; and the Court has a right to look at former acts as if they had happened recently."

These, then, are the principles by which the Court is to be governed in determining the case before it. I am to consider whether there has been that which is cruelty in the eye of the law, or whether an apprehension of bodily injury exists, arising from the conduct of the husband, for if that apprehension be reasonable, it will be sufficient to entitle the wife to her prayer. I am to remember that if the conduct of the husband has tended to produce bodily injury and harm to the wife,

it is not necessary that her conduct should be altogether free from blame; that if, to a certain extent, she has given some provocation, nevertheless, if the return on his part was out of proportion to the offence given, it will be the duty of the Court to interpose its protection.

I will now proceed to the facts of the case, and, in the first place, consider what were the state and condition of the parties at the time of their marriage, and the manner in which they cohabited afterwards, for these are circumstances which must enter into account in every case of this description. The earl and countess were, as I have stated, first cousins, the children of two sisters; the one sister, the mother of the earl, one of the parties in this suit, married Lord Huntingtower, and the other became the wife of Colonel Toone, the mother of [479] Lady Dysart. The father of the earl was possessed of very large and valuable estates, which were entailed upon the present earl, though he was, during his father's lifetime, entirely dependent upon him. The marriage with Miss Toone was directly contrary to the expressed wishes of the earl's father, and when that marriage was contracted he refused to make his son any allowance whatever; in consequence of which, the earl, having no means of his own, in consideration of 106,000*l.* to be paid by him in the event of his surviving his father, purchased an annuity of 3000*l.* during the joint lives of himself and his father; and also an annuity of 1000*l.* for his wife, in the event of the earl's death in his father's lifetime. The sum of 3000*l.* per annum was the income on which the parties were to be maintained during the lifetime of the earl's father; it was not sufficient to permit indulgence in expensive luxuries, but ample enough to enable them to live in comfort and respectability. That the annuity was originally intended to be so applied there can be no reasonable doubt entertained; it cannot be supposed that it was purchased as a sinking fund, to be used as a redemption of the principal; it must have been for the maintenance of the earl and his wife at this time jointly, and not to be laid by to accumulate as a fund, from which the purchase money was to be paid. It is true indeed that Lord Dysart may afterwards, upon consideration, have felt alarm at the large amount for which he had thus become responsible, and under that feeling he may have resolved to abridge himself of all luxuries, and confine himself within the narrowest possible limits.

[480] It was said in the course of the argument of counsel that the habits and tastes of Lord Dysart were known to his wife before marriage to have been in some degree peculiar and eccentric, and that she ought therefore to have made up her mind, before she entered on the marriage state, to conform herself to those habits. This observation may in some degree be correct; but there is no reason, as far as the evidence goes, to suppose that it was mutually understood that the system of economy was to be carried to such an extent as not only to deprive the wife of the conveniences but even the necessities of life; that this degree of self-denial was to extend to his wife, so as to place her in the situation to which I have referred, there was no reason for her to have apprehended. We have an account of the manner in which the earl lived before marriage from one of his own witnesses; it appears he lived in great style; he had a large stud of horses, &c., and a proportionate establishment of servants. It is true indeed that these luxuries were enjoyed, not at his own expense but at his father's; but there is nothing to lead to the inference that his habits and tastes would have become such as they subsequently were. With the income of 3000*l.* a year the wife might have expected that she would be maintained in the enjoyment of some things that may be considered, not as mere necessities, but even conveniences and comforts of life. She could never have been led to suppose that there would have been that rigid economy practised, which would deprive her of all those conveniences and comforts to which she had been previously accustomed. She had been brought up [481] indeed in a state in which she necessarily imbibed tastes and habits opposed to those subsequently adopted by her husband; but there is no reason to believe, though the contrary is suggested in the pleadings, and was adopted in the argument, that she was anxious to have more than was suitable to the station and fortune of her husband. There is no reason to apprehend from anything I have seen in the case that though she wished to live in a different part of the country to that chosen by the earl, though she might have preferred London to Leicestershire, or Lincolnshire, that she was induced to form those wishes from any desire to indulge in the gaieties of a London life. I see no reason to suppose that the marriage was not one of mutual affection. It has been stated that the earl would have refused to

marry her unless she had promised to conform to all his tastes and habits, but one of his brothers (Mr. Frederick Tollemache) says that he believes that the marriage was one of mutual affection; and there is no reason to surmise, looking at the letters annexed to the interrogatories of Lady Dysart, addressed to her before her marriage, and to her mother shortly after the marriage, and taking into account that the earl was contracting a marriage at variance with the wishes of his father, that there was any want of affection on his part. There is nothing therefore in my opinion to justify a reflection on the wife in expecting that she should live in decency and comfort, proportioned to the means her husband had at his command.

As to the terms on which the parties lived between the date of their marriage and the birth [482] of their son, there is very little information, but the little there is may be collected from the letters.

Unfortunately, in July, 1820, a circumstance occurred which seems to have given great offence to the earl, who was in the room at the time at which her ladyship was giving birth to her son. It appears that Lady Dysart had urged and entreated her husband to be present with her on that trying occasion, and that he complied with that request, but Dr. Batty, who was in attendance professionally, requested him to withdraw from the room for a short time, which he refused to do, unless his wife should desire it. At the suggestion of Dr. Batty she did so, and he did withdraw, but in such a manner as to shew that he was seriously offended with his wife. Now this conduct has been urged against the earl as an act of cruelty; but I do not think it can be so considered. There could have been no premeditated intention on his part to hurt his wife's feelings, or to increase the anguish of the moment; the request to withdraw must have come unexpectedly, and probably he thought, under all the circumstances, unnecessarily; he seems to have acted on the sudden impression that it was intended as a marked indifference towards him. I shall dismiss this charge against the earl, so far as it has been urged as an act of cruelty; but this occurrence has another bearing, which I think is entitled to considerable weight. It appears at this time his affection for his wife suffered a very considerable diminution; it is impossible to read his letter annexed to the allegation of Lady Dysart without arriving at that conclusion; indeed the earl [483] avows it in that letter without scruple, and attributes the change to her conduct at the birth of the child as shewing indifference towards him, and to other instances in which she had refused to comply with his wishes.

Now the letter to which I refer bears date the 26th of September, 1820: it will be sufficient to read a part only of this and of any other letter to which I may have occasion to refer in the course of my judgment. . . . "I candidly acknowledge to you, Eliza, that I have not felt the affection I used to feel for you since your confinement. The indifference you evinced towards me at that trying hour tended not a little to banish affection from my breast. You ask me when I shall return to you? I answer, when you can prove to me that you really and sincerely wish it, which you have not yet done; neither will you convince me by any such ways as writing to me four days running, or four years daily. When I am present, not even in one instance have you endeavoured to prove to me you wish to please me. No, but you have convinced me you wish to please the world, for whatever the world seems to say, you adopt immediately. You say your patience is long since worked out. What do you mean by patience? When I see you again, I shall expect you to give me a full account of every visitor who has been at Keston, also every thing else relative to yourself.—Yours affectionately,

"L. M."

"Do you ever walk and with whom do you walk?"

Here then is the clue to everything that subse-[484]-quently took place—an end of all that happiness and comfort which might have been expected to attend the union between these parties. It is too clear to admit of doubt that the whole of the earl's subsequent conduct furnishes continual proof of the unhappy change which at that time took place, and that the comforts of his wife were the last consideration with him. How much of the intermediate time between the birth of his child and the removal to Edmonthorpe was passed in the society of his wife does not appear. There is, however, no charge of cruelty during that period, nor was any personal ill-treatment to be expected, when her ladyship was under the roof of her father; where no doubt she had an abundant supply of those necessities and comforts which were essential to the full re-establishment of her health and strength.

But all this was at an end on the 21st of December, 1820. On that day she quitted her father's roof and went to join the earl at Edmonthorpe, where the scene was completely changed. The house was in a dilapidated state, the rooms were badly and insufficiently furnished, and the provisions, if not scantily supplied to the wife, were at least such as she had not been accustomed to; still these privations might and ought to have been borne and submitted to with resignation. If the slightest attention to her wishes or any degree of affection had been displayed by the earl, these parties must have continued their cohabitation, without the interference of this Court, for these marks of want of affection could not establish a case of legal cruelty: the husband is the person to direct the expenditure, as well as to control [485] the establishment, and direct its management. But though no act of personal violence is proved to have been committed by the earl, yet he was in the constant habit of abusing and swearing at his wife; he deprived her of all such authority in the house as is usually committed to a lady with respect to servants and stores. He gave out his stores, and directed and limited the supplies to his wife of those articles which are of necessary consumption.

The witnesses examined on the part of her ladyship as to the occurrences at Edmonthorpe are two females of the names of Tanswell and Woodley.

It appears Tanswell went to live with this lady in 1813, when under her father's roof. She speaks of the marriage in 1819, the cohabitation of the parties at Keston Lodge shortly after their marriage, and to the conduct of the earl at the time of the birth of the child, to which I have already adverted. After speaking upon the eighth article to the state of the house and furniture at Edmonthorpe in 1820, which she describes as being old, and out of repair, whilst there she says: "Lord Dysart did not behave at all well to his wife; he was surly and passionate; he did not behave at all like a gentleman; he was always in an unpleasant manner towards her. I have not heard him use any improper language towards her, no further than I heard him say, 'Damn you, Madam;' that I heard him say frequently. He did not allow her enough of what I call necessities. She was not sufficiently found with common food as a lady. There was bread and butter to be sure; she might eat that; no fish, no poultry, and it was but occasionally that a joint of meat was dressed. He scarcely allowed her any [486] firing; he had cinders sifted and made wet, and sent into her to burn. He allowed her but one candle a night, 'an eight dip' tallow; there is scarcely a servant in any family but is allowed more than that. He gave all out himself, and coals too. I was with her one evening when there was scarcely any fire in the drawing-room, and the weather was cold; she was really suffering then; she rang, and desired the girl that answered the bell to get her some coal. The girl went for orders to Lord Dysart; that I knew she must do; it was not from any disrespect to Lady Dysart. What passed I cannot say; but no coals came, and Lady Dysart went up stairs. Lord Dysart was at dinner there, dining as he did, that is—for it was off a chest of drawers, and not a table—Lady Dysart had had her bread and butter on a tray; dinner there never was a comfortable meal; cottagers, day labourers had more comforts than they had with their meals. He dined, as he called it, at seven o'clock up stairs off a chest of drawers at which Lady Dysart could not have sat, and indeed there was no dinner if she had. I have seen him in apparent passions with her, but I never saw any violence towards her, but the whole house and furniture, and mode of living was unfit for any lady. He employed himself in the kennel and stable. He would come blustering into the house at times, but he was no society to her, and she had none else." Upon the tenth interrogatory she says, "I do swear that there was not a supply of common necessities for the produdent, in respect of diet, food, firing, candles. They never dined together, nor breakfasted; after about the first fortnight at Edmonthorpe, no dinner [487] was prepared. He had no better himself, but that did not make it fit for her; hard salt beef was what she could not eat. I do say that the food provided by the ministrant was not of a quality fit for such a family, or for the produdent. There was no wine. For the first fortnight at Edmonthorpe there was poultry, because it was on the premises; but after that was killed off there was no more."

The account of the occurrences at Edmonthorpe given by Woodley will be found by no means to differ in any material respect. She says, on the eighth article, she went to Edmonthorpe about Christmas, 1820, "That house was very large and old, and in bad repair. There was a great deal of furniture in it, but it was not convenient

or fit for use; not at all such as one would have expected to see. The house was altogether quite uncomfortable. I consider that Lord Dysart, as he now is, used his wife very badly. Their tempers were quite opposite; Mrs. Manners was good enough, but he seemed to me to do everything that he possibly could to vex and irritate her; he was quite a blustering noisy sort of man, very hasty. I have known him very violent, and going on strangely; I do not know if it is to be called passion. He denied his wife many comforts that she wished to have—firing was one; only a certain quantity of it was allowed her, and if she had not been sparing, she would have been without any. She seemed to have no comforts; I do not know that she was denied a sufficient quantity of necessaries such as the house afforded. He generally took his meals by himself, and he slept away from her. I have heard him swear at her; I do not at this great distance of time remember the [488] particular expressions he used, I can only depose to a general recollection of coarse, rough, unkind behaviour and treatment of his wife to such a degree that I have known her tremble at the sound of his foot on the stairs. He had charge of the household affairs. I used to go to him of a morning for candles, and Mrs. Manners objected to burn them; she was not used to burn dips, and she complained of them, but she got no others from him, so she bought mould candles herself. The coals were brought to us. If I wanted anything I went to him for it, but I cannot now mention what things in particular, for I do not remember. The cook went to him for what she wanted in the kitchen; Mrs. Manners had no authority in the house. I do not consider that she was mistress of her family in any way. I have heard him quarrelling with and aggravating her when I have been in an adjoining room, till my flesh crawled almost. I did not know how to bear myself, he went on in such a shameful manner.”

This witness, as well as the former, have been cross-examined, but their testimony in the main remains unshaken.

As to the mode of living at Edmonthorpe, several witnesses have been examined on behalf of the earl. Richard Pick describes the house as having been amply furnished, and well supplied with everything necessary. Ann Royce states the house was not out of repair; that there was enough of furniture but it was old fashioned; and that she never knew Lord Dysart to ill-treat his wife, though, she says, they seldom dined together. Jabez Dickenson states the house was in a good state for an old [489] house, and very well furnished; there was no stint; there was poultry every day during the time he was in the house with her ladyship, which was for a period of six weeks.

Under all the circumstances, as stated by the witnesses on each side, it must be considered if there was not that degree of discomfort which rendered it extremely unpleasant to Lady Dysart to cohabit with her husband. I do not mean to intimate that she would have been justified in deserting his house, but surely there was grievous ground of complaint. She had never been accustomed to that which might be no inconvenience to him; she must have sustained great injury in her feelings from his coarse conduct and language, and have suffered to a certain degree in her health; still all this was to be borne; though displaying a want of attention and affection on his part, she had no legal remedy; she was bound to submit to the treatment to the extent set forth by the witnesses without redress from any Court of Justice. But the treatment which she received at Edmonthorpe was only a sample of that which accompanied her to other places of residence. The same degree of discomfort followed at Irnham and Buckminster; there was no attention to her wishes, no consideration for her ease. Yet, it is admitted, she did conform in every respect to the habits of her husband; she sacrificed all her own feelings to his desires.

In April, 1821, Lord and Lady Dysart quitted their house at Edmonthorpe, certainly not under circumstances importing legal cruelty, but such as shewed very little attention on his part to the comforts of his [490] wife. At twelve o'clock on a cold and severe night it seems the house at Edmonthorpe was left; not a spark of fire was to be seen in a room after that hour, lest his lordship should have to pay taxes; and her ladyship had to walk on foot with her infant to a neighbouring farm-house, where she passed the remainder of the night. It was not contended that this was an act of legal cruelty, but, coupled with his previous conduct, it shews great want of attention to her ladyship's accommodation, and lays a ground of probability for all that is stated to have subsequently occurred.

On the morning following it seems the countess left the farm-house and proceeded

to London to the residence of her father, where she continued till January, 1822, when, accompanied by her husband, she went to a house taken by him at Irnham in Leicestershire. Their mode of life at this place is stated by two witnesses of the names of Meginley and Holmes, and circumstances did occur which consist with what is stated to have taken place at Edmonthorpe, but some are of a much more serious character. Meginley appears to have entered the service of Lady Dysart in the month of May, 1822. She deposes on the eleventh article—"The house was small for a gentleman's house; it was not a fit residence for a lady; there were but two rooms in it at all comfortable, one was her ladyship's room, bed-room and sitting-room, for she had but one, the other I occupied with the child, about a year old when I went there. On the ground floor there was one sitting-room, besides the offices for the servants, but I was very seldom in it; it was used by Lord Dysart. The only part of the house of [491] which I can speak with any certainty is the two rooms occupied, as I have said, by Lady Dysart and myself, exchanging them sometimes as we did. I was so little in the other parts of the house that I can say very little about them. Lady Dysart's room was furnished, rather I should say it had furniture in it, but it was not furnished fit for a lady. Whether there was no bedstead in it, or one that was too small, I do not now quite remember, but I know that her ladyship slept on the floor, and her bed was taken up in the day-time. In my room there was a bedstead, but, as well as I recollect, no hangings to it; I am not sure if something temporary was not fixed. I never saw any rats in either of our two rooms, I have seen them frequently below stairs, and heard the noise they made in the other older part of the dwelling. We stopped at Irnham some few months, then Lady Dysart went up to London, thence to Keston, her mother's house, each of them, and I was with her, then we returned to Irnham; it was in cold weather, but when it was I do not remember. How long we were there the second time I cannot recollect. The first time that we left Irnham it was owing to Lady Dysart being ill, but how or why I do not remember. Lord Dysart behaved to his lady in a very extraordinary manner, at times unkindly, very, at different times. I should say he was violent in his temper at times; his behaviour was very unlike what I have been accustomed to see in any gentleman to his wife. It was quite without my knowledge if he had any provocation. Lady Dysart behaved more kindly to him, with more attention and forbearance than could have been expected. They seldom slept together, [492] why I am not able to say. He seemed to me to be living to himself, but really I had nothing to do with him, and I know next to nothing of his habits; I was quite separate from him, and only knew any thing of him when he came, as he did sometimes at night, commonly as it suited him, into one or other of our rooms, wherever Lady Dysart happened to be. I must leave to others to tell how he lived, and what rooms he occupied. I believe that he was living chiefly on the floor above us, but there I never was. When he dined below it was I believe in the room on the ground floor. I was there on one particular occasion which I will name, but I saw too little of it to say much about it. I could not say what furniture there was in it, I saw boots and shoes." On the twelfth article she says, "I do not remember any person having called at Irnham while we were there to visit the countess; she had no friends about her. I know but one family living near, that of Mr. Clifford, and I remember an invitation coming from them which was not accepted. I have known Lady Dysart walk in Mr. Clifford's park, but she amused herself chiefly in her own garden. One day I remember that she had been out taking a walk, and it happened, as I believe, that a shooting party of gentlemen were out somewhere in the neighbourhood. I did not see anything of them, but I remember Lord Dysart storming at her, abusing her cruelly and violently, charging her with having gone out that day to meet some gentleman of that party. I am not able to say much about her being deprived of necessities, but I remember that she sometimes went without what I should consider to be such for a lady; I have [493] known her to be without sugar for her tea, or for fruit tart; I have known her to be without wine. Of meat, bread, milk, beer, coals and candles, except on one or two occasions, there was enough I think always. The first time that we left Irnham was when her ladyship's mother, Mrs. Toone, came for her. Lady Dysart was ill then, but I do not remember particularly what was the matter with her, or what brought it upon her."

So far, the account given of the general mode of life at Irnham by Meginley, who was for two or three years in the service of Lady Dysart, accords with that spoken to by Tanswell during the cohabitation at Edmonthorpe. Here, again, I must observe

that had there been nothing further to complain of, though her ladyship must have endured great privations and hardships, she could have had no legal redress. It was her duty to submit, and to endeavour by degrees to turn his lordship from the habits in which he at that time indulged.

But there are one or two circumstances stated to have taken place at Irnham which are of a more serious character, and require to be attended to. I refer, in the first place, to what is pleaded and deposed to on the thirteenth article. Meginley says, "I cannot at all speak to the time, or anything about it, when that happened of which I will now depose. Lady Dysart had gone with the child to dine below stairs with his lordship. I remained above, and whilst there I heard Lord Dysart's voice loud and passionate below, as if, and as I had no doubt, quarrelling with and abusing her. He was so loud and so violent that I was alarmed for her, and went down to the room door; I tried to open it, [494] but it was fastened on the inside; I then knocked, making as my excuse that I wanted the child for its supper. Lord Dysart opened the door, and then, as I had expected from the room being still, I saw her ladyship lying on the floor in a fainting fit." [It is said she was subject to fainting fits, and if a quarrel arose, she went off into a fainting fit.] "She had fainted away; I ran for restoratives, and with their aid brought her to, and lifted her on chairs first, and then helped her up stairs. In so doing Lord Dysart, as I recollect, assisted me, at least in the room. I think that Lady Dysart went up stairs with my help alone; I saw no violence; all passion had subsided before I got into the room; it was time it should when she had fainted. The violence that led to it I heard distinctly, as I have deposed, and I remember the child, though so young, only between two and three years old as I recollect, stamping his little foot in indignation against his father, and using some words which I cannot undertake to remember." When I see how the conduct of the child is counterpleaded in Lord Dysart's allegation, I am not disposed to attach much importance to what the child may have said and done; but we have this fact, though Meginley did not witness any violence, that his lordship was heard quarrelling with and abusing Lady Dysart in a violent manner, that the door was fastened inside, and that, after it was opened, Lady Dysart was found in a fainting fit on the floor. Now there is certainly no proof that this fainting fit had been occasioned by an act of personal violence; at the same time, I may observe there is no attempt to impeach the general character of this witness, or to [495] say she has given an inflamed and exaggerated account of that which she did hear and see on that or any other occasion on which she has been called on to depose.

But there is still another circumstance pleaded in the fourteenth article on which this witness has also been examined. She says, "I remember Lady Dysart going up stairs one night, I cannot say at what hour; I know nothing of any appointment with her husband. She was up there a long time. I heard his lordship quarrelling with her very much in a loud tone of voice; I did not hear the words, but I could tell that he was in a violent passion, and hearing that I went to my own room door, and calling to him, told him I could not bear it any longer. He damned me, and told me I might go out of the house; they were not in my sight at this time. I believe that shortly afterwards I heard her call out murder; how often I cannot say, it might be two or three times; that was I think after I had so spoken as I have said, but I am not sure. I called out to him that I could bear it no longer, and let the consequence be what it would, I would come up stairs to them. His lordship said if I did he would throw me over the balusters." [It appears the witness, Holmes, heard this threat.] "I then went to the door of Mr. Felix Tollemache; to my first knock there was no answer; when I knocked again more loudly he came to the door. I had prepared some salvolatile and water in the meantime, being pretty certain from her ladyship's silence that she had fainted. I tried to persuade Mr. Tollemache to take the glass up stairs; Lord Dysart, hearing what passed, called out that if he [496] came he would serve him the same. Mr. Tollemache was so afraid of his brother that he entreated me not to go, and yet he did not like going himself. I then told him that one of us would go, and therefore if he did not, I should; so then he went, and not long afterwards they brought her ladyship down, carrying her, one at her head, the other at her feet. I staid at the foot of the stairs till they were down; she was quite lifeless apparently. The only noise I had heard, besides that of voices, was a scuffling as in the passage, which was followed by her cry of murder, after which Lady Dysart was silent. It was a long time, but I am not able to say how long, before she came to

herself. I said to him, 'Oh, sir, what a scene is this!' He answered something, I do not remember what it was, but he seemed to be quite calm."

Mr. Felix Tollemache, who might perhaps have given some information respecting this transaction, died in the course of the proceedings and has not been examined; but Mr. Frederick Tollemache states that, when allusion was made in 1829 to some circumstances, stated on the fifteenth article, his brother Felix denied that he ever heard Lord Dysart say that he would throw him over the balusters or anything of the kind, and this is confirmed by a letter. This, be it so or not, is no evidence that the threat was not made, though Mr. Felix Tollemache told his brother he did not hear it; and we have not the particulars of the conversation which passed between the brothers so as to be able to see what part of Meginley's statement was allowed to be correct. But this transaction did not end here, for it appears from [497] the same witness, on the fifteenth article, that her ladyship "was fainting more or less during the night. In the morning Mr. Felix Tollemache went for medical assistance; he brought Mr. Collingwood of Corby, who is since deceased." . . . "He prescribed medicine which she took internally he sent a lotion also, I remember that more particularly, because I did and do believe that she had received a blow from a kick, as she said, by his lordship, in the lower part of her body." . . . "She seemed ill for a good bit after this, though I cannot say how long. I do not remember how long she remained at Irnham. She had medical advice after she came again to London, but I cannot now say whether she required it in consequence of what had so happened at Irnham."

Here is bodily injury inflicted, in some way or other, at this time—and inflicted, as her ladyship declared, by a kick received from her husband. The learned Judge in the Court below doubted whether this was a declaration made *recenti facto*; I cannot, however, hesitate to say that the declaration was made *recenti facto*, for I find Mr. Collingwood was called in on the morning following the occurrence, and prescribed a lotion in consequence of what was represented to him. I have no doubt in this instance as to there being evidence of personal violence to the wife, the effect of which continued for some time. The immediate cause of this violence, according to the evidence of Holmes on the fourteenth article, was that Lady Dysart went up to her husband's room for the purpose of obtaining a rushlight which she was in the habit of burning in the room where she slept, but that she was not [498] able to get one. Lord Dysart pleads in his allegation that Lady D. endeavoured to force her way into his room by kicking at the door, of which there is no proof. Moreover, on the twenty-eighth interrogatory, both Meginley and Holmes, in answer to questions addressed to them in respect of the violence insinuated against Lady Dysart, say that they heard no violence; and that they never heard Lady Dysart use scurrilous language towards Lord Dysart. Supposing the parties had separated on this occasion in 1824, and a suit had been commenced for a divorce at that time by Lady Dysart, the Court, I think, might have considered that this single act, depending on a witness, who did not see the violence committed, but speaks merely to certain effects, and the declaration of Lady Dysart, would scarcely have warranted it in pronouncing a sentence in favour of her ladyship. Still this circumstance, coupled with what had previously occurred, must not be lost sight of by the Court when it comes to consider subsequent events; they all have one tendency, to shew a disposition to violence on the part of the husband.

Upon the 5th of April in the same year, 1824, Lady Dysart again quitted her husband's house and went to reside with her father. About the same time Lord Dysart removed to a small cottage he had taken at a place called Corby Heath, where he continued to reside till the year 1826. During this period Lady Dysart did not reside with him, and no act of cruelty is stated to have taken place. It was pleaded that he refused to go to see his child who was ill at Buckminster in the year 1825, and that on one occasion he refused to admit Lady [499] Dysart; but these circumstances cannot be considered as partaking of the nature of legal cruelty. During the two years passed by Lord Dysart at Corby Heath he had but one servant, William Pick, performing all the offices of an establishment. He was valet, groom, cook; he also performed the offices of laundrymaid and housemaid; there was but one fire permitted in the house, and that in the kitchen. Such was the state in which Lord Dysart thought proper to live. It could hardly be expected that Lady Dysart should have resided there under such circumstances; though Pick seems to have considered

the house a very fit and proper residence for a lady, yet even his lordship's brothers are of a contrary opinion.

I pass over, therefore, all further comment on his lordship's mode of living at Corby Heath, with this single observation, that it shews the inveteracy of his habits, and the same disregard for comfort as was manifested at Edmonthorpe and Irnham, and continued afterwards, it would appear, at Buckminster.

In July, 1826, Lady Dysart went to live at Buckminster, and I think it is quite clear that in 1825, as well as in 1826, she went at the desire of Lord Dysart's family. She so pleaded it, and though Lord Dysart denied it (I have no doubt with sincerity, for he had no reason to presume that it was at the instance of his family), yet there are certain letters annexed to her interrogatories which bear out her statement that she went there not by her own wish, but by the desire of the earl's family, in order, if possible, to induce him to quit Corby and take up his residence at Buck[500]-minster. These letters are not pleaded, and though they appear in an inconvenient form to have any effect on the cause, still I do not see how Lady Dysart could, in this instance, have done otherwise. She had pleaded that she went to Buckminster at the desire of the earl's family; until the statement was denied and witnesses examined to establish that denial, there was no necessity for the introduction of letters which were evidence to establish that statement only, and could not have been introduced in a mutilated state, though a small part only of the letters have reference to the matter.

In July, 1826, as I have stated, her ladyship took up her residence at Buckminster, and there continued until June, 1827, under the same course of treatment as was pursued at Irnham and Edmonthorpe. She was annoyed in every manner of way; she was kept out of her bed-room until one or two o'clock in the morning, by the room being locked up; on some occasions she was kept out of her room all night, and obliged to lie on a sofa in the passage or dressing-room, and a variety of opprobrious names were applied to her by her husband, coupled with swearing. Elizabeth Parker, who lived at Buckminster, in the family of Lord Dysart, for several years, describes the mode of life between the parties very much in the same manner as the earlier witnesses have done.

On the eighteenth article she says, "I remember Lady Dysart's coming again to Buckminster in the month of July in the following year, 1826, and then she stopped there about a twelvemonth, as I recollect none of the family were there when she came, and why or at whose request she came I do [501] not know. I remember Lord Dysart's coming there—that was, I think, about two months after her ladyship arrived. They resided there together for some months, and till his lordship came up to London to attend the House of Commons. It was his lordship's constant practice to lock up their bed-room and keep it locked to a very late hour. When he went to bed himself I do not know, not till quite morning certainly. He did not come down stairs till the afternoon, and when he did he locked up the bed-room. I have been to his lordship many times to ask for the key that the bed might be made and the room cleaned, but he refused to give it or allow the door to be opened; and so Lady Dysart was kept out of her bed-room; it never was opened again till after midnight; it was between twelve and one always, and sometimes later before we were allowed by his lordship to go into the room to make the bed. The dressing-room was open to Lady Dysart, but not the bed-room. On two or three nights he kept her locked out of the room all night long, and she slept in the dressing-room, the sofa being made up for her to lie on. While at Buckminster I frequently heard a deal of noise in their bed-room—disturbance between them. My lord seemed, from what I heard, to be very angry. I have heard him swear at Lady Dysart," . . . "calling her all manner of names." . . . "One night, I remember well, when I was sleeping in the attic, a floor higher than their bed-room, it might be three or four o'clock in the morning, I heard her ladyship's voice screaming 'murder!' I got up and ran down to her. As I came down one pair of stairs I saw her going down the other [502]—next flight. She was very much terrified. She went into the parlour, and was in hysterics there for as much as an hour, I may certainly say. I did not see anything of Lord Dysart then; Lady Dysart stopped in the parlour the rest of the night. On another occasion, when I was sleeping in a room on the same floor with them, I heard a noise and scream from her ladyship, upon which I got up to go to her, and then saw his lordship putting her out of the dressing-room door; she then went into what is called the nursery, where she passed the rest of that night. I saw no further violence.

I never saw him pinch her, but I have seen the marks of pinching, bruises upon her ladyship's arms, which must have been caused by some personal violence. I saw the same kind of marks upon her neck, where they continued visible for several days, though I do not well remember how many. On both these occasions her ladyship was in her night dress. Of the cause of disturbance on either occasion I have no knowledge, except from what her ladyship told me."

Beyond the fact of seeing Lord Dysart pushing his wife out of the dressing-room, which is confirmed by Mary Gregory, a witness on the other side, Parker saw no other violence. It was pleaded that Lady Dysart was the aggressor, and scratched her husband's lip, but Gregory says she saw no marks of violence on his face, though Mr. Algernon Tollemache states that he has some indistinct recollection of seeing Lord Dysart's lip swollen, as if from a blow, but he has no knowledge how it happened. Parker, however, on the fifteenth interrogatory, answers she never knew Lady Dysart to [503] put herself into a violent passion with, or abuse, her husband.

Such is the manner in which Lord and Lady Dysart are stated to have lived in the various residences belonging to his lordship. I think there is, upon the face of the depositions, so far as I have hitherto proceeded, not only proof of want of affection, want of attention to the wishes and accommodation of his wife, but also of privations and hardships inflicted upon her, which, though they may not be sufficient to found a sentence of separation, and could not in this case, as the alleged misconduct was condoned by a subsequent cohabitation, nevertheless must have a very material effect on the case, and lay a probable ground for those circumstances which are afterwards deposed to. It is true that the facts to the general conduct at Edmonthorpe, at Irnham, at Buckminster, when taken separately, rest on the testimony of a single witness; still the witness to the conduct at each place is different, and they all concur in stating the general mode in which the parties lived together—the want of attention and consideration for her ladyship; they support each other, particularly as to the use of opprobrious epithets, so that no one can with propriety be considered in the light of a single witness; for generally that which is deposed to as having occurred at Edmonthorpe is also stated to have occurred at the other residences.

We have at length arrived at a termination of the history of the parties to the year 1827, and after that, until the year 1834, they did not again reside together, except occasionally at the house of Colonel Toone, where of course it is not to be [504] supposed, nor is it pretended, that any act of cruelty was practised. But in the year 1834 the cohabitation was renewed for a few days in Hyde Park Place. Lord Dysart's father, then Lord Huntingtower, had died in March, 1833, when he succeeded to the fortune and estates of his father, producing a large income; so that, from that time, there was no ground, for want of funds, that he should practise that strict economy which he may have considered necessary during the earlier part of his married state.

During the cohabitation in Hyde Park Place, which was, as I have said, of very short duration, very little passed of which the Court has any accurate account. Subsequently, it appears her ladyship endeavoured to obtain an allowance from her husband, with the view that they should live separate and apart. It seems that negotiations for that purpose were set on foot, and that his lordship offered an allowance of 300l. per annum, if she chose to live separate, whereas her demand was, in the first instance, for an annuity of 6000l., and, when that was refused, for one of 3000l. The result, however, was that all negotiations on the subject were broken off, and nothing further occurred till July, 1836. Now in July, 1836, Lady Dysart rejoined her husband at Buckminster, and it is during this cohabitation at Buckminster that circumstances occurred upon which the question must depend whether she is entitled to the relief she prays. The conduct and acts of the husband, which, it is contended, are to have the effect of reviving his previous misconduct, are said to have taken place between July, 1836, and January, 1837, for, although her [505] ladyship continued to reside at Buckminster till the month of April, 1837, there was no personal communication, as will be seen, between the parties after the 23rd January.

The general observation which I have to make on this part of the case is, that her ladyship had to endure privations and insults similar to those proved to have previously occurred. She was not permitted to exercise any control or superintendence in the management of household affairs; if orders were given by her, they were not to be obeyed till the earl had been consulted; no visitor was to be admitted; she was excluded from all society, save that occasionally Mr. Frederick Tollemache was in the

house; the same kind of abuse was continued as before, and the application of opprobrious names, to which one of the brothers of Lord Dysart bears witness. In short, it is impossible to describe a scene of greater misery and less comfort than this lady must have endured during this residence at Buckminster.

Here, however, it was again urged that, whatever inconvenience the countess may have suffered, it arose from her own want of submission to the will of the earl, and of conformity to his habits; but on this I must observe it was not, I think, an easy matter to conform to such habits. To a person of a robust and hardy constitution such a mode of life as is described by the witnesses might not have proved injurious, but to one in an extremely delicate state of health, as this lady is proved to have been, and to one brought up with some tenderness, such habits were but little adapted. Considering the state of health of the countess and the privations and [506] hardships to which she was exposed in the winter of the year 1836-7, I am not surprised that there was some degree of feeling of resentment on her part against the author of these injuries. The occurrences of this period are of too important a nature to be passed over with general observations; it will be necessary therefore that I should examine them with some degree of minuteness.

In the month of July, 1836, the countess went to Buckminster. In that year it was that Lord Dysart, then Lord Huntingtower, was appointed High Sheriff of Leicestershire. It appears that her ladyship accompanied him to Leicester to attend the assizes, and during their visit at that place, which continued for about three weeks, they appear to have lived on more comfortable terms than at any other period of their cohabitation. But this harmony, unfortunately, was not of long duration, it was soon at an end, and caused, too, it is said by a trivial circumstance—whether into an already crowded carriage, on leaving Leicester for Buckminster, a certain portmanteau should, as his lordship insisted, be placed inside, or, as her ladyship required, be sent by the public carrier.

Now there is but one witness examined on behalf of Lady Dysart, who deposes to the conduct of the parties on their return from Leicester to Buckminster. She is a person of the name of Hill, then Shaw, who accompanied Lady Dysart to Buckminster in July, 1836, and continued in her ladyship's service till she quitted in April, 1837. All the other servants were under the control of his lordship, and no visitor was admitted into the house, therefore the countess could have produced [507] no better or further evidence than she has. On this witness all the points, at least the material, depend; I must, therefore, say a word respecting the degree of credit to be given to her representations. In the first place, I must observe there is no imputation on her general character, or on the manner in which she has given her evidence; and so far as I can see from what fell from the learned Judge in the Court below, there is nothing in his opinion to shew that she has given an inflamed or exaggerated account of the events of which she was an eye-witness. In the arguments of counsel, however, she was treated as a prejudiced witness, as every lady's maid is said to be (the force of which observation equally applies to the dependants of his lordship), but the argument was not carried to such an extent as to charge the witness with having given false representations. It is certainly true also that this witness is examined a long time after the events took place to which she deposes, but this remark applies to every witness in the cause. It is possible she may not have a precise and accurate recollection of every circumstance that occurred; still this witness has had some aid in assisting her recollection from the circumstance of her having been examined in former proceedings which took place in the year 1837, for though that suit was abandoned, and I think for sufficient grounds, the pleadings in that case on behalf of Lady Dysart were, I understand, in the main the same with the present.

Now the account this witness gives of the parties certainly exceeds, in one or two particulars, any thing that had previously occurred. The state-[508]-ment appeared to the learned Judge of the Consistory to be so extraordinary as, had the particulars to which I allude not been to a certain extent admitted, to defy belief.

On the twenty-fourth article, Hill, then Shaw, says, "The Countess of Dysart remained at Buckminster for between nine and ten months, that is, from the 8th of July, 1836, to the middle of April in the following year. Buckminster is the family residence of the Earl of Dysart; he lived there in a very singular manner. In some respects there were wanting the common necessities of life, and in no respect did he live according to his rank and station in life. There was a great want of linen." [The

witness mentions the particulars, evidently shewing that there was a great want of articles, which were necessary for comfort, if not for decency.] "Everything in the establishment that came under my observation was of the very meanest description. I remember being present one time in her ladyship's bed-room when Lord Dysart had come to her, and speaking of something that she had desired to be done to a fire-place below, and he had forbade, he said that they, the servants, had obeyed his orders, for, said his lordship, I forbade them to do anything, and it is my order that they shall do nothing that you bid them do, without first coming to me to know if it is my orders. I heard her ladyship once ask him to open a box of linen which was in the house that they might have a little more to use, and his answer was that he had not time to open it, or to that effect; he refused it. She had not even a teapot allowed her. When we first went to Buckminster she used one borrowed off [509] the steward; when the steward wanted it, she made her tea in a jug; when the top of the jug chanced to be broken she was obliged to cover it with a plate. Lord Dysart refused to open the plate chest, when she asked him to do so, and give her out the teapot and candlesticks. He had not time, he said, to look them out. He did debar Lady Dysart of society; I heard him tell her ladyship that he would not have a pack of people coming there after her, and in fact no one ever did that I remember but Lady ——— Manners, the daughter of the Duke of Rutland; and when she called Lord Dysart, who seemed very much afraid that she might get in, told me to go down stairs, and say 'not at home.' I heard him tell her ladyship that she should not send for the most trifling thing without his permission." She says his language to her ladyship was coarse, vulgar, and gross; he called her and her family all manner of names. . . . "The mother and brother of the countess were those he abused most; she used to take it as quietly as she possibly could, she made him very little reply." [The witness goes on to describe the visit to Leicester in the latter end of July, to which I have alluded.] "Before they went there [to Leicester] they did sometimes sleep together but not very often, I do not recollect that he ever slept with her afterwards. I do not remember their ever breakfasting together at Buckminster, and this I believe to be owing to him, because of the irregularity of his hours and also of what he had, and how it was served. It was not a breakfast of which a lady could partake; they dined together but seldom."

The witness says on the twenty-fifth article: [510] "The house at Buckminster is spacious, and would have been very comfortable if properly furnished. I recollect five different entrance doors, but of these four were shut up" [there is some dispute as to the number left open] "by his lordship's orders; the only one left open was that nearest to the servants' offices, so that the countess, to go out that way, had to pass through the principal part of the house, and a long passage, and pass by the kitchen door, and so out of this side door. She could not be expected to do that, and so a form was placed outside the library window, and so she went in and out by that means. That room, though called the library, was in fact the only family room in the house that was furnished, the only one that was carpeted. There were plenty of carpets folded up lying in the entrance hall, but he would not allow them to be undone, though Lady Dysart frequently asked it of him, so she had but two slips of carpet, like pieces of stair carpet, one on each side of her bed. So in like manner with other furniture; the leg of the washhand-stand in her bed-room was broken, and tied up with string. I know that her ladyship suffered from cold, and her bed-room, as furnished, was quite unfit for any lady to live in. The bed hangings were very dirty; they were in a most filthy state; I do not know when they could have been washed. She complained of it, but that was of no use; he said he would not have them washed. In the coldest day in winter the windows of all rooms below stairs and of all bed-rooms unoccupied were thrown up as far as the sashes would go. Even in her ladyship's bed-room a pane of glass which had been broken before we [511] went there was repaired by a piece of board, which remained all the time we were there; and in winter the snow beat in through the crevices. When asked to have the window mended, Lord Dysart said he could not have it done. The windows in her room were so loose that not only did they rattle very disagreeably, but the rain poured in, so that I have seen pools of water; I have sopped up as much as half a pail of it in the room at a time; but when spoken to about it, Lord Dysart said it would do very well, he could not have anything done to them. Lady Dysart really did suffer much from the cold and wet, besides, she had several colds owing to that. It was a dreadful cold place; I have seen the

water actually streaming in the passages, all owing to the want of common care in keeping out the weather, and the want of proper firing within doors. It was not fit to live in; it was at the risk of health and life, too, that we stopped there. Lady Dysart suffered in her health, besides being wretchedly uncomfortable. I caught such a severe cold that I was seriously ill from it, and Lord Dysart himself, who was accustomed to live more like a brute than a Christian, caught such a cold that he thought he should have died."

It is quite impossible to describe a state of greater misery than that in which the parties lived at Buckminster from July, 1836, to the beginning of 1837.

But the witness states in the course of her deposition on this article one particular circumstance to which I must refer, and a most extraordinary one it appeared to the learned Judge of the Consistory Court. He considered it, and I can regard it in no other light than, a want of common decency on the [512] part of his lordship—a closing of those places (of which there were several in the house) peculiarly applicable for the purposes of privacy, and that for the purpose of obtaining manure for the grounds. This averment I must take as true, for there is no denial whatever; and strange to say that this order on the part of his lordship was carried to an extraordinary length: it eventually gave rise to that quarrel which led to the final separation.

Lady Dysart was at this time in an ill state of health, whether suffering from rheumatism as stated in Lord Dysart's plea, or the effects of a miscarriage, I stop not to inquire, nor do I consider it necessary to determine whether her ladyship was furnished with such medical aid as she wished for. Considering she was in ill health, the general treatment she received, and the account given of this residence, it cannot, I think, be wondered at that she should at times have remonstrated with some degree of warmth. I cannot go the length which the learned Judge of the Court below is represented to have done, and say that Lady D. was bound to submit and obey "in all things not sinful;" for, assuming that expression did fall from the learned Judge, I think it must have some qualification. I cannot hold that it is the duty of a wife to submit to whims and caprices, such as are deposed to in this case, when they have the effect of subjecting her to attacks of rheumatism, &c.; I think these are grounds upon which she might fairly resist, or at least remonstrate, without barring herself of relief from this Court.

Having considered the evidence given by Hill on the general conduct of the parties and the state of [513] the residence at Buckminster, I now proceed to some of the particular occurrences on which she has deposed. On the 8th of December, 1836, it appears there was a quarrel, which is pleaded in the thirtieth article, and it seems that Hill at the desire of her mistress made a memorandum of this and other events. It was argued that as she was desired to keep a diary, it is clear that Lady Dysart went to Buckminster at this time for the purpose of provoking her husband to commit such an act of violence as would justify her in seeking a separation on the ground of cruelty: I cannot, however, see how this is consistent with another part of the argument, namely, that the entire conduct of Lady D., as developed in her letters, shews that she was anxious that the cohabitation should be renewed. The two arguments appear not altogether consistent; it is clear, too, from evidence in the case that Lady D. went to Buckminster at the instigation of his lordship's family.

With respect to this quarrel on the 8th of December, 1836, the witness Hill, then Shaw, says: "In the evening of which I am now deposing as inquired of I went up stairs to my lady's bed-room, I cannot say the hour, perhaps from ten to eleven o'clock, in consequence of what I heard from other servants, and when I got there I saw Lord and Lady Dysart both lying on the floor together, he undermost, on his back, holding her by the hands; she lay with her back on his chest, and her hands crossed before her, so that his arms were round her; he appeared to be holding her forcibly. Her ladyship told me she should be strangled." Hill says, [514] "There would be no fear of that I think, though she might have been hurt on the chest, from the manner in which he held her. She told me to fetch a pillow for her head, for in the direction in which she lay it was hanging. I fetched it, and then his lordship told me to put it down 'there,' which I did, thinking it was for her ladyship's head, but he immediately clapped his own upon it and said it would do very nicely. He said more, but I not remember his words, apparently as if he wished to turn it off as a joke. From what passed while I was in the room I understood it to have begun from a dispute about a new housemaid, whom Lady Dysart would not allow to make her bed, which Lord Dysart insisted she

should. He held her till she should say something that he wished her to say, but she for some time would not—I suppose for as much as half an hour after I was in the room; and when she said it, whatever it was, some nonsensical thing it seemed to be, he let her get up. I observed that her ladyship's wrists were discoloured for some days afterwards, and she complained of her bosom also. She was hurt, I do not know that I could say seriously; she was bruised, and appeared to be sore for some days." According to this account, then, there was an act of personal violence exercised by the earl upon his wife for the purpose of compelling her to make a certain promise which she at first refused to do.

Upon the twenty-ninth interrogatory the witness relates this story pretty much as she had done in chief, but with some additions, and it was observed by counsel that the witness could not have sup-[515]-posed there were injuries done to the countess, from the manner in which the witness admits she conducted herself upon that occasion.

Upon the twenty-ninth interrogatory her evidence is this, without going through the whole of the circumstances which are the same as in the evidence in chief: "He" [Lord D.] "might possibly, he did say, 'Here, Shaw, here's a pretty piece of business.' I am sure I cannot tell what reply I made. I never was convulsed, or nearly so, in their presence in my life. I cannot imagine how I could have laughed at all; there was nothing amusing in it; it was more disgusting to see them sprawling in that way; they were laughing part of the time. How it happened I not know; it seemed to me as if what had begun in a quarrel was going off in joke. I remember that Lord Dysart laughed when I brought the pillow and he laid his head upon it. I might say, 'Come, get up both of you;' I do not remember exactly what I said, their proceedings were so very different from anything I had ever before seen; it is very likely that the producent did say to me, in good nature, 'Come here, you nasty little thing, and help me,' probably after I had given him the pillow."

This certainly does give somewhat of a different complexion to the transaction as stated by Hill in her examination in chief; still the fact is, there was an act of violence committed, from which some injury arose. Lady D. was bruised, and appeared sore some days afterwards, though towards the close of this scene some jokes appear to have passed.

The witness also says, upon the thirtieth interrogatory, "What the reason was, or what Lord [516] Dysart said was the reason of holding her as he did on the occasion now inquired of, I am sure I do not remember, but I do recollect that when I went into the room as he held her, she was kicking at his shins as well as she could. Of her having pulled his hair or scratched his face I can say nothing, but that there did not appear to be any marks of it, or her having bitten or pinched him; I can form no belief about it beyond what I have said. I do remember that before the ministrant left the room he did pull up his trowsers (he had no stockings on to pull down), and shewed me his shins. They did not appear to be either swollen or bruised, they looked a little red, that was all. I rather think that the producent did say it served him right. I think that on the following day she sent him some camphor to rub his legs, but I cannot imagine how they could have been seriously hurt, for Lady Dysart had only satin shoes on her feet. I cannot at all believe that scars are now visible, or were long visible, or that there were any arising from such a cause." On the thirty-first interrogatory she says, "When I went into the room, and at intervals while I was there, Lady Dysart was attempting to release herself. It was with that view that she kicked his shins as she did; so I believe. She kicked with her heels; for she lay, as I say, with her back on him. What it was that she was to say as the condition of his allowing her to get up I really cannot say, I do not remember it; I do not think it to have been that she should promise not to pull his hair, or scratch his face, or kick his shins, or pinch or bite him, or tear his papers, I do not think that, or any of it, at all [517] likely; my impression is that it was something of a trivial kind. I have no recollection of her having said that she would tear his eyes out, or tear all his papers to pieces. Whatever it was that he wanted her to say she refused to say it. I did not offer to get the pillow; I got it at the desire of Lady Dysart, and put it down, intending it for her, when he clapped his head upon it. Whether she did at length make the promise in a droll and jocular manner, or what she said, I cannot remember. It may be that he let her get up without, but he did at length release her. The ministrant did remain in the room for some time, a considerable time, after she had got up, and during part of the time they were laughing and joking

together." Then she deposes on the thirty-second interrogatory that her belief is, that the quarrel began with reference to one of the housemaids, who had been hired by Lord Dysart after her ladyship had objected to it, and that Lady Dysart refused to allow this person to make her bed.

Hill so far admits that Lady Dysart was attempting to release herself from the attack that she kicked her husband's shins, and that they did appear to be a little red; but she negatives the suggestion that they were, or could have been, seriously injured.

Thus far then I have considered the evidence produced by Lady Dysart. I will now proceed to consider the version given on behalf of his lordship who has examined three witnesses respecting this occurrence.

Now one of those witnesses, and the most important of the number, for he is present on all occasions, if any one could be present with Lord and Lady [518] Dysart when their quarrels arose, is William Pick, of whom I have already made mention as having lived with his lordship at the cottage at Corby Heath. He appears, as the learned Judge of the Court below observed, to have been rather the slave than the servant of his lordship. Much depends on the credit due to this witness. I pass over his account of the state of the house at Buckminster, and the general mode of living there, which differs from Hill's version, as being of little importance, and perhaps in some respects matters of taste or opinion; but there is something which is stated by him on the thirty-fifth article which shews, I think, the temper and disposition of the witness.

He says on the thirty-fifth article, "I do not remember exactly how long Lady Dysart was at Buckminster before they went to Leicester, it might be a month or six weeks. I believe that they were then on pretty good terms, and so they were after they came back, as well as I remember. Sometimes they were quite friendly for a length of time together, then, for some reason or other best known to herself, her ladyship would begin to aggravate his lordship; I did not always know how it began; but I did sometimes; I have heard her begin to complain of the meat and the bread. One thing brought on another, till they got to high words. As far as I ever knew the origin of their disturbances, they were always begun by her ladyship. It appeared to me to be her object to irritate and provoke his lordship." Such is the general account which this witness here, and in other parts of his deposition, gives of the origin of the quarrels; her ladyship was always the aggressor, she did everything to provoke his [519] lordship, whilst, according to the witness, on the eighth article, his lordship appeared to treat her ladyship kindly and tenderly in every respect. It is, I think, the result of the evidence in the case that her ladyship had sufficient provisions, though perhaps not always of a quality suited to her condition and state of health; but it is impossible that I can believe that her ladyship was the party always or generally to blame; this statement frequently made, in the course of this witness's deposition, satisfies my mind that he was not a very accurate observer of what did take place; and leads one almost to anticipate and to foresee his version of every occurrence.

On the fifty-second and fifty-third articles of the allegation he gives this account of the bed-room scene, "I was present one evening at about eight o'clock, between seven and eight, in Lady Dysart's bed-room; my lord was there. He sent me to fetch Fanny Wing and Elizabeth Haynes to make her ladyship's bed. When his lordship told me to go for them, Lady Dysart said, 'You need not send for them, for I'll not have Elizabeth Haynes come into my room.' His lordship said, 'Oh, poh, nonsense; Pick, you go for them;' so I went for them; and they followed me into the room. When they came in, Lady Dysart still kept saying to his lordship that Elizabeth Haynes should not come in, and that she would bundle her out if she did. Lord Dysart laid hold of her ladyship to prevent her striking Haynes. All the time that Elizabeth Haynes was making the bed, Lady Dysart kept calling her all the whores and strumpets, and every Billingsgate name she could think of. My lord [520] kept holding her ladyship to prevent her striking Haynes, and her ladyship told my lord that if she got loose she would tear his eyes out and knock him down with a poker. His lordship said, 'Well, then, I shall hold you here till you promise that you will not strike me, nor tear my eyes.' She still kept saying she would, and his lordship said, 'I will keep you here till you promise me that you will neither kick nor strike.' He was holding her in front of himself, with his arms round her, and holding

her's down. She then set to kicking of his lordship, till, as I afterwards saw, his legs were all black and blue; all colors they were. He told her then that if she kept on so, he must lay her down on the floor till she promised not to ill-use him any more. He then laid her down upon the floor; she still kept kicking, and he put his leg over her's to prevent her. She kept saying that she would not beg pardon, or promise not to do so any more, and he said how he would keep her down till she did. I should think he held her there an hour, it might be an hour and a half. The maids left as soon as the bed was made."

Upon the seventy-first interrogatory he also gives an account of the same transaction. He says, "On the day inquired of, and of which I have before deposed, it might be nine o'clock, or between eight or nine in the evening, when I went up to her ladyship's bed-room. The bed was still unmade; it had not been made, because his lordship had not given orders for it to be made. His lordship was in the room before me; I cannot say how long. When I went up there, it was with his lordship; he had been there before I believe. He did then [521] look up the room, that is, he looked to see if he had left any papers behind him. I did not assist him any further than being there with him. The first word that was spoken about the bed was his lordship bidding me order Fanny Wing and Elizabeth Haynes come and make it. Her ladyship said that Elizabeth Haynes should not come into the room. His lordship said 'poh, poh,' to that; and to me 'You fetch them.' I went for the maids, and on my return found his lordship holding my lady before him, but not on the floor. He was not in any rage, or swearing, or cursing. I do not say that I thought it a joke or a jest so much as a bit of a pet; I did not think more of it than that I believe that her ladyship was serious about it; but I never made a remark to Shaw, or to any one, on the way in which Lord Dysart had then behaved to her ladyship as being brutal."

This evidence on cross-examination is not very consistent with the account given by this witness on the fifty-second and fifty-third articles, but, passing that over, I must turn to a statement on the fifty-fifth article which is somewhat startling. He states that he left the bed-room before the end of the affray, and concludes his evidence on that article in these words: "My lord's leg was wonderfully bruised; whether it was that night or next morning I saw them (his lordship's legs) I am not sure. I saw them again just a week ago; his lordship shewed them to me as I was coming up to give my evidence" [he was examined on the 16th Nov. 1843]; "there were as many as seven marks upon them, one large scar, and the rest remains of bruises." These bruises are said to have been inflicted [522] on the 8th of Dec., 1836, by her ladyship, who, according to Hill's statement, then had on satin shoes; yet this witness, William Pick, is able to recognise these bruises after a lapse of nearly seven years!

Fanny Christian, then Wing, one of the females called to assist in making the bed, deposes to the fact that on entering the room she found Lord and Lady Dysart on the floor together. She states that her ladyship said she would knock Haynes down with the poker; her violence was directed against Haynes, not his lordship. She called Haynes all manner of names, and Lord Dysart told her ladyship that she should get up if she would promise not to strike Haynes. This is the account Wing gives: it was not to prevent her ladyship from exercising violence on his lordship by tearing out his eyes, and knocking him down with the poker. This witness has also been examined to prove the terms on which the parties lived together; she states that Lady Dysart complained of what was set before her for dinner. She says that there was plenty of the best, that her ladyship's object was to irritate Lord Dysart. His lordship was generally in the library when she came in and the dinner was served; the first words she would utter were, "Is this a dinner for me?" Lord Dysart would say, "Yes, and a very good dinner too; if I can eat it I think you may." The witness also attributes all the quarrels to Lady Dysart, but it is to be observed that she allows in answer to the eighty-fourth interrogatory that she said she would not have stated anything against Lady Dysart had her ladyship not made some statements concerning her which were false.

[523] Elizabeth Stevens, then Haynes, also deposes to the same effect as the preceding witness; she says when she was sent for to make the bed she found Lady Dysart on the floor, who called her all manner of names; she was afraid her ladyship would strike her, "what she said while I was present was only against me."

The misconduct then on the part of her ladyship according to the evidence of the two last witnesses, who differ from Pick, consisted in an attempt to commit violence,

not on the earl, as pleaded, but on the witness Haynes, and in the use of expressions extremely improper, of which her ladyship must I think have afterwards repented, towards that person who is represented to be respectable. Under these circumstances there is no reason to suppose that Hill has given a false representation of what passed in her presence. Still, if the case had rested on this act alone, the Court would not have been in a situation to say that it was such an act of cruelty as would entitle the party complaining to a separation. It is a circumstance, however, not to be lost sight of by the Court when it comes to subsequent acts of a more serious nature.

Upon the 6th of January, 1837, another transaction took place which does go I think very much to shew that the earl's conduct was not under his control, and that a very slight provocation was sufficient to make him act in a manner which, if not amounting to actual cruelty, does much savour of it. It appears that upon the 5th of January, according to the thirty-first article of Lady Dysart's plea, the earl called his wife certain opprobrious [524] names, that upon the 6th he repeated these expressions in the presence of his servants, and without any cause pinched her and held her down on a sofa, and otherwise ill-treated her so violently that her flesh was bruised and discoloured. Hill, who was produced on that article, has no recollection of what took place. But William Pick is examined on behalf of Lord Dysart on the fifty-sixth article of his allegation, and the account which he gives is this: "I do not remember particularly when it was, the time of the year that is, but one day after dinner, when my lord and my lady were together, I do not know how I chanced to be there too, but that my lord very commonly wanted me for some purpose or another (sometimes I have been there by the hour together, only because his lordship did not think proper to tell me I might go), my lord's napkin lay on the floor, and my lady kicked it; my lord told her not to do so, as he did not like his napkins being kicked; her ladyship not giving over, my lord took hold of her and laid her down on the sofa, not hurting her at all, but just to hold her ladyship till she would promise not to kick his napkin again. Lady Dysart did not scream or appear to be anywise ill-tempered. Shaw came in, though I don't know what brought her; my lord told her she need not wait, and so he told me too, saying he would summon me when he was ready to see me again. They had been good friends just before this happened; when I went back to the library about an hour afterwards they were so again."

This witness has been examined on the seventy-second interrogatory, and the account which he [525] gives is this, "I waited at dinner on the day inquired of; I know the day, I spoke to it before, but I do not remember if it was the 6th of January; I do not recollect that the producent was in an ill-humour at dinner; I believe not, he did not curse or swear to my belief; I believe that after dinner Lady Dysart did go to his lordship to endeavour to coax him into a better humour; she would do so sometimes, not often; she tried to annoy him more frequently than to be friendly; she did not accidentally tread upon the napkin (for a napkin it was) that his lordship had been using. I swear that she did not do so accidentally. I do not believe that Lord Dysart did swear at her or abuse her; he might have said, 'Damn it, you should not do so!' but that I do not call swearing at her, neither is it; he took hold of her and put her down gently on the sofa; I do not swear that she struck him; he held her to prevent that. Lord Dysart is a tall and powerful man, very; it would be an act of madness in a woman to attempt to fight a man like his lordship. I did not remain in the room until he released her; I was there a good bit, but I cannot say how long. His lordship was not then in a passion, he did not appear to be, he was not; I swear that I did not hear him curse and swear and use infamous and scandalous expressions; I do swear that I did not hear any such expression. I do not believe that I ever spoke of what so passed to any one, I will swear that I never said to any person that if I were her ladyship I would be damned if I would continue to live with his lordship, or anything to that effect."

This account given by his lordship's own witness [526] shews how trivial a circumstance is sufficient to give rise to an ebullition of temper and violence. Violence and coercion are had recourse to, not to prevent injury to himself, but to enforce obedience to his wish that a napkin be not kicked.

But the circumstance of importance, which lead to the final separation of the parties, occurred on the 23rd of January in the same year, and it is on this, taken in conjunction with what had previously occurred, that the Court is to pronounce its

judgment. This occurrence, pleaded in the thirty-second article of Lady Dysart's allegation, requires to be very accurately considered.

Hill gives the following account:—"On the 23rd of January, 1837, being in my own room about ten o'clock at night, I heard Lord and Lady Dysart come up stairs, and also William Pick, a man who waited upon his lordship. They went into Lady Dysart's bed-room; and soon afterwards I heard the sound of high words between my lord and lady. Presently afterwards I heard Lady Dysart call out 'murder,' and thereupon I went into the room. Lord Dysart was sitting on the floor with his legs extended, holding her ladyship before him much in the same way as on the occasion before deposed of, only that they were sitting, not lying. He was then holding her and treating her with violence; he was in a passion, he grated his teeth, and called her all manner of bad names . . . with many more gross terms. Her ladyship screamed and told us to go for a constable. Lord Dysart said that if Pick or I went for one we should never enter the house again; he was master of the house, he said, and he would be master of every one [527] in it. He held her, as I have said, for I believe as much as an hour and a half, forcibly all the time, abusing her a great part of the time, enraged part of the time, and pulling or twisting her hands and wrists, as he held her, so as, I should think, to hurt her seriously. It really was cruel and brutal treatment. Lady Dysart made very little reply to him; during his greatest fury she never said a word. After a while she asked him to let her get up, and he said that he would not unless she said something which I do not exactly remember. I think that it was some kind of promise he required of her about throwing water out of the window, but I do not remember the words." [It appears by the evidence of Pick that it was throwing some slops out of the window which were too precious to be wasted.] "She asked him to let her get up repeatedly, but he would not, except as I have said; he told her that he mortally hated her, that he had not been in her room before for ever so long, and would not come again but on business; that if the law allowed him he would give her a damned good thrashing, but he knew he could not do that, and therefore he would punish her as he did, for he hated her mortally, and he would say so if he had but three minutes to live. He said that she had been a torment to him as long as they had been married, but she had given herself more airs since she had been at Buckminster that time than ever she had done before, and he would take care she should not be master over him as long as she stayed. When speaking about either of us, Pick or myself, going for a constable, he said if we did he would kick us burning to hell, not if we obeyed any order of Lady Dysart, but if I went for [528] a constable; and then he insisted upon the servants all going to bed. I think that, at last, she was obliged to say what he required of her, that she did say it, whatever it was, and then he let her go, but she was so cramped by his holding her that she could not get up without his help, and he did assist her to get up. Lady Dysart was bruised and hurt seriously on this occasion; he pulled and tore at her, enough to jerk her arms out of the sockets; he looked and acted more like a demon than a human being; her wrists and arms were very much discoloured, and bruised and strained. I was alarmed for her as she was in his grasp; I really feared that he would dash her brains out on the floor. When at last she was released and raised, Lord Dysart said that he should go to dinner as soon as he was cool, but that he was too hot then, and so he left the room. It was then between eleven and twelve o'clock; Lady Dysart then went to bed, intending and resolved as she said, and I believe, to leave Buckminster the next day, but she was hindered."

The witness is examined also upon the thirty-fifth interrogatory, and the account which she gives upon that it is necessary for the Court to notice, as it was said on the argument to be inconsistent with, or at least not to come up to, her evidence in chief. She says: "On the 23rd January, 1837, I went into the producent's bed-room on hearing her scream 'murder' and 'Shaw.' Pick came for me, but I was going, and should have gone had he not come. When I went into the room he, the ministrant, was sitting on the floor and the producent before him, he holding her wrists; she appeared to be frightened when I entered the room. [529] It is possible that while I was in the room I might say to them that it was a pity they did not try to live happily together, or to that effect, but not on entering; for, when I first went in, his language, looks, and voice were such as to frighten me, and I do not think that I spoke to him at all for some time after I went in; besides that, for the first part of the time I was there, he was tearing at her wrists violently. The grievance, I believe,

was that she would not promise him not to throw any more slops out. I do not believe that the quarrel had been begun by her kicking his shins (still sore and tender, as interrogate if they were so or not); she was not kicking or attempting to kick him when I saw them; she had not the power as he held her. I have not the least recollection of his making any complaint of the kind on that occasion, or of her striking, biting, or pinching him; she was not a person to use any such violence unprovoked, and if she threatened anything of the kind it would not have terrified him. He was very odd about papers, unlike any person of sound mind. He would lay a parcel of papers on the floor, and when he took them he would look them over and over as if to see that nothing was sticking to them, and some he left about that would seem not to have been dusted for years; nobody was to touch one of them, and I do not think that Lady Dysart did ever meddle with any paper belonging to him. If he charged her with that I believe it to have been groundless, but as to throwing slops out of the window, which was the principal, if not the only grievance, I dare say that he might persist in holding Lady Dysart by the wrists, as he did, until she would promise not to [530] do it again. I dare say too that I advised her to say it, for I wished her to be released, and Lord Dysart out of the room. What answer she made I am sure I do not remember, but she did not for a long time make the promise, whatever it was, though at last I think she did. I do not recollect, and further I do not believe, that she said as interrogate, 'You may depend upon it I will pay you off for this, and tear your eyes out, and tear you and all your papers to pieces,' or to that effect. The remark which he made was not as interrogate, that he would hold her as well for her own sake as for his own protection whenever it was rendered necessary by any repetition of similar violence on her part. The producent did not say anything about liking to thrash him with a horsewhip, but the ministrant, Lord Dysart, said to her that he should like to give her a damned good thrashing to bring her to her senses, and would do it if the law would let him, but as he could not do that and keep within the bounds of the law, he would hold her as he then did whenever she displeased him, or to that very effect. She did, I think, get up, being released by him, soon after she had made the promise required of her. I was not laughing all the time as interrogate; at first it was no laughing matter at all. Afterwards I very likely did laugh at some of the strange expressions which Lord Dysart was in the habit of using, otherwise I did not; there was no laughing and joking between them that night as I remember. A great deal more passed, and there was a good deal of jangling, but not any joking. When I laughed it was at such expressions as that no one scarce could help it. Lord Dysart remained [531] in the room for about half an hour after releasing her, having so held her as much, I think, as an hour and a half. They parted on unfriendly terms; I do not think that Lady Dysart spoke to him after she got off from the floor. They had not dined together that day, as I believe, for I do not particularly recollect anything about dinner, but I do remember that when he left the room he said he should go to dinner. I know nothing about his lordship determining not to go any more into her ladyship's bed-room, or if he did, why he did. I heard nothing about any expression of contrition required from her, or any promise on her part to abstain from violence, but I do believe that his lordship did not ever again go into her ladyship's bed-room when she was therein but once, and that they had no further intercourse of a personal kind during Lady Dysart's stay at Buckminster."

She deposes on the thirty-sixth interrogatory, "The only person present during any part of the time just deposed of was William Pick. He attended his lordship wherever he went; he had gone up with him on this occasion, as I suppose, and as Lord Dysart ordered him to go, and send the other servants to bed, and then remain at the door. I conclude that he was standing outside the bed-room door during the greater part of the occurrence. He could not have been in the room for any length of time, for I think that he was sent to order the maidservants to bed within a few minutes after I went into the room. I did hear the ministrant grossly abuse the producent on that occasion; I swear that I did; he called her" . . . "He hated her, he mortally hated her. The producent called the [532] ministrant a monster and a wretch; I would not swear that she did not call him a beast, though I do not remember that she did. These expressions were called forth by his language to her, and by his violence to her. She did not begin, but, as it were, took up his own words, some of them, that is, and those not the worst. Without any reference to her acting still as she had done, or anything of the kind, his words were, 'I hate you; I mortally hate

you ; I would say so if I had but three minutes to live ; I have not been in your room for a month, and I won't come again ; I should not have come here now had it not been upon business.' As nearly as possible in those words, or to that very effect, did he then express himself. Lady Dysart did not treat any part of what he so said with ridicule. She did not answer it or speak to his lordship. Whether his lordship added that he should say what he did if he had but three minutes to live, in consequence of what he might consider to be her ladyship's indifference to his previous declaration, is what I cannot say. Of the servants in the family, Pick and myself were the only ones that knew much of what had passed." Then she deposes to certain observations which she says Pick made, but which Pick denies he ever used.

Such is the account which this witness gives of the transactions of the 23rd of January, 1837, and if her account is true, there can be no doubt that there was an act of legal cruelty. The earl held the countess on the floor between his legs with her arms crossed, and pulled her arms and wrists violently. For what was all this violence exercised? Merely because she would not promise to obey his [533] imperious demand not to throw slops out of the windows, when she had not those means of accommodation which even common decency required. Can it be said that this is not cruelty for which the wife is entitled to legal redress, provided there is reasonable apprehension that it may occur again? Can I say there is not reasonable apprehension, when I consider the trifling circumstances detailed in this case, which caused such ebullitions of passion, abuse, and violence? I must say, if what Hill states is true, there is reasonable apprehension of a similar recurrence from any trifling provocation, and that her ladyship cannot return with safety to cohabitation.

I will now see what the adverse evidence amounts to. Pick is examined on the fifty-seventh article of Lord Dysart's allegation, and he there deposes, "I was in her ladyship's bed-room one afternoon about four o'clock, in attendance on my lord, who was there with her, when they two got to words about my lady throwing slops out of the window, which my lord did not approve of, but she said she would. After they had been arguing upon it for some time, my lady flew at my lord as if to tear his hair, to hinder which my lord caught hold of her, and as she was going to kick him my lord said he must lay her down, for his legs had not recovered the last of that. So therewith he laid her down and held her, which he said he would continue to do till such time as she should promise not to throw any more slops out of the window. I went away some time by his lordship's leave. I don't remember Shaw being there at all that time. I do not remember my lady calling to me to fetch a con-[534]-stable ; I never heard my lord say such a word as damn the constable or me, or that if any one went for a constable, or obeyed any orders of his wife, he would send them burning to hell. There was no violence that I saw towards my lady ; she was in a great passion, but my lord was cool. He held her and he laid her down, because, as he said, his legs were bad and he should not like to be kicked again, but that is all that I saw ; I know that paying him off, and tearing his eyes out, were expressions of hers that she commonly used." This is the account Pick gives, and it differs materially from Hill's version, not only with respect to the circumstances, but also as to the hour of the day. He fixes this occurrence at about four o'clock in the afternoon, whereas she speaks of a much later hour.

But he is cross-examined, and thus deposes on the seventy-third interrogatory, "I was present at the beginning of the scene inquired of. It was in her ladyship's bed-room. It began by my lord saying that he would not allow any slops to be thrown out of the window, and my lady said she would throw them. He said that he would have them carried down ; they should not be thrown out of the window. He did not charge her with wasting the slops as I heard. I am sure that he did not call her a wasteful bitch, or use any opprobrious names towards her to my belief. I do not remember his requiring her to take an oath that she had not thrown any out. I do not remember any abuse of her by his lordship. He took hold of her gently to prevent her striking him. He was very gentle with her ; he had hold of her arms, and he put her down on the floor and he held her, but without any violence and [535] without hurting her in the least. She did not appear to be frightened, not in the least. I do not recollect that she told me to go for a constable. Lord Dysart did not say that if any one went for one he would kick him burning to hell ; I am sure he did not. I cannot say how long he continued to hold her on the floor ; it might be an hour. He did not appear to be in any rage ; he did not use any improper language ;

he seemed to be in very good humour. I never expressed myself as alarmed for her safety; I never said to Shaw or any one else that I never saw his lordship so bad, and that I could not think what had come to him, for that her ladyship had tried all she could to coax him. I will swear that I did not then, or ever, hear his lordship say to her that, as the law did not allow him to give her a good thrashing, he would have recourse to that mode of punishing her when she offended him, or anything to that effect. I don't say that it was a joke or jest. His lordship was serious in requiring that her ladyship should not throw the slops out of the window, but he was not in any bad temper about it, or at all, while he had hold of her ladyship. I should not say that the ministrant did treat it or consider it as a joke or jest."

The question now is, On which of these witnesses is the Court to rely? If it be considered that Hill [Shaw] has a bias in favour of Lady Dysart, it may be said with equal confidence that Pick is biassed in favour of his lordship, and is as likely to misrepresent what did take place. I cannot help thinking, on looking at the plea of Lord Dysart on this part of the case, that something more did take place than Pick remembers; he heard nothing about the con-[536]-stable; nothing about the thrashing or anything of the kind; every thing passed off in the most perfect good humour between the parties, and no bad language of any description was made use of during that portion of the time at which he was present. But the fifty-seventh article of Lord Dysart's plea gives this version, "That Lord Dysart did not on the 23rd of January, 1837, treat or conduct himself towards the said countess in manner as falsely pleaded in the thirty-second article of her allegation. That in the evening of that day the said earl went into the said countess's bed-room, in which he had been sitting with her before dinner and up to dinner time, to fetch away some papers that he had left in the room, when and where an altercation ensued between them, provoked by the said countess insisting on throwing some slops out of the widow, which the said earl objected to her doing, in the course of which the said countess having worked herself up into a rage and flown at him, the said earl was compelled to take hold of her by the wrists, but merely to restrain her from further violence, and for his own necessary protection; that the said countess having upon this begun kicking his shins, the said earl first telling her that she would force him to do so unless she abstained, but to no purpose, was also compelled to and did place his said wife on the floor, but in the gentlest possible manner, and still only in restraint of her violence, and for his own necessary protection. That the said earl then on this, as on the occasion in the fifty-fifth article of this allegation pleaded, called the aforesaid Shaw [Hill] into the room, and on this, as on such former occasion, explained to the said Shaw, in the said [537] countess's presence, who did not deny it, his reason for having placed and then holding her on the floor as aforesaid, at which the said Shaw only laughed, saying, 'What a pity it is, you two can't live happily together,' or to that very effect. That the said countess, who was extremely violent when first placed and held on the floor as aforesaid, having called out to Pick the footman to fetch a constable" [Pick heard nothing about a constable at all], "the said earl did say, 'Damn Pick and the constable too,'" but that he did not say he would do so and so. "That the said earl did on the said occasion hold the said countess on the floor for about an hour as articulate, but he only did so in consequence of her refusal to promise to abstain from further violence on his releasing her (upon receiving which promise from her he had told her from the first that he would instantly release her), but which promise it was about an hour before he could obtain from the said countess; that although the said countess was extremely violent when first placed on the said floor as aforesaid, yet that her passion soon cooled, and that during by far the greater part of the time that she was held there, she and the said earl and her maid Shaw were laughing and joking together" [that the earl and countess were joking is positively denied by Shaw, who says he was serious in requiring the promise, and Pick admits as much], "the said earl in consideration of, and in condescension to, his said wife's extreme violence of temper, being willing at the time not to treat her grossly improper conduct in the premises with harshness or severity. That the said earl did, at the commencement or in the early part of the said [538] altercation, abuse his said wife and say that she deserved a good thrashing" [nothing of the kind do we get from Pick even on cross-examination, but we have it in substance from Hill], "and that ninety-nine husbands out of one hundred would give it to her, or to some such effect; but the party proponent expressly alleges and propounds that such abuse on his part was provoked by most

gross abuse on that of the said countess, and such his implied menace by his said countess's actual menaces of 'paying him off,' 'tearing his eyes out,' and the like, on obtaining her release. That the said earl did not say on such occasion, as falsely pleaded, or on any other occasion, that as he could not punish the said countess in any other way, he would punish her in that way, to wit, by placing her on the floor, and there holding her with her arms closed before her whenever she displeased him, but only said that he would prevent by such or similar means a repetition of such or similar violence on her part. That the said earl did not on that occasion say that he hated or mortally hated the said countess, but only that she would soon make him do so, if she persisted in acting as she had lately done, and that it is wholly untrue (as pleaded in the said thirty-second article of the said allegation) that the said earl's manners and conduct, or either, were such on the said occasion as to cause in any one present a reasonable or any apprehension of any peril whatever to the said countess."

Such is the version of the matter set up in plea by his lordship. I am of opinion that I am bound to defer to the testimony of Hill, for I think it [539] accords much more with probability than the account given by Pick, who was not present all the time and has not told all that passed whilst he was present. I do not think that Hill has invented her account; it seems to me to be corroborated in some important respects by the plea of Lord Dysart, and I cannot attach much importance to that witness laughing at some observation which was made. But there is another circumstance to which I must advert as tending in my opinion to render the credence due to Pick and one of his fellow-witnesses, Fanny Christian [Wing], who deposed on an earlier part of the case, extremely doubtful. They depose on the forty-first article to certain expressions said to have been used by the countess in the presence of the earl, which in themselves constitute an imputation of a most grievous offence on his part—a charge sufficient to inflame the passions of any man; but so far from irritating the noble earl, according to the testimony of these witnesses, he took no notice of it and did not shew any displeasure at it—though, says Christian, there is no doubt he heard the words; he did not seem to think any thing of it. I must say this statement detracts very materially from the credit of these witnesses, Pick and Christian. I think it impossible that this could have taken place, as they represent it, without calling into existence violence which the earl indulged in upon slight and trivial occasions. I go further. I doubt whether the words were used; I am strongly impressed with the conviction that they were not. It is impossible that this imputation could have been cast on the earl without some remonstrance, some act of violence, some coercion [540] to extort a promise that his wife would never be guilty of such an offence again; in any of which courses, short of danger to limb or life, he would have been justified.

Being of opinion, then, that the violence charged to have been committed by the earl on the 23rd January, 1837, is established—that it is an act of legal cruelty, and that there is a reasonable apprehension, judging from his former conduct during the short period the parties cohabited together under the husband's roof, that similar acts would again occur without just provocation were the countess to return to cohabitation, I am bound to say she is entitled to the separation she prays at the hands of the Court; unless there be something, subsequently to the 23rd of January, to prevent her from obtaining that sentence. The countess did not immediately quit Buckminster; if it is true she was well enough to leave, and might have left without interruption on the part of the earl, I imagine he would not have failed to prove that part of his case. It appears by the evidence of Dr. Turner that, after the occurrence of the 23rd of January, from a cause into which it is not perhaps material to inquire, the countess was for some time very unwell and confined to her chamber; it is likewise stated that the weather was for a long time very inclement; for these reasons, coupled with other reasons, perhaps with the hope that there would have been some overture and promise on the part of the earl, which would have enabled her to carry on and to perform her domestic duties in a manner less disagreeable and less prejudicial to herself and her health, she remained in the house [541] till the 18th of April, and then finally quitted. No reconciliation took place; although there do seem to have been expressions of strong regard and affection on the part of the countess, even at that time, there was no condonation, no return to matrimonial cohabitation.

What is there, then, to prevent the sentence of separation? It was said that the letters of the countess, annexed to Lord Dysart's allegation, shew that she cannot be under the apprehension of violence were she to return to him, and that their

general tenor is to shew a desire to renew cohabitation. Undoubtedly it was so, at the time they were written; she was desirous that he should join her at her father's house, where there was not the least apprehension that any act of violence could recur; she was there safe from all motives that could induce the earl to quarrel with her. It was evidently her purpose in writing many of these letters, if she could, to effect a reconciliation with the hope of inducing him to reform his manners, and to treat her with more kindness and regard than he had usually done; but, unfortunately, they had no effect upon him. The acts committed at Buckminster on the 8th December, 1836, on the 6th and the 23rd of January, 1837, are all subsequent to the dates of these letters; they may take off in some degree the effect of the earl's misconduct at Irnham and other places during the earlier part of their married life, but, being prior in date, they cannot alter the effect of the earl's conduct in December, 1836, and January, 1837.

Again, the distance of time from the final separation to the date at which the plea of the countess [542] was given in is no bar to her claim. There was a delay of some duration in the case of *Westmeath v. Westmeath* (2 Hagg. Ecc. 5, 6, Supp.), and also in the case of *D'Aguilar v. D'Aguilar* (1 Hagg. Ecc. 781).

I am perfectly well aware of the importance of keeping parties, who have entered into the matrimonial state, to the performance of their respective duties—that it is the duty of a wife to conform to the tastes and habits of her husband, to sacrifice much of her own comfort and convenience to his whims and caprices, to submit to his commands, and to endeavour, if she can, by prudent resistance and remonstrance to induce a change and alteration. But when I see such acts as are deposed to in this case, without any serious ground of provocation on the part of a wife, how can I think of calling upon her to submit and require her to return home to a husband who, in order to gain his end, has recourse to any kind of ill-treatment short of “thrashing” her, and imagines in so doing he has legal authority. I cannot believe that I am at liberty to say that the countess can return home and discharge with safety those matrimonial duties which a wife ought to perform. I trust I shall not be considered as trenching on those principles of law which require the sacrifice of a wife's comfort and convenience to the wishes and authority of her husband when I say I hold that the countess has proved her case—has proved an act of legal cruelty, with a reasonable apprehension that on a slight occasion similar violence might be resorted to again. I am of opinion that I must pronounce for the appeal; [543] I do so, however, with the greatest distrust of my own judgment when I reverse the sentence in a case which has been before the learned Judge of the Consistory Court. This distrust of myself has induced me to postpone much longer than I could have wished my decision, but having at length satisfied myself that the view I take is consistent with law, and borne out by the facts, I am bound to declare my opinion that the countess has proved her case. I therefore pronounce for the appeal, retain the principal cause, reverse the sentence of the Court below, and pronounce for the separation of the parties.

From this sentence an appeal was immediately asserted to the Judicial Committee of the Privy Council, but after an interval of some months a compromise was entered into between the parties. Before, however, a compromise was proposed, or, at least, before the terms of the compromise were arranged, the following motion was made in the Arches Court.

April 15th, 1847.—An interlocutory sentence of divorce was pronounced before the bond required by 107th canon was given, and there was an appeal from that sentence asserted apud acta; but subsequently the bond was given. Before the inhibition was served the Court was moved to sign the sentence in writing to remove the nullity by 108th canon of the former sentence; after argument, the Court, holding that it has power before the service of an inhibition to correct an error, signed the sentence.

On motion.

After the above judgment, which was an interlocutory decree, having the force and effect of a definitive sentence in writing, was delivered, it was discovered that the usual bond, as prescribed by the [544] 107th canon, on the part of Lady Dysart, that she should not, during her husband's lifetime, contract matrimony with any other person, had not been given. With the view to remove the effect, as set forth by the 108th canon, of this omission, the bond was entered into on behalf of

Lady Dysart subsequently to the 2nd of March—the day on which the above judgment was pronounced, and afterwards on the 15th of April an application, of which notice had been previously given to the proctor of Lord Dysart, was made to the Judge to sign a sentence in writing. No step had been taken in the appeal to the Judicial Committee, and the inhibition had not been served.

Dodson, Q. A., in support of the motion. There can be no doubt of the power of this Court to sign the sentence. It possesses the same discretionary power as other Courts to correct errors in its decrees. Such a power the Judge of the Court of Admiralty (Dr. Lushington) exercised in the case of *The Monarch* (1 W. Rob. 21), which had the effect of varying the judgment of his predecessor who decided that case. The case of *Cheese v. Scales* (10 M. & W. 488) shews that Courts of law possess large powers to correct errors. The application in the present instance is not to vary the judgment delivered, but to sign the sentence by which an error or oversight will be corrected.

Haggard on the same side. What we ask the Court in the present instance to [545] do is, *stricti juris*, to sign, according to the ancient and more solemn form, the sentence which it has already pronounced by an interlocutory decree. In the case of *Souter v. Souter*, in the Prerogative Court in Hilary Term in this year, after an interlocutory decree in favour of the will had been taken down by the registrar, an informality was discovered and brought to the knowledge of the Court, and on a subsequent day it pronounced its sentence again. We ask not for any variation in the sentence already given, but merely to have that sentence now in scriptis. In *Galton v. Hancock* (2 Atk. 430), in the year 1744, Lord Hardwicke totally varied a decree he had pronounced in the year 1742.

Addams in opposition to the motion. No allusion has been made on the opposite side to those canons out of which the present difficulty arises. The 108th canon prescribes that, unless the bond mentioned in the 107th canon be given previously to a sentence of divorce, the sentence of separation “shall be held void to all intents and purposes of the law, as if it had not at all been given or pronounced.” The sentence in this case was not simply an interlocutory decree—it had the force and effect to all intents and purposes of a definitive sentence; it was solemnly pronounced, recorded, and appealed from. As the sentence is bad the Court cannot cure the nullity; it would make the canon ludicrous to say the sentence may be given over again; on the other hand, if the sentence be valid there is no occasion to touch it; on the supposition [546] that it is valid, were this motion granted there would be on record two definitive sentences. The sentence in the case of *Souter v. Souter* cited on the other side was not recorded.

Harding on the same side. The cases of *The Monarch*, *Souter v. Souter*, and *Galton v. Hancock*, relied on by the opposite side, are no precedents for the present application. There is a wide distinction between them and the present; there was no appeal in those cases, whereas here there was an appeal *apud acta*. What has been done in a Court of Record is not very stringent in ecclesiastical cases unless some analogy be shewn, and that has not been done; besides, the case cited of *Cheese v. Scales* depended on the statutes of amendments. It is not competent even to a Court of Error to examine the propriety of an amendment of the record made by the Court below, being a Court of Record, although the order for the amendment is sent up as part of the record,^(a) and it has not been said the Judicial Committee could deal with the point now raised, were this Court to make the amendment prayed. The present application is without precedent; it has not been shewn on principle that the Court has the power to grant the prayer. The effect of an appeal is to devolve the cause and render the Judge *à quo* incompetent to do anything in that cause; the appeal does that, and not the inhibition. The following authorities were cited as directly or virtually supporting the [547] proposition:—Gail, lib. 1, obs. 144; Maranta, disp. 1, 38; Van Espen, pt. 3, tit. 10, c. 3, ss. 1, 11, 13; Corp. Jur. Can. 2, 15, 7 in sexto; Oughton, tit. 307; Ayliffe, p. 78. [By the Court. If that be so, what is the use of an inhibition? In this case there has not as yet been even a petition to appeal.] Though Lord Stowell said in *Middleton v. Middleton* (2 Hagg. Ecc. 141, Supp.) that the Court is not legally obliged to defer to an appeal till an inhibition is served,

(a) See the opinion of the Judges as delivered in the House of Lords by Mr. Baron Bayley in *Mellish v. Richardson*, 1 Cl. & Fin. 235.

generally the Court will be inclined to defer, unless circumstances afford a reason against it. Supposing, however, all the authorities cited are overruled, and the Court be against us, there are important objections not to be lost sight of. First. What will be the state of the process and the record on appeal? There will be two sentences (for the one already given is entered in the Court book), of different dates, contrary to all authority, principle, and analogy. Secondly. How is the appeal to be prosecuted—are we to proceed on both sentences? Thirdly. As the application is one *primæ impressionis* it ought not to be granted without special grounds assigned; if granted, it will be a precedent for the future.

Dodson, Q. A., and Haggard in reply. We are not bound in all respects by the foreign authorities referred to. If the bare assertion of an appeal altogether tie the hands of the Judge *à quo*, how is the appeal to be urged on? How is the cause to be transmitted? The Court above cannot deal with the cause till it is sent up. It is notorious [548] the hands of the Court below are not tied till the service of the inhibition. The canons cited completely justify the present application; as the sentence given is to be held to be “void to all intents and purposes of the law, as if it had not at all been given or pronounced,” there is nothing to appeal from, for the Court has not pronounced a sentence.

Judgment—Sir Herbert Jenner Fust. I am prepared to grant the present application, as I consider myself perfectly justified in so doing. If what I have already done is void, I am now going to do that which is my duty, namely, to deliver a sentence. I am not going to vary or extend what has already been done; I am asked simply to give a formal sentence in writing, after bond given, in conformity with the interlocutory decree already pronounced. I consider some of the authorities cited, particularly *The Monarch*, establish the principle that a Court may correct an error or oversight; I shall therefore sign the sentence porrected.

On the Court calling on the proctor of Lord Dysart to make the usual prayer before signing the sentence, a long colloquy ensued. The proctor declined to make any prayer, as he considered his proxy expired on the 2nd March, when he alleged an appeal on the definitive sentence then given, and by making any prayer at this time he might prejudice Lord Dysart in his appeal. The Judge considered that, as the proctor had that day instructed [549] counsel to oppose the motion, he was bound under penalty of suspension to make a prayer. The proctor persisted and would not. Before the rising of the Court the sentence was signed by the Judge, who inserted in his own hand, “Stokes objecting to such sentence being signed.”

SAUNDERS *against* SAUNDERS. Consistory Court of London, Jan. 20th, June 18th, 1847.—Answers to an allegation pleading in general terms a denial of acts of cruelty charged in a libel must, like the allegation, be general and not specific.—Spitting in a wife’s face, accompanied with pushing and dragging her about a room and the admission by the husband that he had once slapped her face, held to be sufficient for a divorce by reason of cruelty.—Affectionate letters from a wife to her husband are not necessarily inconsistent with cruelty on his part.

[S. C. 11 Jur. 738. See *Russell v. Russell*, [1897] A. C. 395.]

This was a suit for a divorce, by reason of cruelty, promoted by Mrs. Catherine Saunders against her husband Mr. John Saunders. The facts will be found sufficiently set forth in the judgment at the final hearing of the cause. Responsive to the libel, consisting of eighteen articles, an allegation of two articles after opposition was admitted. The first article pleaded a denial of the cruelty in general terms; the second pleaded certain letters in the possession of the husband which were written by the wife in the years 1840, 1842, and 1845. The counsel for the wife offered to admit the handwriting of the letters; but that offer was rejected, and answers to the allegation were insisted on. Answers of a considerable length were given in but their admission was opposed. They consisted of a specification of all the acts of cruelty practised by [550] the husband, many of which were not set forth in the libel, as it was seen they were not susceptible of legal proof.

Bayford and Phillimore, R. J., for the husband in opposition to the answers.

Addams and Robertson for the wife.

Jan. 20th.—*Judgment*—Dr. Lushington. I am of opinion that the Court ought always to be exceedingly cautious in endeavouring to form any view of a case in an early stage of its proceedings, for it is utterly impossible that it can know that which

is known to the counsel on the one side or the other. If it take a partial view of the case at its beginning, it may exclude that which is of material importance in ascertaining the truth at the end. The only safe course therefore, which can be adopted with regard to all the pleadings and answers in the cause, is for the Court to govern itself by general principles of law and established rules: such practice is calculated to bring out the truth at the conclusion.

It is upon that principle I admitted the allegation to which the present answers, now objected to, are given. The libel in the case, which is one of cruelty, brought by the wife against the husband, stated in detail a variety of circumstances, on proof of which the wife relied to obtain her prayer; the plea in contradiction to the libel was not a common or ordinary plea; it in fact consisted simply of a general denial of the cruelty charged, without [551] reference to any particular time or place, and without counter pleading, or explaining any of the various occurrences which had been set up in the libel.

Had I been called upon to do that which was not my duty or business to do—to ascertain the real reason why this responsive plea was given in, and determine whether it could be of any possible utility in the ultimate decision of the cause—perhaps I should have deliberated for a considerable time, and been able to come to no satisfactory conclusion at all. I governed myself, however, in the admission of that plea by the general rule and principle which has always prevailed, so far as I know, namely, where a party has thought it his interest to aver a certain fact in the libel of his case, the other party is at liberty to contradict that fact, for if it is of importance with one party to prove it, it may be of importance for the other to disprove it; though it will unquestionably happen in this case, as well as in others, that no satisfactory evidence can be produced on the allegation.

I now come to the only matter for my decision at this stage of the case, whether the answers are or are not redundant or objectionable; I think, however, it is a little desirable to bear in mind the course of proceedings had in these Courts, because, if we confound them with the course in other Courts, we may be led to intricate and inextricable difficulty.

Our course of proceeding is this: each party is at liberty to plead all the facts which he thinks are for his benefit, provided they be legitimately stated, and lead to the conclusion to which he seeks to bring the Court; but that must be done in plea. [552] The purport of the answers is to benefit the party who requires the answers, that through their medium he may be able, either, if the facts be admitted, to dispense with evidence which might not be procurable except at great expense, or to compel a party to disclose on oath those circumstances respecting which there can be no other evidence. The answers, I repeat, are generally for the benefit of the person requiring, and not for the benefit of the person giving, such answers; but according to every principle of justice, the Court has always held, a party shall not be compelled to admit a fact pleaded without also giving, if in his power, an explanation of the fact. Whenever requisite for bringing forward the whole truth, whether it refers to matter pleaded already or to be pleaded, or matter never intended to be pleaded, and which never ought to be pleaded, the same observation will apply; if the explanation be necessary to the party giving in answers, it ought to be inserted.

But there is another rule not to be forgotten. Where the party giving in answers thinks it necessary to go into explanations amounting to facts which are capable of proof, such facts, unless set forth in plea and proved by evidence, are to be considered as not inserted in the answers; otherwise the effect might be to dispense with the trouble of putting an important fact in evidence, which fact might tend to establish the main point at issue. I doubt, myself, whether, in any stage of the case, it can be said the answers are for the benefit of the party giving them. I am aware, and I think it is well to advert to it now, that there have been cases where parties have insisted on giving answers. It [553] may be this is a privilege to which the party is entitled, but the Court would be exceedingly cautious, where it saw answers not called for given in, and those answers at the hearing of the cause not read. In looking into those answers, the Court is naturally anxious and always desirous not to rely upon the statements, though on oath of a party himself, and never resorts to such statement, when not made evidence by being read, except for the purpose of explaining, or bringing out a fact in favour of the opposite party.

The answers in the present instance are the answers of the wife to an allegation of

the husband, containing, with the exception of certain letters exhibited, nothing but a general denial of the cruelty charged in the libel. I will state the substance of these answers, as it is unnecessary to read them, in the narrowest compass I can. The wife in effect says—"You did commit cruelty towards me on divers occasions, and I will go on and specify all those occasions on which you so conducted yourself, whether they are, or are not, pleaded in my libel." It has been very candidly admitted by Dr. Addams, and I accede to the observation, that these answers would have been objectionable had Mr. Saunders in his allegation counter-pleaded in detail the facts set forth in the libel; in that case the proper line would have been to answer to the facts separately alleged. Supposing I were to admit the answers as they stand, I cannot see what possible good could result to the wife; I cannot conceive that the counsel for the husband would read them, inasmuch as they not only negative his plea, but affirm a vast variety of acts [554] of cruelty not in her libel. Most assuredly if these answers were not read, though I might be at liberty, as a strict matter of right, with great care and caution to look into them, I certainly never could look at them with a view to make them evidence of the principal charges already contained in the libel.

But I do not ground my opinion upon any idea of my own, that these answers would be of no utility in the cause. The true question I am to decide is, where there is a general denial in plea of cruelty, can the specific acts of cruelty from the beginning to the end, literally giving the whole history of the married life, from the date of the marriage to the day on which the cohabitation ceased, be given in the answers? I am decidedly of opinion they cannot; I am of opinion that the answers ought to be confined strictly to answering the article of the allegation—in other words, that the answers in this case should be general, as such is the form of the allegation, and there should end; and that the whole of that which remains, which is simply an assertion on oath of divers acts of cruelty pleaded or not pleaded, is irrelevant to the purposes of the suit.

I must therefore direct the answers to be referred back to be so reformed; but I cannot help at the same time expressing my sincere regret that the offer, made on behalf of the wife to admit the letters to be in her handwriting, and waive the production of the answers, was not accepted, because so far as I can form a judgment upon the case, that course would have tended to save expense, and to accelerate the hearing of the cause.

[555] No witness was examined on the allegation.

The cause was argued in April, and in June the Court delivered its judgment.

June 18th.—*Judgment—Dr. Lushington.* The parties in this case were married on the 9th August, 1825, and, after a cohabitation of full twenty years, separated on the 15th November, 1845. The citation at the instance of Mrs. Saunders, in a cause of separation by reason of cruelty, was returned on the 26th January, 1846. Mrs. S. was by birth a Scotchwoman, and in Scotland her relations resided. Mr. S. resided chiefly at Woodford, in Essex. Four children were the issue of the marriage.

The evidence is not extensive; eight witnesses only have been examined, and they were produced on the libel given in by Mrs. S.; for though a responsive allegation was admitted on behalf of Mr. S., no witness has been examined.

It is, I think, somewhat peculiar that, of the witnesses examined, all, with the exception of a servant, Mary Ramsay, should be relations, and very near relations, of the parties. It is singular, too, that of the number should be the mother and sister of Mr. S., and three of his sons, and that the cause comes to be decided without any opposing testimony. Singular however as this may be, it is accounted for by this circumstance, that a cause of this description involves transactions to which none but the domestic circle can be witnesses. With respect to near relations, there is generally some ground to fear they are partisans; in the present [556] instance, however, that remark can scarcely apply in respect of the sons, and as to the relations of the husband, the presumption is, as Dr. Addams properly observed, if under a bias at all, they would be in his favour.

I will now examine the acts of cruelty charged against the husband; general rules or principles I will not advert to, as they are well known and acknowledged; the difficulty, when any, lies in their application. In this, as well as in all similar cases, all the circumstances together must be taken into consideration; for the question is, not whether this or that fact alone would render it the duty of the Court to pronounce for a separation, but whether all the facts combined ought to lead to that result.

General ill-usage is pleaded in the fourth article ; but the first specific act of cruelty charged is alleged in the fifth article to have occurred in June, 1842, on some trifling discussion respecting Mrs. S. not using her influence with a neighbour to get certain trees cut, which overhung the garden of Mr. S. It is alleged on this occasion Mr. S. seized his wife by her clothes, and violently dragged her about the room ; that in consequence she fainted away, and in that condition was found and carried to bed.

As no person is alleged to have been present at the actual moment of ill-usage, no direct evidence of personal violence was to be expected. Mr. John Saunders, the son, of the age of twenty at the date of his examination in 1846, consequently sixteen at the time of the occurrence, deposes to finding his mother in the state described, and to upbraiding his father with ill conduct towards his [557] mother. Mr. S.'s observation, as stated by this witness—"It was only an exhibition of her temper"—is no admission of personal ill-usage.

Mr. William Saunders, a brother of the preceding witness, but younger by four years, not only confirms his brother's statement, but goes beyond it, for he states his father said, "I only gave her a little push." This is an admission, to some extent at least, of some actual violence ; but looking at the lapse of time and the youth of this witness, it would, I think, be too dangerous to confide in his statement, as precisely accurate.

Mr. James Saunders, another son, a year older than the last witness, is also examined as to this transaction. He confirms his brothers generally, though he does not speak to the particular expression deposed to by the preceding witness.

Looking at the whole of the evidence on the fifth article, I am not prepared to say that it establishes any legal act of cruelty. When I find, however, these facts distinctly proved—that the screams of Mrs. S. were heard—that she was found in a fainting and helpless state—that her husband then treated her with utter indifference—I am of opinion that such facts strengthen the probability of other evidence to acts of misconduct ; for the descent, from utter indifference to the feelings and sufferings of a wife, to acts of violence is only one step in the same path.

This occurrence, it would appear, led to the following circumstances pleaded in the sixth article:—Mrs. S., in the same summer, 1842, proceeded on a visit to her father in Scotland, and then complained to him of the ill-usage she had experienced from her [558] husband. Mr. Miller, the father, very properly remonstrated with Mr. S. on such imputed misconduct, which he described in fitting terms, and that misconduct was not denied by Mr. S. Mr. Miller, in his evidence, states that Mr. S. virtually admitted the charge, for he did not attempt to deny it, but he did attempt to palliate his conduct. Mr. M. went the length of threatening to institute legal proceedings, and to produce as a witness against him his own mother.

This is, I apprehend, very strong evidence of gross misconduct on the part of Mr. S., though perhaps it does not furnish direct proof of the article. It is often, and must be, impossible to produce evidence of what occurs between husband and wife ; consequently admissions, whether in words or by the absence of denial of charges which every innocent man would, if he could, deny with indignation, are important evidence, for they are the best and most credible testimony the *res gæstæ*, under the circumstances, can admit of.

The seventh article relates to the discharge of a servant named Eliza Mayhew, in 1842, and the only witness who deposes to it is the mother of Mr. S. She states that Mr. S. desired her to use her influence with his wife to get this servant reinstated ; that she, the mother, refused in consequence of what Mrs. S. had told her respecting this woman, and that upon this Mr. S. was very despondent about the matter. No important inference can, I think, be drawn from this statement.

The eighth article pleads that Mr. S. frequently declared that it was his wish and object to drive his wife from his house, and then it pleads in detail [559] many expressions used by him with a view to induce her to quit. Mary Ramsay, who was in the service of the parties from September, 1844, is examined on this article, and, if believed, she proves the article distinctly ; I see no reason why I should not give credit to her. She is fully confirmed by the sons, James and William, whose memories, when speaking to transactions in 1844-5, are more to be trusted than when speaking to occurrences of an earlier date.

I deem this evidence to be of weight ; it proves the animus by which Mr. S. was governed in his conduct towards his wife. When once it is proved that a husband is

desirous of compelling his wife to quit his roof, it is not very likely he will be over-scrupulous in the means adopted to attain that end; when such a motive exists, and is proved to exist, as in the present case, by the declaration of the husband himself, conduct of a corresponding character will seldom be found wanting.

In furtherance of the declarations of the husband mentioned in the eighth article, the ninth relates to his conduct in 1845, prior to the separation. It charges the use of most opprobrious language—the infliction of personal violence, and, finally, the gross outrage of spitting in his wife's face.

Mary Ramsay deposes only to an act of personal violence, though not one of a very aggravated description. I use that expression because the evidence is too loose to allow me with safety to affix to it a stronger character. She deposes to Mr. S. pushing his wife out of the room, and to very unfeeling expressions then made use of by him. The evidence of the two sons William and James, upon [560] this article, remains to be considered; if true, its effect must be very important on the issue of the cause. I fear it is too true that near relations, though standing in the same degree of relationship to both parties, when examined in a case, are too apt, though often perhaps unintentionally, to be imbued with the spirit of partisans; nor is this to be wondered at in the present instance, as they have often been mixed up to a greater degree than mere spectators of the events they narrate. Still, however, the opinion expressed by Sir John Nicholl holds good, that they are to be believed as to facts, unless satisfactorily contradicted or otherwise discredited, but with respect to general description, or matters of opinion, some allowance must be made for excited feelings.

Mr. William Saunders speaks to the use of epithets, which, coming from a husband to a wife, are most insulting. It is perfectly true that at the end of his cross-examination he, to a certain extent, qualifies that evidence; but he so qualifies it as rather to induce me to repose greater confidence in his testimony in general. He says: "Whilst I have been under examination, I have considered more carefully as to whether I ever heard my father call my mother 'a liar,' as I have deposed positively to having done; and 'I am anxious to qualify such deposition, for though I verily believe I have heard him apply such epithet to her, I am not sufficiently clear on the point to swear positively that I have done so.'" He deposes to an act of personal violence, which can scarcely be distinguished from a blow, for to draw the line between a push and a blow administered by a husband, and this is [561] admitted by him, would be a very nice distinction. As to a second act, to which this witness speaks, I cannot safely conclude that any actual personal violence took place. Mr. James Saunders deposes to the use of the most disgraceful expressions, accompanied with gross personal insults, all of which took place in the presence of the children. It is impossible to describe conduct more offensive to a wife, or more at variance with the obligation of the marriage vow.

The tenth article contains a charge of misconduct, such as, if well founded, deserves to be characterised in terms of the severest reprehension. After detailing some dispute about money matters, the article pleads that Mr. S. spat in his wife's face, and that he repeated this unmanly act with expressions of insult, in the presence of one of his sons.

All these facts are distinctly spoken to by Mr. James Saunders, and I see no reason whatever for not giving entire credit to the statement. The counsel for the husband did not, and I think very properly did not, attempt to call in question the fact of spitting as described. I have thought it my duty on the present occasion to look to the personal answers of the husband, a thing which I very seldom indeed do, when they have not been read by the counsel, and I find the fact of spitting in the wife's face is admitted, though with an attempt at palliation.

The question then is, what is the legal consequence of such conduct? Lord Stowell declares it to be legal cruelty; *D'Aguilar v. D'Aguilar* (1 Hagg. Ecc. 776). [562] Some discussion arose on the argument as to the authority of the case in *Hetley*, p. 149, mentioned by his Lordship. What matters it what is said in a report in *Hetley* on this point? What more competent judge on such a question could there be than Lord Stowell? What higher authority? I would follow the authority of Lord Stowell on such a matter, even if the reported case in *Hetley* had been in direct opposition; for such a question appertains to the ecclesiastical jurisdiction, and not to the Courts of common law. In truth, however, does such a question require any

authority at all? So gross a personal insult would be insufferable even in the lowest grades of life. How much more criminal, how much more painful to the feelings of the injured wife, when such an offence takes place between those who have been accustomed to the decencies of society, and have been educated to entertain a high regard for them! I will look, however, at such behaviour even with more technical strictness. Is it possible to imagine that when a husband has proved himself so utterly insensible to all those feelings which he ought to entertain towards his wife, so brutal, so unmanly, that he would, when his passion was excited, restrain himself within the bounds of the law, and that his wife would be safe under his control? Threats (1 Hagg. Con. 364, 409) of personal ill-usage have been deemed sufficient to justify a separation. I am of opinion that such an outrage as this is more than equivalent to any threat, for it proves a malignity of feeling which would require only an opportunity to shew itself in [563] acts involving greater personal danger, but never surpassing in cowardly baseness. Nor as such consequences less to be feared when it is proved, as it here is, that the husband supposed, though vainly so, that he was not within the cognizance of the law; for those who are resolved to go to the verge of the law are the most likely to overstep those bounds which their fear only, and not their sense of duty, prescribes to them.

There is no occasion for me to say what would be the effect of such an act—that of spitting in a wife's face—if taken singly, but I have no hesitation in declaring my opinion that, united with other circumstances proved in this case, there is enough to require the Court to interfere for the protection of the wife, and to pronounce for a separation; unless indeed some facts still remained which could take off the legal effect of those I have already examined.

I shall very briefly dispose of the remainder of this case. The evidence of Miss Saunders, on the occurrences which took place on the night of the 15th of November, 1845, is to be found under the fifteenth article, but I shall not read it. It is impossible to read that evidence and not conclude with Miss S. herself that the removal of Mrs. S. from her husband's roof was necessary for her personal safety. Miss S., being the sister of the husband, was the last person likely to take part unjustly with the wife. Though this witness does not depose to actual personal violence on that occasion, yet the conduct of the husband, she states, was so outrageous as to render it necessary for her and her nephews to sit up during the night for the protection of Mrs. S. Miss S. too is the person [564] who strenuously urged, as she says, the departure of Mrs. S. the following morning from her husband's house—a measure she considered necessary to ensure the personal safety of the wife.

The evidence of Miss S. on this disgraceful scene does not stand alone; it is corroborated by Mr. William Saunders. In fact his evidence goes further, for he states that on Mr. S. being charged with actual violence that night, he, denying all other actual assaults, admitted he had on one occasion slapped his wife's face. Mr. James Saunders gives even a fuller account. Singular it is, but also fortunate, that when a person endeavours to evade justice by what he thinks extraordinary caution, it often happens he is unable to shape his conduct to the attainment of his end; when he imagines he is advancing his own end by making certain declarations, he makes that known which enables a Court to administer true justice in the case. On the 16th of November, 1845, it appears Mrs. S. took refuge in the house of Mr. S.'s own mother, who, infinitely to her credit, afforded to her daughter-in-law the most fitting asylum.

Against all this evidence what has been urged by way of defence? In the first place, it has been said that there were, on some of the occasions deposed to, persons present who have not been examined; and Eliza Mayhew was mentioned as of that number. I am yet to learn that it is incumbent on a wife to produce all possible witnesses without regard to character or circumstances. Eliza Mayhew, who had been a servant and discharged by Mrs. S. herself, is clearly not a person whom the Court could expect Mrs. S. to examine. [565] Upon what principle the obligation on Mr. S. to produce witnesses, if they would have availed him, is to be dispensed with I was not informed. The wife has done all that was required; she has made out her case; and if anything was to be advanced in the shape of a defence, the husband should have produced witnesses to establish it.

In the next place, it was said Mrs. Saunders withdrew herself from her husband's bed; if this was so, though there is no sufficient proof of the fact, I confess I do not

wonder at it. Assuming, however, that Mrs. S. is so far reprehensible that she did even without good cause occasionally absent herself from her husband's bed, still that would be no justification, nor in any way take off the legal effect of the cruelty and insult practised by Mr. S.

The letters of Mrs. S., addressed to her husband, do not in any degree alter my opinion of the conduct of Mr. S., or of what ought to be the result of this case. Affectionate letters from a wife are not necessarily inconsistent with cruelty on the part of a husband; though they may be so, they are not necessarily so. So long as the parties dwell together it would be folly to suppose that the letters of a prudent and affectionate wife should teem with complaints of his past misconduct; the only effect such a reiteration could have would be to defeat her own object, namely, to secure for the future better treatment. The letters marked 8 and 9 only prove what is established throughout the case, that Mrs. S. was an attached and dutiful wife; most reluctant, till necessity compelled her, to separate from her husband: all the letters reflect credit upon the character of the lady, and, if all sense of feeling on [566] the part of the husband is not wholly extinguished, must strongly remind him of the happiness he has thrown away by his misconduct. I pronounce for the separation.

SIMMONS against SIMMONS. Consistory Court of London, April 22nd, 1847.—An allegation, responsive to a libel for the restitution of conjugal rights, pleaded cruelty and adultery, which were held not to be proved. The charge of adultery rested on the testimony of the woman alone, with whom the husband had, previously to his marriage, cohabited.—Evidence of mere probability of a transaction is not evidence to corroborate a single witness. To constitute evidence corroborative, the evidence must have relation to the transaction itself.—The Court will not give costs to a party who has fettered a witness by taking written declarations from the witness previously to his examination.

[S. C. 5 Notes of Cases, 542; 11 Jur. 830. Commented on, *Burder v. O'Neill*, 1863, 9 L. T. 232; 9 Jur. (N. S.) 1109.]

This was a suit for restitution of conjugal rights promoted by Mr. John Simmons against his wife. Mrs. Simmons, as a bar to the prayer of her husband, pleaded cruelty and adultery, and subsequently to the admission of her allegation brought in additional articles pleading other acts of adultery. An allegation responsive to these charges was asserted on behalf of the husband but was afterwards waved; Mrs. Simmons's witnesses were cross-examined at considerable length. The cause was argued in Hilary Term by Phillimore and Bayford for the wife, and by Addams for the husband.

Judgment—Dr. Lushington. This suit, which was brought by the husband, commenced as a suit for the restitution of conjugal rights. The wife's defence was cruelty and adultery pleaded in an allegation admitted on her behalf; subsequently to which additional articles were admitted alleging other acts of adultery committed by the husband. I do not hesitate to say that the [567] most difficult part of this case arises from the consideration of the evidence given on those additional articles.

The marriage of the parties, each of whom had been previously married and had a family, took place on the 20th of October, 1842. Mr. Simmons was in the employment of the Basingstoke Canal Company. Mrs. Simmons had an income settled to her own use, the net proceeds of which are stated to be about 600l. per annum. When and how the parties separated may be a subject for discussion, but the separation is pleaded to have taken place on the 3rd of May, 1845; the citation was returned on the 11th of February, 1846.

It was argued that the object of Mr. S. in bringing this suit is to obtain money. It is not improbable that this argument may have some foundation; but assuming that it has, I am not satisfied that that circumstance, even if well founded, can, with a due regard to legal principle, materially affect the judgment of the Court. It is not the motives of suitors which the Court sits here to scan, its judgment must be founded on the acts done by them. I apprehend the law has told me that I must pronounce a decree to return to cohabitation in a suit for the restitution of conjugal rights, unless adultery or cruelty be proved. How far less stringent evidence can be received by way of defence I have considered in former cases, and to the opinions there expressed I adhere.

I wish to notice another argument which was much pressed, that the husband has

not given in any plea in answer to the case set up by the wife. It appears to me that the utmost length to which [568] this argument can be carried is, that the husband has no witnesses to contradict the evidence given on behalf of the wife, though, if he had any, it might be to his interest to produce them; such is the inference fairly to be deduced; still, however, the onus probandi is on the wife, and she must succeed by the strength of her own evidence.

I proceed now to examine the proof as to cruelty and adultery. I must have proof of one or the other of these charges; evidence, however conclusive, of something short of either will not suffice, for I am not invested with any discretionary power to relax the requisites of the law. I am not disposed to introduce uncertainty into the system established; I have neither authority nor indeed inclination to do so; believing as I do, and as I have often said, that it would be highly prejudicial to the public interest to render legal separation more easy of attainment.

[The learned Judge minutely examined the evidence taken on Mrs. Simmons's allegation and came to the conclusion that neither of the charges of cruelty or adultery was established. He then proceeded.]

With respect to all the previous charges, though I deemed it my duty to discuss them at length, I have really felt no difficulty; but in reference to that part of the case which I am now approaching I am free to confess that I think it deserves the most serious consideration, and that it is attended with more than usual difficulty. I advert to the adultery pleaded in the additional articles to have been committed with a person of the name of Lucy Peacock. Some questions of law as well as of fact here arise—whether, assuming Lucy Peacock to [569] be a single witness, there be any, and what, evidence, legally to be called corroborating evidence.

The case of *Evans v. Evans* (ante, p. 165) has distinctly prescribed the rule which I, as Judge of the Consistory Court, am bound to follow, however much I may regret that there should be any difference in rules of evidence between Ecclesiastical Courts and those of the Common Law. It is in my opinion a fearful discrepancy that a man might be executed on evidence which would not be sufficient in law to prove in these Courts a fact of adultery, even by way of defence.^(b) The case of *Evans v. Evans* [570] was decided by Sir Herbert Jenner Fust after great deliberation and after a

(b) On a question somewhat obscure, as far as the principle involved is concerned, the editor submits the following note, in the hope that, when the question comes to be fully investigated, his remarks will be found to be not entirely useless:—

The difference in respect to the quality of evidence depends entirely on the form or manner of trial, for instance (to pass over other species of trial), whether a trial be one “by witnesses,” or “by jury.” The form of trial “by witnesses” is not entirely peculiar and confined to those Courts in which the principles of the civil and canon law prevail. The same form of trial is to be met with in Courts of Common Law, though, at this day, very rarely, but, when met with, the same quality, or, as some would express it, the same quantity, of evidence is there and then required as in the Ecclesiastical Courts; 3 Bl. Comm. c. 22, s. 4; Com. Dig. tit. “Trial (B. 5) by Witnesses;” 1 Inst. 6 b.

The nature and difference of the evidence in the two distinct species of trial above-mentioned have been pointed out, not only by text-writers of the highest authority, but have been observed upon also in trials in Courts of law. See the arguments, pro and con, of Bradshaw, Attorney-General, and Brook, Recorder of London, in *Reniger v. Fogossa*, in the Exchequer Chamber, 4 Edw. 6; Plowd. pp. 8 & 12, and the observations of Holt, C. J. and Dr. Oldys in *Vaughan's case*, 8 Wm. 3; 13 State Trials, 535, Oct. edit. To the same effect were the arguments of Sir Bartholomew Shower in *Sir John Fenwick's case*, 8 Wm. 3; 13 State Trials, 642-3; and also of Mr. Wynne in *Bishop Atterby's case*, 9 Geo. 1; 16 State Trials, 566.

Though the principle upon which juries were formerly summoned and the reason assigned why in trial by jury less (to use perhaps a somewhat incorrect expression) evidence is required than when the trial is by witnesses, were many years back exploded, namely, that the jury were to a certain extent witnesses, being presumed to come “ex vicineto” from the neighbourhood where the party dwelt and consequently to know something of the fact upon which, coupled with the testimony of one witness, they found a verdict on oath; still the reason why one witness alone should be deemed sufficient remains unexplained.

careful consideration [571] of all the previous authorities. It was a case in which only one witness was produced to prove the adultery between the alleged paramour and the wife. That learned Judge having gone through the case held the evidence of the single witness to be insufficient, and stated that, though there had been a verdict of 500*l.* damages in favour of the husband, such verdict was not of the nature of corroborative evidence. What constitutes corroborative evidence appears to me to be a very important and nice question, but before I venture upon it I will consider the facts of the present case.

It appears that Lucy Peacock acted in the capacity of barmaid to Mr. Simmons, when he kept a public-house in the Haymarket; that he cohabited with her for a considerable period previously to his marriage; that he supported or contributed to support, both before and after his marriage, a child he had by her; and that he eventually abandoned her. All these are admitted and undoubted facts; one consideration will be whether they are facts legally corroborative of the direct evidence as to adultery.

Lucy Peacock herself must be considered as an accomplice; and all the legal considerations applicable to such a witness must apply to her. To this I must add she has been taken into the service of the son of Mrs. Simmons—a circumstance which must excite the jealous vigilance of the Court. I must observe, however, there is no impeachment of her general character, and the last person living entitled to impeach that character, on the ground of her former connection with Mr. Simmons, is Mr. Simmons himself. Moreover, I am bound to [572] say I see no objection to the manner in which she has given her evidence; I perceive nothing savouring of a disposition from disappointment or revenge to state that which is not true.

This case, I think, resolves itself into this, not whether I believe the witness, but whether in law the evidence in the cause is sufficient. There is a wide distinction between believing what a witness says and determining whether that evidence is sufficient to satisfy the exigency of the law.

Before, however, I turn to the evidence there is, I conceive, a preliminary question of great difficulty to which I must direct my attention, namely, where there is but one witness to a fact, what constitutes corroborative evidence. This is a point which

It may be a question worthy of consideration in this supposed conflict between the Courts as to the quality or quantity of evidence called for in trial “by jury” and trial “by witnesses” whether the mutual control and check, which the Judge and the jury have, the one on the other, when viewed in all its bearings and effects, coupled with the circumstance that unanimity is required in the jury themselves, may not be considered to diminish the great disparity supposed to exist in reference to the amount of evidence required. On the supposition that there is some foundation for this suggestion, a defendant in a suit in the Ecclesiastical Courts would, were the testimony of one witness for the party proceeding held to be of itself sufficient, stand in a worse position than he would in a trial by jury.

In addition it may be observed that though in a suit for divorce by reason of adultery and in a criminal suit in the Ecclesiastical Courts the answers of the party proceeded against are not called for, still it is open to that party to insist, as is sometimes the case, on his right to give in answers to the libel or articles denying the charge; by which course, were one witness alone examined, without any corroborating circumstance, in behalf of the other party, there would be no more than oath against oath. Even though a defendant in the suits referred to may not insist on his right, it may perhaps be allowed that, to meet such instances by admitting the testimony of one witness alone, an evil, always if possible to be avoided, would be produced, namely, an exception to the general rule, which general rule, putting the matter of answers entirely out of consideration, is said to be founded on this, that the presumption in favour of innocence is by the principles of the civil and canon law supposed to be nearly equivalent to the oath of one witness.

It may be almost superfluous to add that a decree in equity is given on the evidence of two witnesses only.

Whether by the Mosaic law the testimony of one witness alone was in any instance sufficient is perhaps doubtful; see Smith’s Translation of the Commentaries on the Laws of Moses, by Michaelis, Art. 299, and then Art. 162.

to the best of my knowledge has never been closely considered in these Courts, and respecting which no rule has been laid down by any of my predecessors. The case of *Kenrick v. Kenrick* (4 Hagg. Ecc. 114) is the only one which, according to my recollection, makes the nearest approach, but I doubt whether in that case the point was considered either by myself or Sir John Nicholl, who affirmed my judgment with that close attention which is now required. "The only question," said Sir John Nicholl in that case, p. 136, "is whether the recrimination is proved, if the witness be believed, there can be no doubt about it. She is a single witness, but if circumstances support her testimony it is sufficient. There need not be two witnesses; one witness and circumstances in corroboration are all that the law in these cases requires."

There is, I apprehend, a great difference between [573] evidence of probability and evidence corroborative of a fact. There is but one case that I know of in which the point has been touched. In *Theakston v. Marson* (4 Hagg. Ecc. 314) Sir John Nicholl said: "By the general law of these Courts one witness does not make full proof; not that two witnesses are required to each particular fact, or to every part of a transaction; for it often happens that to the contents of a will, or to instructions, there is only one witness—the confidential solicitor or other drawer—but there are, and must be, adminicular circumstances to the transaction, such as the expressed wishes of the testator to make his will, the sending for the drawer of it, his being left alone with the deceased for that known purpose, some previous declarations or subsequent recognitions, some extrinsic circumstances in short, shewing that a testamentary act was in progress, and tending to corroborate the act itself." Now I am by no means certain that Sir John Nicholl intended his expression to admit that strictness of construction which may be put upon his words "tending to corroborate the act itself;" because, in the case of a will, a previous declaration, although shewing a probability and an *animus testandi*, must, to be evidence of the execution, be connected with the instrument. According to the best opinion upon this point that I am able to form, evidence proving the probability of any transaction, but not going to the transaction or act itself, is not corroborative evidence in the sense in which I must use the term. I have endeavoured, so far as I am able, to discover whether any help can be derived from analogy to cases decided at [574] common law. The decisions in those Courts cannot, however, furnish a direct analogy for this reason, that, except in cases of treason which rest on particular Acts of Parliament, the Courts of Common Law do not require two witnesses (see note at p. 569). The nearest analogy is in the case of an accomplice, and the law in strictness seems to be that, save in cases of treason, the sole and unsupported evidence of an accomplice is sufficient; though in practice, at the present day, it is usual with the Judge, where the evidence of an accomplice stands uncorroborated in material circumstances, to direct an acquittal. That general probability alone will not suffice—that the facts must be applicable to the transaction itself appears from the following passage in *Phillipps on Evidence*, vol. 1, pp. 35-6:—"In the case of *R. v. Addis* an accomplice, who was the principal witness, was corroborated as to collateral facts, none of which tended to connect the prisoner with the accomplice or with the transaction: Mr. Justice Patteson observed that the corroboration ought to be as to some fact or facts, the truth or falsehood of which would go to prove or disprove the offence charged against the prisoner. . . . In a later case, on an indictment against two persons, the same doctrine was laid down by Mr. Baron Alderson, who pointed out the distinction between confirmation as to the circumstances of the felony and confirmation affecting the individual charged; the former only proves that the accomplice was present at the commission of the offence, the latter shews that the prisoner was connected with it. In summing up the Judge observed that confirmation merely as to [575] the circumstances of the felony was really no confirmation at all."

The result, then, is that, though the law in theory is satisfied with a conviction founded upon the evidence of an accomplice alone, in practice the Judge modifies that law.

Where there is no rule as to the number of witnesses required, evidence as to probability may have great weight and be justly considered in forming a conclusion; but when two witnesses are required by law, either together to one overt act, or separately to two overt acts, I conceive that evidence to mere probability, not applying to the act, cannot be received as corroborative. I think so for this reason, that, unless this distinction be adhered to, the rule of two witnesses must vanish into air, for there

scarcely ever was a case in which some circumstance, in some degree tending to prove probability, might not be found.

It is upon this principle I conceive that the fact of Mr. Simmons having cohabited with Lucy Peacock, prior to his marriage, is not in law corroborative of the evidence of Lucy P. to a connection afterwards. Certainly the existence of a former connection renders a renewal more probable than the commencement of an entirely new connection, but the existence of the former is a totally separate fact, and may be true without affording any proof of a subsequent connection.

For this reason I must examine this case with a view to see whether there be any evidence, legally, corroborative of Lucy P.'s; that is, evidence not merely shewing that her account is probable, but proving some facts ejusdem generis with her evidence, and tending to produce the same result, namely, the commission of adultery at a certain time and place.

The additional articles plead that Mr. Simmons renewed his connection with Lucy P. soon after his marriage, that he supplied her with money for herself and child, that he had such connection with her at her father's house, 44 Union Place, Lambeth Walk, and at other places by appointment.

Lucy P. herself deposes to a renewal of the intercourse in February, 1843, at 36 Paradise Street, Lambeth Walk, again in June, 1843, at the same place, and once in the interval at the Sydney Smith in Kennington Lane. She also speaks to the allowance made for her child, to application to the parish, and to Mr. Simmons' letter respecting his going to Hambro'. There is, it is true, a confusion about Paradise Street and Union Place, but that I consider arises from the pleading and is of little importance; there is also a contradiction as to the date of the meeting at the Sydney Smith, and that I pass over as a trivial circumstance.

I will now turn to the evidence of Lucy P., the mother, to ascertain whether the daughter is corroborated. "Up to November, 1844, Mr. S. was in the habit of coming occasionally to our house to see my daughter, and pay the allowance he made for the child he had by her" [namely, from 1839, when, according to the daughter's evidence, they ceased to live together]; "in the early part of 1843 Mr. S. saw my daughter, and he and she were alone together for some time:" she repeats this statement several times in the course of her examination.

[577] There is no other evidence applicable to this part of the case except the letters. With respect to the letter of Mr. Simmons addressed to Mr. Peacock, the girl's father, and annexed to the additional articles, stating that he was about to start for Hambro', I do not see what bearing it has on the present question; for though there is no doubt Mr. S. made sundry payments for the child, and was desirous of getting rid of that burthen, still that will not establish the commission of adultery subsequently to the marriage. There are letters also addressed to Mr. S. himself, but from them I can draw no conclusion beyond this, that they are letters requesting assistance from Mr. S. to maintain the child, which he was bound to do, and to assist the daughter whom he had abandoned; they neither prove nor disprove the alleged connection in 1843. The letters, with the exception of the one annexed to the additional articles to which I have already adverted, written by Mr. Simmons himself, bear date not later than the year 1840, two years before the marriage; the only effect they have is to corroborate the statement of Lucy Peacock as to the connection between her and Mr. Simmons at that time, a fact which is not in dispute.

I now revert to the real difficulty of the case. It is clear, according to the decision in *Evans v. Evans*, that a decree for separation on account of adultery cannot be given on the evidence of Lucy Peacock alone. Is she corroborated in the legal sense of the term? The only other evidence, if it may be so considered, is that of her mother, who speaks to Mr. S. being alone with her daughter on one occasion in the year 1843. At what hour—dark or [578] light; in what room—bed-room or not; whether that room was accessible to any one or the door locked; whether any familiarities took place, clothes or bed disordered, or anything of the kind, I regret to say on these points there is not a word of evidence. Nay, the fact of their meeting and being alone together may be perfectly consistent without any criminal connection having taken place, for it is in evidence that Mr. S. was in the habit, both before and after his marriage, of going to the house to make some payments for the child.

Is this, then, sufficient legal evidence to support the testimony of a single witness to the fact, when that witness is an accomplice in the offence, at least as to an illicit

connection, though, perhaps, not of adultery—a witness, too, living, in effect, in the service of the party producing her, and naturally irritated, to a certain extent at least, by the abandonment of herself and child? I feel constrained, though, as I have already said, I admit her evidence is fairly given, to come to the conclusion that such evidence is not sufficient in law. I truly say constrained, for, if left free from all legal restrictions, I should not be inclined to discredit Lucy Peacock. Looking at all the circumstances of this case it would have been a much more acceptable duty to me to have pronounced for the separation than against it. Unquestionably, Mr. S. has no claim to favour from the Court, still he is entitled to justice; and that, to the best of my ability, I must administer, without permitting a regard to the comfort of any individual to interfere with the due course of law.

I am of opinion that neither cruelty nor adultery [579] is legally proved, and that therefore I must decree, according to the husband's prayer, that his wife do return to cohabitation. Application was made to do so with costs. Most certainly I will not give costs, for two reasons: first, I consider the case, in its whole complexion, not one of a favourable character; secondly, I consider the means adopted by the husband to procure the evidence of Mrs. Bish highly improper. I repeat now, what I have said before, that I never will give costs to any party when I find a witness in a case fettered by written declarations made out of Court previously to his examination.

From this sentence there was an appeal to the Court of Arches, and on the 9th of December, 1848, the sentence was affirmed. Sir Herbert Jenner Fust, in delivering his judgment, expressed his adherence to the principle involved in the former judgment of *Evans v. Evans*, and did not discuss the question what constitutes corroborative evidence, as he was of opinion that in the evidence of Lucy Peacock's mother there was no corroboration at all of the charge made by her daughter of Mr. Simmons' postnuptial infidelity.

[580] CATTERALL *against* CATTERALL. Consistory Court of London, July 14th, 1847.—A marriage had in New South Wales (before a Presbyterian minister), where there was a fact of consent between the parties to become husband and wife, held to be a valid marriage, notwithstanding a non-compliance with the provisions of a local act, in which there were no words constituting a nullity, and that the husband was entitled to a sentence of divorce by reason of the adultery of the wife.

[S. C. 5 Notes of Cases, 466.]

This was originally a cause of nullity of marriage promoted by Mr. Catterall, on the ground that the fact of marriage, which took place in New South Wales, was not had in conformity with the provisions of a certain act in force in that colony. After due deliberation, the Court held that the marriage was not invalid by reason of non-compliance with the provisions of that act. Instead, however, of rejecting the libel absolutely, the Court intimated that it would permit the libel to be amended, if the husband were so advised, by pleading that the marriage was null and void by the ancient common law of England, independent of the act (see ante, pp. 304-21). The advisers of the husband, instead of so pleading, on a subsequent day prayed leave to withdraw the libel and to bring in an allegation as in a cause of divorce by reason of adultery committed by the wife, without taking out a new citation, which, after opposition made, the Court permitted.^(b) The other facts necessary to elucidate the case will be found in the judgment.

Addams and Robertson for the husband.

Dodson, Q. A., and Phillimore, R. J., for the wife.

[581] *Judgment*—*Dr. Lushington*. The question which I have to decide on the present occasion is, whether the marriage between the parties is a sufficient marriage to enable me to pronounce a sentence of separation by reason of adultery, which it is admitted on all hands has been committed by the wife?

It is true that the allegation commences by pleading the local act of the Legislature of New South Wales, from which circumstance it would seem to follow that it was intended to plead that the marriage was had in pursuance of that act. Whether

(b) A similar objection was taken with the same result in *Clowes v. Clowes*, 3 Curt. 194.

that is so or not, if I am satisfied that the marriage is sufficiently valid to enable me to pronounce for the separation, it will not be necessary to enter into a consideration of this act.

I shall not now give my judgment at length, for this obvious reason. When the question of nullity was presented for my consideration in July, 1845, I then stated, after great deliberation, all the reasons that occurred in bringing my mind to the conclusion that the marriage was not void. If I could not pronounce the marriage void, it almost follows, as it seems to me, that I must pronounce it valid for certain purposes; and if for certain purposes valid for the husband or wife, as the case might be, to obtain a separation for a violation of the marriage vow.

New South Wales is a settled colony of Great Britain, and consequently amenable, according to received authorities, to such portions of the statute law and the common law of the mother country as were in force at the date of the settlement of that [582] colony, and were applicable to its condition. Undoubtedly very great difficulties have from time to time arisen how far—to what extent—the laws of the mother country have been imported into the colonies; but it is unnecessary that I should enter into that question, as it has been frequently discussed with considerable ability. There can be no doubt, however, that the common law of England as respects marriages was carried to New South Wales,^(a) for in Lord Hardwicke's Act there is no mention of the colonies; its operation was confined to England and Wales.

The simple question then is, if the local act does not render the marriage invalid, whether according to the ancient law of England a marriage before a Presbyterian minister was valid—valid at least to the extent to which I am called on to pronounce an opinion. When I consider how much that question was discussed in the celebrated case of *The Queen v. Millis* (10 Cl. & F. 534) I am justified in saying that nothing fell from any one of the law Lords in the House of Lords (I am not alluding to the opinions expressed by the common law Judges) which in any way intimated that such a marriage would not be sufficient to enable this Court to proceed to a separation *a mensâ et thoro*. I am not disposed to carry the decision in that case one iota further than it went, for two reasons: first, as the law Lords were divided, it was only in consequence of the form in which that [583] case came before them there could be considered to be a judgment at all; in the second place, were I to hold the presence of a priest in the orders of the Church of England to be necessary, I should be going the length of depriving thousands of couples married in the colonies and the East Indies (where till of late years there were no chaplains) of the right to resort to this Court for such redress as it can give in cases of cruelty or adultery. Until I am controlled by a superior authority, for no further examination of the question will induce me to change my opinion, most unquestionably I shall hold in this and all other similar cases that, where there has been a fact of consent between two parties to become man and wife, such is a sufficient marriage to enable me to pronounce, when necessary, a decree of separation. Accordingly I pronounce for the separation now prayed.

PAYNE AND MEREDITH *against* TRAPPES. Prerogative Court, Feb. 13th, July 23rd, 1847.—One entire part of a will in duplicate in the possession of a testator being undestroyed, but the other part in the possession of his solicitor having been destroyed by the testator on the execution of a subsequent will made in 1838, in terms revoking the prior will, held to be revived by a codicil made subsequently to the second will, though referring to the first will merely by date, and that such reference sufficiently shews the intention to revive as required by sect. 22 of the Wills' Act, and that parol evidence is not admissible to establish a mistake in the date.

[S. C. 5 Notes of Cases, 147, 478; 11 Jur. 854. Distinguished, *Thomson v. Hempenstall*, p. 793, post. Applied, *Newton v. Newton*, 1861, 5 L. T. 223. Referred to, *In the Goods of Steele*, 1868, L. R. 1 P. & D. 578.]

George Payne, Esq., died on the 23rd of September, 1846, leaving a widow and

(a) See the provisions of stat. 9 Geo. 4, c. 83, s. 24, entitled "An Act to Provide for the Administration of Justice in New South Wales and Van Diemen's Land and for the more effectual Government thereof," &c.

Caroline F. L. Trappes (wife of Roger M. Trappes) and Georgiana [584] F. A. H. Payne, spinster, his only children; on his death the following testamentary papers were found:—

A will (in duplicate) dated May 12th, 1837.

A codicil (in duplicate) dated May 12th, 1837.

A will (in duplicate) dated October 17th, 1838.

A codicil dated November 9th, 1839.

By the will of the 12th May, 1837, the deceased devised two certain estates to his wife for life, and after her death one of such estates to his daughter Caroline (then unmarried) and her heirs, the other to his daughter Georgiana and her heirs, and bequeathed all his personal estate, except household goods, &c., which he gave to his wife absolutely, to trustees in trust for his wife for her life, and at her death in certain trusts, which it is unnecessary here to set forth, for his daughters. Of this will the deceased's wife and Mr. Meredith were appointed executors.

By the codicil of the 12th May, 1837, the deceased bequeathed a sum of 1000*l.* to his wife, and in other respects confirmed his will.

By the will of the 17th October, 1838, the whole of the property real and personal were devised and bequeathed to the wife, an additional executor was appointed, and all other wills and codicils were revoked.

By the codicil of the 9th November, 1839, the testator in his own handwriting bequeathed an annuity of 20*l.* to his sister; it commenced thus: "I George Payne write this as a codicil to my will made by Charles Meredith, Esq. of No. 8 New Square, Lincoln's Inn, London, dated 12th May, 1837."

[585] When this last codicil was brought to light after the death of the testator the executors suggested that the reference contained in it to the will of the 12th May, 1837, was a mistake, and that the testator intended to refer to his will of the 17th October, 1838. In support of that suggestion an allegation to the following effect was given in on their behalf, propounding the will of 1838 and the codicil of 1839:—

The first and second articles pleaded the factum of the will of 1838 and the codicil of 1839.

The third article pleaded "that whereas the codicil pleaded and propounded in the next preceding article of this allegation is in the words following, to wit:—'Weybridge, November 9th, 1839, I George Payne write this as a codicil to my will made by Charles Meredith, Esq. of No. 8 New Square, Lincoln's Inn, London, dated the 12th May, 1837. I leave to my sister Louisa Payne now living at Haliford in the county of Middlesex the sum of 20*l.* a year for her life, to be paid half-yearly by Charles Meredith of Lincoln's Inn, and I am sure that my wife Anna Maria Payne will see that this my wish will be strictly attended to.—George Payne. (L.S.) Witness, William King, Ann King. Weybridge, November 9th, 1839, signed this day:' that such codicil does not shew an intention on the part of the testator to revive his will dated the 12th May, 1837, in terms therein referred to, and that the testator had not any intention by means of such codicil to revive the same."

The fourth article pleaded "that subsequently to the execution by the testator of his will dated [586] 12th May, 1837, his daughter Caroline intermarried with Mr. Roger Trappes, and that the testator expressly, as he declared, in consequence of such marriage, made and executed his will dated the 17th October, 1838, revoking his will of the 12th May, 1837."

The fifth article pleaded "that the will propounded was made by Mr. Meredith, as well as the former will dated the 12th May, 1837; that one part of the will of May, 1837, the same having been executed in duplicate, was in the possession of Mr. Meredith from the time of the execution thereof until the execution of the will propounded, on which day, and after the execution thereof, the testator being then at Mr. Meredith's office, cancelled such one part by cutting off his signature and seal therefrom respectively, as also from the codicil thereto of even date therewith, and by signing his name under the word 'cancelled' endorsed on each of the said scripts."

The sixth article pleaded "that when the testator wrote the codicil propounded, dated 9th November, 1839, the duplicates of the will and codicil bearing date respectively the 12th May, 1837, were, as was also one part of the will, propounded which had likewise been executed in duplicate in his possession, and that he by error or mistake inserted the date of the former in his said codicil instead of the date of the latter will dated 17th October, 1838; that the testator made and executed his said

codicil solely for the purpose of bequeathing the annuity therein mentioned to his sister, the sole legatee named therein."

The seventh article pleaded "that the testator, a [587] day or two after having executed the codicil propounded, gave the same, closely sealed up, to his sister, desiring her, and which she did, to keep the same in her possession and not to open it till after his death."

The eighth was the usual concluding article.

The admission of this allegation was opposed on behalf of Mrs. Trappes, a legatee under the will of 1837, but the Court, being of opinion that the circumstances of the case, as pleaded, seemed to distinguish it from former decided cases, declined to give its opinion on the question of law involved until the evidence was before it, and therefore admitted the allegation.

Mrs. Trappes in her answers admitted the first and second articles of the allegation to be true.

In her answer to the third article she admitted the codicil of 1839 to be in the words pleaded, but she submitted to the judgment of the Court whether such codicil does or does not shew an intention on the part of the testator to revive his will of 1837 in terms therein referred to, and that she disbelieved and denied that the testator had not any intention by means of the codicil to revive that will.

To the fourth article she admitted that subsequently to the execution of the will of 1837 she intermarried with her present husband, but she said that such marriage took place subsequently to the execution of the will of 17th October, 1838, to wit, on the 22nd November in that year, and that no property was settled on her in respect of such marriage, and she denied that the testator, in consequence of such marriage, made and executed his will of 1838, or that he declared he had so done.

[588] To the fifth article she admitted the same to be true.

To the sixth article she admitted that when the testator wrote the codicil of 1839 the duplicates of the will and codicil of 1837 were, as well as one part of the will of 1838, likewise executed in duplicate, in his possession, but she denied that the testator, by error and mistake, inserted the date of the will of 1837 instead of the date of the will of 1838; she further disbelieved and denied that the deceased executed the codicil of 1839 solely for the purpose of bequeathing the annuity therein mentioned to his sister.

To the seventh article she admitted the same to be true.

No witness was examined on the allegation. The cause came on for hearing the 23rd July.

July 23rd.—Addams for the surviving executors propounding the will of 1838 and the codicil of 1839. The question is, which of the wills is to be proved with the codicil of 1839. The rule as formerly laid down with respect to the admissibility of parol evidence in *Rodgers and Browning v. Pittis* (1 Add. 38), and adopting the rule in *Walpole v. Cholmondeley* (7 T. R. 138), is perfectly clear, but the present case is distinguished from those and all other analogous cases, including Dr. Lushington's decision in *The Goods of Chapman, Deceased* (ante, p. 1). In other cases the will, though revoked, existed unimpaired—here it was destroyed to all intents and purposes. In *Walpole v. Cholmondeley* the testator described his former [589] will by date to be in the codicil "his said last will." There was in that case a confirmation of his "said will" and not merely a reference to it by date. Here there is simply the date, for both wills, that of 1837 and that of 1838, were made by Mr. Meredith, and he is an executor in both. I am not aware of any decision which has gone the length of establishing that a reference in a codicil merely to the date of a revoked will is sufficient to revive that will. The present Wills' Act certainly requires something more, for sect. 22 enacts "that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and shewing an intention to revive the same." There are no words in this codicil which shew in executing it the intention was to revive the former will; the date is mere surplusage; it was introduced by mistake; the intention on the part of the testator, his sole object, was to give, as shewn, an annuity to his sister. For these reasons the instrument of 1838 must be regarded with the codicil propounded as the will.

Jenner contra, for Mrs. Trappes. If, when there is a duplicate of a will, a testator destroys the part in the possession of his solicitor and preserves that in his own

custody, as is here the case, the presumption as to the intention to revoke the will is weaker. Why Mr. Payne did not destroy the part of the will of 1837 in his own custody has not been explained. It is pleaded, but not proved, that the testator was dissatisfied with his daughter's [590] marriage; this is material. Though the will of 1838 contains a clause of revocation, still the codicil of 1839 on the face of it refers to and sets up the will of 1837; the words of the codicil are plain; the reference is so expressed as to fit the will of 1837, and to shew an intention to revive it according to the requisites of the Wills' Act.

Judgment—*Sir Herbert Jenner Fust.* The last of the papers propounded in this case, bearing date Nov. 9, 1839, purports on the face of it to be a codicil to the will of Mr. Payne dated May 12th, 1837, but the question raised on argument is whether it is to be so considered, or whether it is to be taken as a codicil to a will of a different tenor which was executed October 17th, 1838.

When the Court admitted the allegation it declined then to give its opinion on the question of law involved, not from any doubt in its own mind as to the law applicable to the state of the facts pleaded, but in the expectation that some light would be thrown on the circumstances which led to the making of the will of 1838, and the revocation of the former one of 1837. It has turned out, however, that all the information furnished is to be gained from the papers themselves and the answers of Mrs. Trappes to the allegation, in which answers some of the averments of the allegation, so far from being admitted, are denied; it is further to be remarked that no witness has been examined in support of the plea, and that Mr. Meredith, who might have given some information, is prevented from the circumstance of his being a party in the cause.

[591] The following facts are to be collected from Mrs. Trappes' answers:—That her marriage, which was pleaded as the motive for making the will of 1838, took place subsequently to the execution of that will; that both wills were made by Mr. Meredith; and that a duplicate part of the will and codicil of 1837 in the possession of Mr. Meredith were, after the execution of the will of 1838, destroyed by the testator.

There has been no attempt to controvert the principle as laid down in *Walpole v. Cholmondeley* (7 T. R. 138), and acted upon by Dr. Lushington in *The Goods of Chapman, Deceased* (ante, p. 1), but it is said the present case is distinguishable from the case of *Chapman* in this respect, that the part of the will of 1837 in Mr. Meredith's possession was destroyed—that consequently the other part in the testator's own possession must be considered as destroyed, and that, being destroyed, according to the provision of sect. 22 of the Wills' Act, an intention must be shewn to revive the same.

I cannot go the whole length of the argument and say that the presumption with regard to revocation is precisely the same, whether a testator destroys the part of his will in his solicitor's hands, or whether he destroys that in his own custody, for I think the presumption varies in degree, and is weaker in the one instance than in the other; but putting aside that question, how does this case stand in reference to the Wills' Act?

It is undoubtedly true when a will is revoked "an intention to revive the same must be shewn;" [592] but it was said that in the present instance there is merely a date given in the codicil and that alone cannot shew that intention, as the date was inserted by mistake, and that something more is required. I cannot act on the mere suggestion of a mistake; were I to do that I should have to substitute one set of figures for another—a most dangerous precedent to start. I must gather the intention from the codicil itself as pleaded in the third article of the allegation, and I must confess that to my mind the intention to revive the will of 1837 is clearly shewn; there is a specific reference to the will of 1837 by date, and I must say the testator has taken great pains to describe the instrument to which the paper of 1839 is described as a codicil. I cannot see that the circumstance of one part of the will of 1837 being destroyed takes this case out of the principle laid down by Dr. Lushington; I must therefore pronounce against the will propounded, namely, that of 1838.

The will and codicil of 1837 were then propounded *apud acta*, their due execution was admitted, and probate of them decreed with the codicil of 1839: costs out of the estate.

[593] GODFREY *against* HUGHES. Prerogative Court, June 25th, July 23rd, 1847.—A bequest in the words following:—"And at the death of my sister M. I give and bequeath all the property I die possessed of in remainder to my own dearest niece B., subject to the annuity of 150l. as before named to my sister P., but if my niece B. should be married at the time of my sister M.'s death" [which event occurred], "I, in that event, bequeath my property at the decease of my sister M. to my sister P. for her life," &c. Held, that the bequest to the niece B. was not in general restraint of marriage, but until marriage, and consequently that B. was not entitled to a *de bonis non* grant as a residuary legatee of property left unadministered.

On petition.

This was a question as to the grant of administration with the will and two codicils annexed of the unadministered estate and effects of the Most Honorable Barbara Dowager Marchioness of Donegal, who died in December, 1829, having by her will appointed her sister, Mary Godfrey, sole executor, according to the tenor, and residuary legatee for life.

The disposition of the residue after the death of Mary Godfrey was provided for in the following words:—"And at the death of my sister, Mary, I give and bequeath all the property I die possessed of in remainder to my own dearest niece Barbara Godfrey, subject to the annuity of one hundred and fifty pounds a-year as before named to my sister Philly, but if my niece Barbara should be married at the time of my sister Mary's death, I, on that event, bequeath my property at the decease of my sister Mary to my sister Philly for her life, and in remainder to the most deserving and those who may want it most amongst our nearest relations."

In the codicils were contained the following paragraphs:—"In the first, "I do not now bequeath any of my property to my own dearest niece Barbara, because I know that as long as my ever dear Mary lives she will be a mother to her and will continue the same care and protection to her that she has hitherto shewn her;" in the second codicil, [594] "If my sister Mary, who has ever been a comfort and blessing to me should survive my sister Philly and live to see Barbara married, I give to her, my sister Mary, all my property for ever to be disposed of as she pleases."

In February, 1830, Mary Godfrey, the executor, proved the will, and in her lifetime Barbara Godfrey married the Rev. John Hughes. Mary Godfrey died in 1842 intestate, on which event, without any application to the Court, letters of administration with the will annexed of the unadministered effects of Lady Donegal were granted to Philippa (in the will called Philly) Godfrey as the residuary legatee for life substituted in the will.

Philippa G. died still leaving some of the effects of Lady Donegal unadministered. On the 16th March, 1847, the Court was moved *ex parte* to decree the administration to Captain Godfrey, a nephew and one of the persons entitled in distribution to the residue of the deceased's effects; but the Court refused the application and required that notice should be given to Mrs. Hughes (the niece Barbara) in order that she might, if she thought fit, contest the grant. An appearance was given for Mrs. Hughes and an act on petition was entered into.

The above statement was on each side admitted to be in substance true.

In the act on behalf of Captain Godfrey it was submitted "that, according to the true construction of the said will, the residue of the estate and effects of the said deceased is now divisible amongst her next of kin according to the Statute of Distribution," and it was prayed that letters of administration [595]-tion with the will and codicils annexed of the goods, &c. of Lady Donegal, left unadministered, be committed to Captain Godfrey. In the answer to the act on behalf of Mrs. Hughes it was submitted that "in consequence of such intermarriage" [the marriage of her, the niece Barbara Godfrey with the Rev. John Hughes] "the residue of the estate and effects of the said deceased on the death of the said Mary Godfrey did not become vested in the testatrix's sister Philippa Godfrey" . . . "but vested at the time of the testatrix's own death in the said Barbara Hughes (then Godfrey), subject to the said Mary Godfrey's life interest therein, as also to the annuity of 150l. to the said Philippa Godfrey for life; the limitation over in the event of the said Barbara marrying in the lifetime of the said Mary Godfrey being, as is submitted, null and void in law," and it was prayed that the aforesaid administration be granted to the said Barbara Hughes as the absolute residuary legatee substituted in the said will.

Jenner for Captain Godfrey argued that the provision made for Mrs. Hughes was not in restraint of marriage, but it was for her so long as she continued single—that the codicils to the will shew the object and intention of the bequest, that she was to have the property so long as the testatrix presumed she would require it—that such limitation is good according to a dictum of the Vice-Chancellor, Wigram, who in his judgment in *Morley v. Rennoldson* (2 Hare, 570) says, “Without doubt, where pro-[596]-perty is limited to a person until marriage, and when she marries then over, the limitation is good”—that this law exactly fits the present case. 2dly, that the Court cannot take into its consideration the bequest in remainder “to the most deserving and those who may want it most amongst our nearest relations;” the property must go to those who are entitled under the Statute of Distribution.^(a)¹

Addams for Mrs. Hughes argued that a limitation in restraint of marriage is void, and that it has so been held even when for a limited period; *Hartley v. Rice* (10 East, 22). He contended and argued from the words of the will that the bequest to Mrs. Hughes was not, as set up on the opposite side, a bequest “until” marriage, but a bequest in general restraint of marriage. The second proposition as contended for on the other side he did not dispute.

Sir Herbert Jenner Fust said that though it was allowed in argument that a bequest in general restraint of marriage is void, there are many and very nice distinctions in reference to the subject generally—that his impression was the testatrix was desirous of doing that which seemed to him by no means unreasonable—to keep her property in her own family, but before deciding the question at issue between the parties he would look into some of the cases decided in Chancery.

July 23rd.—The Court having reviewed the judgment in [597] *Scott v. Tyler* (2 Bro. C. C. 431), and that in *Morley v. Rennoldson* (2 Hare, 570), at considerable length, observed that it is the clear opinion expressed by the Vice Chancellor, Wigram, in the course of his judgment in the latter case, that a gift until marriage, and when the party marries then over, is a valid limitation. The learned Judge then directed his attention to the precise words of Lady D.’s will, in which the bequest to “Barbara” (Mrs. Hughes) was couched, and said that the condition was a condition precedent and not subsequent—in other words, that it was not in general restraint of marriage, but until marriage. Taking that view of the matter he decreed the administration as prayed to Captain Godfrey.

IN THE CASE OF THE OFFICE OF THE JUDGE PROMOTED BY TROWER *against* HURST.

Archbishop Court, Feb. 18th, May 4th and 22nd, 1847.—A writ of sequestration issued by a bishop in virtue of a sentence certified to him from the Court of Arches, to which Court the case was originally sent by letters of request, must be enforced by the bishop.—Motion to decree a monition against an incumbent to shew cause why he should not pay the sequestrator, appointed by a bishop, a sum of money claimed as due rejected by the Court of Arches.

[S. C. 5 Notes of Cases, 160, 382; 11 Jur. 210. Referred to, *In re Thakeham*

Sequestration Moneys, 1871, L. R. 12 Eq. 499.]

Motion.

This motion arose out of the following cause:—The office of the Judge was promoted in the year 1844, in virtue of letters of request from the Lord [598] Bishop of Chichester, by the Rev. W. J. Trower, a rural dean within that diocese, against the Rev. J. Hurst, rector of Thakeham in the said diocese, to answer to certain articles charging him with certain immoralities. The cause proceeded in the usual form; a defensive allegation was asserted, but afterwards waved, and on the 3rd of May, 1845, the Judge held the articles to be sufficiently proved and sentenced Mr. Hurst to be suspended for the space of three years *ab officio et a beneficio*,^(a)² condemned him in

(a)¹ *Anonymous case*, anno 1716, 1 P. Wms. 327, and *Gower v. Mainwaring*, 2 Ves. sen. 87, 110.

(a)² The following is the precise decree:— . . . “that the said Reverend John Hurst, the party proceeded against, be suspended for the space of three years, from the time of publishing the suspension for that purpose in the parish of Thakeham otherwise Thakeham Saint Mary aforesaid, from all discharge and function of his clerical offices and the execution thereof, that is to say, from preaching the word of God and administering the sacraments, and celebrating all other duties and offices

the costs, and directed a copy of his decree or sentence to be duly transmitted to the Consistorial Court of Chichester, in order that the sequestrations might therefrom be issued, or such other steps taken as the nature of the case and the exigency of the law might appear to require, &c. An appeal from that sentence was asserted, but on the 3rd December, 1845, the appeal was abandoned and the costs were acknowledged to be paid.

In pursuance of the decree of the Court of Arches the Bishop of Chichester appointed Mr. Butler, of Chichester, sequestrator, the 18th of July, 1845. Mr. Butler, in an affidavit sworn the 15th January, [599] 1847, stated "that on the 16th of August, 1845, he caused a written notice to be served upon Mr. Hurst, demanding possession of a certain part of the glebe land belonging to his rectory, and in his possession, and on the 24th September, 1845, caused a printed notice to be given to Mr. Hurst, as occupier of land in the parish assessed to a tithe commutation or rent-charge, and also to the other tithe payers of the parish, to the effect that he would attend at a certain place on the 22nd October, 1845, to receive payment of what was due; that Mr. Hurst refused to yield up possession of his glebe land, or to pay the rent-charge; that on the 15th October, 1845, Mr. Hurst sent a notice to the deponent not to demand the tithes or emoluments of his rectory, as he had appealed from the sentence of the Court of Arches, and he likewise sent a notice to the tithe payers not to pay Mr. Butler, and in consequence of such latter notice the tithe payers declined paying as required. That he, the deponent, on the 5th January" [after the appeal was abandoned], "on the 28th April, and on the 26th October, 1846, in pursuance of due notices given by him, held audits for the purpose of receiving the tithe commutation or rent-charge, but Mr. Hurst did not pay any part thereof; that repeated applications had been made to Mr. Hurst demanding possession of the glebe land; that he, the deponent, personally, on the 30th June, 1846, demanded possession thereof, and also payment of the rent-charge in respect of the land occupied by him, without effect, but that on that day Mr. Hurst promised to pay this deponent the rent-charge, and also, if allowed to remain in possession of the glebe land, part of which had up to [600] that time been let, such rent for the glebe as a surveyor should put upon it. That he, the deponent, by letter, informed Mr. Hurst on the 20th of July, 1846, the amount, fixed by a surveyor, due for the rent of the glebe to be 54l. 15s. 8d. and for the rent-charge 79l., but that no part thereof has been paid. That he, the deponent, on the 28th December, 1846, made by letter a further demand for such payments, and intimated if such demand was not complied with, it would be his duty to bring his refusal before this Court. That according to a notice given by this deponent, he attended at a certain place on the 4th January, 1847, for the purpose of demanding and receiving the payments due, but no part of the sum due was or has been paid, and this deponent verily believes that the same cannot be recovered without the aid and process of this Court."

Haggard, on the state of facts set forth in Mr. Butler's affidavit, moved for a monition against Mr. Hurst to shew cause why he should not be pronounced in contempt, and his contempt signified, for disobedience to the sentence of the Court of the 3rd May, 1845. [By the Court. In what does the disobedience to this Court consist?] Mr. Hurst continues in the occupation of the glebe and refuses to give it up. [By the Court. The Bishop of Chichester must enforce the sequestration he issued, the necessary proceedings must emanate from that Court, at least in the first place.] Though there may be some mode of proceeding there, still this Court is in no wise hindered from enforcing its own decree. [By the Court. For what purpose was the [601] sentence here pronounced transmitted to Chichester? Was it not that it might be carried into effect there? It appears the sequestration was issued; the sequestrator ought to certify to that Court what he has done. An affidavit cannot satisfy me; before I can act I ought to have a return from the bishop. At present, the contempt, if any, is of the bishop.] There is a *prima facie* case for applying in the present instance to this Court; in the case of *Moysey v. Hillcoat* (2 Hagg. Ecc. 30), brought into this Court by letters of request, after sentence against the defendant he

in the parish church and parish of Thakeham otherwise Thakeham Saint Mary aforesaid, and elsewhere, within the province of Canterbury, and from receiving and taking the fruits, tithes, rents, profits, salaries, and other ecclesiastical rights, dues, and emoluments whatsoever belonging and appertaining to the said rectory," &c.

disobeyed a part thereof by continuing to perform certain offices; so also was it in *The Hampstead case*,^(b) yet this Court interfered; though the present application has reference to a different part of the sentence, namely, to the suspension a beneficio, and not, as in those cases, to the suspension ab officio, still as being parts of the same judgment they stand on the same footing—to disobey one part is as much an offence and contempt of Court as to disobey the other.

Bayford on the same side argued that the sentence consists of two parts: first, a suspension ab officio; second, a suspension a beneficio—that the sentence could not be said to be carried into effect, or to be obeyed by the incumbent, if he remained in possession of the glebe and did not pay the rent-charge—that a breach of one part of the sentence is as much an offence as a breach of the other. The object in sending notice of the entire sentence to the bishop is that he, as local ordinary, may enforce [602] it; he stands in the position of a sheriff at common law. [By the Court. Does not the sheriff make a return?] Yes. [By the Court. What return is there from the bishop? I have none before me, and know not what he has done.] Mr. Hurst, undoubtedly, as incumbent, stands on a different footing from others, who, as tithe payers, are mixed up, according to Mr. Butler's affidavit, with this case; with respect to them the sequestrator's account should perhaps be rendered into the Court of the bishop. There is evidence that application has been made to obtain the profits of the benefice, and that the incumbent retains them. Whatever may be the right mode of proceeding against others, the tithe payers, there would be much difficulty in enforcing a process of law against Mr. H. as incumbent. If the incumbent do any act which Mr. Hurst is sworn to have done, to hinder any part of the sentence of this Court from being carried into effect, he must be answerable to this Court.

Judgment—*Sir Herbert Jenner Fust*. I am not aware of any other application similar to that which is now made to the Court; I know of no instance in which the Court has been asked, under the circumstance here set forth, to enforce its sentence. Notice of the sentence of this Court was, according to usage, transmitted to the local ordinary in order that he might take the necessary and legal steps to enforce obedience and see its decree carried out and complied with. The bishop is the ecclesiastical sheriff; it is his duty to receive the emoluments of the living and see them [603] properly applied; for that purpose he appoints his agent, the sequestrator, and it is the duty of the sequestrator to make a return of what he has done into the bishop's registry. At common law when the sheriff is unable to make a levy, he makes a return to that effect to the Court, which resorts to other means; so this Court would, under a like state of things, adopt such means as are in its power to carry out its sentence. In the present instance I am not in possession of the facts, I have only an affidavit from the bishop's agent on which I cannot act. Had the bishop certified me he had appointed a sequestrator and that he, the bishop's agent, had done his best to enforce the writ, but without effect, I might have been more disposed to entertain the application. But there is another difficulty in this case; on the face of the affidavit there would seem to be an agreement that the incumbent should remain in possession of the glebe on paying rent, so that the case becomes one rather of non-payment of rent than of receiving, or keeping to himself, strictly, the profits of the living. The two cases mentioned in argument have no bearing on the present; there was no other authority but this Court to whom a return of the disobedience in those instances could have been made; had Mr. Hurst disobeyed the sentence of the Court by performing the offices of the church I would have immediately interfered, as the bishop could not have dealt with that part of the sentence. With respect to the present matter of complaint, it is impossible I can proceed till I have a return from the bishop; when I have that, it will be time enough for me to say [604] whether under all the circumstances I can grant the monition; at present I am certainly not in a position to do so, and must, therefore, refuse the prayer.

May 4th.—In accordance with the suggestion of the Court, an official return was made by the Bishop of Chichester on the 21st of April, 1847, setting forth in detail all the attempts made by the sequestrator, which are summarily stated in the outline of Mr. Butler's affidavit, given above, and also, in addition, that a further ineffectual attempt was made on the 20th of April, the day preceding the return, to obtain payment of the sum then owing; and the return concluded by requesting the Court

(b) *Wilcox v. White* (on appeal), Arches, July, 1833, not reported.

would act in the premises as to it might seem meet. On the return so made, the motion of the 18th of February was on the 4th of May renewed—that a monition should issue against Mr. Hurst to shew cause why he should not be pronounced in contempt for disobedience to the sentence of the Court of Arches. The Judge, without expressing any opinion, but intimating a desire to see a draft of the intended monition, directed the motion to stand over.

May 22nd.—The return of the Bishop of Chichester having been altered and brought down to the 17th of May, 1847, was, together with a draft of the monition, brought in. The monition did not in any way refer to the sentence of the Court, as the execution of it was placed in the hands of the bishop, but was grounded wholly on the bishop's return of the amounts then due from Mr. Hurst. The motion [605] made on the 22nd of May was, that the Court would decree a monition against Mr. H. to shew cause why he should not pay the sequestrator the amount in question then due from him.

Sir Herbert Jenner Fust noticed the variation of the terms of the motion. He said he was not informed why the bishop did not himself follow up this sequestration—that he was by no means satisfied that the bishop had not the power, and that he could not see on what principle the Court could proceed to enforce payment to one not its own officer, but the officer of the bishop to whom the bond was given. After again adverting to the agreement entered into with Mr. Hurst by the sequestrator, the Court said that part of the sum alleged to be due from Mr. H. was not in his character of rector, but of a tenant of the sequestrator. Under all the circumstances, the Court stated it was not in a position to decree the monition to issue, and therefore rejected the motion.

No further step was taken in the Court of Arches in respect of the monition. On the 26th of May, 1848, without proof or inquiry of any thing having been done by the Bishop of Chichester in reference to the writ of sequestration, the Court, on the usual certificate of the good behaviour and morals of Mr. Hurst during the period of the three years' suspension, relaxed the suspension and directed it to be taken off.

[606] IN THE CASE OF THE OFFICE OF THE JUDGE PROMOTED BY BROOKES THE YOUNGER *against* CRESSWELL. Arches Court, Nov. 2nd, 1847.—A beneficed clergyman being suspended for misconduct and condemned in costs, is entitled to a relaxation of the suspension on the Judge being satisfied with the certificate of good conduct during his suspension though the costs be not paid, but he is not entitled to be dismissed from the suit until he has paid the costs.—On a monition having been granted to shew cause why a beneficed clergyman, who was under suspension at the death of the promoter of the suit, but had not paid the costs in which he had been condemned, should not pay those costs to the administratrix of the promoter; it was held, after argument, that the suit did not abate by the death of the promoter, and that the monition for payment should be issued.

[S. C. 5 Notes of Cases, 544; 11 Jur. 934. Followed, *Sheppard v. Phillimore*, 1869, L. R. 2 P. C. 461.]

Motion.

This motion arose out of the following cause:—The office of the Judge was promoted in the year 1844, in virtue of letters of request from the Lord Bishop of Bath and Wells, acting by the Lord Bishop of Salisbury,^(a) by Henry Brookes, the younger, of Wells, against the Rev. Henry Cresswell, vicar of Creech Saint Michael, in the diocese of Bath and Wells, to answer to certain articles, charging him with habitually swearing,

(a) A preliminary objection was taken at the hearing of the original cause, that there was no proof before the Court of the due appointment of the Bishop of Salisbury to act for the Bishop of Bath and Wells; and that the letters of request were not properly signed—that they ought to have been signed E. Sarum, for G. H. Bath and Wells, whereas they were signed “George H. Bath and Wells, by E. Sarum;” on these grounds it was contended that the whole proceedings were null and void, but the Court, referring to the statute 6 & 7 Vict. c. 62, s. 11, resolved that the letters of request were properly signed, and that it was not necessary to produce proof of all the facts alleged or recited in that instrument.

frequenting public-houses, drinking to excess, (b) &c. On the articles nineteen witnesses were examined, and on a responsive allegation in behalf of Mr. C. thirty-five witnesses were examined. The Court on the [607] 12th of February, 1846, held the articles to be sufficiently proved, and sentenced Mr. C. to be suspended for the space of eighteen months *ab officio et a beneficio*, condemned him in the costs, and, amongst other things, ordered and directed that, at the expiration of the said eighteen months, Mr. C. should leave in the registry of the Court the usual certificate of his good behaviour and morals during the period of his suspension, "and that such certificate be approved by this Court, before such suspension be relaxed or taken off; and that the said suspension continue in full force, notwithstanding the expiration of the said term of eighteen months, until the said certificate shall be so exhibited and approved of."

The suspension was published on the 8th of March, 1846; on the 10th of the same month the costs were taxed at the sum of 580l. 19s. 9d., and the monition for payment was decreed. The monition was never served on the defendant, but it was sworn that between the 26th of March and the 16th of April, 1846, five ineffectual attempts were made to serve it. Mr. Brookes, the promoter of the suit, died on the 16th of April, 1846, and on the 16th of May following administration of his effects was granted to his sister, Mrs. Hawkes.

The term of Mr. C.'s suspension expired on the 9th of September, 1847, and the certificate of his good conduct during his suspension was left in the registry. On the following Court day, the 5th of October, a motion was made on behalf of Mr. C. for the relaxation of the suspension, but was opposed on the ground that the costs were not paid; and the [608] surrogate, sitting for the Judge, declined to make any order.

On the 2nd of November, 1847, the motion was renewed.

Addams in behalf of Mr. C. argued that the sentence of the Court did not state that the suspension should not be relaxed till payment of costs; it did not point to payment of costs before relaxation of the suspension; that the only condition had been complied with, namely, the bringing in a certificate of good conduct; that in respect of the matter of costs, if that could be by possibility a part of the question, the fault lay on the opposite side, inasmuch as, though a representation was obtained to the effects of the promoter, on the 16th of May, 1846, no step had been to the present day taken to obtain payment.

Dodson, Q. A., in opposition to the motion, contended that the application ought not to be granted till the entire sentence was complied with; that a compliance with one part of the sentence was not enough; that the defendant evaded the service of the monition for costs; that inasmuch as the promoter did not die till after the costs were taxed, his representative could give a sufficient discharge, and were that not deemed sufficient, still the costs ought to be paid into the registry.

Addams in reply. The two questions raised on the opposite side are perfectly distinct; the question whether the representative of the promoter [609] ought to have a monition for the payment of costs is not before the Court.

Judgment—*Sir Herbert Jenner Fust.* The question at this time presented to the Court is whether the suspension ought to be relaxed, though, as admitted, the costs have not been paid. In reference to the relaxation of the suspension there was one condition annexed, namely, that the defendant should leave in the registry the usual certificate of good conduct during his suspension—that such certificate be approved before such suspension be relaxed or taken off, and that otherwise the suspension should continue in full force, notwithstanding the expiration of the term of suspension. Such is the condition of the relaxation; has it been complied with? I am clearly of opinion that the certificate is satisfactory—there is no averment that it is not true; the sentence, so far as regards the suspension, has therefore been satisfied, but the matter of costs presents another consideration. With respect to the costs, though there has been considerable delay and neglect, I cannot release the defendant from the payment of them, and must therefore keep him before the Court; but in regard to the relaxation of the suspension I consider that not only on general principles, but

(b) In respect of one of the charges it was argued that it was beyond the period limited by the Church Discipline Act, 3 & 4 Vict. c. 86, s. 20; the Court, however, resolved that the commencement of the suit or proceeding dates from the time at which the citation is served, and referred to *Sherwood v. Ray*, 1 Moore's P. C. C. 395, as furnishing a principle for the determination of the point.

also under the peculiar circumstances of this case, I must take off the suspension, and do so accordingly.

The counsel for Mr. C. submitted that the relaxation ought to be made retrospective, and referred back to the day on which the certificate of [610] good conduct was lodged in the registry. The Court refused so to do, and said it must date as from this day, the 2nd of November, 1847.

The counsel for the representative of the promoter (for whom a proxy was exhibited) prayed a monition by ways and means for the costs. The Court refused that application, and said that, if any monition at all be granted, it must be an original one—to shew cause why the costs should not be paid. As that was not opposed it was accordingly issued.

The monition as decreed was personally served on Mr. C., and his proctor prayed that he might be heard on his petition.

The petition set forth in detail the facts already stated, which were not in substance denied, and also alleged “that as the promoter of the suit at the time of his decease was not in a position to enforce immediate payment of the costs, it follows as a just legal consequence that such costs are not now recoverable—that the original suit, which was not in any manner revived, abated at the death of the promoter, and that the claim for costs, though made in the name of the administratrix, was not made for her benefit, or for that of the promoter’s estate, but for the benefit of others responsible for his costs from whom they have been or are expected to be received.”

In the answer it was alleged that, owing to the decease of the late Bishop of Bath and Wells [which in the rejoinder was admitted to have occurred previously to the sentence in the original suit], as well as of the promoter, a delay unavoid-[611]-ably occurred in determining upon the steps to be adopted in regard to payment of costs until the 10th September, 1846, when a sequestration was obtained; that when the sequestration was obtained, its execution could not be enforced, in consequence of the existence of a prior sequestration at the suit of a creditor, and it was submitted that a revival of the suit was not required, as sentence had been given in the lifetime of the promoter, from which there had been no appeal, and that the claim for costs was made *bonâ fide*.

May 26th, 1848.—Addams for Mr. Cresswell. A party to obtain his rights must use due diligence. The excuses set up on the other side are not sufficient to account for the delay which has taken place. The suit abated on the death of the promoter, and though a proxy has been exhibited for his administratrix, there has been nothing done to revive the suit. The proceeds of a sequestration cannot, as the law stands, be applied to payment of costs. A representative cannot recover, unless the original party was in his lifetime in a condition to enforce payment. There is nothing to shew that the present application is for the benefit of the administratrix, nor is it sworn that the costs were not paid in the lifetime of the promoter.

Dodson, Q. A., and Haggard for the administratrix of the promoter. Due diligence was used in the lifetime of the promoter, and he was in a condition to enforce obedience to the monition, which was originally [612] granted; the delay has been sufficiently accounted for. The claim is founded on a sentence which, from the circumstance of there not having been an appeal, has become *res adjudicata*, Conset, pt. 3, s. 2, a part of that sentence remains to be executed. A revival of the suit is not necessary; that is evident from the fact that the defendant, after the death of the promoter, applied for a relaxation of his suspension.

Cur. adv. vult.

June 3rd.—*Judgment*—*Sir Herbert Jenner Fust*. Both parties seem to me to have lost their way. There was undoubtedly no want of activity on the part of the promoter, in the first instance, to effect a service of the original monition, but subsequently to his death there does appear to have been considerable neglect; still, I do not see that any injury has thereby arisen to the defendant, or that any thing material results from the circumstance of the delay. At the same time, I must observe I have no satisfactory explanation afforded me why the sequestration was not issued before the month of September, 1846; or how the duties of the parish were performed in the interval between the publication of the suspension and the issuing of the sequestration, which ought in all cases to be taken out as soon as possible after sentence.

But dismissing these matters, as they do not, in my opinion, affect the real merits of the case, the question which I have to determine is whether sufficient cause has

been shewn why the monition should not be issued for the payment of costs to the [613] representative of the promotor of the suit, for condemnation in costs was a part of the sentence, and from that sentence there has been no appeal.

It was said that this is not a bonâ fide application—that the sum claimed is not for the benefit of the promotor's estate—that there is nothing to shew the costs were not paid in his lifetime, and that the suit abated on the death of the promotor.

In reference to these objections, I must observe there has been no proof adduced to shew that the present application is not a just one, nor does the defendant aver that he did pay the costs in the promotor's lifetime. I cannot, in the absence of all authority, say that the suit abated on the promotor's death; condemnation in costs was as much a part of the sentence as the suspension; if one part abated, the other part—the suspension—would have shared the same fate; that has not been pretended. I consider all that is necessary is that there should be a party before the Court who can give Mr. C. a legal discharge for the costs; there is such a party—the administratrix of the promotor. I must overrule Mr. C.'s petition, as the cause shewn is insufficient, and therefore decree the monition to be issued.

[614] THE OFFICE OF THE JUDGE PROMOTED BY BURDER *against* MAVOR.

Arches Court, Jan. 11th, 1848.—A clerk in holy orders being in possession of a perpetual curacy with cure of souls, augmented by the Governors of Queen Anne's Bounty, and having, without dispensation, been instituted and inducted into another benefice with cure of souls, held to have forfeited the former, which was on sentence declared void.

[S. C. 6 Notes of Cases, 1. Referred to, *Martin v. Mackonochie*, 1868, L. R. 2 Adm. & Ecc. 153.]

This was a cause promoted, in virtue of letters of request from the Lord Bishop of Oxford, by Mr. John Burder against the Rev. John Mavor, perpetual curate of Forest Hill, in the diocese of Oxford, to answer to certain articles, &c., “and more especially for, that having been duly licensed and admitted to the said perpetual curacy, and being in the real actual and corporal possession thereof, the same having been augmented by Governors of the Bounty of Queen Anne, and being a benefice with cure of souls, he procured himself to be instituted and inducted into the possession of another benefice, with cure of souls, to wit, of the rectory of Hadleigh, in the county of Essex, then in the diocese of London, but now in the diocese of Rochester, without any legal dispensation by him first had and obtained, and for that he still continues in the possession of the said two benefices with cure of souls.”

The decree was personally served on Mr. Mavor, but no appearance was given; the proceedings were carried on throughout in pœnam.

The articles were eleven in number.

The first pleaded, that by the 29th chapter of the Council of Lateran, held anno 1215, which chapter is a part of the ecclesiastical law of this kingdom, whosoever shall take a benefice with cure of souls, if at the time he be in possession of another such benefice, shall ipso jure be deprived of [615] the former in date, &c. The chapter was set forth in the article.

The second pleaded that Mr. Mavor was on the 21st of November, 1823, duly admitted into the perpetual curacy of Forest Hill, which had been previously and continued to be augmented by the Governors of the Bounty of Queen Anne, and was a benefice with cure of souls.

The third pleaded a copy of the act on licensing Mr. Mavor to the said perpetual curacy, and the identity of the said curacy, and of Mr. Mavor.

The fourth pleaded that Mr. Mavor was in the possession of the said perpetual curacy, and received the emoluments thereof.

The fifth pleaded that Mr. Mavor, notwithstanding he was in possession of the said perpetual curacy, procured himself to be instituted on the 9th of August, 1825, to the rectory of Hadleigh with cure of souls.

The sixth pleaded a copy of the act on instituting Mr. Mavor to the said rectory and his identity.

The seventh pleaded the induction of Mr. Mavor into the said rectory, and that he was instituted and inducted without any legal dispensation for holding the first benefice, and that he was in the possession of Hadleigh, the same being a benefice with cure of souls.

The eighth pleaded that Mr. Mavor, for such his offence in the preceding articles set forth, ought to be corrected and punished according to the exigency of the law.

The remainder of the articles pleaded the right of the bishop, under the Church Discipline Act, to send the case by letters of request—that by reason [616] of the premises, the perpetual curacy of Forest Hill ought to be declared void, and that Mr. Mavor be condemned in the costs of the suit, &c.

On the articles eight witnesses were examined.

Dodson, Q. A., and Phillimore for the promotor. The Court, on referring to the evidence and the law as pleaded, held the articles to be sufficiently proved, pronounced the perpetual curacy of Forest Hill to be void, and signed a sentence declaring the same so to be.

SMEE against BRYER. Prerogative Court, Jan. 15th, 1848.—A holograph will, in which an executor was appointed, and the residue disposed of, being written on three sides of a sheet of paper, ended on the third side, leaving eight-tenths of an inch of that page blank; the signature of the testatrix was not placed there; the upper part of the fourth page was in blank (for which a reason was assigned), and more than half-way down that page, opposite to the attestation clause (for which clause there was not space on the third page), her signature was placed. It was held that the will was not signed “at the foot or end thereof,” that it ought to have been signed at the bottom of the third page.

[S. C. 6 Notes of Cases, 20; 12 Jur. 103: affirmed, 6 Moore, P. C. 404; 13 E. R. 739 (with note). See also *Allen v. Maddock*, 1858, 11 Moore, P. C. 456; 14 E. R. 768.]

Mary Bateman died on the 1st of October, 1847, a spinster, leaving a will without date, but which was executed on the 22nd of April, 1845, entirely in her own handwriting, by which she bequeathed several legacies to her relations and friends, and the residue of her property to Mr. Smee, an old and confidential friend, whom she appointed sole executor.

The will was contained in a sheet of foolscap paper, measuring thirteen inches in height. The dispositive part occupied the first three pages or sides of the sheet; the writing throughout was [617] uniform, and the lines stood apart as nearly as possible three-tenths of an inch; under the last line of the third page the signatures of the testatrix and attesting witnesses might have been squeezed in, there was a space of eight-tenths of an inch, but there was no space for an attestation clause. On the fourth side there was a memorandum of attestation, together with the names of two witnesses to an interlineation of certain words between the fifth and sixth lines of the first side, and when the sheet was spread out, such memorandum, for which there was no space in the margin of the first side, was immediately opposite to, and close to, the interlineation. Very nearly half-way down the fourth page commenced a long attestation clause, occupying one-half of the width of the page, on which was stated that the before mentioned interlineation was made prior to the execution; opposite to the third line of the attestation clause, and to the right, was placed the signature of the testatrix, so that the signature of the testatrix stood rather more than half-way down the fourth side. Between the testatrix's signature and the memorandum opposite to the interlineation on the first page before referred to, there was a space of rather more than four inches. The names of the attesting witnesses to the will stood at the end of the attestation clause.

The will was propounded by Mr. Smee the executor, and opposed by Mr. Bryer the nephew, and one of the next of kin of the deceased.

In the allegation it was pleaded to the effect that the day before the will was executed the testatrix shewed it to her executor, and, in answer to a question from him why she had written the attestation [618] clause so low down on the fourth side, replied, she had left the upper part of the fourth side blank to admit of the attesting witnesses affixing their signatures opposite to the interlineation on the first side or page; that on the day of the execution of the will the testatrix assigned the same reason to the attesting witnesses.

Robinson and Jenner in opposition to the admission of the allegation. If the admission of this allegation depended on the intention of the testatrix to execute her will in conformity with the provisions of the statute, no opposition could justly be raised; intention alone, however, will not suffice. The statute requires that a will

should be signed by a testator "at the foot or end;" on the face of the present paper itself it is clear the provisions of the law have not been complied with. There was sufficient space at the bottom of the third page of the sheet of paper for the due execution of the will, though not for the long attestation clause adopted which is not required by the statute. In some of the early cases on motion the Court was pleased to put an equitable construction on the words "foot or end," but since, in the cases of *Ayres v. Ayres* (ante, p. 466), and *Willis v. Lowe*,^(b) it has adhered to a more literal construction. The present case cannot be taken out of those cited; the allegation must therefore be rejected.

Addams and Harding in support of the allegation. It is a great question whether the Legislature in enacting that a will is to be signed "at the foot or end" intended anything more than that the signature or name of the testator at the commencement should not be deemed sufficient. The statute does not enact that blank spaces may not be left in the body of the will; and why an extremely rigorous interpretation is to be given to the statute, and it is to be held that there may not be a space between the end of the will and the testator's signature, is not apparent to reason. In the cases of *Woodington, Deceased* (2 Curt. 324), and *Carver, Deceased* (3 Curt. 29), the rigorous interpretation contended for was not adopted. Provided care be taken not to violate the spirit of the statute, the question is one of degree. The cases cited on the other side are clearly distinguishable [620] from the present; in those cases no reason was attempted to be assigned why the testator's signature did not immediately follow, but here there is a sufficient reason pleaded and set forth. The testatrix considered it was necessary, in reference to the 21st section of the statute, that the interlineation on the first page of the will should have the signature of the witnesses "opposite or near to such alteration;" there was not space for such signatures on the first page, and as she knew not what space they would occupy, she wrote the attestation clause and her signature lower on the page. If we establish this plea by evidence, the paper will be entitled to probate.

Robinson in reply. The cases on motion referred to on the other side are earlier in date than those on which we rely.

Judgment—*Sir Herbert Jenner Fust*. The question arising in this case respects the due or undue execution of a paper which purports to contain the will of Miss Mary Bateman, who died the 1st of October, in the year 1847. The paper is all in the handwriting of the deceased, and contains various legacies of different amounts. On the first side there is an interlineation in these words—"Nine thousand nine hundred dollars Pennsylvania five per cents being." The dispositive part of the will occupies almost three sides of a sheet of paper very carefully written; with the single exception I have mentioned, there is no other interlineation. In the space intervening between the [621] last line on the third side and the bottom of that page the paper is left in blank; the signature of the deceased is not there; but upon the fourth side, which is folded in the middle, about half-way down, or rather more, is the signature of the deceased "Mary Bateman" upon the right hand; and that signature is made opposite to the third line of the attestation clause, which is very particular in itself, and runs

(b) The case of *Willis v. Lowe* was argued and decided on the 25th of June, 1847. By the will, which was executed the 4th March, 1847, the residue was disposed of, and an executor appointed. The case is not inserted in this volume, as the Judge did not add any thing to what he said in *Ayres v. Ayres*, but rather declined, as it was understood, to lay down a rule or principle. Until some principle be established, the editor knows of no other more satisfactory mode of recording the cases which may occur on the question—what is signing "at the foot or end thereof"—than by giving an accurate measurement of the paper, for by reason of the expense a facsimile is out of the question. The following is a description of the will propounded in *Willis v. Lowe*:—It was written on a sheet of letter paper, measuring in height $9\frac{1}{10}$ inches; the first page was completely covered with writing; the writing on the second page commenced at the top, and ended at a distance of $5\frac{6}{10}$ inches; the remainder of the second page, measuring $3\frac{5}{10}$ inches, was blank, though there was a sufficient space for the signature of the testatrix as well for the attestation clause, with the names of the witnesses; a space of two inches from the top of the third page was blank, and then followed the attestation clause, with the signature of the testatrix and the witnesses. The will was held not to have been signed "at the foot or end thereof."

in the following words:—"Signed, published, and declared by the within-named Mary Bateman, as and for her last will and testament, in the presence of us both present at the same time, who in her presence, at her request, and in the presence of each other, have hereunto subscribed our names as witnesses, the words 'Nine thousand nine hundred dollars Pennsylvania five per cents being' interlined previous to the execution hereof;" then below this attestation clause follow the names of two witnesses—"Thomas Kirkpatrick, No. 3 Portland Place, Wandsworth Road; Robert Cornell, No. High Street, Newington Butts."

The question is whether this is a due execution of the will within the terms of the ninth section of the act.

It may be as well that I should read the words of that section, and then state the interpretation which has been put upon it both in earlier cases and those of later occurrence. The section provides: "That no will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned; that is to say, it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction; and such signa-[622]-ture shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

Since it is required by the act that the will should be signed at the foot or end thereof, the question is whether this will is so signed—whether, according to the construction which has hitherto been put upon this section of the statute, it is necessary the paper should be signed immediately at and after the conclusion of the will, or may be signed upon any part.

If the Court had to follow its own inclination, it would pronounce that the paper in question was duly executed, for there can be no doubt, on looking to the care bestowed on framing the attestation clause, that the testatrix did intend to comply with the requisites of the act; but I am afraid that the point which I have to determine is not whether she wished to comply, but whether she has complied, with the act, by signing the will at the foot or end thereof. On looking at the will, it is clear that the strict letter of the act is not complied with. The paper is not signed at the foot or end on any strict interpretation that can be put upon those words. That there is plenty of room for the deceased in the present case to have written her name on the third page, Mary Bateman, there can be no doubt; and there is also space for the names of the witnesses, though undoubtedly not for the particular attestation clause. At the same time I am not aware that the Court has ever held so strictly that [623] the will must be signed immediately following the last line of the will. The case of *Woodington* (2 Curt. 324) was one somewhat peculiar; but the question there was not whether the paper was signed at the foot or end, but whether it had been signed at all; and upon a just interpretation of the attestation clause, I thought there had been a signature by the deceased.

Cases did occur, when the statute first came under consideration, in which I was inclined to go as far as I possibly could to give effect to the intentions of testators. With that view, I did not hold to the strict letter of the law, but acted upon the equitable construction of the statute. In consequence, however, of a suggestion from other quarters, I have latterly, in the cases of *Ayres v. Ayres* (ante, 466) and *Willis v. Lowe* (see note (b), p. 618), found myself under the necessity to adhere more closely to the words of the statute. Accordingly, in those cases, I held it is not competent to a testator to assume to himself a latitude of construction, and sign his name at any part of the paper where he may think it more convenient than at the foot or end of the will properly so called.

Immediately after the statute was passed, I was induced to think that its principal object was simply to alter the law which had obtained on the construction of the Statute of Frauds, under which it was held that the signature of a testator at the beginning of a will was a sufficient signing. But as cases multiplied, I was inclined to think there was another object, namely, to prevent a testator [624] adding to his will, by filling up spaces left blank at the time of the execution, through which the mere commencement, or a part only at least, of the will would be attested by the witnesses. It was from these further considerations, coupled with a suggestion from other quarters, that I have of late been induced to adopt a stricter interpretation of the words.

It is very true many cases may occur—and the present certainly is one—where there is not the least ground for suspecting that it was the intention of the deceased to evade the law. On the contrary, the intention here was to comply with the strict requisites of the law, and no doubt the deceased thought she had done so. Still, the question recurs, Has she complied with the statute? has she signed the will at the foot or end thereof? If not, can the Court accept as a reason that the deceased thought the signature, where it now appears, would be sufficient? It does seem to me there is no sufficient reason assigned why the deceased did not subscribe the will at the bottom of the third page; though there was not space on the third page for the attestation clause, that might have been written on the fourth side. It is not the attestation that is required to be at the foot or end, but the signature of the deceased. If the attestation clause is found at any other part, that circumstance will not vitiate the will. Again, there is not only the blank space at the bottom of the third side, but there is a great space at the commencement of the fourth side. The reason assigned for the will not being signed higher up is, that it was supposed the attestation to the interlineation would have occupied more space. [625] That might have been the notion of Miss Bateman at the time, but even that is not borne out by the fact; for there is plenty of room for the attestation clause at the commencement of that side of the sheet of paper without interfering with the attestation to the interlineation.

I cannot see that this case differs in a material degree from the later cases which I have decided, on more serious consideration than I did some of the earlier motions: I think it is in principle the same as *Ayres v. Ayres* and *Willis v. Lowe* (cases already referred to). I apprehend I must, on principle as well as on precedent, reject the allegation propounding the paper, and shall not, therefore, go into the particulars of the allegation. I cannot consider that this paper is signed “at the foot or end thereof.” Evidently the deceased has mistaken the matter, and has thought the attestation clause must necessarily become a part of the will where her signature appeared. I do not know any case that has occurred where that was considered necessary. All that the act requires is, that the signature shall be at the foot or end; the attestation clause may follow at the most convenient place, provided the witnesses are able to identify the paper they sign. In this particular case it is quite conclusive there was no intention to add to the will. The entire *res gestæ* shew (I repeat it), conclusively to my mind, that there was no intention to add anything to the instrument. There is, moreover, one small circumstance (a very small circumstance, but still something); in this whole will there is not a single stop between the numerous legacies contained in it until you arrive at the conclusion, where the testa-[626]-trix appoints the executor. There is, therefore, something more to shew the testatrix did not intend to do any other act. Still, I regret the same principle must govern this and all other cases where the will (according to the interpretation of the act) is not signed where it ought to be, at the foot or end. If the will had occupied the entire third side, and the testatrix had signed at the top of the following page, then the question might have arisen whether, though not signed at the foot, it was not signed at the end, but this is not so here. Under these circumstances, I am clearly of opinion that I am bound on principle, as well as upon the adjudged cases referred to, to reject the allegation; for if the facts, as pleaded, were proved, they would not be sufficient to shew compliance with the act: I accordingly reject this allegation.

From the above judgment there was an appeal to the Judicial Committee of the Privy Council; on the 17th July, 1848, their Lordships affirmed the sentence of the Judge of the Prerogative Court, but they did not, though they took time to deliberate, lay down a principle to govern the question.

[627] WADE AND OTHERS *against* NAZER. Prerogative Court, June 15th, 1847; Feb. 25th, 1848.—A testator in 1843 executed his will, in which was contained a clause revoking all former wills; he afterwards duly made and executed a codicil confirming his will, save as altered by the codicil, and subsequently he re-executed the will, on the supposition that the attestation clause of the will was defective, and for that reason only, but did not re-execute the codicil, or in any way refer to it. It was held that the re-execution of a will extends to and republishes, notwithstanding the clause of revocation, a codicil, unless an intention to the contrary appear.

[S. C. 6 Notes of Cases, 46; 12 Jur. 188. Referred to, *Green v. Tribe*, 1878, 9 Ch. D. 238. Applied, *In the Goods of Rawlings*, 1879, 48 L. J. P. 65; 41 L. T. 559. Dis-tinguished, *Ffrench v. Hoey*, [1899] 2 Ir. R. 481.]

Henry Nazer, Esq., of Wiveliscombe, in the county of Somerset, a commander in the Royal Navy, died on the 10th November, 1846, leaving a will in his own hand-writing duly executed, dated the 18th March, 1843, and containing a clause of revocation in the following words:—"And hereby revoking and making void all former or other wills and testaments by me at any time heretofore made, I do declare this to be my only and last will and testament, &c."

The testator also left a codicil, which was drawn up by his solicitor in London, and duly executed in his office on the 6th June, 1846, on which occasion the solicitor not having seen the will, which was left in the country, made inquiry as to the execution of it, and suggested to the testator in reference to the Wills' Act that it was safer to use in the attestation clause the words—"all being present at the same time," and gave him the form of attestation including the said words. The codicil referred to the will by date, and, except so far as the will was altered by the codicil, ratified and confirmed it.

On the testator's return home he tied up the codicil with his will, and some days afterwards, namely, on the 10th July, 1846, in reference to the suggestion of his solicitor alluded to above, he re-executed his will, writing the following clause on the last sheet of the will, and immediately under it:—"Henry Nazer (L. S.) Re-signed by the above [628] named Henry Nazer, the testator, this tenth day of July, 1846, in the presence of us, who, at his request, in his presence, and in the presence of each other, all being present at the same time, have hereunto subscribed our names as witnesses. Witness John Lean—John Venn Norman."

Motion was twice made for probate of the will and codicil; and on the last occasion a proxy of consent from the parties interested was exhibited; but the Court rejected the application and directed that the papers be propounded.

An allegation was offered, setting forth the above facts, together with certain parol declarations prior and subsequent to the 10th July, 1846, that the testator intended the codicil of the 6th June, 1846, to operate. There was no dispute as to the intentions of the testator, or as to the alleged motive for re-executing the will.

The question involved was one of law.

Robertson in opposition to the admission of the allegation. The effect of the memorandum of the 10th July, 1846, is undoubtedly to republish the instrument of March, 1843, but the question is, Does this republication extend to the codicil?

In the first place, there is no mention of the codicil. The meaning of the words employed is plain. The testator "resigned" obviously the paper executed in 1843, but which paper, in the interval between the 6th June, 1846, and the 10th July, was not his will, for it was in part altered by the codicil.

There are cases in which it has been held that a [629] testator by republishing his will republished the codicils to that will, though no reference or mention was made of the codicils in the instrument or memorandum of republication. In all such cases, however, it will be found the testator republished his will in some such forms as these—I confirm my will—I republish my will—I re-execute my will, &c. See, for instance, *Crosbie v. Mac Doual* (4 Ves. jun. 613); *Gordon v. Lord Reay* (5 Sim. 277); *Smith v. Cunningham* (1 Add. 455); *Upfill v. Marshall* (3 Curt. 637). The ground of such decisions is this—that inasmuch as the word "will" has a technical meaning attached to it—that it includes the aggregate of papers, however numerous may be the codicils, a testator by using the word will must, unless an intention to the contrary be manifest on the face of the papers, be held to use the word in that technical and comprehensive sense.

In the present instance no such word is introduced—there is therefore no republication of the codicil, either on the face of the memorandum of July, 1846, or by construction of law.

In the next place, the parol declarations of the testator, set up in the allegation, cannot have the effect of republishing the codicil of the 6th June, 1846, for the Wills' Act contemplates but one mode of republication—to hold the contrary would be to subvert the scope of that act, which is to preserve uniformity. But there is another reason why the parol declarations cannot work a republication—the effect of the re-execution of the will of 1843 in July, 1846, is to make the will so republished a

[630] new will, and to speak, as it were, from that time (Williams on Executors, part i. bk. ii. ch. iv. s. 2), and in that will of the 10th July, 1846, there is a clause revoking all former testamentary papers. To introduce therefore parol evidence in this case, the effect would be neither more nor less than to expunge a clause—the clause of revocation—from a written instrument, which the law will not permit; a written instrument cannot be varied by parol evidence.

As the codicil of June, 1846, cannot be entitled to probate for the reasons assigned, the allegation ought to be rejected.

Dodson, Q. A., in support of the allegation. It is not contended on the opposite side that the testator intended that, in executing the memorandum in July, 1846, the codicil of June should not have effect, but it is said that codicil is revoked by operation of law. The language of the memorandum of republication is sufficiently ambiguous to let in parol evidence; although the testator has not introduced the word “will,” it is clear from the facts as pleaded he did not intend to exclude the codicil from taking effect. Intention in such a case is every thing, *Methuen v. Methuen* (2 Phill. 426); *Greenough v. Martin* (2 Add. 243). The republication was intended to give legal effect to the will, which was supposed to be in the attestation clause defective. Though the 34th section of the Wills’ Act enacts that every will re-executed, &c., after 1st January, 1838, shall be deemed to be made at the time at which it is re-executed, that provision is “for the [631] purposes of this act,” namely, for the purpose of execution, &c. The law in other respects is not altered, a re-execution of a will extends to the codicils, *Crosbie v. Mac Doual* (4 Ves. jun. 610).

Addams, on the same side. The Court is not precluded by the Wills’ Act from receiving parol evidence. In *Upfill v. Marshall* and *Coventry v. Williams* (3 Curt. 787) parol evidence was not excluded. The present is not so much a case of republication as of revocation. Intention is every thing. Even a Court of Construction does not altogether exclude parol evidence. See *Guy v. Sharp* (1 Myl. & K. 602). Independent of the question of parol evidence he argued that the codicil of June, 1846, when executed, became a part of the will, and that the testator by re-executing his will in July, 1846, in effect also re-executed the codicil.

The Court directed the question of the admissibility of the allegation to stand over for deliberation, but on the next Court day, namely, June 25th, ordered the allegation to be admitted, reserving the point of law till the final hearing. The answers of the opposite party were waved, and five witnesses were examined on the facts of the allegation as pleaded, about which there was no dispute, for the intentions of the testator were admitted in argument on debating the admissibility of the allegation.

At the final hearing on the 25th of February, 1848, the same line of argument was adopted as before.

[632] Feb. 25th, 1848.—*Judgment*—*Sir Herbert Jenner Fust*. I do not think that I am precluded from considering the object the testator had in view in re-executing his will in July, 1846. If that be so, it is perfectly clear—it is not denied—it is admitted—the only object was to render the matter of the attestation of the will of 1843 unquestionable—it was not to revoke the codicil of June, 1846, which was made principally to give greater effect to, and to secure, certain benefits conferred by the will on a son of the testator. In *Upfill v. Marshall* I took into account the intention of the testator, as did the Vice Chancellor, Wigram, in *Winter v. Winter* (5 Hare, 306), whose judgment in that case involves a consideration not only of the 34th, but likewise of the 33rd, section of the Wills’ Act.

There is no decision which exactly meets the difficulty that arises in the present case from the clause revoking all former wills; still I cannot help thinking that the principle laid down in *Crosby v. Mac Doual* (4 Ves. jun. 610) will apply, that the re-execution of a will extends to and republishes the codicils, unless an intention to the contrary appear. I am inclined to pronounce for the codicil as well as the will, and to decree probate of both. If inconvenience arise from this doctrine in any future case, recourse must be had to the Superior Court.

[633] IN THE GOODS OF CHARLOTTE ANNE COSSER, Deceased. Prerogative Court, Feb. 21st, 1848.—Administration with a will annexed, dated Oct. 1837, which was unattested and unsigned by the testatrix, whose name in no part appeared, granted on proof of handwriting and safe custody, and on a proxy of consent.

[S. C. 6 Notes of Cases, 46; 12 Jur. 208.]

Motion.

Charlotte Anne Cosser died on the 26th of June, 1847, a widow, without a child, or parent, leaving her surviving a brother and a sister, together her only next of kin, and the only persons entitled in distribution to her personal estate, had she died intestate.

A few days after the death of the deceased, her brother, in searching amongst her papers, found locked up in a cabinet, to which the deceased had frequent and common access, a will, folded up and indorsed "my last will," but not inclosed in an envelope, dated October, 1837, without any clause of revocation, unattested, unsigned by the deceased, and without her name appearing in any part of the paper; the residue was not disposed of, and no executor was named. Two disinterested persons deposed that the paper was entirely in the handwriting of the deceased, and her brother swore that he could not ascertain, or of himself say, what day in October, 1837, the will was written or made, inasmuch as the deceased never declared to him or to any one else, as far as he could from inquiries ascertain, that she had ever made such a will.

A strictly formal and uncanceled will, bearing date 11th of November, 1820, was found in the possession of another party, but the brother of the deceased swore that all the persons therein men-[634]-tioned died in the lifetime of the testatrix, with the exception of himself and his sister.

Jenner, on the above facts, and there being a proxy of consent from the sister, moved that administration with the will of 1837 annexed be granted to the brother of the deceased.

Judgment—*Sir Herbert Jenner Fust*. The paper is certainly most informal, but the only difficulty in granting this motion arises from the rule not to give probate of a paper in which a testator's name no where appears. In the present instance, however, the paper is beyond a doubt in the handwriting throughout of the testatrix, who evidently with care preserved it, and as the only other party, sworn to be interested in the effects of the deceased, is consenting to the grant being made to her brother, I shall allow the motion as prayed to pass.

ANGLE against ANGLE. Consistory Court of London, May 11th, 1848.—An allegation "in part responsive" to a wife's libel for a divorce, by reason of the husband's adultery, pleading some contradictions to the libel, but not denying the adultery charged, was rejected, on the ground that it in substance admitted so much of the charge as, if proved by the wife, would entitle her to a divorce, and that nothing was pleaded which in law amounted to connivance or condonation on her part.

[S. C. 6 Notes of Cases, 192; 12 Jur. 525.]

This was a suit for a divorce by reason of adultery promoted by Mrs. Susan Angle against her [635] husband Mr. John Angle. The marriage of the parties took place on the 26th of April, 1835.

The fifth article of the libel pleaded the cohabitation in various places in and near London till the spring of 1837, when the husband went to reside at Boulogne; that a few days afterwards he was joined by his wife, where she remained for five weeks; that by reason of illness she for the benefit of medical advice, with the approbation of her husband, came over to England to her father's residence; that early in June, 1837, she rejoined her husband at Boulogne for a short time, after which she returned to England, at the request of her husband, to endeavour to borrow money of her father; that in July following she again returned to her husband at Boulogne, and cohabited with him till October, 1837, when at his suggestion she again came over to her father's residence in the City Road, where she ever since has continued to reside.

The sixth article pleaded that early in November, 1837, Mrs. A. in a letter to her husband expressed her intention to return to him in France; that on the receipt of that letter he, on the 7th November, 1837, having commenced, or being about to commence, an adulterous intercourse, sent a letter to the mother of his wife, in which he expressed himself in the words following:—"I received a letter from your daughter, dated the 6th inst., wherein she states she is about returning to France; I am fully determined nothing on earth shall induce me to live with her again."

The eighth article pleaded that in November, 1837, a woman, E. R., with whom Mr. A. had, unknown to his wife, been criminally connected, [636] and by whom he had a child before he left England, proceeded at the invitation of Mr. A. to Boulogne, there to renew such her criminal connexion with him; that from such time he and

the said E. R. lived, cohabited together, and committed adultery till the death of E. R. which occurred in August, 1845.

The ninth article pleaded that during the cohabitation of Mr. A. and E. R. mentioned in the preceding article, the said E. R. gave birth to three children.

The eleventh article pleaded that Mr. A. admitted the adulterous intercourse between him and E. R., and the birth of children by her; that after her death, with a view to induce his wife to return to cohabitation with him, he wrote on the 24th November, 1845, to the father of his wife: "I trust you will excuse my going into minute particulars of my unfortunate case, further than by telling you that the great cause has been removed, Mrs. Robinson having been dead some months, and although I have children by her, they are all provided for;" that he also wrote letters of a like import to his wife and her mother.

The fourteenth, fifteenth and sixteenth articles pleaded that the delay in instituting proceedings on the part of Mrs. A. against her husband arose from the circumstance of her having been erroneously advised she could not obtain a divorce in England whilst he was resident in France; that she had not had any sexual intercourse with him since 1837; that he had from that year resided at Boulogne, where he was personally served with the citation in November, 1847; that his last place of residence in England was in the parish of St. Leonard, Shore-[637]-ditch, and that by an appearance given the jurisdiction of the Court was well founded.

The libel was admitted without opposition, and witnesses were examined.

"In part responsive" to the libel admitted on the behalf of the wife, an allegation was given in for the husband.

The first article pleaded that prior to the marriage of Mr. A. with Mrs. A. he had for some time cohabited with E. R., the result of which was the birth of a child; that after the marriage, when the parties in the suit were residing with the wife's father, certain differences as to pecuniary matters arose, in consequence whereof Mr. A. quitted that house, leaving his wife there, and himself went to reside at the house of E. R.; that his wife was fully aware of the same before she went to Boulogne in 1837; that as well with the privity and knowledge of his said wife, as also of her father and mother, he continued to cohabit and carry on a criminal connexion with E. R. at her house for several weeks, at the expiration of which period he returned to cohabitation with his wife.

The second article pleaded that shortly after Mr. A. had taken up his abode at Boulogne in 1837, the said E. R. also went to France, and resided in the vicinity of Boulogne, at which place he was, with the full privity and knowledge of his wife, in the constant habit of visiting the said E. R.; that his said wife never complained thereof, or remonstrated with him in regard thereto, but that they continued to live together on affectionate terms up to the last [638] time, October, 1837, of her quitting Boulogne for England.

The third article pleaded that on an occasion in 1837, when Mr. and Mrs. A. were walking out together at Boulogne, they met the said child of Mr. A. and E. R.; that on the following day his wife, Mrs. A., sent for the child of her own accord to the residence of himself and wife, where it remained in the care and under the control of his wife for the space of two months.

The fourth article pleaded that the letter dated 7th November, 1837, pleaded in the 6th article of the libel, did not originate in any intention on the part of Mr. A. to renew his connexion with the said E. R., but was written by him under a feeling that he had just cause of resentment against his wife's family by reason of their not having consented to enter into certain pecuniary arrangements.

The fifth article pleaded that upon the death of the said E. R., as pleaded in the libel, Mr. A. became anxious to return to cohabitation with his wife, and in furtherance of that object he wrote letters referred to in the eleventh article of the libel to his wife's father and mother, as well as to herself; that in consequence thereof his wife's father wrote to him consenting to an interview, but that such interview did not take place by reason of illness and business.

The sixth article pleaded two letters referred to in the preceding article from the father of Mrs. A. to Mr. A.

Addams and Bayford for the wife argued against [639] the admission of the allegation as not containing any defence valid in law; that there was nothing amounting to connivance, and there was no condonation after 1837.

Phillimore, R. J., for the husband, argued for the admission of the allegation as setting up a case of great delay on the part of the wife in instituting proceedings, and of continued condonation to the death of the woman in 1845. He cited *Dunn v. Dunn* (2 Phill. 403), and contended that the principle contained in that case is as applicable to the case of a wife as of a husband.

Judgment—*Dr. Lushington*. The admission of this allegation, which is “in part responsive” to the libel admitted on behalf of the wife in a cause of separation by reason of adultery with which her husband is charged, must depend upon the opinion the Court may form of the effect it would have on its judgment, assuming all the averments pleaded in it to be capable of proof.

There can be no doubt that it is perfectly competent to a husband to plead in defence any fact or circumstance which may operate to prevent the Court from pronouncing a sentence against him. He may plead a denial of the adultery charged; he may plead condonation or connivance on the part of his wife; or he may recriminate. He may also, if he should think fit, when charged with the commission of adultery with different females, counterplead the acts charged with one, and leave the acts charged with others uncontradicted in plea, [640] relying on a failure of proof. But though he has this latitude afforded to him, there are rules to which he must attend. He is not at liberty to counterplead an unimportant part only of a transaction; if he counterplead that transaction at all, the plea must go to the whole transaction. Again, it would be useless for the husband to counterplead even an important part of a charge, if he at the same time admitted other parts, which, if proved, would entitle his wife to a sentence against him. A plea so framed, if proved, could have no effect at the final judgment in the cause; it would therefore be improper in the Court to admit it.

Having thus stated some of the rules or principles of pleading applicable to a defence in a suit of this nature, I will now proceed to consider the general contents of the allegation now brought before the Court.

The allegation undoubtedly contradicts some of the averments contained in the libel, but it does not go the length of denying that adultery has been committed. The allegation does not allege in words that the wife either condoned the offence or connived at it, but it does aver, I think, that which is tantamount—that the adulterous connexion was carried on “with the privity and knowledge” of the wife.

To do ample justice to the husband, I will put his case quite as strongly as I think it is pleaded. The allegation in effect states that shortly after the marriage in 1835, the adulterous intercourse was renewed; that the wife had a full knowledge of that intercourse, nevertheless she continued to cohabit with her husband in London and Boulogne [641] till October, 1837; that after that date there was no renewal of intercourse between the husband and wife—that the adultery was continued till the death of the female in August, 1845, after which he wrote certain letters to his wife and her family with the view to induce her to return to cohabitation.

Such is, I think, a fair outline of the allegation; the question is whether, were it proved, it would constitute a bar to the suit which the wife has brought against her husband. That question, I, without hesitation, answer in the negative, for the doctrine of condonation when applied to the wife is totally different from the doctrine when applied to the case of the husband. I could, were it not a waste of time, refer to various cases in which a distinction is laid down between condonation on the part of a wife and condonation on the part of a husband. To mention one, Lord Stowell, in *Beeby v. Beeby* (1 Hagg. Ecc. 794), said, “Condonation is objected; but the Court is not to hold that strictly as to the wife; it is a merit in her to bear—to be patient and to endeavour to reclaim; nor is it her duty, till compelled by the last necessity, to have recourse to legal remedy.”

In the present case Mrs. A. cohabited with her husband till October, 1837. In the month of November following he addressed, in a letter annexed to the libel, his wife’s mother thus—“Madam, I received a letter from your daughter, dated 6th inst., wherein she states she is about returning to France: I am fully determined nothing on earth shall induce me to live with her again, therefore it is quite useless for you to say any thing to her [642] that may induce her to come here.” It is true it is pleaded in the husband’s allegation that this letter had nothing to do with his intercourse with the prostitute—that it had reference to certain pecuniary affairs; still I cannot see that this explanation rests on any settled basis. In the first place, I hold

it is utterly incompetent to a party to give an explanation to a written instrument at variance with the plain import of the words, by reference to any thing within his sole knowledge; and in the next place, assuming that a difference on pecuniary affairs did exist, I think it is utterly impossible that any evidence of that averment, however strong, could induce the Court to put that construction on the words of this letter. According to the plain and obvious meaning of the letter, there was, on the part of the husband in 1837, an entire abandonment of his wife; there was no step taken on his part towards a renewal of cohabitation till the year 1845, in which the woman, with whom he was living in adultery, died. It is impossible for the Court to adopt such a line of defence.

Two other grounds were urged why I should admit this allegation. It was said that the delay on the part of the wife in instituting this suit constitutes a bar to her prayer, and that the letters annexed to the allegation constitute a like bar, as they bespeak connivance and condonation. These arguments are easily disposed of: had the husband been resident in England, the delay complained of would not have been a bar; however, were any explanation required, it is furnished in her libel; the letters annexed to the husband's allegation can in nowise [643] prejudice the wife, as they are not her letters; moreover, there is nothing in them, as I can see, bespeaking connivance or condonation.

The allegation shews that Mrs. A. was, during her cohabitation with her husband, too patient and too forgiving. I am of opinion that, were it proved, there would be no defence to the libel or bar to her prayer; as such is my view, it would be quite useless to admit the allegation. I therefore reject it.

Ultimately, on the 14th June, 1848, the Court pronounced for the divorce.

THE OFFICE OF THE JUDGE PROMOTED BY FREELAND *against* NEALE. Arches Court, June 3rd, 1848.—Articles against a clergyman for publicly reading prayers, preaching, and administering the sacrament of the Lord's Supper in an unconsecrated building called Sackville College Chapel, without the license of, and contrary to the inhibition of, the bishop of the diocese, sustained. What constitutes a public reading of the prayers.

[S. C. 6 Notes of Cases, 252; 12 Jur. 635. Discussed, *Taylor v. Timson*, 1888, 20 Q. B. D. 678. Applied, *Nesbitt v. Wallace*, [1901] P. 354.]

This was a case, in virtue of letters of request under the hand and seal of the Lord Bishop of Chichester, of citing the Rev. J. M. Neale, M.A., of Sackville College, in the parish of East Grinstead, diocese of Chichester, and province of Canterbury, to answer to certain articles touching his soul's health, &c., "and more especially for having within two years last past, within the said diocese of Chichester, offended against the laws ecclesiastical, by publicly reading prayers and by preaching and administering the Holy Sacrament of the Lord's Supper, according to the rites and ceremonies of the United [644] Church of England and Ireland, in a certain unconsecrated building in the said parish of East Grinstead, commonly called or known as Sackville Chapel, within the said diocese of Chichester and in the province of Canterbury, without any license or authority for so doing, and contrary to, and in spite of, the injunction or inhibition of the said Bishop of Chichester," &c.

The articles which were brought in on the 11th of January, 1848, and admitted the following Court day without opposition, were in substance as follow:—

The first pleaded the law that no minister of the Church of England can lawfully officiate in any parish church or chapel, or in any other place within the realm, by publicly reading prayers, or by preaching or administering the Holy Sacrament of the Lord's Supper, or performing any other ecclesiastical duties therein, without a sufficient permission or authority for so doing, and a license first had and obtained from the ordinary of the place having episcopal jurisdiction.

The second and third articles pleaded that Mr. Neale was admitted into priest's orders on the 22nd of May, 1842, &c.

The fourth and fifth pleaded that the Bishop of Chichester, on the 8th of May, 1847, sent a notice to Mr. Neale, inhibiting him from the exercise of clerical functions in his diocese, also a letter of advice to Mr. Neale, and a letter from Mr. N., dated the day following, acknowledging the receipt of the notice and letter from the bishop, &c.

The sixth pleaded that Mr. Neale, notwithstanding the notice he received, did on the 9th of May, [645] 1847, and has since continued, publicly to read prayers daily

according to the forms prescribed by the Book of Common Prayer, in the said Sackville Chapel.

The seventh pleaded that Mr. Neale did on the 16th of May, 1847, and every following Sunday, preach in the said Sackville Chapel.

The eighth pleaded that Mr. Neale did on the 13th of May, the 16th of May, 1847, and every succeeding Sunday, as well as on divers other occasions subsequent to the said 16th of May, administer the Holy Sacrament of the Lord's Supper in the said Sackville Chapel.

The ninth pleaded that Mr. Neale did on the 29th of September, 1847, publicly read prayers, preach and administer the Holy Sacrament of the Lord's Supper in the said Sackville Chapel, and that there were present assisting and partaking of that sacrament three at least, priests in holy orders "in no way whatsoever attached to or connected with Sackville College aforesaid, in or adjoining to which college the said unconsecrated building called Sackville Chapel is situate."

Mr. Neale admitted in acts of Court the 2nd, 3rd, 4th, 5th, 7th, and 8th of the articles to be true, but otherwise contested the suit negatively.(a)¹

Six witnesses were examined on the articles.

An allegation was asserted on behalf of Mr. Neale, but afterwards, to wit, on the 13th of May, waved; [646] at the same time his proctor tendered and prayed leave to bring into the registry true copies of the charter of incorporation of Sackville College, and of the statutes and ordinances of the said college,(a)² the originals to be produced at the hearing, but the Judge rejected that prayer, and decreed publication.

Addams for the promoter. The articles are fully proved. No defence is set up in plea, but suggestions are contained in the interrogatories that Mr. N. did not read prayers, preach, or administer the sacrament in public—that what he did was not as a minister of the Church of England, but as warden of Sackville College. If he had any defence as warden of the college, acting in compliance with the charter and statutes of the college, they should have been pleaded. If the persons who attended the chapel were no other than the immediate family and servants of Mr. N., I admit, on the authority of *Trebec v. Keith* (2 Atk. 499), that there was not a performance in public, but I deny the inhabitants [647] of the college can be considered as his family; besides, there is evidence that strangers were sometimes admitted into the chapel. Moreover, if the college is to be regarded as a private house, by frequently celebrating without necessity the Sacrament of the Lord's Supper, he has offended against the 71st canon. The offence charged upon Mr. N. is that of performing divine service quā minister of the Church of England publicly—that charge is fully established. The offence too is aggravated in his having celebrated divine worship in defiance of an injunction from the bishop.

Phillimore, R. J., on the same side. The law applicable to this case is perfectly clear, *Barnes v. Shore* (ante, p. 382); *Hodgson v. Dillon* (2 Curt. 388). If Mr. N. had any defence, he ought to have pleaded and proved it, *Bluck v. Rackham* (ante, p. 376).

(a)¹ The admissions amounted to this, that he had been inhibited by the bishop, that he had been in the habit of reading prayers daily, and preaching, and that he had also been accustomed to administer the Sacrament of the Lord's Supper, but he denied any of these acts had been publicly done.

(a)² Sackville College was founded in or about the year 1610, by virtue of the will bearing date the 10th February, 1608, of Robert, Earl of Dorset, for the maintenance of twenty-one poor unmarried men and ten poor unmarried women not under the age of fifty.

The college was on the 8th July, 1632, incorporated by royal charter, and for the government of the college statutes were framed. By the will of the founder, and by the statutes and charter, the general management was placed in the hands of a warden and two assistants.

By the 6th statute it is ordained "that the warden shall carefully see the brethren and sisters morning and evening, to meet at a certain due hour in their chapel, there to pray, serve, honor and praise Almighty God, according to the true intent and meaning of the said Robert, late Earl of Dorset, expressed in his will, and the said services and prayers, there to be read by the said warden for the time, or such of his brethren as he shall thereunto appoint."

Dodson, Q. A., for the defendant. No ecclesiastical offence has been committed, and if no offence, no aggravation. The notice sent to Mr. Neale by the bishop inhibited him "from celebrating divine worship, and from the exercise of clerical functions within the diocese of Chichester," but it did not go to the extent of inhibiting him from reading prayers or expounding the Scriptures in his own family, or to the inmates of the house in which he resided. Though the inhabitants of the college were not his relations or servants, they were living under the same roof, and constituted the same family; by reading prayers to them daily there [648] was no ecclesiastical offence. The chapel of Sackville College is not open to the public, it is for the use only of the inmates of the college. A few strangers may occasionally, as a matter of favour, as visitors at the apartments of Mr. N., have been admitted, but that circumstance no more constitutes that chapel a public chapel than the circumstance of visitors attending the chapel at the bishop's palace would make it a public chapel. Prayers are read before the Judges and members of this profession at the commencement of term, but I imagine that is not a reading of the prayers in public. It would have been better had Mr. N. not have celebrated the Sacrament of the Lord's Supper to the extent he has done. The case of *Barnes v. Shore* (ante, p. 382) and that of *Carr v. Marsh* (2 Phill. 203) hinted at, though not expressly cited on the other side, are totally different from the present case; there the chapels were avowedly open to the public.

Bayford on the same side. The object of the 71st canon was indirectly to prevent parishioners from absenting themselves altogether from their parish church. The canons on the subject from the earliest time have always had some restriction.^(c) All priests and deacons "are to say daily the morning and evening prayer, either privately or openly."^(d) The meaning of that cannot be that they are to read aloud to themselves [649] only; it is clear they ought to assemble their households; it appears from the evidence in the cause that Mr. N. has done no more.

Judgment—*Sir Herbert Jenner Fust*. The principle involved in the present case is one of general importance, and by no means confined to the case of Sackville College. By the general law no clergyman of the Church of England can daily officiate in the parish of another without his authority as well as that of the bishop of the diocese; and if there be any thing in the charter and statutes of Sackville College which could in any way exempt Mr. Neale (who is said to be the warden of this college) from the operation of the general law, those instruments ought to have been pleaded.^(a) I have no proof furnished me that the chapel of this college is one "dedicated and allowed by the ecclesiastical law of this realm;" and were it even one of that description, a clergyman would, by frequently preaching and administering the communion on Sundays and holidays, be acting contrary to the 71st canon. Undoubtedly a clergyman may read prayers to his own private family and household, without committing an ecclesiastical offence, but though he may so read prayers in a private house, he cannot, according to the 71st canon, "preach or administer the holy com-[650]-munion, except it be in times of necessity, when any being either so impotent as he cannot go to the church, or very dangerously sick, are desirous to be partakers of the holy sacrament," &c.

That Mr. Neale has repeatedly preached and administered the holy communion is admitted in his answers to the seventh and eighth articles without any reserve; it is proved, too, that he is in the habit of administering the sacrament three Sundays in every month; he has made no attempt to justify himself in so doing, by bringing the instances within the exception of the canon and shewing the necessity. The counsel of Mr. Neale have scarcely ventured to justify his repeated administration of the holy communion; the only defence offered was that the prayers read twice a day in this chapel were not read in public—that the inmates of the college are to be regarded as a private family. I should like to have heard some authority for the statement that a number of persons constituted a corporation, as the inhabitants of Sackville College

(c) See Lynd. lib. 3, tit. 23, Can. "quam sit inhonestum," &c.

(d) See Preface to the Book of Common Prayer.

(a) The Judge in the course of the hearing made frequent complaints that the charter and statutes were not pleaded; the reason assigned why those instruments were not pleaded was the great expense that would have been incurred. It was also stated that the emoluments of the warden are very small.

are said to be, is a private family. It is possible that the inmates of the college may be under one continuous roof—that they have one common table, but those circumstances will not render them a private family or household; each member has, I presume, his separate apartments allotted. Without, however, entering further into that point, I will assume for the argument that the collegians are one family; and then the question arises, Were the reading of prayers and the celebration of divine service confined to the inmates of this college? It is clear from the evidence that strangers, though not perhaps very many, were on occasions admitted, [651] under the pretext of being visitors, to attend the service in the chapel. Moreover, it is proved that on Michaelmas Day, 1847, there were three clergymen unconnected with this establishment engaged in officiating at the sacrament. It is impossible, then, to say that this was an assemblage of a private family. In *Barnes v. Shore* I said, what I now repeat, that where two or three are gathered together, who do not strictly form a part of a family, there is a congregation, and the reading to them the service of the Church is a reading in public.

I am of opinion that Mr. Neale is proved guilty of an ecclesiastical offence; that the charges brought against him are established, namely, of publicly reading prayers, of preaching, and of administering the Sacrament of the Lord's Supper in an unconsecrated building, not only without the license, but against the positive prohibition, of the bishop, and that he is liable to ecclesiastical censure. I have no doubt that this case has been brought before the Court to obtain its opinion as to the right of the warden of the college thus to officiate; the Court will therefore satisfy the ends of justice by admonishing him to abstain from offending in future. Accordingly I admonish Mr. Neale to abstain from administering divine offices in Sackville College Chapel or elsewhere, without the license or permission of the bishop, and I must condemn Mr. Neale in the costs of these proceedings.

[652] GODWIN *against* KNIGHT AND KNIGHT. Prerogative Court, May 30th, June 8th, 1848.—A. died intestate in 1832, leaving B. and C. his only next of kin. B. in 1833 took administration of the effects, entered into the usual bond with sureties, did not distribute, but died insolvent in 1839. C. from 1809 a lunatic, continued such till his death in Feb. 1847, but no commission of lunacy was sued out till after the death of B. D., the committee of the estate of C., and as such administrator de bonis non of A., established a debt in Chancery, as a simple contract creditor of the distributive share of A.'s estate, and was paid a small dividend. D., on being cited by E., who became the administratrix of C., exhibited his inventory and account in the Prerogative Court, and was dismissed. E. then cited the sureties of B.'s bond for the due administration of A.'s estate, to shew cause why the bond should not be put in suit.—The application to allow the bond to be put in suit was granted.

[S. C. 6 Notes of Cases, 261; 12 Jur. 706.]

On petition.

This was a business of citing Henry Knight and Robert Knight to shew cause why an administration bond, given and entered into by them, should not be attended with and produced, on the said bond being sued for at common law.(a) The suit was promoted by Charlotte Godwin, widow, under the following circumstances:—

James Young died on the 25th November, 1832, a bachelor, without a parent, and intestate, leaving William Young and John Young his lawful brothers and only next of kin, the only persons entitled in distribution to his personal estate. Letters of administration of the goods of the said James [653] Young were on the 6th February, 1833, granted to the said John Young, who, together with Messrs. Knight, the parties cited, entered into and executed the usual bond in the sum of 16,000l.

(a) On the 6th November, 1847, the Court was moved to decree a decree against Messrs. Knight, to appear and shew cause why the bond entered into by them should not be declared forfeited, &c. It was stated by counsel that that was the old form; the Court, however, refused that application, but permitted the decree to be issued as above.

An appearance was given on the 13th December for the party cited; a long act on petition, reply and rejoinder followed; the facts on which the argument and judgment turned are only here set forth.

The said William Y. had been for many years previously to the death of the said James Y. a lunatic, but not having been entitled to or possessed up to that time of any property a commission of lunacy had not been sued out.

The said John Y., by virtue of the administration granted to him as aforesaid, possessed himself of all the personal estate of the said James Y., and paid legacy duty upon the sum of 5189l. 1s. 10d. as the amount of the net residue belonging to himself and his lunatic brother, all of which residue he himself retained, and in the account rendered by him to the Legacy Duty Office he charged a sum of 500l. as having been paid by him on account of a mortgage on the real estate of the said James Y. (which real estate descended to the said lunatic as heir at law), but which sum he never did pay, although due from the personal estate, and he died on the 29th May, 1839, without having exhibited an inventory, or having truly administered the estate of the said James Y. By his will the said John Y. appointed his aforesaid sureties, Messrs. Knight, together with Charles Bailey, his executors, who proved the will on the 11th July, 1839.

No commission of lunacy was sued out against the said William Y., who survived the said John Y., till after the death of John Y., shortly after which event, to wit, on the 16th July, 1839, he was found and declared to have been a lunatic from the year 1809, and Mr. W. W. Bulpett was appointed com-[654]-mittee of his estate. On the 10th September, 1841, letters of administration of the goods of the said James Y. left unadministered by John Y. were granted to Mr. B. for the use and benefit of the lunatic.

The said John Y. died insolvent, and after his death a creditor's suit was instituted in the Court of Chancery for the administration of his estate. In that suit Mr. B. established a debt as a simple contract creditor of John Y. in respect of the lunatic's rents received by John Y., and he also, as the administrator of the unadministered estate of James Y. aforesaid, claimed the sum of 3094l. 10s. 11d. as a specialty debt due to the lunatic from John Y. as administrator of the goods of James Y. At the hearing it was decided by the Master of the Rolls, in the year 1843, that Mr. B., as the administrator of the unadministered goods of James Y., was only a simple contract creditor, and he was so admitted. Upon the final settlement of the affairs of John Y., under the decree of the Court of Chancery, his estate was found capable of paying only 4½d. in the pound, and, at that rate, the sum of 54l. 16s. was paid on the 19th August, 1845, to Mr. B. on account of his claim of 3094l. 10s. 11d.

The Messrs. Knight were in no way concerned in the Chancery proceedings.

On the 15th of February, 1847, William Y., the lunatic, died intestate, leaving Charlotte Godwin widow, a party in this suit, and two others his lawful cousins german, and only next of kin, the only persons entitled in distribution to his personal estate; and on the 16th of March, 1847, the said Charlotte Godwin obtained letters of administration of the goods of the said lunatic, which were sworn under [655] 200l. It appeared that Mrs. Godwin was to some extent concerned in the proceedings in Chancery.

Previously to the institution of this suit a citation was issued in June, 1847, at the promotion of Charlotte Godwin, as the administratrix of William Y., against Mr. B., as the administrator of the unadministered goods of the said James Y., to exhibit an inventory and account of the goods of James Y., which had come to his hands. He complied with the order of the Court, and was dismissed with his costs. By the inventory and account it appeared that the only sum which he received was the above mentioned sum of 54l. 16s., so that in fact the sum of 3039l. 14s. 11d. remained due to the lunatic's estate. Mr. B. had not taken any proceeding against Messrs. Knight in respect of the bond.

Dodson, Q. A., and Harding for Messrs. Knight. That an administration bond should be issued for the purpose prayed is a matter of pure judicial discretion. It depends not upon dry legal principles, but upon equitable considerations. Even when there has been a breach beyond all controversy, the Court will not always grant the prayer, *Murray v. McInerheny* (1 Curt. 576). There has been a considerable degree of laches and acquiescence on the other side. In the first place, it was open to Mrs. Godwin to obtain a commission of lunacy.(b) Secondly, fourteen years have elapsed since the bond was entered into; Mrs. G. might have applied long ago, she was fully cognizant of the proceedings in Chancery. The bond might have been

(b) See Shelford on Lunacy, sect. 3, p. 93.

applied for during [656] the pendency of those proceedings. For these reasons, Mrs. G. is not entitled to the equitable consideration of the Court.

Curteis and Bayford for Mrs. Godwin. There have been no laches and acquiescence here as there was in the case cited on the other side. No right in law accrued to our party till the death of the lunatic in February, 1847; her interest, prior thereto, was merely in expectancy; the lunatic might have recovered from his lunacy; up to his death the property was under the protection of the Court of Chancery; directly a legal right accrued the matter was proceeded with.

Cur. adv. vult.

June 8th.—*Judgment*—*Sir Herbert Jenner Fust*. The bond which was entered into by the Messrs. Knight, in behalf of John Young for his due administration of the goods of his brother James Young, remains uncanceled, and might, it is granted, be allowed by the Court to be put in suit, were it not for some special circumstances in this case.

The reasons assigned, why the Court should withhold its hand and refuse the application, are, when briefly stated, these: that the affairs of John Y., who died an insolvent, have been wound up in the Court of Chancery; that the Messrs. Knight were no party to those proceedings; that had the bond during the suit of *Parker v. Young* (6 Beav. 261) been applied for, Mr. Bulpett, the administrator de bonis non, would have been held to be a specialty creditor of [657] the estate of John Y., so that all due to the estate of the lunatic would have been recovered; and, lastly, that there has been great delay on the part of Mrs. Godwin, the next of kin of the lunatic deceased, in seeking to put the bond in suit.

The objections here stated are easily disposed of. The decision in *Parker v. Young* by no means supports the proposition that, had the bond been given up, Mr. B. would have been held to be a specialty creditor. The Master of the Rolls said nothing of the sort; his Lordship said "that an action on an administration bond cannot be maintained, even in the name of the archbishop, without the production of the bond, and that the action can only be maintained in the name of the obligee," &c. That the Messrs. Knight were not made a party to the Chancery proceedings in no way affects the present case; they became sureties, and rendered themselves responsible for the defects of John Y., not to Mr. B., the committee of the lunatic, but to a public officer, the archbishop. Mr. B. has done all that was required of him in the Court of Chancery, as well as in this Court.

Again, it was said Mrs. G., the administratrix of the lunatic, has been guilty of laches, and has acquiesced in what had been previously done. It is very true the bond is of long standing, but I cannot find any circumstance which fixes her with neglect. Though the bond was entered into in the year 1833, John Y. did not die an insolvent till the year 1839, and even after that, till the year 1847, when William Y. the lunatic died, she had no sufficient interest to enable her to put the bond in suit. With little reason can it be said that Mrs. G., who had [658] but a contingent interest at the most during the lifetime of the lunatic, should have incurred the risk and expense of suing out a commission of lunacy. The case of *Murray v. McInerheny* (1 Curt. 576) was different in a most material respect from the present; there there was a delay of full three years, besides, that was in other respects a peculiar case. The circumstance of Mrs. G. having taken administration of the effects of the lunatic under 200l. is accounted for by that sum being found to be all that was due to the estate in Chancery.

There is no ground that I can see for imputing laches to Mrs. G.; the case may be a hard one for the sureties, but I cannot discover any greater hardship than in other cases of this description. I am of opinion that I must permit the bond to be put in suit in a Court of law, but in so doing I make no order as to costs.

IN THE GOODS OF GEORGE COTTON, Deceased. Prerogative Court, June 28th, 1848.

—A part of a testimonium clause, in which mention was made of executors, stood under the signature of a testator, that part was held not to contain an appointment of executors, but to be descriptive only of the attesting witnesses, and administration with the will annexed, together with the words under the testator's signature, was granted to a legatee.

[6 Notes of Cases, 307.]

On motion.

George Cotton, late first mate of a merchant vessel, recently deceased, previously to one of his voyages, to wit, on the 21st January, 1845, requested a friend, W. A., to write out his will for [659] him, which the said W. A. then did from the oral instructions of the testator.

By the will various legacies were given and the residue disposed of, but no executor was named in the body of the will. There then followed a testimonium clause in which was contained the signature of the testator in this form:—"In testimony of the foregoing being my wishes and desires, and they, as herein expressed, being the last and final I have to make previous to my leaving England for the voyage to the South Seas, have this day signed my name, George Cotton, being the twenty-first day of January, in the year of our Lord one thousand eight hundred and forty-five, in the presence of my executors or trustees for the just fulfilment of my last wishes and desires herein described.

"Witness, William Austin, Elizabeth Austin."

Both the attesting witnesses deposed to the effect that the whole of the will, including the recited words before and after the signature of the testator, with the exception of their names, was written previously to the will being executed by him, and W. A., one of the witnesses, further deposed that in writing the will he purposely left the space in the testimonium clause, as above, for the testator's signature, "imagining such to be the proper place for the same."

Harding moved the Court either to decree pro-[660]-bate of the will as above to William and Elizabeth Austin, the executors therein named (he cited *In the Goods of Esther Powell, Deceased* (ante, p. 421)), or to decree administration with the will annexed to one of the legatees, omitting the words below the signature, as in *In the Goods of T. Howell, Deceased* (2 Curt. 342).

Judgment—Sir Herbert Jenner *Fust*. The only difficulty in my mind is in what light I am to regard the words below the signature of the testator. Were I to regard them as a constructive appointment of executors, I could not grant probate of that part, as the signature of the testator would not be "at the foot or end;" but I am inclined to think that the testator's signature does follow the dispositive part of the will; and that these words are descriptive only of the attesting witnesses, and not dispositive. Being of this opinion, I am inclined to allow administration with the will annexed, together with the words beneath the testator's signature, to pass to a legatee.

[661] STOCKWELL *against* RITHERDON. Prerogative Court, July 19th, 1848.—A will pleaded to have been executed in 1843 as a contingent will only, and, by reason of the contingency not having occurred, not to be entitled to be joined in probate with other papers, held not to be contingent, as the proof of the alleged contingency rested on unattested memoranda written subsequently to the execution of the will. A testator cannot authorize a will to be destroyed after his death.

[S. C. 6 Notes of Cases, 409; 12 Jur. 779.]

Thomas Stockwell, Esq., a lieutenant colonel in the service of the East India Company, died in India on the 14th July, 1847, leaving Clara Stockwell, his widow, and four children in their minority him surviving.

The following testamentary instruments were found after his decease:—

A will executed the 15th August, 1838 (A).

A codicil executed the 9th September, 1839 (B).

A codicil executed the 19th July, 1841 (C).

A will executed the 28th October, 1843 (D).

By A, B, & C, the widow, who was appointed executrix, had a life interest in the whole property given her, with remainder to the children in such proportions as she should appoint; by D the children's shares were appointed, and trustees and guardians of the children were nominated, but the pecuniary interest of the widow was not altered. The value of the entire personal property was 12,000l.

A, B, & C were written on the same sheet of paper, and together occupied three pages; D, which occupied an entire sheet of paper, was enclosed in an envelope, E. By reason of certain passages contained in D, and certain unattested memoranda written on the envelope E, and also on the fourth page of the paper, on which A, B, & C were written, it was suggested that D was a contingent will only, [662] and that

as the contingency had not taken place, it should not be joined in probate with the other papers.

On the 20th June, 1848, application was made to the Court to grant probate to the executrix of A, B, & C only, on the suggestion above mentioned, but the motion was rejected.

An allegation propounding the papers, and the circumstances attendant on the making and execution of D, was subsequently given in. It was to the effect following:—

The 2nd, 3rd and 4th articles pleaded the making and execution of the papers A, B, & C.

The 5th pleaded that in the year 1843 the testator went to stay at Geneva, on account of his wife's then delicate state of health, but shortly afterwards was compelled to quit it in order to resume his military duties in India; that, being apprehensive that his wife, still in very delicate health, though the survivor, might follow him so soon to the grave, as almost of necessity to die herself intestate, under such apprehension and in compliance with her entreaty, he with his own hand drew up and wrote the will marked D, the same beginning thus—"This my last will and testament made at Geneva in October, 1843, is to have effect only after the death of my wife," ending thus—"Tenth, In the event of my wife surviving me, I hereby authorize her to cancel and destroy this will, Nota bene,—My children are entitled to the benefit of the Madras Military Fund, to which I am a subscriber," and duly executed the same on the 28th October, 1843, at Geneva, which place he was about to quit on his return to India; that the said will was contin-[663]-gent only, and was intended by the testator to operate in the single event (which has not happened) of his wife, if surviving, dying so very shortly after him as not to give her the opportunity of herself making and executing her will, and so, as it were, compelling her to die intestate.

The 6th pleaded that, in order clearly to provide for the will D having effect only under the circumstances, and upon the contingencies aforesaid, the testator himself wrote on the envelope, wherein he enclosed the same, the following memorandum, to wit:—"This my will, executed at Geneva in October, 1843, is after my death to be held at the disposal of my wife, to be dealt with according to her orders. But in the event of the death of both of us at the same period it is to be sent to Messrs. Fletcher, Alexander & Co., who are to open the will and communicate with those concerned," and which said memorandum he duly subscribed "Thomas Stockwell," and added thereto the following address:—"To Mr. Louis Pictet, Banquier," and which said will, in the said envelope, was then deposited by the testator with M. Louis Pictet, his banker, at Geneva, in whose custody the same remained until after his testator's death.

The 7th & 8th pleaded the paper E to be the original envelope, and the memorandum to be the original memorandum in the preceding article pleaded, and the whole to be the handwriting and subscription of the testator.

The 9th pleaded that the testator, retaining in his own possession the papers A, B, & C, in December, 1843, quitted Geneva on his return to [664] India, accompanied by his wife; that at or about such time, in order to prevent any misapprehension which might arise in case of the death of himself and wife contemporaneously, or nearly so, in the course of their voyage to, or shortly after their arrival in, India, the testator endorsed on the paper whereupon A, B, & C were written, the following memorandum, to wit:—"N. B. There is a will of later date than this laying at my bankers, Monsr. Louis Pictet, at Geneva, in Switzerland," and duly subscribed the same in manner following:—"Thos. Stockwell, Major, 28 Regt. Madras Army."

The 10th pleaded that the testator and his wife arrived in India in January, 1844; and where (in the month of April, 1845), his wife being still in a delicate state of health, they went for change of air to the Neilgherry Hills, in the Madras Presidency. That the testator whilst there being himself taken ill, in order still further to prevent, if possible, any misapprehension as to the aforesaid conditional will, or as to the event upon which only he meant and intended the same to operate, with his own hand, on the 22nd January, 1846, added a further indorsement on the paper containing A, B, & C in the words following:—"Memorandum. My will laying at Geneva, a draft of which is herewith enclosed, is not intended in any way to affect my bequest of all my property to my wife for the term of her natural life, but is to have effect only in the event of my wife dying intestate," and the testator duly subscribed the same in manner

following:—"Thos. Stockwell, Lt. Colonel, Madras Army," and dated the same "Neilgherry Hills, 22 January, 1846." [665] That the said will and codicils A, B, & C, with the endorsements thereon, remained in the testator's custody until his death.

The 11th and 12th pleaded that the aforesaid endorsements appearing on the fourth side of the paper A, B, and C are of the handwriting of the testator, &c.

The admission of this allegation was opposed on behalf of Mr. Ritherdon, one of the guardians of the children, and one of the universal legatees in trust, named in the will D (1843), who prayed probate of all the papers as together containing the will of the deceased.

Jenner in opposition to the allegation. The effect of the paper D, executed in 1843, is to apportion the shares of the children after the mother's death, which, prior to the execution of that paper, was left to her to do. The 20th section of the Wills' Act prevents the destruction of a testamentary paper unless done by the testator himself, "or by some other person in his presence, and by his direction, with the intention of revoking the same;" consequently the testator in this case could not delegate the power after his death. The executrix, however, has not attempted to exercise the power; and the question is, what is the legal result. It is pleaded that the testator intended the will of 1843 to take effect only on a particular event, which did not occur. If he had such an intention, it ought to have been expressed on the face of the will itself. Certain memoranda on the papers are particularly pleaded, but as they were written subsequently to the execution of the papers themselves, and were not attested, they cannot over-[666]-ride the papers duly executed and attested; such memoranda can have no effect; consequently, all the papers are entitled to probate.

Addams in support of the allegation for the executrix, who prayed probate of the papers without D. Probate is prayed on a simple principle. The paper D was made on a contingency which did not occur, therefore it is a nullity. The Wills' Act does not interfere with my position. I deny that the contingency must appear on the face of the will itself; that is not the doctrine to be found in *Greenough v. Martin* (2 Add. 243); it is therein said that "the intentions of the deceased as to what instruments shall operate as, and compose, his or her will, are to be there collected from all the circumstances of the case taken together." As the event under which D was executed did not occur, that paper is not to be joined in the probate.

Judgment—*Sir Herbert Jenner Fust*. The question in this case depends on two considerations: first, on the construction to be put upon the words appearing on such parts of the papers as are duly executed and attested, and secondly, on the power of the Court to admit extrinsic circumstances which are recorded on those papers at a date long subsequent to their legal execution.

The will D, the paper in question, contains no clause of revocation impliedly or directly, of the papers prior in date, except so far as the power of [667] appointment amongst the children is taken away from the wife; but there are two paragraphs contained in it, and pleaded in the 5th article of the allegation, from which it is contended that D was contingent only, and that, from the circumstance under which it is pleaded to have been made not having happened, it is not entitled to be joined in probate with the other papers. The following are the words:—"This my last will and testament made at Geneva in October, 1843, is to have effect only after the death of my wife." . . . "In the event of my wife surviving me, I hereby authorize her to cancel and destroy this will." From the former paragraph it is perfectly clear that the interest which the wife had under the paper A, B, & C, which was an estate for life of the whole property, is not taken away; but there are words, or rather clauses in D which it is unnecessary here to set forth, shewing that the purport of that paper is to give, under a particular event, a certain and fixed interest to the children, after the death of the wife, which interest was by the former papers uncertain, as being dependent on her pleasure. The words cited, and the passages contained in D alluded to, cannot be pressed to extend beyond the boundary I have assigned to them; and in reference to the other paragraph authorizing the wife, on the event of her surviving her husband, to destroy D, it is sufficient to say that she did not attempt to exercise that power, and, had she so done, the act would, by reason of the 20th section of the Statute of Wills, have been inoperative. Looking then to the construction of the words of the paper, I am clearly of opinion that I cannot [668] affix such a meaning

to those words as to say that D is a contingent paper, and by reason of the circumstances pleaded of no effect.

The second and only remaining point for consideration is whether I have now the power to admit extrinsic circumstances—certain unattested memoranda to be found on the testamentary papers to have the effect contended for in argument.

I admit the doctrine laid down in *Greenough v. Martin*, that the intentions of a testator are to be collected from all the circumstances, but they must be circumstances existing at the time the will is made. It is clear that the circumstances pleaded in this allegation are not contemporaneous with the making of the will, but are, many of them, long subsequent. This, however, is not the only difficulty. Before the present Wills' Act passed the memoranda endorsed on the testamentary papers, and pleaded in several of the articles of the allegation, would have been in themselves testamentary, and would have expressed the intentions of the testator in a legal form, so as to have given effect to those intentions, but now, as they are unattested, I am unable to attach any weight to them.

From the general complexion of this allegation it is evident the proof of it must depend on the memoranda alone: to allow them to have the force and effect contended for would subvert an important feature of the Wills' Act. Under these circumstances I am bound to pronounce that the documents A, B, and C alone do not form the will. It would have been more convenient had one of the trustees propounded all the papers and left it to the widow, who is the executrix, to oppose D. As [669] the case stands I hardly know in what shape to put my decree; if I reject the allegation I reject the articles pleading the factum of A, B, & C, respecting which there is no dispute.

Eventually, after some deliberation, the Court, with the consent of both parties, rejected the allegation, and decreed probate of all the papers with costs out of the estate.

IN THE GOODS OF JANE CORDER, Spinster, Deceased. Prerogative Court, Nov. 7th, 1848.—A will, containing a disposition of the entire property, and an appointment of executors on the first page, with two inches in the last line in blank, and under that line a blank of one inch two-tenths, the second page wholly in blank, the third page commencing a testimonium clause, with a revocation of former wills, and the signature of the testatrix written one inch eight-tenths below that clause, held to be signed "at the foot or end." The Wills' Act does not require a will to be written continuously.

[S. C. 6 Notes of Cases, 556; 12 Jur. 966.]

Motion.

Jane Corder died in June, 1848, leaving a will dated the 13th February, 1847.

The will was written on foolscap paper. The first page contained a disposition of the property, including the residue, and the appointment of executors. The last word of the last line on that page did not reach the extreme edge or width of the sheet—there was a space after that word of two inches; under the last line there was a space of $1\frac{2}{10}$ inch. The second page was entirely in blank. At the top of the third page commenced the following clause:—"And I hereby revoking all former wills made by me at any time heretofore, do declare this only to be my last will and testament, in witness whereof, I, the said Jane Corder, testatrix to this my last will and testament contained in one sheet [670] of paper, and to this thereof set my hand and seal, the thirteenth of second month, one thousand eight hundred and forty-seven." Below this paragraph there was a space of $1\frac{8}{10}$ inch, and then followed the signature of the testatrix: the attestation clause, with the signatures of the witnesses, stood at some distance beneath the testatrix's signature.

In the body of the will there was an obliteration of the word "two" with a word written over it, and there was also an interlineation of a word in another part. Probate was prayed of the will with the word interlined (that word being almost necessary to complete the sense) together with the word "two," as the attesting witnesses were wholly unable to depose whether the alterations were made prior or subsequent to the execution.

Bayford in support of the motion observed that there is nothing in the act requiring a testator to write his will continuously; whenever a will is written brief-wise, one side of a sheet of paper is always blank.

Judgment—*Sir Herbert Jenner Frost*. The signature of the testatrix is not at the foot

or bottom of the first page, where, had the will, in my opinion, there ended, it should have been placed, as undoubtedly there is sufficient space. I cannot, however, regard the will as complete on the first page; the clause of revocation, and the declaration that this only is her last will, which are written on the third page, I must consider to be a part of the will. Had the paragraph on the third page con-[671]-sisted merely of a testimonium clause, I should have taken a different view of the matter; but it is not so. It is true that the second page of the sheet of paper is in blank; but I agree with the observation of counsel; I cannot discover in the statute any provision requiring a will to be written continuously. I am not aware that the points involved in this motion have been before distinctly brought to the notice of the Court, but, in granting the present motion, I cannot undertake to lay down a rule as to what space may exist between paragraphs. I am of opinion that the paper as prayed is entitled to probate.

IN THE GOODS OF MARY HOWELL, Widow, Deceased. Prerogative Court, Nov. 7th, 1848.—A will, written on one side of a sheet of paper, with a blank on the last line of one inch seven-tenths, and a space under the last line of one inch two-tenths, and the signature of the testatrix on the second page opposite to the third line of the attestation clause, written as near the top of the second page as possible (for which clause there was not space on the first page), rejected, as not signed “at the foot or end.”

[S. C. 6 Notes of Cases, 555.]

Motion.

Mary Howell died on the 23rd March, 1848, leaving a will dated the 18th December, 1844, by which she appointed her daughters executors. The value of her property was about 250l.

The will was written on one side of a sheet of foolscap paper; and that side concluded with the following testimonium clause:—“In witness hereof I have to this my last will and testament set and subscribed my hand and seal, the day and year first above written.” The word “written” did not reach the extreme edge or width of the sheet—there [672] was a space after that word of $1\frac{7}{10}$ inch; there was also a space underneath the last line of $1\frac{2}{10}$ inch; the will was written throughout with the lines at a uniform distance of $\frac{4}{10}$ of an inch apart. The signature of the testatrix was not at the foot of the first side, but was placed opposite to the third line of the attestation clause on the second page, for which clause there was not space on the first page; the attestation clause was written as near to the top of the second page as possible. At the end of the attestation clause were the signatures of the witnesses.

Deane moved the Court for probate of the paper.

Sir Herbert Jenner Fust said that this was another of the unfortunate cases in which there has not been a strict compliance with the provision of the statute. There is plenty of space for the signature of the testatrix at the foot of the first page; the signature is not there; I must therefore reject the motion.

ACASTER *against* ANDERSON. Prerogative Court, Nov. 15th, 1848.—A release in general terms, given to an executor, is no bar to a claim for an inventory and account. The Court has power of itself, though it seldom exercises the right, to call for an inventory and account.

[S. C. 13 Jur. 44.]

On petition.

This was a cause of citing Robert Henry Anderson, the sole executor of the will of James Lawson [673] Moon, of which probate was taken in May, 1841, to exhibit an inventory of the goods of the said deceased, and to render an account of his administration thereof. The suit was promoted by Ann Acaster (wife of William Acaster), the mother and residuary legatee for life named in the said will.

An appearance was given for the party cited under protest; and a long act on petition, answer and reply followed.

It is deemed sufficient to state, as the Court did not enter into the particulars contained in the pleadings, that it was alleged, in behalf of the party cited, that he was not bound, and ought not to be compelled, to exhibit an inventory, or to render any account of his administration, by reason that he had paid the balance of the estate to Ann Acaster and her husband on the 18th January, 1843, who gave their receipt

for the same, and also by an indenture, bearing date the 4th May, 1844, released them from all actions, suits, debts, dues, &c., &c., whatsoever in law and equity.

Bayford for the executor cited *Millington v. Sorsby*, decided by Sir George Lee in 1754 (1 Lee, 525), and *Williams v. Roberts*, by Dr. Bettesworth in 1746 (quoted in argument in the former case). He observed that the only case which made against him is *Kenny v. Jackson* (1 Hagg. Ecc. 105), and that that was decided on an ex parte motion,^(c) and is in some respects distinguishable from the present.

[674] The counsel for the other party was not called on.

Judgment—*Sir Herbert Jenner Fust*. I cannot accept a release given and worded in general terms; and I will not enter into the questions whether the release is properly executed and stamped, or whether the Statute of Limitations will or will not apply.

It is the duty of an executor to exhibit an inventory and an account, and I am clearly of opinion not only that the Court has power to require them at the instance of a party duly interested, unless great delay intervene, which is not the case here, so as to render it a matter of impossibility to furnish them, but also that it has the power to do so ex mero motu, though it does not often exercise that power.

I am of opinion that the applicant is not barred from his claim; I overrule the protest, and assign the party cited to give an appearance absolutely, and to bring in an inventory and account, but I reserve the matter of costs.

[675] *BIRCH against BIRCH*. Prerogative Court, Dec. 9th, 1848.—A will prepared with blanks left for legacies was found after a testator's death in an open envelope, which had been twice sealed, with the legacies inserted by the testator, some in black, some in red ink, with sundry alterations and interlineations connected with the legacies, of which the attesting witnesses could give no information. Held not to be necessary that a testator and witnesses should execute legacies so inserted. Probate granted of such parts of the will as were in black ink, those in red rejected on facts leading to the presumption of their being inserted after the execution of the will.

[S. C. 6 Notes of Cases, 581; 12 Jur. 1057. Referred to, *In the Goods of Cudge*, 1868, L. R. 1 P. & D. 545.]

Jonathan Birch, Esq., died on the 20th September, 1848, leaving a will bearing date the 22nd February, 1845, which was prepared under the following circumstances:—

In the month of February, 1845, the testator gave directions to his son to prepare and draw up his will for him, and in order to assist him in so doing, gave Mr. B., Junr., a former will made in the year 1835, with directions in preparing the new will to leave blanks for the amounts of the several legacies, stating that he would himself take care to fill in the amounts previously to the execution. Mr. B., Junr., having prepared the will, which was contained in four sheets of paper, in accordance with the instructions, delivered it to the testator, who executed it on the day above mentioned, in the presence of two servants, who attested the same.

After the death of the testator the will was found in a box in a room of his house, in an envelope, which had been apparently twice sealed, once, with black, and again with red wax, but, when found, the seals were broken; the envelope was indorsed "1845—The last will and testament—Jonathan Birch—made the 22nd day of February, 1845—Jonh. Birch." In that envelope was also found a list or schedule of legacies, bearing even date with the will, and headed "my last will," signed by the testator and sealed, but not attested, and written throughout in black ink. When the [676] will was so discovered, it was found with the legacies filled in to contain an immense number of alterations, obliterations and interlineations (some at least apparently arising from want of sufficient space being left by the drawer) on the first and second sheets, with certain words underlined, some in black, some in red ink, to the existence of which, at the time of execution, the attesting witnesses were unable to depose, as, when they attended the execution, they saw only the last sheet. There was also found, but where was not stated, another list or schedule of legacies, headed "22nd February, 1845," the body of which was in black ink, but there were

(c) When *Kenny v. Jackson* was decided in the year 1827 by Sir John Nicholl, it is probable that *Millington v. Sorsby* and *Williams v. Roberts* were then unknown. Sir George Lee's Cases were not published till the year 1833.

certain alterations in red ink, and the paper was subscribed in red ink—"May, 1848, J. Birch;" that paper was not attested, and did not accord with the amount of the legacies specified in the other schedule, which agreed with the sums specified in the will, but some of the legacies contained in the will were in red ink.

The Court was moved to decree probate of the will as it then appeared; it refused the prayer, and directed the papers to be propounded.

In the allegation propounding the papers, most of the above circumstances (though some are collected from the affidavit of scripts) were pleaded, and, in addition, it was pleaded that all the legacies were filled in, all the alterations, &c. made previously to the execution—that all such were in the handwriting of the testator, and that he in conversation with his son on the subject of his will, some days after the outline of the will was delivered to him, observed that he had supplied all the blanks left, and had actually executed his will.

[677] The suit was an amicable one; the papers were propounded by one of the executors, and opposed by the son, another of the executors, who was residuary legatee, and the only person entitled in distribution in case the deceased had died intestate.

The attesting witnesses alone were examined; they were unable to give any information respecting the alterations or interlineations, &c.

Jenner for the executor propounding. There is nothing in the Wills' Act to make it imperative on a testator to write his entire will at one and the same time; where there is nothing to call forth the suspicion of the Court, it need not strain the law.

Phillimore, R. J., for the son. I do not oppose the will; but when, as in this case, there is no circumstance whatever to lead to a conclusion when additions and alterations were made, the presumption is they were made subsequently to the execution.(a)

Judgment—*Sir Herbert Jenner Fust*. The will in this case was originally prepared according to the instructions of the testator in such a manner that the amount of the legacies were left in blank. The will after his death was discovered with the amount of each legacy inserted in the handwriting of the testator, some in black and some in red ink, but the attesting witnesses, who alone have [678] been examined, are unable to depose when those amounts were inserted, or when any other alteration or interlineation apparent on the face of the paper was made.

Under this state of circumstances, I am called upon to deal with a most formidable principle, not only in reference to the 21st section of the Wills' Act, but also in reference to the doctrine laid down by the Judicial Committee of the Privy Council in *Cooper v. Bockett*, alluded to, though not cited, by counsel.

The difficulty with which I have to deal is whether I am to hold that no will, when the attesting witnesses are unable to depose to more than the subscription of the testator, can, as to the amount of the legacies, be drawn in blank, and afterwards filled in by the testator, some of those insertions involving interlineations, obliterations and alterations of the instrument as originally sketched. This, I say, is a formidable question; and, did I consider these difficulties as insurmountable, the result would necessarily be that the paper before the Court is no will. I am not, however, disposed to go to that length; I consider that when a will, like the present, has been in the first instance prepared with the amounts of the legacies in blank, and the amounts, though for want of space they may involve some interlineations and alterations, afterwards filled in by the testator himself, I must hold that those blanks were filled in prior to the execution; otherwise, one would be at a perfect loss to understand why the will should have been prepared and executed; the execution, if not subsequent to the insertion of the legacies, must have been intended as a farce, and [679] to be perfectly nugatory; to such a supposition I cannot accede.

The difficulty, however, in the present instance is increased: not only was the envelope, which appears to have been twice sealed, found open, but some of the legacies, some of the interlineations and additions appear in red ink as distinct from other parts of the instrument written in black ink. Under this state of things, when I find, also, one of the schedules or list of legacies, referred to in the affidavit of scripts, though headed with the same date as the will itself, subscribed by the testator, and

(a) The learned counsel had in view the decision of the Judicial Committee of the Privy Council in *Cooper v. Bockett*, 4 Moore, 419.

dated a second time, subsequently to the date of the will, in red ink, I cannot help considering that such portions of the will as appear in red ink were inserted and introduced at the same time as that schedule was so signed. I am inclined to hold that all the legacies and all the alterations connected therewith in black ink were inserted prior to the execution, and to grant probate of them, as I think it would be preposterous to say that the insertion of the legacies made, as in the present case, should, every one of them, be subscribed and attested by the testator and the witnesses; but those portions of the instrument which are in red ink, as there is some foundation for saying they are subsequent to the execution of the will, I reject. I therefore decree probate of such parts alone of the will as are written in black ink to the executors.

[680] *MATSON against MAGRATH*. Prerogative Court, Dec. 5th, 1848; March 24th, 1849.—A., being under engagement of marriage to B., made in 1833 a will bequeathing, after a life interest to his mother, the whole of his property to B., telling her “that he had made it as a provision for her in the event of anything happening to him.” A. and B. married in Nov. 1833, and had issue surviving at his death. Declarations, subsequent to the birth of issue, of adherence to the will were pleaded: Held, the Court rejecting the allegation, that the will was absolutely revoked, by reason of a tacit condition annexed to the will at its execution.

[S. C. 6 Notes of Cases, 709; 13 Jur. 350.]

Captain Melville Gore Matson died on the 13th of February, 1846, leaving a will, executed at Enniskillen, and bearing date the 14th of March, 1833. At the date of the will the testator was a lieutenant in the 59th Regiment of Foot, and a bachelor, but under engagement of marriage to Miss Charlotte Butler, to whom he was united in November, 1833. By that marriage children were born in the years 1834, 1838, 1841, and 1843.

The testator bequeathed all his personal estate to his mother for life, and after her decease to his then intended wife, Miss Charlotte Butler, to whom, it was pleaded, at the time of the execution of the will, he shewed it, stating to her “that he had made it as a provision for her in the event of anything happening to him, and further or otherwise made reference to his engagement of marriage with her.” The allegation further pleaded that, notwithstanding such, the marriage of the deceased, and the birth of the aforesaid children, he continued to adhere to his aforesaid will, and meaning and intending the same to continue unrevoked, thereby accordingly carefully preserved the same; that at times from the date of the said will to the year 1843, when he became and ever after continued of weak and imbecile mind, the deceased mentioned the fact of his having made his will and recognised it as a still existing and valid will; that having in the year 1838 made an inventory [681] of his property, he, in the month of June or July in that year, shewed the said inventory to his wife and said, “That is the property I mentioned in my will which I made at Enniskillen.”

The admission of the allegation was opposed by the aunt and curatrix of the children, who are minors.

Haggard in opposition to the admission. The rule of law contained in *Marston v. Roe dem. Fox* (8 Ad. & Ell. 14), and adopted in *Israell v. Rodon* (2 Moore, P. C. C. 51), and *Walker v. Walker* (2 Curt. 854), must govern the present case. Such also is the view taken of the question by Mr. Justice Williams in his Treatise on Executors, 4th edit. p. 160. The declaration, pleaded to have been made in 1838, would have been insufficient to repel the presumption against the will even as the law was formerly laid down in this Court; but putting other objections aside, that declaration cannot, under the Wills' Act, operate as a revival or republication of the paper. The allegation must be rejected.

Phillimore, R. J., for the mother of the deceased, the executor, in support of the allegation. It was not necessary to the decision of *Israell v. Rodon* to say that *Marston v. Roe dem. Fox* is to be the rule in this Court; that observation of the learned Judge was an obiter (see 2 Moore, P. C. C. 69). Tindal, C. J., did not suppose that *Marston v. Roe dem. Fox* would be here absolutely binding. *Walker v. Walker* was merely an ex parte motion. This will [682] was made in contemplation of marriage, so the present case differs from those referred to. The children may be provided for by the

whole of the property being given to the mother; they are as effectually provided for as in the case of *Brown v. Thompson* (1 Eq. Cas. Abr. 413, pl. 15; S. C. 1 P. Wms. 304, note). The Court may admit the facts and circumstances here pleaded, in order better to understand the meaning of the testator; *Guy v. Sharp* (1 M. & K. 602).

Haggard in reply. The propriety of the decision in *Brown v. Thompson* is much questioned (8 Ad. & Ell. 62).

Cur. adv. vult.

March 24th, 1849.—*Judgment*—*Sir Herbert Jenner Fust*. The testator in this case died in February, 1846, leaving a wife and four children. The will bears date the 14th of March, 1833, and it appears that in November of that year he married. It is clear the will does not fall within the operation of the Wills' Act; still the question is whether it is entitled to probate. By the will, after a certain event, the property is given absolutely to the lady who subsequently became his wife, but there is no provision for his offspring.

It was asserted in argument on behalf of the executor, though not pleaded or borne out by the affidavits before the Court on motion for probate, that the will was made in contemplation of marriage; to that observation I cannot assent, for I think some [683] parts of the allegation shew the will was made with a different object. However, there are certain declarations set forth in plea which, it was contended, have the effect of shewing that the testator, after marriage and the birth of his children, adhered to the will, and intended it to operate.

If the law at this day stood as it did when I had to deal with the case of *Fox v. Marston* (1 Curt. 494), it would be my duty to consider all the circumstances of this case, but that is now rendered unnecessary, as revocation in such a case is no longer a question of presumptive intention.

In the year after my judgment, in the case I have just referred to, there was a decision respecting the same will in the Exchequer Chamber (see 8 Ad. & Ell. 54), and though it is true that that decision is not of itself binding on this Court, still, from the circumstance of the principle therein contained having been imported into the judgment in *Israell v. Rodon* (2 Moore, P. C. C. 51), it is the rule by which I must be regulated.

Now, in the judgment in the case of *Israell v. Rodon* it was observed, "in that case" [alluding to *Marston v. Roe dem. Fox* (8 Ad. & Ell. 60)], "it is expressly laid down that it does not depend upon the presumed intention that the deceased would alter his will under the change of circumstances, but that the rule is that it is to be considered a tacit condition annexed to the will, that at the time of making that will it should not have any effect, provided the deceased had a wife and child of the marriage subsequently born, and that is the rule now which must be applied, not only in the Courts of Common Law, [684] but also to any cases which may arise in the Ecclesiastical Courts with respect to personal property."

As the question involved in this case is, then, as the law now stands, no longer a question of presumptive but of positive revocation, by reason of the tacit condition annexed, it would be useless to admit this allegation to proof, for if all the facts pleaded were proved, they would not have the effect of removing the "tacit condition annexed to the will," and enable the Court to grant probate of the instrument.

I am of opinion I am bound to pronounce that this will is revoked by the subsequent marriage and birth of children for whom there is no provision made by the will.

I reject the allegation. Costs of both parties to be paid out of the estate.

MILES against CHILTON, FALSELY CALLING HERSELF MILES. Consistory Court of London, Jan. 30th, 1849.—Allegation on behalf of a woman, responsive to a libel of nullity of marriage by reason of bigamy, pleading deception, fraud, and cognizance by the man of the existence of the husband of the first marriage at the date of the second fact of marriage, rejected.—Misconduct, however gross, of a party proceeding, by reason of bigamy, is no bar to a sentence of nullity.—A wife de facto, as a fact of marriage, is necessarily pleaded in such a suit, is entitled pendente lite to alimony.

[S. C. 6 Notes of Cases, 636.]

This was a case of nullity of marriage, promoted by George Frederick William Miles, otherwise George Miles, Esq., against Lavinia Jane Mason Chilton (wife of

Harrison Chilton), pretending to [685] be the wife of the said Mr. Miles, by reason of her former marriage with the said Mr. Chilton.

The libel, which was admitted on the 28th November, 1848, pleaded that on the 2nd December, 1844, the party proceeded against, then Lavinia Jane Mason Harvey, a spinster, was lawfully married to Mr. Chilton, who was living at the date of, and long subsequent to, the 5th April, 1847, at which date the party proceeded against, passing herself as a spinster, contracted a fact of marriage with Mr. Miles.

Responsive to the libel an allegation was brought in, of which the substance is as follows:—

First article. That in January, 1845, L. J. M. M., the party proceeded against, who was at such time a minor, and resident at Liverpool with her then husband, H. C., was induced to leave him at the entreaties of Mr. Miles, with whom she continued to reside till their separation in July, 1847.

Second article. That at the end of the year 1845, or commencement of 1846, Mr. M. proposed to her that she should be legally divorced from Mr. C., and that, when so divorced, she should marry him; that she was ignorant of the law, but that he (Mr. M.) faithfully promised that all the necessary legal steps should be taken to obtain a divorce; that at such time Mr. C., from want of means, was unable to carry on legal proceedings to obtain a divorce, and that Mr. M., who well knew such to be the fact, voluntarily offered and undertook to supply all necessary funds for that purpose, on condition that Mr. C. should duly proceed, to which he assented; that such arrangement was made and carried on chiefly by the agency of Mr. [686] Y., a mutual friend of Mr. C. and Mr. M., and with their express authority.

The third article. That in pursuance of such arrangement, Mr. M., at some time previous to the 5th February, 1846, paid various sums of money to Mr. Y. on behalf of Mr. C., to enable him to carry on legal proceedings with the view to obtain a divorce.

The fourth article. That in pursuance of the aforesaid arrangement in January or February, 1846, a proctor was, with the knowledge of Mr. M., instructed by Mr. Y., or by some other person acting as agent of Mr. M., on behalf of Mr. C., to procure a divorce between Mr. C. and his wife in the Consistorial Court of London, on the ground of adultery, committed by her with Mr. M.; that accordingly such proctor did on the 5th February, 1846, extract a citation against her.

The fifth article. That shortly after the issue of the citation, Mr. Y. having, with the knowledge of Mr. M., made all the necessary arrangements in respect to the personal service thereof on her, who was at such time residing with Mr. M., at Inver Villa, Hammersmith, drove the person who effected the service of the citation to that place; that Mr. Y. was present when the citation was served, and that Mr. M. was in an adjoining room, and fully cognizant of the proceeding; that Mr. M. immediately after the service entered the room and took the copy of the citation, delivered to her, out of her hand, telling her that it was not fit for her to see.

The sixth article. That the citation was duly returned, and that on the 21st April, 1846, the proctor of Mr. C. brought in a libel, pleading [687] adultery to have been committed by her with Mr. M., and also pleading that Mr. C. had previously commenced, and afterwards abandoned, proceedings against her from want of means, but that he had since been furnished with means by his friends; that Mr. C. had not been theretofore furnished with any means for the prosecution of such suit by any other person than by Mr. M., and in the manner and under the circumstances pleaded in the fourth article.

The seventh article. In supply of proof of the premises in the next preceding article mentioned, the original libel remaining in the registry in the cause of *Chilton v. Chilton* was referred to, and the remainder of the article pleaded that Mr. M. mentioned in that libel; and the party proceeding in this cause are one and the same; also that the female proceeded against both in the present suit as well as in that of *Chilton v. Chilton* is one and the same.

The eighth article. That the libel in the suit, entitled *Chilton v. Chilton*, was duly admitted to proof on the 29th April, 1846, but no witness was ever examined thereon; that that suit was on the 27th November, 1846, dismissed, on the ground that no further steps had been taken therein; and that such suit was not duly prosecuted; that no sentence was ever given; that no steps whatever were taken to commence any other similar suit, were facts well known to Mr. Y. and Mr. M.

The ninth article. That shortly after the dismissal of the suit of *Chilton v. Chilton*, Mr. M. renewed his solicitations for marriage, on the ground that she was at such time lawfully divorced [688] from all matrimonial alliance with Mr. C., and at liberty to contract a new and lawful marriage, and further to induce her to agree thereto, Mr. M. agreed to pay an annuity of 200l. to her for life and to effect a policy of insurance for the sum of 5000l. on his own life by way of marriage settlement, which policy was effected in January or February, 1847; that Mr. M. intimated by letter to her he had so done; that that letter was sealed up and deposited with the policy in the hands of E. F.; that E. F. had been applied to for the same but refused, at the direction of Mr. M., to deliver them up; that Mr. M. never paid the premiums upon the said policy, which by reason thereof has become void.

The tenth article. That fully believing she was then legally divorced from Mr. C. and able to contract another legal marriage, at the entreaty of Mr. M. she consented to be married to him; that in January, 1847, he Mr. M. proceeded to make inquiries and arrangements, but finding he could not obtain a license without making an affidavit, which might afterwards subject him to prosecution for perjury, he determined on proceeding to Jersey, with the view to the solemnization of the said marriage in that island.

The eleventh article. That in pursuance of such arrangement the said parties proceeded together to Jersey, where they arrived on the 2nd of April, 1847; that immediately on their arrival at Jersey Mr. M. alone went to, and had an interview with, the Dean of Jersey for the purpose of procuring the intended marriage or a license for the purpose; that no affidavit in writing is required by the said [689] dean to the granting a license; that a license is granted at Jersey on application by one of the parties, provided the dean is satisfied from the answers of the applicant that no legal objection exists; that on the occasion articulate Mr. M., wholly without her knowledge, or consent, made divers false statements to the dean, in order to procure the said license—that inter alia he falsely represented her to the dean as being at that time a spinster, and that her true and correct names were Lavinia Jane Mason Chilton, and that she was the daughter of Isaac Chilton, &c., and made divers other false representations to the dean, who, being ignorant of the real facts, granted a license for the intended marriage.

The twelfth article. That after Mr. M. had procured the said license, he informed her that he had made the necessary arrangements for the said marriage at St. Heliers on the 5th April, 1847, and that such marriage when celebrated would be perfectly valid and could not be set aside—that she believed such representation—that Mr. M., just before the celebration of the said marriage, represented that she, if asked, must describe or sign her name as being a spinster, and that accordingly the said parties were on the 5th April, 1847, married.

The thirteenth article. That after the said marriage, Mr. M. introduced her as his lawful wife—that they so lived together till July, 1847, when they ceased to live and cohabit together—that since February, 1848, Mr. M. hath wholly ceased to pay to her any part of the before mentioned annuity of 200l. or any other sum whatever, and hath left her wholly unprovided for.

[690] The admission of this allegation was opposed, as well as the reception of an allegation of faculties which was tendered.

Addams for Mr. Miles. First, with regard to the allegation of faculties, I admit the general rule of law, as laid down in *Bird alias Bell v. Bird* (1 Lee, 209, 418), that, when a fact of marriage is admitted, alimony and costs pendente lite follow. In that case, however, the question whether the first husband was alive at the time of the second marriage was at issue; in the present case that is admitted, and the woman in effect admits the felony and nullity of the second marriage. Secondly, the facts pleaded in the responsive allegation are irrelevant; the conduct, be the character what it may, of the party proceeding has nothing to do with a case of nullity; he is entitled, without reference to his conduct, if the facts pleaded in the libel be proved, de jure, to a sentence (*ibid.* 531, 621).

Phillimore, R. J., same side, in reference to the question of alimony, cited *Smyth v. Smyth* (2 Add. 254). In reference to the other part of the case he cited *Hawke v. Corri* (2 Hagg. Con. 280).

Dodson, Q. A., in support of the allegations, contra. First. The general rule of law, in respect to alimony and costs, laid down in *Bird v. Bird*, cited on the other

side, and recognised in *Wilson v. Wilson* (2 Hagg. Con. 204), [691] and in *Portsmouth v. Portsmouth* (3 Add. 63) is subject to one exception only, namely, where the wife has an independent income competent to her support and the maintenance of her suit; misconduct on her part is no bar to her claim. Secondly, the purport of the responsive allegation is to shew that Mr. Miles is not in a condition to bring this suit of nullity; he is barred by his own conduct; he is himself a guilty party (see 9 Geo. 4, c. 31, s. 22). The Court has in other instances refused to allow a husband to take advantage of his own wrong, *Hawke v. Corri* (2 Hagg. Con. 280); *Norton v. Seton* (3 Phill. 147).

Harding, on the same side, cited in addition, in order to shew that Mr. M. was equally as guilty as Mrs. M., Russell on Crimes, bk. i. c. 2, p. 32. He also argued that the charge against Mrs. M. was a strong ground for giving her scope in her defence; that marriage is a contract, and is subject to the same considerations as other contracts; that no party to a contract is entitled to take advantage of his own wrong. He cited Black. Comm. bk. i. c. 15; Step. Comm. bk. iii. c. 2; *Turner v. Meyers* (1 Hagg. Con. 414), and *Pickard v. Sears* (6 Ad. & Ell. 474).

Addams in reply. The principal ground on which the libel was rejected in *Norton v. Seton* was the impossibility of proof. *Hawke v. Corri* was disposed of on the ground that it was subsequently admitted by Lord [692] Hawke that the woman did not in the terms of the libel "maliciously" boast; that, though there was no valid marriage, he had permitted her to pass herself as his wife.

Judgment—*Dr. Lushington*. Two questions are raised on the present occasion. If I entertained any doubt as to the decision at which I ought to arrive on either point, it would be my duty to take time to deliberate; but as I do not think there is the least probability that my opinion would be changed by so doing, the pains which I might take in drawing up a written judgment would by no means compensate for the delay which would necessarily ensue.

Mr. Miles is the plaintiff in a suit of nullity of marriage, and a person denominated in the proceedings as "Chilton, falsely calling herself Miles," is the defendant. The facts, as contained in the libel, are, as they ought to be, simply stated; they allege a marriage to have taken place between Mr. Chilton and the party proceeded against in December, 1844; that another fact of marriage was entered into in April, 1847, between the latter party and Mr. Miles; and that at that date Mr. C., the first husband, was alive, and consequently that the second fact of marriage is null and void.

The questions raised on argument are these: firstly, whether I ought to receive an allegation of faculties on behalf of the woman asserting herself to be the wife of Mr. M., and secondly, whether I ought to admit as a responsive allegation to the libel the one now offered, or, in other words, whether [693] the allegation offered is relevant to the principal cause.

In respect to the allegation of faculties taken by itself, there cannot be the shadow of a doubt, inasmuch as the party proceeding, who is asking the Court to pronounce the second marriage null, is of necessity bound to admit and plead the fact of that second marriage. The practice which has prevailed since the decision of Sir George Lee in *Bird alias Bell v. Bird* (1 Lee, 209), even if there had been originally any doubt as to the principle, is conclusive. The case of *Smyth v. Smyth* (2 Add. 254), referred to by one of the learned counsel, involved a totally different consideration. The wife in that case was the party proceeding to obtain a sentence of separation by reason of adultery committed by her husband, and of course she alleged a marriage—an allegation in her own favour—but the marriage was not admitted by the other party; and had the Court allotted alimony in that instance, it would have been on the allegation alone of the party interested, but here the averment of marriage is made by the party having an opposite interest, and we well know that every one is bound by his admission of a fact which operates against him.

It is said, however, that the contents of the responsive allegation are a bar to the admission of the allegation of faculties. This assertion leads me to investigate the contents of the responsive allegation with the view of deciding whether it is on any ground admissible; and whether, if admissible or inadmissible, it can produce any effect upon the reception of the other allegation.

[694] The following will, I conceive, be deemed by the learned counsel, who signed that allegation, to be a fair representation of its contents. It, in substance, avers that Mr. M., the party proceeding, carried off the lady from her first husband—

that he deceived her by representing that a sentence had been obtained for a divorce, and that she might lawfully be married to him—that the suit for the divorce, though commenced, was discontinued before it reached a sentence—that nevertheless he took her to Jersey, leading her to suppose that a valid sentence of divorce had been obtained, and knowing her former husband to be alive induced her by these and other false representations to contract a fact of marriage with him.

Assuming all these averments to be true, the point I have to determine is whether they are admissible, or can have any bearing, in a suit of this description; for that Mr. M. has been a party to the commission of a felony is probably a matter beyond dispute.

In behalf of the party proceeded against it was argued by her junior counsel that as marriage is a contract, and as the party proceeding was cognizant at the time of making the contract of its illegality, he is in this, as in all other contracts, barred from excepting to it. Authorities were adduced, shewing that that general principle in regard to civil contracts was well founded I admit, but there the argument ended; it was not shewn that the principle extended to marriage, which most undoubtedly is something more than a civil contract.

There certainly have been a great many suits, not only before, but in my recollection, in which [695] parties, having made affidavits that they were of age, though they knew such declaration to be false, have, after many years' cohabitation, applied to these Courts for a decree of nullity of marriage, under Lord Hardwicke's Act, and obtained their prayers. There was, amongst others, the case of *Johnston v. Parker* (3 Phill. 39), in which a marriage, after the birth of no less than seven children, and a cohabitation of upwards of twenty years, was set aside; but I never before remember to have heard it suggested that either party was, in consequence of any such false averment, barred from instituting a suit of nullity, though I do recollect that the Court has, in some instances, expressed its indignation at such a suit being instituted.

Again, there have been several suits of the like nature with the present, where a lawful husband or wife was living at the date of a second marriage, but I have no recollection of an argument having been offered similar to that, which has been to-day addressed to me, and before I could allow it to have any weight I should require it to be supported by some sufficient precedent from the records of these Courts.

The only case brought to my notice in to-day's argument, in which a sentence of nullity was refused, is that of *Norton v. Seton* (3 Phill. 147), and certainly, had it been a case in point, I should have been bound by the decision; but it was not a case in which the marriage was null and void, either under the statute or at common law; it was a case of a voidable marriage, and one somewhat peculiar.

[696] Mr. Seton prayed a decree of nullity of marriage, on the ground, as he alleged, that at the time of the marriage he was impotent and defective in his organs of generation. The marriage was solemnized by license in June, 1812, when he was forty-five years of age, and the woman twenty-three, and the cohabitation continued till June, 1819, a period of seven years.

Upon objection taken to the admission of the libel, the Court examined all the authorities, and gave judgment that no such suit could, at the instance of the husband, a party alleging his own defect, be sustained. But upon what ground did Sir John Nicholl found his sentence? Had it been on the sole ground that a party could not take advantage of his own wrong, that position, though the case is not one in point, and consequently not decisive of the one before me, would be entitled to considerable attention in the present instance. But Sir John Nicholl said, "The first objection is, that the suit is of a novel kind; after the best and most diligent search no instance has been found of a party bringing a suit to set aside a marriage on account of his own incapacity." He then adverted to certain averments in the libel, and in regard to the delay in instituting the suit observed, "The lapse of time may act as an absolute bar to the suit not brought by the party injured. In *Ball v. Ball* (a) it was so held by the Delegates." That was another consideration with him; he likewise [697] adverted to other circumstances (as will be seen on reference to the report of the case), and then said—"Under these preliminary observations on the

(a) Though some of the particulars of this suit are stated by Dr. Phillimore in his report of *Norton v. Seton*, the process does not appear at this time to be in the registry of the Court.

circumstances of the case, it would be necessary, in order to support this suit, that the law authorities should be clear beyond all possibility of doubt. It has been said the public has an interest that the real state of the parties should be ascertained, and that is true where the marriage is void under the Marriage Act ; but this is a voidable marriage, and laid down to be so by Blackstone."

Though Sir John Nicholl does not state the ground of the distinction, he undoubtedly gives the sanction of his authority to the fact that a distinction, of which I myself entertain no doubt whatever, does exist in suits of nullity, where the marriage is void by statute law, and where the marriage is voidable only. Then after examining various authorities he states—"If the marriage was contracted scienter, the party knew of the defect, and he could not be heard ;" and afterwards he expresses a sentiment, mentioned by one of the learned counsel, and not to be denied—"it is a maxim that no man shall take advantage of his own wrong ;" it is the principle of the canon law itself ; the principle of reason and justice.

That judgment proceeded upon a consideration of all the circumstances of the case, combined with the absence of precedent, a doubt of some of the authorities cited, and in addition the fact that the husband, who complained of the injury, had not in reality been subjected to any, inasmuch as he at the date of the marriage must have been cognizant of his own state. I think it would be injustice to [698] Sir John Nicholl to hold that he intended everything he said in *Norton v. Seton* should apply to such a suit as is now before me ; for he himself takes the distinction, and in effect, though not in words, says that his observations would not apply to a case of nullity under the Marriage Act.

I must say I think there is a very strong distinction in the different suits of nullity—nullity by reason of impotency, nullity by reason of statutable enactment, and nullity at common law, where there has been a husband or wife living at the date of the second marriage. This distinction has been recognised by my predecessors ; moreover, when Lord Hardwicke's Marriage Act was passed, it was, at first, supposed to be a matter of some doubt whether it was competent to these Courts to entertain a suit of nullity for non-compliance with the provisions of that statute. It was said that as the nullity arose from the statute, the cognizance of the question belonged to the Courts of law, and that it was not necessary to apply to the Ecclesiastical Courts. Nevertheless, these Courts did claim to exercise jurisdiction, and that seems to have been allowed to them on the ground that it was to the interest of the public not only that the status of the parties themselves should be known, but that the legitimacy of the offspring should be beyond doubt ascertained, which, without a sentence in these Courts, might in after times be placed in considerable peril.

To this extent, but I conceive no further, will the case of *Norton v. Seton* apply to this and every other suit of nullity of marriage. I well recollect that in the course of the argument in that case it [699] was urged on the Court "that the consequence would be, if it, by rejecting the libel, refused to entertain the suit, a child born in adultery would oust the heir of entail." However, Sir John Nicholl, who, of all the ecclesiastical Judges, was probably the least inclined to entertain suits of nullity, though fully aware that after the death of either party there could be no remedy here, did reject the libel in that case. I do not mean to say that Sir John Nicholl was not perfectly justified in thinking his own reasons sufficient for refusing to entertain that suit, but at the same time I cannot honestly refrain from saying that there were grounds, if not counter-balanced by others, which ought to have induced him to have admitted that libel.

There, are, however, other reasons beyond those which I have stated to justify me in refusing to admit the present allegation. Hitherto, a suit of this nature has been plain and simple ; but were I to admit the plea now offered, I must create a precedent for examining into all the circumstances leading to a second marriage, and in fact refuse a remedy to a party proceeding, when that party shall be proved to have been cognizant of the invalidity of that marriage. But that would not be all ; if I admit this allegation, and the averments contained in it be proved, I suppose I should be called upon to say that this second marriage is not null and void ; and then the woman might sue for a restitution of conjugal rights. What course could I take under that state of circumstances ? Could I refuse that prayer ? Could I content myself by saying that, though I will not pronounce the marriage null and void, I will not pronounce it valid and good, for if I refused [700] the former I should in effect

refuse the latter prayer by refusing to decree a return to cohabitation. I feel sure that in admitting an allegation of this description I should entirely defeat the law, and throw the marital relations into entire confusion.

I notice the case of *Hawke v. Corri*, cited by one of the learned counsel, for the purpose of saying that it was a case of jactitation of marriage and not of nullity, consequently it does not apply to the present inquiry.

There are two other points adverted to on argument, the one on the one side, the other on the other, which I must notice, for each in its way is singular and extraordinary.

I was called upon to reject the allegation which I have just been considering, as it does not contain facts relevant to the issue, but at the same time I was asked to bear in mind its contents, for the purpose of refusing to receive the allegation of faculties. I apprehend if I first of all reject the allegation, which I intend to do, I reject its entire contents, and then it will be no longer before me. But, putting the question of the admission of that allegation aside, I am reluctant above all things to disturb the well established principle of law that, when a fact of marriage is acknowledged or proved, alimony follows as a matter of course, except where a wife has a provision of her own sufficient for her condition in life, and proportionate to the means of her husband.

In the next place, I was asked in some way to qualify my judgment so as to give the lady, in case of an appeal from my rejection of the responsive allegation, an opportunity of taking up to the Court [701] of appeal an allegation of faculties admitted. I certainly am not in the habit of anticipating an appeal, or of intimating that a case should be appealed, because I think that the expression of such an opinion would commonly lead to useless litigation. But there is this further reason in the present case; if any inconvenience were to arise in respect of the allegation of faculties it would be entirely the fault of the party herself who might have brought in that allegation at an earlier stage.

For the reasons I have assigned, on looking at the whole case, I am clearly of opinion that the facts alleged in the responsive allegation could not affect my ultimate judgment in the case, and being of that opinion, it becomes my duty to reject that plea, which I accordingly do, but nevertheless it is incumbent on me to receive the allegation of faculties.

From this decision there was, on the behalf of the wife, an appeal asserted *apud acta*; but on the 21st March, 1849, the inhibition was relaxed, and on the 1st May following, the sentence of nullity, as prayed, was signed.

[702] IN THE GOODS OF SIMON SILVESTER ENSELL, Deceased. Prerogative Court, Feb. 3rd, 1849.—A will, written on one side of a sheet of paper, with a blank on the last line of one inch six-tenths, and a space under the last line of five-tenths of an inch, and the signature of the testator on the second page at eight-tenths of an inch from the top, rejected, as not signed “at the foot or end.”

Motion.

Simon Silvester Ensell died on the 27th May, 1848, leaving a will which was executed by him in the presence of witnesses, and attested by them on the 16th May, 1848. There was neither an executor nor residuary legatee appointed. The amount of the property bequeathed was 170l. The deceased was a jobbing smith.

The will was written on a sheet of letter paper, and occupied the first page. The lines were as near as possible at a uniform distance of five-tenths of an inch apart; the writing on the last line did not occupy the entire width of the paper, for there was a space of one inch six-tenths; under the last line there was a space blank of exactly five-tenths of an inch. From the top of the second page there was a space blank of eight-tenths of an inch, then followed the testator's signature, with his name at full length, and under that the signatures of the two attesting witnesses.

Robinson moved the Court to grant administration with the paper annexed, as executed within the spirit and meaning of the act.

[703] Judgment—*Sir Herbert Jenner Fust*. The question here is whether the will is signed at “the end,” for it is clear it is not signed at “the foot.” It seems to me that there is space enough at the bottom of the first page for the testator's signature. Though I feel great hesitation, I am inclined to reject the paper without saying more on the subject, leaving the party interested to propound, so as again to take the

opinion of the Judicial Committee of the Privy Council. I did hope when *Smee v. Bryer* was sent up to that Court, their Lordships would have laid down some principle for my guidance, but unfortunately they have left the question in much the same state as it was before, and determined that case on its special circumstances. I reject the motion.

IN THE GOODS OF WILLIAM HARRIS, Deceased. Prerogative Court, Feb. 22nd, 1849.—A will, with a testimonium clause, after which a space of four-tenths of an inch, then an attestation clause, with a space under it of six-tenths of an inch, and then the signature of the testator, held to be duly signed.

[S. C. 13 Jur. 285.]

Motion.

William Harris died on the 9th January, 1849, leaving a will, which was executed by him in the presence of witnesses, and attested by them on the 20th of June, 1846. Executors were appointed, and the whole of the property disposed of.

The will concluded thus: "I do declare this to be my last will and testament. In witness whereof, I have set to this my last will and testament my [704] hand and seal, this 20th day of June, in the year of our Lord one thousand eight hundred and forty-six."

Under the above last line there was a space of four-tenths of an inch, and then followed this attestation clause:—

"Signed, sealed, published and declared by the said William Harris as and for his last will and testament in the presence of us, who at his request and in his presence, have subscribed our names as witnesses thereto, this 20th day of June, in the year of our Lord one thousand eight hundred and forty-six."

Under the above last line there was a blank space of six-tenths of an inch, then followed the signature of the testator, and afterwards those of the witnesses.

Curteis moved for probate of the paper, and stated that with the exception of not being in the first person, the present attestation clause was much like that in the case of *Woodington, Deceased* (2 Curt. 324).

Judgment—*Sir Herbert Jenner Fust*. The question here is whether the will is signed "at the foot or end." Strictly and properly speaking, the will ended with the date at the end of the testimonium clause, and there the testator's signature ought to have been placed. When, however, an attestation clause follows so near, I will not carry the rule so far as to say that there may not be a due execution of the paper by a testator after the attestation clause. I am of opinion the will before me is duly signed.

[705] CORNEBY *against* GIBBONS. Prerogative Court, March 14th, 1849.—A will executed in 1846, containing in the body of it blank spaces, held to be entitled to probate, as the statute is silent in regard thereto.

[S. C. 6 Notes of Cases, 679; 13 Jur. 264.]

This was a suit promoted by Mr. Samuel Corneby, the sole executor named in the last will of Mary Corneby, who died on the 11th April, 1848, against Lydia Gibbons, the lawful niece and one of the next of kin of the deceased.

The will was executed on the 19th March, 1846, and the circumstances under which it was prepared and executed were set forth in an allegation in substance as follows:—

The first article pleaded, "that sometime in the year 1844 the testatrix requested her nephew, Mr. Samuel Corneby, to draw for her the form of a will—that accordingly he wrote on the first side of a sheet of foolscap paper the following words and figures, to wit"—[here the formal commencement of a will used on the occasion was set forth, and then the article pleaded that] "the said words and figures occupy the upper part of the said first side, that the remainder of the first side, and the whole of the second side, had no writing thereon—that Mr. C. also wrote on the third side of the sheet of paper the following words, to wit"—[here was introduced a clause directing that, if the funds were insufficient to pay all the legacies in full, there should be a proportionate reduction in each; then a clause for the appointment of an executor, with a space left for the name; then a testimonium clause, with blanks for the dates, and lastly, an attestation clause, with blanks for the [706] names of the attesting witnesses; then the article pleaded that the outline of a will as above drawn] "was delivered to the deceased."

The second article pleaded, "that on the 18th March, 1846, the deceased in conversation with Miss Betts, who resided in the same house with her, declared she intended making her will, and on the following morning the deceased, who had in her hand, amongst other papers, the paper mentioned in the preceding article, informed Miss B. that she was then going to write her will, and so soon as she should finish the same she would call her in to witness it—that the deceased then with her own hand wrote in the blanks left for that purpose."

The third article pleaded the due execution of the will on the 19th March, 1846, after the date had been inserted in the blank left for that purpose.

The fourth article pleaded, "that on the morning following, the deceased, who had a lighted candle and some papers in her hand, informed Miss B. she was about to seal up her will, so that nobody should see what she had been doing," &c.

The fifth article pleaded, "that after the death of the deceased, the will, as propounded, was found in the repositories of the deceased, sealed up in an envelope," &c.

The will, when found after the death of the deceased, presented an appearance of the following description:—a portion of the last line on the first page of the sheet of paper was in blank—the writing on the second page commenced at the top, and occupied about half that page—the remainder, namely $6\frac{3}{10}$ inches, was in blank, the upper part of the third page to the extent of $2\frac{4}{10}$ inches was also [707] in blank, and in the writing which followed there was also another blank to the extent of the space of one line; a testimonium clause followed, and immediately afterwards the signature of the testatrix, beneath which was an attestation clause, with the signatures of the attesting witnesses.

The admission of the allegation was opposed on the 15th November, 1848; but before the counsel had an opportunity of fully stating the grounds of his opposition, he was interrupted by the Court,^(a) which suggested it would be better that all the facts should be before it in evidence in the first place. Accordingly witnesses were examined in support of the allegation.

Jenner for the executor. The evidence of Miss Betts leads to the conclusion that, so far as the intentions of the testatrix were concerned, the paper is complete. The only question that can be raised against the will is whether the blanks form any obstacle. The will is signed in conformity with the provisions of the statute, and there is nothing to shew that any addition was made after the execution. The act does not provide against blanks being left in the body of a will. It is no part of the duty of the Court to add to and multiply the difficulties which have already arisen on the statute.

Robinson contra, for the next of kin. One of the objects of the statute is to guard against the possibility of any alteration or addition [708] being made after execution: to carry that object into effect, there are the provisions contained in the 9th and 21st sects. in particular. If blank spaces may be allowed in the body of a will, the object of the Legislature may be as easily frustrated as by leaving a space between the foot or end of the will and the testator's signature, and that is held not to be allowable. The general scope of the statute must be preserved, namely, to prevent the chance of any alteration after execution, unless made in accordance with the provisions of the statute.

Judgment—*Dr. Lushington, sitting for Sir Herbert Jenner Fust.* The statute directs that a will shall be signed "at the foot or end thereof." In this respect the statute has been carried into effect in the present instance to the letter, as well as in the spirit. The object is to prevent a space being left between the foot or end of the will and the signature of the testator, so as to admit of additions being made after execution. In regard, however, to blank spaces in the body of the will, the statute is silent. Were I to introduce that, as a circumstance to work a nullity to the will, I should have occasion to consider what would constitute a blank space, and in some instances that might be an exceedingly nice question. Here the blanks are accounted for; but, independent of that, I do not think I should be justified, on the strictest principles of interpretation, to hold that to be a nullity which appears not to be so rendered on the face of the statute. There are no words in the act to hinder a space or [709] spaces being left blank in the body of a will, and I cannot undertake, though undoubtedly in some instances mischief may arise, to introduce a provision not to be found in the

statute. The evil, if any, must be remedied by the Legislature. I am of opinion the will is entitled to probate.

IN THE GOODS OF MARIANNE KIRBY, Spinster, Deceased.

Prerogative Court, March 20th, 1849.

[S. C. 6 Notes of Cases, 693.]

On the 20th March, 1849, the principle, as above laid down by Dr. Lushington, was acted upon by Sir Herbert Jenner Fust, *In the Goods of Marianne Kirby, Spinster, Deceased*. In that case the will was written on post letter paper; the first side was filled; three lines were written at the top of the second page, a blank of $1\frac{2}{10}$ inch followed, then three lines more were written, and the remainder of that side to the extent of $5\frac{5}{10}$ inches was blank; the third side was completely filled, and the will ended with five lines on the fourth side of the sheet, below which, at a distance of eight-tenths of an inch, stood the testatrix's signature, with the signatures of the attesting witnesses beneath.

[710] IN THE GOODS OF ROBERT BROWN, Deceased. Prerogative Court, March 20th, 1849.—A will, with the dispositive part concluding on the second page, leaving a blank space of seven-tenths of an inch, and the third page commencing with an attestation clause, after which was a blank of five-tenths of an inch, then the signatures of the attesting witnesses, after which another blank of seven-tenths of an inch, then the signature of the testator, held to be signed “at the foot or end.”

[S. C. 6 Notes of Cases, 697.]

Motion.

Robert Brown died on the 11th February, 1849, having on the 25th July, 1848, executed his will, and appointed his wife the executor.

The will was written on a sheet of foolscap paper, and the dispositive part thereof concluded at the bottom of the second page, leaving under the last line a blank space of seven-tenths of an inch, and having in the corner of the page the words “carried up;” at the top of the third page were the words “brought up,” and then followed this attestation clause:—

“Assigned, sealed, published, and declared by the said Robert Brown, the testator, as his last will and testament, in the presence of us, who in his presence, at his request, and in the presence of each other, have hereunto subscribed our names.”

There was then a blank space of five-tenths of an inch; then followed the names of the two attesting witnesses, below which there was a blank space of seven-tenths of an inch, after which followed the signature of the testator, with a seal.

The account given by the attesting witnesses of the transaction was as follows:—“... the deponents further make oath that on the 25th July aforesaid, the said testator produced to them his aforesaid will, and requested they would subscribe their names thereto as witnesses, but the deponent, [711] G. E. F. H., observing that the testator had previously subscribed his name ‘Robert Brown,’ to the said will, remarked to him that the said will was not dated, and that he ought to have signed his name to his said will in the presence of the persons who were to witness the same; whereupon the said testator, at the suggestion of deponent, the said G. E. F. H., and on the 25th July aforesaid, with a pen and ink retraced his subscription ‘Robert Brown’ to the said will (such retracing being intended by the said testator as his signature to the said will), and then affixed his seal thereto in the presence of these deponents, both of whom were present at the same time; and these deponents (after he had so retraced his signature and affixed his seal thereto) attested the execution of the said will by subscribing their names in the presence of the said testator, and of each other, at the foot of the clause of attestation to the said will, but above the signature and seal of the said testator.”

There was a memorandum with a date under the signature of the testator of which it is not necessary to say more than that the same was added after the execution.

Haggard moved for probate of the will without the addition made after the execution.

Judgment—Sir Herbert Jenner Fust. The only question that can be raised in this case is whether the will is signed “at the foot or end.” I have no doubt that there

has been a good execution; for although the testator's signature stands [712] below the attestation clause and the signatures of the witnesses, both of them swear that it was written before they signed their names. I am of opinion the requisites of the statute have been sufficiently complied with; and accordingly I grant probate of the paper ending with the signature and seal of the testator. What appears beneath, it seems, was added after the execution; that part must therefore be omitted.

IN THE GOODS OF ELIZABETH WOODS MARTIN, Spinster, Deceased. Prerogative Court, March 20th, 1849.—Interlineations and obliterations made, as the attesting witnesses deposed, after the first but prior to a second execution by the testatrix, when she acknowledged her signature in their presence, and they attested such second execution by placing their names in the margin opposite to the alterations, pronounced against, as there was no memorandum in any part of the will, or notice in the attestation clause referring to the alterations. Probate decreed as the will originally stood.

[S. C. 6 Notes of Cases, 694. Applied, *In the Goods of Shearn*, 1880, 50 L. J. P. 16; 43 L. T. 736; 29 W. R. 445; 45 J. P. 308. Referred to, *In the Goods of Blewitt*, 1880, 5 P. D. 116.]

Motion.

Elizabeth Woods Martin died on the 18th November, 1848, leaving a will contained in eight sheets of paper, every one of which was duly executed with the mark of the testatrix and the names of the attesting witnesses, on the 20th December, 1847.

A few days after such execution it was discovered that there was a mistake in the Christian name of the deceased's sister. That mistake occurred three times in the third sheet, once in the fourth sheet, and twice in the sixth sheet, and such mistake was corrected in all the instances by striking out the word "Elizabeth" and writing over it "Sarah Hamilton." The following is the account given by [713] the attesting witnesses respecting the alterations:—"About three weeks after the aforesaid execution of the will, but the time more particularly they are unable to set forth, the said recited alterations having been previously made in the will, and explained to the testatrix in their presence, she the said testatrix again duly executed her said will by tracing a dry pen over her mark, made by her when first executing her said will, and acknowledged such to be her signature in the presence of these deponents, both being present at the same time, and these deponents thereupon duly attested the said last-mentioned execution of the said will by signing their respective initials opposite and against the said respective recited alterations made in the said will, in the presence of the said testatrix, and of each other."

Jenner, in moving for probate of the will as altered, stated that, as far as the testatrix was concerned, she properly executed the will on the latter occasion; that opposite to the alterations there are the initials of the witnesses as attesting the re-execution; and that such mode of attestation is sufficient, as the act does not prescribe any particular place for their marks or signatures.

Judgment—*Sir Herbert Jenner Fust*. There is not any notice in the attestation clause of the re-execution of the will, nor is there in any part of the instrument a memorandum referring to a due execution of the alterations. The signatures of the attesting witnesses alone appear in the margin near [714] to the alterations. All the information respecting such alterations is contained in the affidavit of the attesting witnesses, wherein they say "they duly attested the said last-mentioned execution of the said will by signing their respective initials opposite and against the said respective recited alterations;" there is no evidence that they subscribed the second execution of the will, though they may have intended so to do; as the instrument appears on the face of it they attested the alterations only.

I am of opinion I must reject the motion so far as it relates to the re-execution, and grant probate of the will as it originally stood.

LEECH AND OTHERS *against* BATES. Prerogative Court, March 22nd, March 24th, 1849.—Positive affirmative evidence, by the subscribing witnesses, of the facts of a testator acknowledging his signature in their joint presence, and of their subscribing in conformity with the requisites of the law, is not absolutely essential to the validity of testamentary papers. When the inaccuracy and imperfect

recollection of witnesses are established, the Court may upon the circumstances of the case presume due execution.

[S. C. 6 Notes of Cases, 699. Applied, *Wright v. Sanderson*, 1884, 9 P. D. 149.]

This was a business of proving the last will with two codicils, bearing date respectively the 8th October, 1845 (A), the 20th February, 1847 (B), and the 10th February, 1848 (C), of Edward Bates, late of Kettering, who died in the year 1848, at upwards of eighty years of age. The suit was promoted by the executors named in the will against John B., one of the children of the said deceased, whose interest in the residue of the testator's property was considerably reduced by the codicils.

All the papers were in the testator's own handwriting. The codicil (C) was described by him as "a further codicil." No question was raised re-[715]-pecting the will, but the due execution of the codicils was disputed. The attestation clause of the codicil of 1847 was, "Witness to the signing of the aforesaid codicil being all in the presence of each other," signed "Thomas Messenger, Ethell Messenger,"—of the codicil of 1848, "Witness to the signing hereof," signed, "Thomas Messenger, John Mee."

The following are the material parts of the evidence of the attesting witnesses. Thomas Messenger deposed in respect of B—"I knew the said deceased for many years, all my life, so to speak. I witnessed two papers for him. The first he brought to my house, and told me that he had been making a little alteration for peace and quietness." . . . "He had the paper in his hand at the time. I was not alone; there was a young man at work with me in the shop; it was not in the shop that he said that, but in my little room adjoining, into which he went first and I followed. Being there together and alone, he put the paper that he carried in his hand on the table, and said what I have deposed, and he added, 'Just put your name to it.' I did so." . . . "While I was still in the room the deceased called out to my mother, 'Here Mrs. we'll have you and all.' My mother came in from another little room where she was." . . . "I had signed my name before she came in. When she came in I gave her the pen and I pointed for her where to sign her name under mine, which she did. The deceased said nothing to her while in the room with me; as soon as I had seen her write her name I left the room." . . . "It was in the early part of this present year" [the witness was examined in [716] 1848] "I am sure. I see my name to the paper writing now shewn to me, and dated the 20th February, 1847; that is the paper I signed, as I have deposed, but it was in this present year that I signed it. I am sure of that by reason of the young man that worked with me then, which he did not at all last year—William Leslie by name." . . . "I cannot say positively that the deceased's name was on the paper when I signed it. I cannot say whether it was or not. I did not particularly look to that. I remember that there was some writing on the paper just against where I wrote my name, and more I cannot say. My mother was not present when I signed my name, as I have deposed."

On the article pleading the execution, &c., of the codicil (C) the same witness deposed—"The next time I signed for the deceased he had sent for me to his house. I have said next time, but I cannot be sure which of them I signed first—the other time, however, we will say." . . . "He was in his chair, and a paper lay on the table before him; his son George, and I, and Mee went in at the same time as nearly as could be. The deceased said to me, 'I want you to put your hand to this paper; it is concerning that property of the late Randall Brown; I am going to turn it over to my son George.' I then put my name to it as it lay on the table towards me. I wrote it in his presence and that of John Mee, who signed his name as soon as I had wrote mine. I do not remember what he said to him, if anything, but I know that he did so, as I say, in the deceased's presence and mine. The deceased did not sign in my presence." . . . "The paper now shewn to me marked (C), dated the 10th [717] February, 1848, is that of which I have deposed, and it might be the day that I witnessed it, but I cannot speak to that. I cannot say whether the name 'Edward Bates' was upon it or not when I signed, as I have said I do not remember seeing the words 'witness to the signing hereof.' I have no reason to say or think that the writing on the paper was not the same then that it is now, but I took no notice of it." . . . "I remember now that just as I was beginning to write my name, Mr. George Bates told me that I had better write a little lower, but I had begun writing, so he said it did not matter, and I went on."

On the seventh and eighth interrogatories the witness answered—"I can say but

as I have said about the date of the codicil (B); I did not see the deceased sign it, I am sure of that; whether his name was to it when I witnessed it I cannot depose. The deceased did not point it out to me, or call my attention to his signature in any particular manner; I should not have forgotten it if he had." . . . "The deceased did not speak the word codicil, or say that the paper I witnessed for him was of that nature."

Ethell Messenger deposed in reference to the codicil (B). "I live with my son. I put my hand to one paper for him" [the testator]. "He came alone to our house." . . . "I went to him immediately in the parlour where he then was with my son. When I went in my son had just finished writing his name on a paper that was on the table." . . . "I wrote my name under my son's. By the time I had wrote my name, my son was gone out, and then the deceased (he and I being alone) said to me, I am doing this for peace and quietness [718] when I am gone. That is all that passed. He took up the paper, open as it was, and took it away just as he brought it; he never said what it contained or what it was," . . . "it was in the early part of this year" [1848], "and in the month of February, I think, certainly, and this year, for I know that it was but a little time after William Leslie came to us, and by my own entry in the book I keep I see that he came on the 7th February." . . . "I cannot say if the deceased's name was to it" [the codicil] "then, as it is now or not."

On the ninth interrogatory the witness deposed—"It is quite true that the deceased did not sign the codicil in my presence, or make any allusion to his name as having been signed to it already. I have no doubt at all that it was in the present year, not that of 1847."

John Mee, in reference to the codicil (C), deposed—"I knew the deceased in this cause quite well." . . . "I have signed papers for him several times. I never signed any one that I knew to be a will, or codicil, or testamentary paper of any kind. The last time that I signed any paper for him was some time last February" [1848], "that was at the deceased's own house." . . . "I met Thomas Messenger there; we both went in together." The witness stated the deceased asked him and Messenger to sign a paper on the table, and that the deceased stated it was only about Mr. Randall Brown's property. "Thomas Messenger signed his name first on the right hand side of the page, to the right of the middle of the page I mean. As he began to sign, either Mr. Bates, or his son, told him to sign either a little higher or lower, I do not [719] remember which, but he had begun, and so he went on where he was. Mr. Bates then turned the paper to me, and pointed to where I should write my name, which I did, and so it was that I did not sign my name in the same place or part of the paper as T. M. did, but on the left side of the page opposite his." . . . "I can and do swear that the deceased's name was not signed to it at any time when I saw the paper." . . . "If his signature had been to it, I should have seen that, but it was not. I will swear there was no name to it when I wrote mine, but only that of T. M.; I did not read any of the writing, but I saw the whole page distinctly; it lay open before me, and I took particular notice of it; there was no signature to it of the deceased." The codicil (C) was then shewn to the witness, and he stated it "is not that of which I have been deposing. The name John Mee appearing upon it is my writing, but I am sure that the paper itself is not the same. There was less writing on that than on this. T. M.'s name on that was in quite another part of the page, and mine was as far as it could be to the left, while his was as much to the right." [The names of the attesting witnesses stood, in the codicil (C), the one under the other on the left side of the page.] "I have signed other papers with T. M. for Mr. B.; this must be one of them. I did not witness any other for him in the month of February last [1848], or for as much as a year before. I have no recollection of when the paper now shewn to me was signed by me, as I see it to have been. Whenever it might be, I cannot say whether the name of the deceased was upon it or not before I put mine to it. As well as I remember, I never did [720] witness any paper for him, which had not been signed by him, except the last; the last I swear was not. I should say of that now shewn to me that it is likely it was, and I believe it was. I am sure that the last was not, and that the paper writing now shewn to me was not the last. Mr. R. Brown died in September, 1846, I believe. I cannot recollect that I signed any paper for the deceased between the death of Mr. R. B. and February last [1848]; I should say that I did not, but, as there never was a piece of work about

any other paper I signed for him, I cannot be sure; I took no such particular notice of any other."

On the twelfth interrogatory the witness deposed—"The deceased did not make or acknowledge any signature to the paper I witnessed for him in February last [1848], not in my presence that is. There was none to it then; if it was a paper of a testamentary nature, I did not know it so to be."

Haggard and Robinson for the executors. The papers in question are admitted in the answers to be in the handwriting of the testator. At first sight they may seem to fall under the case of *Moore v. King* (3 Curt. 243), but on a careful consideration of the evidence they come under a principle contained in *Burgoyne v. Showler* (ante, p. 10); it must here be presumed "omnia rite esse acta." The attesting witnesses, though they forget all that occurred, must have seen the signature of the testator; there was no attempt to conceal it; *Blake v. Knight* (3 Curt. 547) applies [721] here. If any defect exists in (B) it must be held to be cured by (C), which is described as "a further codicil" for (C) must be presumed to have been duly executed.

March 24th.—Addams and Curteis for the party opposing. On the evidence it is clear that neither (B) nor (C) is entitled to probate. (B) is clearly defective; Mrs. M. was not present when her son subscribed; *Casement v. Fullon* (5 Moore's P. C. C. 130). In respect to (C), Mee swears that when he subscribed, the signature of the testator was not made. Even if (C) were well executed, it would not reflect back on and incorporate (B), for both attesting witnesses to that codicil swear positively it was executed not in 1847, but in 1848, therefore subsequently to (C).

Judgment—Sir Herbert Jenner *Fust*. All the testamentary papers are in the handwriting of the deceased, who, from the mode in which they are drawn up, appears to have been a person of good understanding, and possessing some professional knowledge. The question is whether, from all the circumstances of the case, I can hold the papers (B) and (C) to have been executed in conformity with the requisites of the law, for in respect of (A) (the will), there is no dispute.

The statute enacts that it is sufficient if the testator acknowledge his signature in the presence of two witnesses present at the same time, and such witnesses shall attest, and shall subscribe the will in [722] the presence of the testator. To constitute such an acknowledgment, it has been ruled that it is not necessary that an express acknowledgment be made; it is sufficient that the paper be produced open to the witnesses with the testator's signature upon it. The evidence, then, of the witnesses becomes material.

With regard to the date of the paper (B), I am perfectly satisfied it was executed, as it purports to have been, in the year 1847, and not, as the attesting witnesses are pleased to say, in 1848. It seems to me, from the general complexion of their evidence, they had talked over the matter of the execution, and settled, as far as their recollections served, the evidence they should give. The only question here is whether Thomas Messenger and his mother were present together when the testator produced the paper, and before either subscribed, for I think it is clear that the testator's signature had been previously made. The witnesses certainly negative the fact of their joint presence prior to T. M.'s subscription, but when I find them both inaccurate on some points I cannot rely on their recollections in this particular, more especially as I find that Mrs. M. states in her answer to the seventh interrogatory that "what passed was so little, and was done in so short a time, that one could scarce give it a thought."

Thomas Messenger is also a witness to the codicil (C) described by the testator as "a further codicil." He states he was present with the other attesting witness of the name of Mee at the deceased's house when that paper lay open on the table before them. He identifies (C) as the paper signed by him and his fellow witness, but states it was not signed by the testator in their presence, and he is unable to say [723] whether the signature of the testator was upon it, or that the words "witness to the signing hereof" were there; he, however, adds, "I have no reason to say or think that the writing on the paper was not the same then that it is now, but I took no notice of it." The other witness, Mee, positively denies that (C) was the paper he signed conjointly with Messenger in February, 1848. He states he signed at different times other papers for the deceased, and that (C) must have been one of them, but he did not sign more than one paper in February, 1848, or for a twelvemonth before.

Notwithstanding the minute account the witness gives of the paper he supposes he signed in February, 1848, totally differing in respect of the place of his signature and that of his fellow witness—an account which would go to establish that (C) was not the document—there is a circumstance deposed to by both the witnesses, which satisfies me as to the identity of the paper, and also shews the witness, Mee, was confounding one paper with another. Mee says, “As he” [Messenger] “began to sign, either Mr. Bates or his son told him to sign either a little higher or lower, I don’t remember which, but he had begun, and so he went on where he was;” Messenger says it was “a little lower,” and the paper itself bears out this representation. In regard to the signature of the testator, Mee states that to the best of his recollection he never witnessed any paper for the deceased which had not been signed by him “except the last,” and he is sure the paper (C) is not the last; the witness then established the fact that (C) was signed by the testator before the witnesses subscribed.

The learned Judge entered fully into the evidence, [724] in reference to which he observed that it is not necessary there should be positive affirmative evidence of the execution, and referred in support of that proposition to *Burgoyne v. Showler* (ante, p. 5), and *Blake v. Knight* (3 Curt. 547); he came to the conclusion that both papers in question, in the order in which they bear date, were duly executed, and entitled to probate, without considering the point raised in argument whether (C) republished (B). The costs of both parties were decreed out of the estate.

THE OFFICE OF THE JUDGE PROMOTED BY THE LORD BISHOP OF LINCOLN *against* DAY. Arches Court, April 16th, 1849.—A beneficed clergyman, having been suspended for three years and further, until he exhibited a certificate of good conduct, and having resumed on the expiration of the term his clerical duties without exhibiting such certificate, pronounced in contempt, and the contempt decreed to be signified.

[S. C. 7 Notes of Cases, 1. Referred to, *Martin v. Mackonochie*, 1879, 4 Q. B. D. 717.]
On motion.

This was originally a cause, in virtue of letters of request, under the hand and seal of the Lord Bishop of Lincoln, of proceeding against the Rev. W. Day, rector of Hawridge, in the county of Buckingham, heretofore in the diocese of Lincoln, but now in the diocese of Oxford, and of citing him to answer to certain articles touching his soul’s health, &c., “and more especially for having addicted himself to habitual and excessive drinking of wine, beer, and spirituous liquors, so as frequently to be intoxicated, and particularly for his having been in a state of intoxication on Wednesday, the 5th June, 1844, in [725] Hawridge, in a public house, called the Rose and Crown, and also concerning his having since the issuing of a commission of inquiry,^(a) &c., continued to addict himself to habitual and excessive drinking, &c., so as frequently to be intoxicated, &c., and also concerning his having been lawfully convicted at the Aylesbury Assizes, on the 10th of March, 1845, of an assault upon T. B. on the 7th February, 1845, at Hawridge aforesaid,” &c.

The proceedings were carried on throughout in pœnam. On the 3rd December, 1845, the Court holding the charges, as contained in the articles, both prior and subsequent to the report of the commissioners, to be sufficiently proved, sentenced Mr. Day to be suspended (*b*) ab officio et a beneficio, for the space of three years, and

(*a*) The learned Judge observed, at the hearing of the original cause, on the delay in commencing the proceedings in the Court of Arches, and on the mischief that might have arisen, as his inquiry is confined by the statute to two years reckoning from the day of the return of the decree or citation. It appeared that the commission was issued on the 14th September, 1844, that the inquiry of the commissioners did not extend to any offence later in date than the 5th June, 1844, that their report was dated the 10th October, 1844, and transmitted to the registrar of the diocese on that day, but no further step was taken till the 18th April, 1845, the day on which the letters of request were presented and accepted.

(*b*) Deprivation was prayed by counsel, but the Court, though allowing the case, as proved, to be most aggravated, declined, in the absence of a precedent, to pass that sentence for such offences.

then until he should produce the usual certificate of good conduct, also condemned him in costs, and directed the sentence to be published on the 14th December following.

On Sunday, the 4th February, 1849, and also on Sunday, the 11th February following, Mr. Day performed divine service, and preached in Hawridge [726] church without having lodged in the registry, pursuant to the sentence, a certificate of his good conduct during the period of the three years.

On affidavits of the above facts the Court, on the 17th February, 1849, on motion of Dr. Haggard, decreed a monition against Mr. Day, to shew cause why he should not be pronounced in contempt. The monition was personally served on Mr. Day on the 19th February. On the 16th April (there was no appearance given) the Court pronounced Mr. Day in contempt, and decreed his contempt to be signified.

FELL against LAW AND OTHERS. Arches Court, April 15th, May 26th, 1848.—A Judge having acted *ad instantiam partis*, and not *ex mero motu*, cannot be cited to answer to an appeal.—The admission of proctors to practise is not a matter of arbitrary discretion in a Judge.—An appeal from the admission of proctors is not perempted by the party objecting thereto, not having appealed on the simple fact of their admission; enrolment and registration of names are a part of the admission, which is not complete without them.—A plurality of persons joined in one citation is irregular; but an objection thereto after issue joined is not fatal; if taken before, it would probably be sustained.

[S. C. 6 Notes of Cases, 209.]

This was an appeal and complaint of nullity against the order or decree of the Rev. and Worshipful James Thomas Law, Clerk, M.A., Vicar General of the Lord Bishop of Lichfield, and Official Principal of the Consistorial Court of Lichfield, appointing Edward Bond, William Greene, Charles Gresley, and Robert William Hand as proctors of the said Court, promoted by William Fell, one of the proctors of the same Court, against the said chancellor, and against the said four gentlemen who, together with the chancellor, were cited under one and the same instrument "to answer to the said William Fell in his said cause of appeal and complaint of nullity, and further to do and receive as unto law and justice shall appertain, under pain of the law," &c.

[727] The parties cited appeared under protest.

In the act extending the protest it was alleged—

That the chancellor of the diocese, by virtue of his office, admitted on the 4th May, 1847, the four gentlemen, respectively attornies and solicitors of the Court of Queen's Bench and of the Court of Chancery, into the number of proctors exercising in the Court of Lichfield, in the presence of Mr. F., the pretended appellant, thencefore and then a proctor of the said Court, protesting against such their admission; that no cause or business concerning the admission of the said four gentlemen into the number of proctors in the said Court were ever depending there, as pretended in the inhibition and citation issued and served in order to found the jurisdiction of this Court; that the admission of the four gentlemen to act as proctors by the chancellor is a matter at least so far within his own discretion that he is not amenable for such his exercise of it to this Court, either in virtue of the said pretended appeal, or otherwise; and that if the pretended appellant has sustained any legal wrong thereby, other Courts have authority, and are the proper Courts, to administer a legal remedy for the same.

In the answer it was alleged—

That on the 4th May, 1847, a regular Court day, the chancellor himself presented for admission as proctors of the Court the said four gentlemen, and Mr. F. then and there objected to and protested against the same, and the chancellor, after hearing Mr. F. in support of his objection, upon the petitions of the said four gentlemen then and there unduly presented and received, did in fact, though contrary to law and justice and the practice of the Court, [728] order their admission as proctors to be entered, and did also sign and seal their appointments, but which appointments were not registered in consequence of the protest and objection of Mr. F.; that on the 18th of the said month, the next following Court day, the proceeding relative to the said appointments between the said E. B., W. G., C. G., and R. W. H., on the one part, and the said Mr. F. on the other part, came on to be heard before the chancellor, when, after the proceedings of the preceding Court day had been read, he, contrary

to law and justice and the practice of the Court, ordered the appointment of the said four gentlemen as proctors to be registered and enrolled, whereupon Mr. F. protested of a grievance and of appealing to this Court, whereupon the chancellor deferred to such the appeal of Mr. F., and assigned him to prosecute the same by the next Court; that Mr. F. did not prosecute his appeal by the next Court, but the chancellor allowed him further time, and Mr. F. has since duly prosecuted the same. It was expressly alleged that from the 4th May, 1847, and until the service of the inhibition there was depending in the Court of Lichfield a cause or business concerning the admission of the said four gentlemen, as proctors, between them on the one part, and Mr. F. objecting to such their admission on the other part. It was alleged and submitted that the acts, orders, and decrees of the chancellor, done and made in respect of the said cause or business, were and are subject to the legal correction and controul of this Court, upon an appeal duly made and prosecuted, and that the chancellor was and is in respect of his orders, &c., in regard to the admission of the said four gentlemen, [729]—men, amenable to this Court as well by virtue of the appeal prosecuted in this behalf as otherwise; that the chancellor hath not, either by the usage of his Court, or by virtue of his offices of vicar general or official principal, or by virtue of any grant or letters patent, or other instrument in writing, any power or authority to present, admit, or appoint proctors; and lastly, it was submitted that the chancellor and the four gentlemen were bound to appear in this Court, and it was prayed that the protest might be overruled, &c., and that they be condemned in costs.

In reply it was alleged—

That the grants, faculties, or appointments of the four gentlemen, as proctors, duly made on the 4th May, 1847, were not registered on that Court day in consequence, not of the protest and objection of Mr. F., but of the wilful refusal of Mr. John Mott, the deputy registrar of the Court, on that Court day to register the same, of which refusal he, Mr. M., having repented, duly registered the said appointments on the following Court day, the 18th May; lastly, it was expressly denied that the chancellor ever deferred to the pretended appeal, or even recognised this Court's jurisdiction to interfere in the premises, either directly or indirectly.

April 15th.—Addams and Curteis in support of the protest. The appeal is altogether erroneous. No cause was depending in the Court below. Had there been a cause depending the appeal was perempted, for on the 4th May certain individuals were admitted as proctors, on which there was no appeal; the only act to be done, which stood over, was the [730] registration. Supposing there had been a cause depending, it is not competent to cite the Judge; if injury were done by him there is a remedy—a right of action—against him. The only case having a bearing, which can be cited on the other side, is *Gastrel and Hand v. Herbert and Others*; (a) what the result of that cause was, in the Court of Delegates, does not appear.

Dodson, Q. A., and Harding contra. There was a cause pending sufficient to justify an appeal. Much less than appears in the present case is sufficient to found an appeal. (b) The process must be taken to be true, and that shews a cause or business was depending; the appointment was not complete without registration or enrolment; the appeal is from the whole matter, which was one continuous act. In respect of making the Judge below a party, the case referred to on the other side is in point; there is sufficient to shew that *Gastrel*, the Judge, was cited. The principle is clear that a Judge may be cited. (c)

Cur. adv. vult.

May 26th.—*Judgment*—*Sir Herbert Jenner Fust*. This is a cause of appeal from the Consistorial Court of Lichfield. The learned Judge of that diocese (Mr. Law) admitted four gentlemen as proctors of that Court, contrary to the petition or [731] protest of Mr. Fell, one of the proctors there practising, whose objections he overruled; from the order or decree for the admission of these gentlemen, Mr. Fell has appealed to this tribunal.

Upon the face of the inhibition which has been served, it appears that the chancellor, as well as the four gentlemen, are called upon to answer to the appeal; they have answered, so far, by one and all giving an appearance under protest, the

(a) Before the Delegates in 1733, not reported.

(b) See *Cotterell v. Mace and James*, 3 Hagg. Ecc. 743.

(c) Oughton, vol. 1, tit. 284, 285, also *Whiston's case*, Comyn's Rep. 199.

grounds of which are set forth in the pleadings. I will, in the first place, deal with the case of the chancellor.

That a chancellor may, under some circumstances, be called upon to answer to an appeal is a position which I am not prepared to deny, but I think, as I proceed, it will appear that, in this instance, the Chancellor of Lichfield is exempt.

The passages in Oughton, vol. i. tit. 284, 285, referred to in argument, require to be considered with some minuteness. The heading of title 284 is, "Quòd in causa appellationis a gravaminibus illatis, in causa correctionis, Judex a quo citari possit ad respondendum in causa appellationis, licet non appellatur specificè quoad eum." Sect. I. thus begins—"In omni appellatione a gravaminibus præsertim in causa correctionis dicitur, gravamina fuisse illata, tam ex officio Judicis, a quo appellatur, quam ad instantiam M. et N." Sect. II., "Solent tamen appellantes, in his casibus, ob reverentiam Judici debitam, petere citationem decerni contra dictos M. et N. et non contra Judicem ad respondendum in causa appellationis." It would seem then that in a cause of correction the Judge may be called upon to answer to the appeal but, "ob reverentiam Judici debitam," the citation is to be taken [732] out, not against him, but against the parties. Sect. III., "Si tamen, in processu transmissio, non apparebit gravamina, a quibus appellatum fuit, illata fuisse ad instantiam Partis, sed ex officio Judicis;" Sect. IV., "appellans poterit in hoc casu petere a Judice ad quem, post litem contestatam cum parte appellata, ut decernat citationem contra Judicem a quo, ad respondendum in causa appellationis;" so that, as soon as the process is transmitted, which is after the libel is given in, a citation may be obtained against the Judge to answer in the appeal; "et eo comparente novum dare libellum; et statim exhibere processum ejusdem Judicis, alias per eum, videlicet, per Judicem a quo, in dicta causa et inter dictas personas, transmissum, et in præsentia ejusdem Judicis, seu ejus procuratoris, procedere in causa ad sententiam;" Sect. V., "et si Judex a quo non possit justificare processum suum, ferenda est sententia absolutoria pro appellante quoad objecta per Judicem a quo:" it would seem that when the Judge has proceeded ex mero motu, and not ex officio promoti, he may be called to answer; and then Sect. VI., VII., "et idem Judex condemnabitur in expensis istius secundæ instantiæ; dimittenda tamen est, primò, pars appellata cum expensis." This doctrine is further carried out and explained in tit. 285.

Although these are principles which have not been applied in my recollection, nor can I find instances in which they have been, yet I am of opinion that if a Judge act ex mero motu, and not ex officio promoti, he might be properly made a party to an appeal. In the present case, however, it is quite clear that Mr. Law did not proceed ex [733] mero motu, for though in the words of the answer to the act it is pleaded he "himself presented for admission" the four gentlemen, it appears, from what follows in the same plea, they were admitted each one on his own petition; consequently the proceeding was ad instantiam partis. Under these circumstances, I am of opinion that the chancellor of the diocese of Lichfield is not liable to be called to answer to this appeal, at least in its present stage; I say at the present stage, because if in other steps taken in the cause, the particulars of which I have not now before me, it should turn out that Mr. Law has acted ex mero motu, he may be called upon to answer hereafter; at the present time I dismiss him from this appeal.

I now proceed to consider the case of the other individuals cited, namely, the four gentlemen admitted as proctors at Lichfield. It is stated in the protest that the admission of proctors to practise is a matter discretionary in the Judge. That proposition may possibly be to a certain extent true, but I cannot go the length of holding that whatever may be done by a Judge in such a matter may not be a subject for inquiry in a Court of Appeal. I may observe that Judges of Ecclesiastical Courts have no original jurisdiction; all they have is derivative; the extent of their authority is specified in their patents; they are bound to act in accordance with the power therein given them; if they exceed that authority, there must be a mode of correcting the undue exercise; they must be responsible to a superior Court. In *Maidman v. Malpas* (1 Hagg. Con. 210) Lord Stowell said, "The office of the [734] Judge is not original, but derivative, and may fairly be styled the office of the bishop, for it is the office of the bishop exercised by his Judge—*officialis judex episcopi*." It is not then a mere arbitrary discretion which Ecclesiastical Judges exercise in any matter. Even this Court, the highest Court of ecclesiastical jurisdiction, save the Judicial Committee of her Majesty's Privy Council, acts at all times ministerially in admitting practitioners,

whether to the bar or as proctors; in each case there is a special commission emanating from the archbishop which the Court carries into effect. I cannot doubt, were I to admit an unqualified gentleman to either branch of the profession, or even a qualified one without authority, I should render myself liable to be called to account elsewhere.

There was a case mentioned at the bar, *Gastrel and Hand v. Herbert and Others* (not reported), which I must notice. The case appears to have been this:—In the year 1728, a gentleman named Hand applied to be admitted a proctor in the Court at Chester; the practitioners, Herbert and others, protested against his admission, notwithstanding the Judge, Mr. Gastrel, admitted him; from that decree or order there was an appeal to York, and on the 18th January, 1732, the Judge of that Court reversed the order at Chester and condemned Mr. Gastrel and Mr. Hand in costs.^(b) From the decision at [735] York Mr. Gastrel and Mr. Hand appealed to the Court of Delegates; there were additional pleadings admitted on behalf of the appellants, and the last minute is “for sentence on the second assignation,” &c. What eventually became of that cause does not appear, but it seems to me to be a precedent founded on a just principle, and a sufficient one, why I should not refuse to inquire under what authority the four gentlemen were admitted at Lichfield.

Another point, however, raised in the protest remains to be considered. It appears that the order of the Judge at Lichfield was given on the 4th May, 1847, for the admission of the four gentlemen, and that their admission was not registered till the 18th of that month. On these facts it was contended that the right to appeal, if any, from the admission is perempted. I apprehend that the admission was not complete till the names were enrolled and registered, and upon that ground there is sufficient reason why there was no appeal from what was done on the 4th. It does appear to me that were I to say that the appeal was not alleged or prosecuted in due time, I should be construing the proceedings of the Court below much too strictly; and I think I should be doing an injustice to hold that there was not a sufficient deference to the appeal on the part of the learned Judge at Lichfield by assigning the appellant to prosecute his appeal which had been alleged on a previous Court day.

Before I conclude, I must observe that a question not raised at the bar has arisen in my mind respecting the citation in this appeal. It appears that [736] there were four separate acts or petitions from the four gentlemen to be admitted to practise in the Court at Lichfield; in consequence thereof it at first seemed to me that, as they were all included in one, instead of separate citations, they were not bound to appear. I have, however, looked through some notes of cases officially belonging to me, and I find that this difficulty has not been solved in a uniform manner. From Sir Edward Simpson's Repertorium I have collected the following cases which occurred in this Court:—

The cause of *Coxe v. Chapman* (vol. 3, p. 250, also Dr. Audley's note) was brought from Northampton; the process was against three persons for striking in the church, and on appeal, July 1st, 1736, the suit was dismissed, because three persons were named in one citation, which was held to be a nullity.

Jeffs v. Wood (ibid.) was a suit for legacy, also in the year 1736, in which suit three legatees joined in one citation, and on argument it was dismissed; it was said that the process could not hold for one of them.

Robins v. Harding was a tithe cause, and was brought from Worcester in the year 1737; two were cited in one citation, but one only appeared; no objection was at first taken, subsequently the question was raised. The Court, after commenting on several cases cited in argument, observed that, had the objection been taken in the first instance, it might have been considered, but it was at that stage different, because the parties had gone on by consent; “Citatio alias nulla per comparitionem convalidatur” (Gaill, lib. 1, obs. 68, s. 1). There is no law which [737] says two may not be inserted in one citation in a civil suit, but criminal cases are different.

Williams v. Morgan (vol. 3, p. 251) occurred in 1728. After issue was joined, the Court said it would not look back; therefore it held that the circumstance of

(b) It appears that though the Bishop of Chester at first sanctioned Hand's admission, he, on the ground that a misrepresentation had been made to him, retracted his consent before the admission took place, and ordered that Hand should not be admitted; Mr. Gastrel, however, did admit Hand.

more than one person being included in the citation did not work an absolute nullity.

In 1723 (vol. 2, p. 146) there was the cause of *Finch v. Blundel*, in which three legatees joined in the same suit, and at the prayer of the executor it was dismissed, on the ground that there ought to have been three distinct causes. It was so determined in *Pollard v. Mason*.

In 1737 there was a suit of *Eyre v. ———* (ibid.), three canons residentiary, who were cited by the chancellor of the diocese in one process (ex mero motu, I presume) to answer to articles for depriving the congregation of divine offices. The parties cited were dismissed, on the ground that they were included in one citation.

Again, in the same year, in the suit of *Kneller et Uxor v. David et Uxor*, on appeal, I believe, from Llandaff, for defamation, a man and his wife were included in one citation. In the Court below there was a libel as well as a sentence, but whether the appeal was dismissed or the parties dismissed admits of some doubt.

In 1743, in the case of *David v. Samuel*, which was a suit against four persons for church rate, it was agreed that the answers and depositions in one cause should be read in the other. "If an error, it is purified by consent." The marginal note is "a wrong citation cured by consent."

[738] Again, there was a suit for a legacy to a wife brought by the husband and wife; an appearance was given under protest; it was argued that two plaintiffs ought not to be joined in the same process; but the Court, in overruling the protest, said, "The interest is in the husband; he may give a discharge for the legacy, they may sue as conjuncta persona."

In respect to the older cases on the subject, I have not been able to discover more than those I have mentioned. These seem to me to shew that the decisions have not been exactly uniform, but thus much seems to be clear, that when there has been an absolute appearance and no objection taken till after issue joined, the libel given in and witnesses examined, such a citation has not been pronounced a nullity. In the present instance there has been an appearance, but that appearance has been given under protest.

In later times, however, within my recollection, there have been a few instances in which the same principle was involved, though the objection was not taken. There was in the year 1832 the case of *Greenwood and Spedding v. Greaves, Clay and Others* (4 Hagg. Ecc. 77, also cited in 3 Curt. 225), which was brought before the Delegates on appeal from York; in that case twelve persons were included in one citation, and called upon to answer for refusing to make a sufficient church rate, though the decision of the Court at York rejecting the articles was affirmed on appeal; in reference to the merits of the case, no notice appears to have been taken of the plurality of persons included in the citation.

Again, there was in the year 1840 the case of [739] *Cory and Others v. Byron* (2 Curt. 396), for brawling and smiting. In that instance the office of the Judge was promoted by three persons without any objection being taken thereto at the bar; nevertheless, though I held the charges not to be established, I thought it my duty, in the course of the judgment for the reasons therein stated (see ibid. p. 403), to direct that in future there should not be, except in the case of churchwardens, who, as a corporation, may be considered persona conjuncta, more than one promoter of the office.

In reference, then, to all the cases to which I have referred, ancient and modern, though I cannot extract any certain rule, I am disposed to say that if, before issue joined, but not afterwards, an objection be taken to a plurality of persons being cited in one and the same instrument, it is possible I might entertain the objection; and as issue has not been joined in this case, it will be for the parties cited to consider whether, in reference to the cases I have mentioned, or others which may be discovered, the objection suggested by me can be maintained, for I am not disposed at the present moment to stay the proceedings on this ground.

Upon the general principles which I have stated, and on the authority of *Gastrel and Hand v. Herbert and Others*, before the Delegates, I am of opinion there is a sufficient case for inquiry into the proceedings at Lichfield. I have already dismissed the Judge, but in respect to the other individuals cited, I pronounce against their protest, and assign them to give an absolute appearance, but they have [740] an opportunity to consider whether they can maintain the objection taken by me in

reference to the citation, or whether they drop that and proceed on the merits of the case.

On the 24th June, 1848, an absolute appearance was given for Messrs. Bond, Greene, Gresley, and Hand, and the cause proceeded under the following name:—

FELL against BOND AND OTHERS. April 16th, May 2nd, 1849.—The lawful admission of proctors depends upon the usage and practice of the Court into which they are admitted.—A decree of a Judge of a diocesan Court for the admission of proctors, contrary to the usage and practice of his Court, reversed on appeal.

[S. C. 7 Notes of Cases, 31 ; 13 Jur. 592.]

The usual steps were taken in the appeal, and, on the 9th December following, an allegation on behalf of the appellant was admitted without opposition. It consisted of nine articles in substance as follows:—

First. That according to the ancient, constant, and existing practice of the Consistorial Court of Lichfield, and according to the ancient, constant, and existing usage therein always observed and adhered to, no person whatsoever of right ought to be, or can lawfully be, admitted as a procurator of the said Court, unless such person has, before such admission duly served under articles of clerkship for five years, at the least, to a procurator general, or notary public practising in the said Court, nor unless such person before such admission duly produce a proper certificate in writing of such service and qualification to the registrar, to be filed in the registry of the said Court; and that all persons who have ever before the pretended admissions of [741] the four respondents in this cause been admitted as procurators in the said Court, have so duly served and produced such certificate to be filed in the registry, and that such certificates have always been and are regularly filed therein.

Second. That no person whatever hath ever, before the admission now in question, either by the present chancellor or by any of his predecessors in the office, or by any other person, been admitted as a procurator of the said Court, without having before his admission duly served under articles of clerkship for five years at the least, to a procurator general or notary public practising in the said Court, nor without having before his admission duly produced a proper certificate of such service and qualification to the registrar, to be filed in the registry.

Third. That no one of the four respondents has at any time served under articles of clerkship to any procurator general, or notary public exercent, in the Consistorial Court of Lichfield, or any other Ecclesiastical Court, for the period of five years or any other period, nor has any one of them produced to the registrar of the said Court, or to any other person, any certificate of service, or of qualification by service, to be filed in the registry of the said Court.

Fourth. That Mr. Law, the present chancellor, exercises his office of Judge by virtue of certain letters patent, bearing date the 13th February, 1821, which grant was duly ratified and confirmed by the then dean and chapter of Lichfield, the 23rd February, in the same year.

Fifth. That the said letters patent are in the possession or under the controul of the said Mr. Law, &c.

[742] Sixth. That the said Mr. Law hath not by virtue of the said letters patent any power or authority whatsoever either to present, or to appoint, or to admit any person as procurator in the said Court; and that no such power or authority is given or granted or conferred by the words of the said letters patent, and that no such power hath ever been granted to him by any other instrument.

Seventh. Pleaded in supply of proof an authentic copy of the original entries or registrations of the letters patent and confirmation remaining in the registry.

Eighth. Pleaded that the said entries or registrations were duly made in the records, by or under the directions of the then registrar, and chapter clerk, &c.

The answers denied the first and second articles, and admitted the rest, with the exception of the latter part of the fifth, wherein it was pleaded that application had been made to Mr. Law to produce his letters patent, but he had refused.

On the first and second articles Mr. Mott, deputy registrar, and one of the proctors of the Court, and Mr. Walthew, a clerk in the registry, were examined and cross-examined; no allegation was given in for the respondents.

The cause was argued on the 16th April, 1849, by Dodson, Q. A., and Harding for the appellant, and by Addams and Robinson for the respondents.

May 2nd, 1849.—*Judgment*—*Sir Herbert Jenner Fust*. As an absolute appearance has been given in this Court for the four gentlemen admitted as proctors at Lichfield—the respondents in this appeal—I may [743] consider the question of my jurisdiction at an end, and that I am at liberty to inquire into the merits of the case, and to pronounce a decision in accordance with its merits.

I must observe, however, in the outset that from the circumstance of no plea having been given in by the respondents in answer to the allegation of the appellant, I am somewhat imperfectly instructed as to their case; all the information I have is contained in their petitions for admission as proctors, which petitions form a part of the process sent from Lichfield.

From these documents I collect that the respondents consider they are properly qualified to be admitted to practise as proctors in that Court, by reason that they have been admitted attornies and solicitors in the Courts of Common Law and Equity, and are practising as such; that, moreover, in the case of two of the respondents, one holds the offices of clerk and registrar of the dean and chapter, the other the office of secretary to the Bishop of Lichfield, and that they all under these circumstances have acquired a sufficient knowledge of ecclesiastical law to fit them to act as proctors.

The objections raised by Mr. Fell to the admission of the respondents to act as proctors are set forth in detail in his allegation; in substance they are that, according to the ancient, constant and existing practice at Lichfield, no one can become a proctor unless he shall have served under articles for five years to a proctor, or notary public practising there, and have filed in the registry a certificate of such service; that no one has ever been admitted, before the instance in question, without such service; [744] that the respondents have not so qualified themselves; and lastly, that the chancellor has not, by his letters patent, power to appoint any person he pleases to act as proctor.

That the letters patent granted to the Chancellor of Lichfield do not in terms confer the authority of admitting whomsoever he may think fit to practise is evident on inspection, but there is reserved in that instrument to the bishop the power of deciding for himself whether a proctor once admitted shall be deprived of his office; (a) this reservation I cannot but think does to a certain degree imply that it is a part of the right and privilege of the bishop to determine also the question of admission. But be that as it may, the decision at which this Court may arrive, either to reverse or affirm the order of the chancellor, must depend upon what has been the practice at Lichfield. There is no universal rule by which Ecclesiastical Courts are governed in the admission of proctors. (b) In some Courts there are special commissions issued at the fiat of the bishop for the admission; in some they are appointed by the Judge, with the approbation of the bishop; in some the bishop issues general [745] orders for the admission; in others there are certain qualifications required, without which the admission cannot take place. In this Court we know that there is a special commission issued in every case when a proctor is to be admitted; he is, after his admission, entitled to practise in all the Ecclesiastical Courts, but prior to his admission he states in his petition that he has served a proctor of this Court for the period of seven years, and that he is actually a notary public. That there should be some qualification—some knowledge of the principles and practice on the part of the candidate—cannot be deemed an unreasonable requisite. It can hardly be contended that a Judge is entitled to say, I will admit whom I please. The allegation before the Court does allege certain requisites, and that those requisites have not been complied with in the instance of the respondents; the question is whether those averments are in the main established by the evidence.

(a) The only mention of proctors in the letters patent is contained in one of the clauses of reservation in the words following:—"It shall not be lawful for the above-mentioned James Thomas Law to remove from or deprive of their office of proctor any proctors, or any person exercising the office of a proctor of the said Court, that has or have been lawfully admitted and constituted, or shall be so admitted or constituted hereafter, without the consent and approbation of ourselves and our successors, Bishop of Lichfield and Coventry, first had and granted."

(b) See the report of the commissioners appointed to inquire into the practice and jurisdiction of the Ecclesiastical Courts. Appendix B, Part III., answers 12 and 13 to the fourth set of questions.

Now, two witnesses have been examined; the first in order is Mr. John Mott, who, on the first article, states, "I have practised as a proctor in the Court of Lichfield since the year 1806, and have held the situation of deputy registrar of the Court since the year 1826. I was appointed to the last mentioned office on the death of my father, William Mott, who had, as I believe, held that office since about the year 1780. I was articulated as a clerk to my father, and served him for the period of five years previous to my being admitted into the number of the procurators practising in the said Court." . . . "The number of practitioners in the Court is but small; during the whole of my [746] experience it has been so. I am, from my long connexion with the Court, fully competent to depose to its usages in respect to the admission of its practitioners. I depose that, as far as my experience of the Court extends, I have always known it to be the invariable custom and practice, which practice exists still, to require previous to the admission of a proctor a service of at least five years, under articles of clerkship to one of the practitioners of the Court; all the practitioners are notaries public. My father was a proctor and notary." . . . "All the present practitioners have served to my knowledge the required period to one or other of its proctors and notaries. It is and always has been required that, previous to any admission of an articulated clerk as a proctor (and none but articulated clerks can be so admitted), a certificate should be exhibited from the proctor and notary himself, and from some other proctor of the fact of such service." . . . "I have now with me, which I produce to the examiner, three of such certificates bearing date respectively in the years 1806, 1837 and 1842, and all of them signed in addition, either by the principal surrogate or deputy registrar." . . . "The only other instance of an admission to the office of proctor that has happened in my time is one where the certificate is missing, but," . . . "of my own knowledge as deputy registrar I am sure the certificate was produced." . . . "The other certificates above mentioned were filed, and it is the practice to file them in the registry. I should add that my own certificate is also missing, but of that having been produced at the time" . . . "I depose of my own knowledge." . . . "From this long and invariable [747] practice, and from my not having been able to discover in the records of the Court, which I have searched for this purpose, any trace of an admission of a proctor recorded as having occurred without such previous service I consider that no person whatsoever of right ought to be, or can be, lawfully admitted as a proctor of the Court without such service and certificate. As neither such service nor certificate was alleged or produced on occasion of the pretended admissions of the respondents in this cause, I consider such their admission to be as articulate, pretended only, and not legal."

On the second article he states, "As deputy registrar I have the custody of, and constant access to, all the Court books and records, and I have searched the same for more than a century last past, and I do not find any one of the records relating to the admissions of the various persons, as proctors, wherein it is either expressed, or in any way intimated, that such persons were so admitted without a previous service of the usual period, or without the usual certificate in proof thereof, and therefore, although I am bound in fairness to state that it does not seem to have been the practice in former times minutely to record the fact of the service, or clerkship, or the production of the certificate, but only the fact of the admission itself, I have no doubt in my own mind that the service and the certificate as truly and invariably preceded the admission then, as they have done, as I have deposed, in the long course of my own experience."

On cross-examination the witness states the number of proctors at this time admitted at Lichfield is three, including himself; that the appellant is his [748] nephew and son-in-law, that he has a son under articles serving to himself, and that as deputy registrar he does not conduct suits, but confines himself to common form business.

Mr. Mott then proves that he and the other two proctors now in practice were admitted after five years' service, and that he has a son serving under articles. Mr. Walthew, a clerk in the registry of forty-two years' standing, confirms, as far as his experience goes, Mr. Mott's statement. On behalf of the respondents there is nothing shewn—nothing produced from which it can be collected that there has been any other practice; there is merely an absence of recital in the petitions produced that the parties referred to in them served under articles of clerkship; notwithstanding Mr. Law was appointed chancellor as far back as the year 1821, there is no instance mentioned of his having admitted a person who had not served under articles. I do

not mean to say that a custom, as to service under articles, has in the strictest sense of the term been established; but I think the facts deposed to, in the absence of any evidence to the contrary, sufficiently prove the alleged practice, otherwise why should Mr. Mott and the other two gentlemen have served for five years and, moreover, have paid stamp duties on their admission to a considerable amount, if not also, in some instances, high premiums, if such a course was not necessary to qualify them for admission.

The respondents are no doubt most respectable gentlemen, and well qualified to discharge their duties as solicitors, but there is nothing in their case from which I can presume they have a knowledge of the law and practice of the Ecclesiastical Courts, [749] and even were that established, I do not find that any inconvenience from the circumstance of there not existing a larger number of proctors has arisen to justify me, if I had the power to disturb the practice and usage of the Court at Lichfield.

In the absence of evidence to the contrary, I consider there is quite sufficient before the Court to justify me in assuming that it has been and still is the invariable practice that those who claim to be admitted as proctors at Lichfield shall have previously served under articles a practitioner in that Court. Upon these grounds I am of opinion that the decree of the chancellor cannot be sustained; I pronounce for the appeal, reverse the decree, retain the principal cause, and reject the petitions of the respondents made in the Court below. As this is a case *primæ impressionis*, it is not one for costs.

IN THE GOODS OF MARTHA BEADLE, Widow, Deceased. Prerogative Court, May 5th, 1849.—A will, with a testimonium clause ending in the middle of a line of which the remainder was left blank, and with an attestation clause following under that line, at an equal distance with the rest of the writing, and extending over the width of the page, beneath the last line of which attestation clause, at a distance of two inches eight-tenths, the signature of the testatrix stood, held to be signed “at the foot or end.”—The residue of the property was not disposed of.

[S. C. 7 Notes of Cases, 43; 13 Jur. 478].

Motion.

Martha Beadle died on the 21st January, 1849, leaving a will, bearing date the 20th November, 1848, and thereof appointed an executor, but did not dispose of the residue of her property.

[750] The will was written on foolscap paper, and occupied the first two pages, and also a part of the third page. The third page commenced with a clause of revocation, followed by a testimonium clause, which together occupied four-and-a-half lines; the remainder of the fifth line was in blank. There then followed at an equal distance with the other lines an attestation clause, extending over the width of the page and occupying five lines, beneath the last line of which, at a distance of $2\frac{8}{10}$ inches, was placed the signature of the testatrix, and under that the signatures of the attesting witnesses; to the left of the signature of the testatrix, but rather above it, was the word “witnesses.”

Bayford moved for probate of the paper.

Judgment—*Sir Herbert Jenner Fust*. Notwithstanding the residue is not disposed of, and there is just space enough for the signature of the testatrix after the last word of the testimonium clause, the question is whether this will is not signed by the testatrix in compliance with the law. Had she signed immediately under the attestation clause, that would have been sufficient. (a) It seems to me that if I am to construe the act according to the principles of common sense, I should be straining the act to say that the signature of the testatrix in this case is not sufficient. I hold this to be a subscription by the testatrix, at the foot or end, and that the form of the law has been duly complied with.

[751] IN THE GOODS OF MARY BAULY, Widow, Deceased. Prerogative Court, May 12th, 1849.—A will, written on a sheet of letter paper, and containing on the first page a disposition of the entire property, an appointment of executors, and a testimonium clause extending almost to the very verge of the bottom of

(a) See *In the Goods of William Harris, Deceased*, ante, p. 703.

that page, with the second page in blank, and at the top of the third page the signature of the testatrix, followed by an imperfect attestation clause, and the names of two witnesses, held to be signed at the "end."

Motion.

Mary Bauly died on the 7th April, 1849, leaving a will, bearing date the 8th September, 1841, in her own handwriting.

The will was written on a sheet of letter paper, and contained on the first page a disposition of all her property, and an appointment of executors, after which followed a testimonium clause, which carried the writing so near to the foot of that page that the signature of the testatrix could not by possibility have been there inserted, except in very small writing. The second page was left in blank. At the top of the third page the testatrix placed her name, and then followed an imperfect attestation clause, with the signatures of two witnesses.

Twiss moved for probate; he cited *In the Goods of Gore, Deceased* (3 Curt. 758).

Judgment—*Sir Herbert Jenner Fust*. There is nothing to lead to the supposition that the testatrix intended to add any thing more to her will. Wills are commonly, when drawn in a solicitor's office, left with the backs of the sheets or pages in blank. If the signature of the testatrix in this case is not valid, I know not where it could have been placed. I decree probate.

[752] QUAIT AND SNOWDEN *against* MANBY. Prerogative Court, May 26th, 1849.

—The conclusion of a cause rescinded after publication to allow a party, taken by surprise, to plead and prove an exhibit to be in the handwriting of an adverse party, one of whose witnesses could not depose thereto on cross-examination.

[S. C. 7 Notes of Cases, 58.]

Motion.

This was a cause of granting probate of a will of James Snowden, bearing date the 29th April, 1848, promoted by Emery Alexander Quait, and James Snowden (the son), two of the executors therein named, against William Edward Manby, one of the executors named in a will of the deceased, bearing date the 4th February 1847.

The will of 1848 was propounded in a conditit; the two attesting witnesses were examined and cross-examined, and publication passed, on which it appeared that one of those witnesses, to whom an exhibit annexed to the interrogatories and purporting to be in the handwriting of one of the producents was shewn, was, in answer to a question, unable to depose to the handwriting.

Harding on behalf of the ministrant (Mr. Manby) moved to rescind the conclusion of the cause, in order to plead the exhibit above-mentioned to be in the handwriting of one of the producents.

Addams opposed the motion, on the ground that the will propounded was fully proved without the aid of the exhibit.

Judgment—*Sir Herbert Jenner Fust*. It is impossible for me, not having seen the evidence, to say whether the exhibit in question is [753] or is not material to the issue of the cause. Assuming there was reason to suppose that the handwriting would have been proved, clearly the ministrant has been taken by surprise. Though there are objections to pleading after publication, a cause is never concluded against the Judge, who is always unwilling to exclude written testimony. No inconvenience can arise to the opposite party, unless he choose to take on himself the responsibility of the expense of the proof, by refusing to admit his own handwriting. I am of opinion I must grant this motion.

IN THE GOODS OF ELINOR HELLINGS, Widow, Deceased. Prerogative Court, June 5th, 1849.—A will, completely filling two sides of a sheet of paper, with a space of four inches blank on the third page, after which was placed the signature of the testatrix, held, as the testatrix was blind, to have been sufficiently signed by her.

[S. C. 13 Jur. 568.]

Motion.

Elinor Hellings died on the 17th March, 1849, leaving a brother and two sisters her only next of kin.

The will of the deceased, which was executed the day before her death, filled two sides of a foolscap sheet of paper; the second side ended with a testimonium clause,

beneath which there was a space of two-tenths only of an inch ; the upper part of the third page was blank ; four inches from the top of that page the signature of the testatrix stood, and beneath that an attestation clause, with the names of the two subscribing witnesses.

The person who prepared the will swore that the [754] testatrix was at the time of her decease upwards of seventy years of age, was totally blind, and had been so for two or three years prior to her death ; that a day or two before her death she requested him to draw out and prepare her will, which he accordingly did ; and in order that she (being blind) might have full space for signing her name, he left a larger blank or space on the third page than he otherwise would have done for the purpose, and also wrote the clause of attestation low down as above described. He further swore that, having so drawn out and written the will, and the clause of attestation, he took the will to the testatrix for execution, but previously thereto he read the same all over to her audibly and distinctly, when she said, "the will was correct and as she wished it, and that she would sign her name," which she accordingly did in the presence of the subscribing witnesses, who thereon signed their names.

Addams, on the above statement, moved for probate of the paper as sufficiently signed by the testatrix.

Judgment—*Sir Herbert Jenner Fust*. Had the testatrix been able to see, I must, in accordance with the decision of the Judicial Committee of the Privy Council in *Smee v. Bryer*, have rejected this motion, but I think it is but reasonable to make a distinction when a testator is blind. I allow the motion for probate.

[755] IN THE GOODS OF ANN STANDLEY, Spinster, Deceased. Prerogative Court, June 14th, 1849.—A will, having the signature of the testatrix immediately after the attestation clause, and a dispositive clause written partly below that signature, held to be entitled to probate without that clause, as it was somewhat doubtful when that clause was written, and as, with it included as part of the will, the will would not be signed at the foot or end.

[S. C. 7 Notes of Cases, 69.]

Motion.

Ann Standley died on the 26th December, 1848, leaving a will, dated the 29th May preceding, of which executors were appointed, and the residue of the property disposed of.

The will was written on a sheet of foolscap paper. The entire disposition of the property, together with the appointment of executors, were contained on the first page, which ended with the words "car^d over ;" that page was completely filled, so as to render it an impossibility for the testatrix to have signed her name there. At the top of the second page there was an attestation clause, and under it were placed the signature of the testatrix, and an addition to the will thus :—

"I bequeath my bed, bolster and two pillows, and dimity bed furniture, counterpane, and window curtains to Mrs. Ann Roaks, my cloathes I leave to Hannah Barrett and her two sisters, and to Ester Barrett I leave my tea caddy.

ANN STANDLEY, (I.S.)
"William Hampton, baker, Clarence Street (I.S.) ; Andrew Dunlop, victualler, Clarence Street (I.S.), Witnesses to the above."

[756] The signature of the testatrix stood immediately in a line with the word "pillows ;" and the last line of the addition, ending with the word "caddy," stood $2\frac{5}{16}$ inches below the signature of the testatrix.

With respect to the above addition, William Hampton swore it was not as he verily believed written before the will was executed ; A. Dunlop swore that he had no recollection, and could not form a belief, whether the addition was or was not written at the time of the execution, but he swore that the will was sealed up, and placed in a drawer by the testatrix, before he and his fellow-witnesses left the room, and that he had no recollection of any words having been written in his presence. The writer of the will, who was also present at the execution, swore that he remembered "that by the direction of the deceased, who said that she wished such addition to be made, he wrote the said words upon the occasion of the execution of the said will, and before the same was sealed up and put away (as before deposed to), from which time he

never saw the same until after the deceased's death, and that the said words, as he verily believed, were so written before the said will was signed by the said deceased and the witnesses."

Haggard moved for probate of the will, including the addition written under the attestation clause.

Judgment—Sir Herbert Jenner Fust. I am of opinion that there is a good execution of the will, that the signature of the testatrix, immediately following the attestation clause, is at the [757] foot or end, but I cannot grant probate of the addition written beneath the attestation clause, though it is possible, and perhaps probable, it was written before the execution, for, were it to form a part of the will, the signature of the testatrix would not be at the foot or end. I decree probate without the addition.

IN THE GOODS OF EDWARD CHAMNEY, Deceased. Prerogative Court, June 14th, 1849.—The attesting witnesses, instead of signing their names near to that of the testator on the first side of a sheet of paper where the will ended, and where there was ample space for their signatures, signed under an endorsement on the fourth page; such attestation held to be good, as the Wills' Act does not specify where they are to sign.

[S. C. 7 Notes of Cases, 70.]

Motion.

Edward Chamney died on the 5th April, 1849, leaving a will in his own handwriting, bearing date the 26th January, 1849, by which he bequeathed the whole of his property to his wife for life, and after her death to his son, but did not appoint an executor.

The will was written on one side of a sheet of letter paper, and signed on that side by the testator at the foot or end of the will; there was ample space left for the signatures of the attesting witnesses, but instead of signing their names near to that of the testator, they added them to an endorsement written by the testator on the fourth side in the following words:—"The last will and testament of Edward Chamney, the 26th day of January, 1849.

"Witness—John Foulds, Jas. Irving."

By the affidavit of one of the attesting witnesses it appeared the will was, in respect of the required [758] presence of the testator and the attesting witnesses, duly executed.

After the death of the testator his widow took administration of the effects of the deceased as dead intestate on the representation made to her by a broker that the will was invalid, and of no effect whatever, in consequence of the witnesses not having signed on the first page. From information subsequently received, she was led to doubt the correctness of that opinion, and the question was brought to the notice of the Court.

Dodson, jun., moved the Court to revoke the letters of administration previously granted, and to decree letters of administration with the will annexed to the widow as the universal legatee for life.

Judgment—Sir Herbert Jenner Fust. The witness, who has made an affidavit, deposes to a due execution on the part of the testator. The only question is whether the witnesses have made a good attestation. The statute does not point out the place where the witnesses are to sign. In the absence of such a direction I am not prepared to say they have not duly subscribed the will by signing in the manner they have. I am of opinion that their attestation is good. I therefore revoke the outstanding administration, and decree administration with the will annexed to the widow as universal legatee for life.

[759] WARD AND CODD *against* DEY. Prerogative Court, Nov. 24th and Nov. 28th, 1846; June 19th, 1849.—A marriage in an interest suit, pleaded to have been lawfully solemnized in a British possession, according to the rights and ceremonies of the Church of England, by a priest in holy orders of that Church, in the parish church of which he then was the minister, in pursuance of a license for that purpose first duly obtained, held to be *prima facie* valid, and to be sufficiently pleaded; and that it was for the opposing party to plead and prove the invalidity of the marriage.—The marriage was subsequently pleaded to be

invalid, as had contrary to the *lex loci*, but after evidence taken the Court pronounced for the marriage with costs.

[S. C. 7 Notes of Cases, 96.]

This was an interest cause in which the executors, Messrs. Ward and Codd, named in a will bearing date the 7th June, 1845, prayed probate thereof. The testatrix, who died on the 18th June, 1845, described herself, at the commencement of the will, as "Shirley Elizabeth Fraser, formerly of Demarara, in the West Indies, but now residing in the parish of Lambeth, in the county of Surry, spinster:" she also signed the will in the name of "Fraser." An appearance was given for William Dey, who was alleged to be the lawful husband (a) of the testatrix; and, on his interest being denied by the executors, it was propounded in an allegation, consisting of four articles in substance as follows:—

First. The fact of the marriage of William Dey, then a bachelor, with the party deceased, then a spinster, on the 10th November, 1837, by license, at the parish church of Castries, in the island of St. Lucia, according to the rites and ceremonies of the Church of England, by the officiating minister of the said parish, a priest in holy orders of the Church of England, and the entry of the marriage in the register book of that parish.

Second. Exhibited in supply of proof a copy of the entry (b) of the marriage in the register book [760] of marriages of the said parish of Castries, and pleaded the identity of the parties.

Third. The cohabitation of the parties and the consummation of the marriage; their cohabitation, first at Barbadoes, afterwards at Demarara, until July, 1838, when Mrs. Dey left her husband, and their reputation as husband and wife.

Fourth. The concluding article, in which it was prayed that letters of administration of the goods of the deceased be granted to William Dey, as the lawful husband.

The admission of the allegation was opposed.

Nov. 24th, 1846.—Addams in opposition. Firstly. It is not enough that a fact of marriage is pleaded; when the question at issue is the validity of a foreign marriage, the foreign law must be pleaded, particularly when a party is called on to plead to interest. *Steadman v. Powell* (1 Add. 58). In *Montague v. Montague* (2 Add. 375) the law of Scotland was pleaded; so in other cases. The marriage laws of St. Lucia and England are not the same (1 Burge, Col. Law, 176); again, they differ from the law of Demarara (*ibid.* 174), the place of the domicile. Had the parties to the present marriage been domiciled in England, and there had been a difficulty in conforming to the law of St. Lucia, the marriage might have been valid, *Ruding* [761] v. *Smith* (2 Hagg. Con. 371). The marriage in this instance must be pleaded, and proved to be good according to the *lex loci*. Secondly, a copy of the entry of the marriage is exhibited, but before that can be received it must be shewn that the registers are kept by authority (1 Curt. 764-7).

Waddilove on the same side cited in addition, as to the first point, *Herbert v. Herbert* (2 Hagg. Con. 271); *Scrimshire v. Scrimshire* (*ibid.* 395); *Swift v. Kelly* (4 Hagg. Ecc. 139); and *Lloyd v. Petitjean* (2 Curt. 251); on the second point, *Conway v. Beazley* (3 Hagg. Ecc. 651).

Dodson, Q. A., in support of the allegation. Firstly. We have *primâ facie* done our duty, by pleading that a lawful marriage was celebrated, *Steadman v. Powell* (1 And. 58); it is for the other side to shew the contrary. The doctrine as to foreign marriages does not apply here; there is a clear distinction between a marriage in a foreign country and in a British colony; the rule is not the same. If British subjects marry in a British colony, in accordance with the law as it stood before the passing

(a) There was no mention in the will of William Dey, or of the circumstance of the testatrix having ever been married.

(b) The following is a copy of the entry:—"William Dey, of the colony of Demarara, and Shirley Elizabeth Fraser, spinster, of the same colony, were married in this church by license from his Excellency Thomas Bunbury, Esquire, Colonel, administering the government, this tenth day of November, in the year of our Lord one thousand eight hundred and thirty-seven.—By me,

"SAMUEL ATHILL FARR,
"Officiating Minister of Castries," &c.

of statute 26 Geo. II. c. 33, the marriage is good. It was not necessary that it should be set forth that this marriage was by license from the governor. Even in respect to the proof of a foreign marriage Dr. Lushington observed, in 1836, in *Duncan v. Duncan* (2 M. L. Mag. 612), "When the libel was brought in, there was no attempt to impeach the validity of the marriage; on the contrary, the fact [762] of the marriage was admitted. If it were absolutely necessary, in all cases of this description, where the marriage was in a foreign country, that I must have actual and direct proof that it was according to the *lex loci*" . . . "it would lead to considerable inconvenience" . . . "it would amount pretty nearly to a denial of justice. I do not apprehend that such strictness of proof is required." Secondly. There is public authority for keeping parish registers, namely, Can. 70; consequently an examined copy is sufficient.

Jenner on same side, cited *Lautor v. Teesdale* (8 Taunt. 830), as resembling this case.

Addams in reply. No authority was adduced on the other side for the statement "that a marriage had in a British colony, according to the rites of the Church of England, is good;" Lord Stowell did not go that length in *Ruding v. Smith*.

Cur. adv. vult.

Nov. 28th.—*Judgment*—Sir Herbert Jenner *Fust*. I have looked into the cases referred to in argument, and I find most of them respect suits of nullity of marriage. The marriage in the present instance is stated to have been solemnized between two British subjects, in a British colony, according to the rites and ceremonies of the Church of England, by one of its ministers, who is the officiating minister of the parish where the ceremony took place. This, *prima facie*, must be taken to be a [763] valid marriage; it is for the party alleging the contrary to plead and prove that it is not. I cannot, on a mere suggestion that the marriage is not valid according to the law of St. Lucia, undertake to reject this allegation; I must, therefore, admit it to proof.

On behalf of the executors, an allegation was admitted without opposition in substance as follows:—

First article. That the party deceased was born on the 1st July, 1823, at Demarara—that her mother was Elizabeth le Blane, spinster, and her reputed father was . . . both of that colony, and that from the time of her birth she remained in and never quitted Demarara until the time, and under the circumstances, thereafter pleaded.

Second. That in November, 1837, the deceased, then little more than thirteen years of age, was prevailed upon by William Dey, a journeyman cooper at Demarara, of which he was a native and domiciled inhabitant, to leave her mother, in whose house and under whose protection she was residing, and to embark with him on board a sloop at such time lying in the river at Demarara, and which immediately put to sea, and after a few days' sail reached St. Lucia, when and where they were in fact, but not legally, married.

Third. That by the laws and ordinances in force, amongst others, for the regulation of marriages at St. Lucia, at the time the marriage in question was had, no marriage in general could be contracted [764] there, so as to be good and valid in law, if contracted without due publication of banns first made on three several occasions (feast days), at competent intervals, unless dispensed with for some urgent and lawful cause at the request of the principal and nearest relations of the contracting parties, and who, in that case, should have been married in the presence of four at least credible witnesses and without the consent first had and obtained of the mother of the woman, if under the age of twenty-five and illegitimate. That the marriage in question was had without any publication whatever of banns—that such publication was not dispensed with at the request of the principal and nearest, or any, relations of the contracting parties—that they were not married in the presence of four witnesses, and that the consent of the mother of Mrs. Dey, at that time under the age of twenty-five and illegitimate, was not first obtained.

Fourth. That by the laws and ordinances in force, amongst others, for the regulation of marriages in Demarara, at the time the marriage in question was had, no marriage in general could be contracted so as to be valid without due publication of banns on three succeeding Sundays, unless dispensed with for weighty reasons assigned at the Court-house, or church of the place of domicile, or residence of the contracting parties, or without the consent first obtained of the mother of the woman, if under the age of twenty-one years and illegitimate. That the marriage in question was had without any publication of banns (such publication, moreover, not dispensed with for weighty or any other reasons assigned), and without the consent

first obtained [765] of her mother, she being under the age of twenty-one years and illegitimate.

Fifth. That inasmuch as the marriage (very shortly after which the parties finally separated, and never after cohabited, or mutually acknowledged each other as husband and wife) was so had or contracted as to be valid, neither according to the law of the place wherein it was contracted, nor according to the law of the place of the domicile of the contracting parties at the time, Mr. Dey, by proving the marriage in manner as pleaded in his allegation, will not have proved himself to be the lawful husband of the deceased.

A further allegation in behalf of W. Dey was, after opposition, admitted in substance as follows:—

First article. That for some time prior to November, 1837, W. Dey, with the approbation of the mother of the deceased, paid his addresses to the deceased, who received them and agreed to be married to him; that the preparations for leaving Demarara for their marriage were made with the full consent, privity and concurrence of the deceased, as she declared both prior to and after her marriage; that the deceased had left the residence of her mother and sought the protection of other persons some time prior to her departure from Demarara, without reference to her engagement to be married; that she was not prevailed upon to embark on board the vessel to St. Lucia in November, 1837, [766] but, on the contrary, she embarked of her own free will, and that they arrived at St. Lucia on the 8th November, two days before they were married.

Second. That after their marriage the parties proceeded together to Barbadoes, from which place they returned in January, 1838, to Demarara, where they were received and acknowledged, as well by the mother of the deceased as others, as lawful husband and wife.

Third. That by the laws and ordinances for the regulation of marriages at St. Lucia, at the time of the marriage in question, a marriage between Protestants by license from the governor for the time being, by a minister in holy orders of the Church of England, in the presence of two witnesses, is a valid marriage without publication of banns, or the consent, or any of the formalities set forth in the third article of the adverse allegation—that at the time of the marriage in question Mr. and Mrs. Dey were respectively Protestants, and that the marriage as pleaded in Mr. Dey's former allegation is valid.

Fourth. That whatever formalities may have been required, according to the laws and ordinances of Demarara, for the due performance and validity of marriages in that colony between natives, a marriage solemnized according to the laws, usages, and customs of the place wherein it was solemnized and valid according to such laws, &c., is good and valid, and that the marriage in question having been solemnized at St. Lucia according to the laws, &c. of the said island, is good and valid.

Four witnesses were examined in behalf of the executors, Messrs. Ward and Codd, namely, John [767] Reddie, Esq., late Chief Justice of St. Lucia; Thomas Norton, Esq., late first puisne Judge in the colony of British Guiana; Gabriel Agostini and Ellis Henry Bent, late barristers at St. Lucia. They deposed to the general law as pleaded in the third, fourth, and fifth articles of that allegation, but they did not negative the power of dispensation, they admitted that a power of dispensation in some way existed.

Thirteen witnesses were examined in foreign parts on the two allegations admitted in behalf of William Dey, of which number were Louis la Caze, Chief Justice of St. Lucia, and John Grey Porter Atthill, Attorney-General of the same island. They deposed to the power of the governor of St. Lucia to grant a license, and to the validity of a marriage had in consequence thereof, in the manner as pleaded in the third article of W. Dey's second allegation.

June 19th, 1849.—Dodson, Q. A., and Jenner for William Dey.

Addams and Twiss for the executors. The Court, after observing that the right of the deceased to make a will depended on the validity or invalidity of the marriage as alleged, for of the fact of marriage there was no dispute, proceeded to consider the evidence adduced in support of the law as pleaded; and, after having examined the evidence in detail on the one side and on the other, without entering into the abstract question of the effect of a marriage had not in accordance with the *lex loci*, held that W. Dey had proved his case, and pronounced for the marriage with costs.

[768] IN THE GOODS OF WILLIAM BAYARD, Deceased. Prerogative Court, June 22nd, 1849.—A chain of representation is not broken by a surviving executor, who afterwards died, leaving executors, having taken a grant of administration with will annexed *de bonis non* by his attorneys alone, and not having himself proved the will. Such administration refused to one of the residuary legatees substituted.

[S. C. 7 Notes of Cases, 117; 13 Jur. 664.]
Motion.

The deceased by his will, with thirty-one codicils thereto, appointed his wife and four of his sons, together with his brother, and R. R., executors, and therein named his children, five sons and three of his daughters, residuary legatees, and his daughter A. J. (wife of B. J.), afterwards widow, residuary legatee for life, and substituted all and every her child and children residuary legatees, in respect to her share after her decease.

Two of the sons, who were two of the executors, died in the lifetime of the testator.

In March, 1805, probate of the said will and codicils was granted by the Prerogative Court to the testator's brother and R. R., then two of the surviving executors; a power was reserved for a like grant to the widow and two sons, the other surviving executors; but the widow and one of such sons afterwards died without proving the will.

The testator's brother and R. R., having for some time intermeddled in the goods of the testator, afterwards died, leaving a part thereof unadministered.

In January, 1829, letters of administration with the said will and codicils annexed, of the unadministered effects of the said testator, were granted by the Prerogative Court to two persons as the lawful attorneys of S. V. Bayard, the son, and only [769] surviving executor named in the will, who was then residing in Nova Scotia.

The said S. V. B. died in Nova Scotia the 24th May, 1832, whereby the said letters of administration, so granted to his attorneys, ceased and expired; but some of the goods of the original testator were then also left unadministered.

S. V. B. left a will bearing date the 21st March, 1828, and thereof appointed his wife and his sons executors, all resident in New Brunswick, who, in June, 1832, proved that will in Nova Scotia; but they did not and have not as yet proved it in the Prerogative Court.

All the residuary legatees, and also the residuary legatee for life, named in the will of William Bayard, were dead, and there was no representative of him under the authority of this Court. There was due to the estate of W. B. a sum of £1961 3¼ per cent. Bank Annuities, with accumulations thereon, to obtain payment of which a legal representative of the testator W. B. was required.

Jenner, on behalf of one of the children of A. J., widow, deceased, whilst living the residuary legatee for life named in the will, and, as such, one of the residuary legatees substituted in the will of William Bayard, moved for administration, with the will and codicils annexed, of the goods of W. B., twice left unadministered, on the supposition that the chain of executorship was broken in consequence of the last executor (S. V. B.) not having himself proved the will, but by his attorneys only.

[770] *Judgment*—*Sir Herbert Jenner Fust*. There have been cases, I understand, similar to the present, in which a grant to an attorney of an executor has not by the executor's death, when he has appointed executors, been deemed to break the chain of representation. My impression is that a will proved by the attorney of an executor is the same thing as if actually proved by himself. I confess it seems to me impossible that I can at present dispose of the interest of absent parties by assuming the chain of executorship broken and decreeing the administration to one of the residuary legatees substituted. I must reject the motion at present.

After the lapse of some months the executors of the surviving executor (S. V. B.) gave a power of attorney to a party in London to take the grant.

CULLUM AND CULLUM *against* SEYMOUR. Prerogative Court, June 22nd, 1849.—Motion for a party in a cause, in whose joint behalf an allegation responsive had been admitted, to be dismissed, in order to his wife being examined to a material averment in the plea, rejected.

[S. C. 7 Notes of Cases, 114; 13 Jur. 711.]
Motion.

Anthony Seymour died on the 30th November, 1848, leaving, amongst other testamentary papers, a will bearing date the 27th June, 1848, of which Messrs. Cullum were appointed executors, and also a will bearing date the 1st September, 1848, of which the deceased's wife was appointed the executor.

Messrs. Cullum, who had been sworn as the ex-[771]-ecutors of the will of the 27th June, 1848, opposed the will of the 1st September, 1848, which was propounded by Mrs. Seymour.

On behalf of Mrs. Seymour an allegation was admitted and witnesses were examined in support thereof; and on behalf of Messrs. Cullum a responsive allegation was given in, which was opposed and directed to be reformed; on the 14th June, 1849, the same was admitted as reformed.

Harding, on the 22nd June, 1849, moved that Mr. C., senior, on his renunciation of the executorship, be dismissed from being a party in the cause, in order that his wife might be examined on the eleventh article of the responsive allegation. He argued that, though Mrs. C. was deeply interested, all objections, which formerly arose therefrom as to competency, are now too late—that the Legislature (6 & 7 Vict. c. 85) has determined that no amount of interest forms an obstacle.

Bayford contra. To say nothing of the extent of the interest of Mr. C., the application for his dismissal is now too late. In all the cases in which a party to a suit has been dismissed that party had not materially acted in the cause; see *Arnold v. Earl and Newbee* (2 Lee, 380); *Punchard v. Weger* (1 Phill. 212); and *Sanders v. Wigston* (ante, p. 460). In the present instance Mr. C. has materially acted; he has rendered himself liable to costs.

[772] *Judgment*—*Sir Herbert Jenner Fust*. Certainly by the statute referred to, the law as it respects the competency of witnesses is very much altered, but that statute does not here apply, as the present question is not one of interest; it depends on another consideration. In all the instances of which I am aware, a party who has been dismissed from a suit had not taken any important step in the cause, but in the present case Mr. C., senior, has joined his co-executor in every act done. He has given in an allegation in opposition to the will propounded—he has defended that allegation which was opposed, and he has been a party to its reformation; moreover, he is clearly entitled to the answers of the opposite party. Were I to grant this application I should go infinitely beyond any other case. I cannot in justice, in reference to the security for costs, grant this motion; and am clearly of opinion I am bound to reject it.

PLAYNE *against* SCRIVEN. Prerogative Court, June 28th, 1849.—An attesting witness to a will having on the re-execution thereof traced over his previous signature with a dry pen held not to have subscribed, but only to have acknowledged his signature, which is not sufficient under the statute. The statute requires an act to be done by the witnesses which shall be apparent on the face of the paper.

[S. C. 7 Notes of Cases, 122; 13 Jur. 712. *Appellu, In the Goods of Maddock*, 1874, L. R. 3 P. & D. 170.]

This was a cause of proving the last will, bearing date the 25th June, 1845, of Elizabeth Keen, who died on the 10th January, 1849. The suit was promoted by Edwyn Playne, one of the executors, against William Scriven, the other executor named in the will. The will purported to be attested by [773] three witnesses, one of whose names was struck out with a pen. The matter was thus explained: Immediately after the due execution of the will, one of the attesting witnesses, Mr. H., observed to the testatrix that the legacy given in the will to the other attesting witness, Mrs. G., would in consequence of her having attested the will be void, whereupon he was directed by the testatrix to strike through with ink the signature of Mrs. G., which he did in their presence. The testatrix then requested him to procure the attendance of Mr. C., for the purpose of his being a witness to the re-execution, and when H. and C. attended for that purpose the testatrix produced her will and acknowledged her signature in their joint presence, after which H., with a dry pen, traced over his name previously subscribed, and C. subscribed his name, respectively, in the presence of the testatrix and of each other as witnesses, attesting the re-execution of the will.

The Court was moved three times to grant probate of the will, and on the third occasion a proxy was exhibited on behalf of Mrs. G., consenting that probate of the

will, as executed in the presence of herself and H. only, should be granted to the executors, but the Court refused the application, and directed the will to be propounded.

The above facts were set forth in plea, and the three witnesses, G., H., and C., were examined in support thereof—they fully supported the statement.

Jenner, in behalf of Playne, praying probate of the will as executed on the second occasion argued:—[774] The case of *Bailey v. Bellamy* (9 Dowl. P. C. 507), referred to on motion, turned on the construction of 1 & 2 Vict. c. 110, ss. 9 and 10, and differs materially from the construction to be put on section 9 of the Wills' Act. In the former statute, by the 9th section, a certain form is prescribed—"the attorney shall subscribe his name," and unless he do so, with certain other observances pointed out by the following section, the object intended is rendered invalid; whereas, by the Wills' Act, the attesting witnesses are not required to subscribe their names; moreover, there are no negative words as in sec. 10 of the other statute. Again, the Wills' Act does not prohibit an acknowledgment by a witness of his signature; to hold that an acknowledgment under that statute by a witness of his signature is not sufficient, the Court must of its own authority import negative words into the statute.

Deane for the executor opposing the prayer, on the various occasions on which the question was before the Court, cited or referred to *Bailey v. Bellamy*; *Moore v. King* (3 Curt. 243); *Powell on Devises*, 111 (Jarman's note); *Casement v. Fulton* (5 Moore's P. C. C. 140); *Christopher v. Christopher in Chancery* (in 1841, said not to be reported); and *Jones v. Dale*, commented on in *Sugden on Powers*, 242-3 (5th edit.).

Judgment—*Sir Herbert Jenner Fust*. By the Wills' Act, a testator may sign his name, [775] or acknowledge his signature in the presence of the witnesses present at the same time, and "such witnesses shall attest and shall subscribe," but no authority is given to them, as in the instance of the testator, to acknowledge their signatures previously made. The witnesses are to subscribe, in other words, they are required, I conceive, to do an act which shall be apparent on the face of the will. To pass over a signature previously made with a dry pen amounts, I think, to no more than an acknowledgment of a signature, which, in the case of a witness, has already been held not to be sufficient, *Moore v. King*. Saying and doing are not the same thing, and the case of *Bailey v. Bellamy*, cited, is not without weight on this question. I am of opinion that the attesting witness, H., did not, by tracing over his signature with a dry pen, "subscribe," as nothing in fact was written. I pronounce for the will as it was originally executed, without the name of the third witness, and without, of course, the obliteration. Costs out of the estate.

TRIBE *against* TRIBE AND OTHERS. Prerogative Court, June 22nd, July 3rd, and July 13th, 1849.—A will signed by the attesting witnesses in the same room where the testatrix lay in bed with the curtains closed, and her back to the attesting witnesses, who deposed to her utter inability to have turned herself so as to have drawn aside the curtains, held not to have been signed by the witnesses in the presence of the testatrix.

[S. C. 7 Notes of Cases, 132; 13 Jur. 793. Discussed, *Norton v. Bazett*, 1856, Deane, 264.]

This was a case of proving a will by mistake, bearing date the 22nd, but in fact executed on the 23rd, December, 1848, of Frances Tribe, who died on the 23rd December, 1848, promoted by a brother of the deceased and a legatee therein named, against a [776] nephew of the deceased, who was the sole executor named in a former will dated the 8th May, 1848, as well as the sole executor of the will propounded.

At the instance of the executor a decree was issued against the legatees named in the will of December, 1848, and all interested in distribution as the residue was undisposed of, calling on them to propound that will, otherwise to shew cause why probate of the will of May, 1848, should not be granted.

The allegation was admitted on the 22nd February, 1849, and on the 20th March Mary Tribe, a sister of the deceased, and a legatee named in the will propounded, was dismissed from the suit, in order that she might be examined as a witness; she had no interest under the earlier will.

The will in question was drawn by Mary Tribe, and executed about half-past

three o'clock of the morning of the 23rd December, 1848, half an hour after which the deceased became speechless; she died about four hours later.

The entire evidence established testamentary capacity, but shewed that Mary Tribe, the drawer of the will, was the active person, and that the deceased was almost passive. It was sworn by Mary Tribe that she read over the instrument to the deceased prior to the execution, but before so doing the other persons in the room, the attesting witnesses, were sent out.

The witnesses examined in support of the allegation were Mary Tribe, who drew the instrument, and was a party interested, and the two attesting witnesses, Jane Grevatt and Martha Davies.

At the argument, and likewise at the judgment, [777] two questions were discussed: first, whether there was satisfactory proof that the deceased knew the contents of the instrument propounded; and secondly, whether the instrument was attested according to the requisites of the statute.

The case is here reported in reference to the question of the due attestation only, in respect of which the following evidence was given:—

Mary Tribe deposed: . . . "I gave her" [the deceased] "the pen to sign; she asked for my glasses (my spectacles)—'Give me your glasses, Mary,' she said. I gave them to Martha Davies, who was standing next to her, and she handed them to my sister, who herself put them on. She then signed her name to the will under where I had written the finishing words; she so signed in the presence of myself and Mrs. Grevatt and Martha Davies; we all stood by the bed-side. The witnesses then signed the will; Martha Davies took it from her, and then turning round, but without having to move from the bed-side. The room being so small they signed it at the dressing-table which stood there. Mrs. Grevatt observed that she could not write, and so I told Martha Davies to write her name for her, and that she could put her mark at the end of it, and they did as I directed. When Martha Davies took the will from my sister to sign it, my sister said to Mrs. Grevatt, 'Remember your name is Grevatt, not Winchester.' It was in that way that I learned her name to be Grevatt. Martha Davies wrote her name and Mrs. Grevatt's to the will, and Mrs. G. put her mark to it severally in the presence of my sister and of each other. They signed within my sister's sight. I hear they [778] say that the curtains were closed, but it was no such thing; that I positively state."

Jane Grevatt deposed: . . . "When she" [Mary Tribe] "had finished writing, she said to Miss Davies and me, 'I'll thank you to leave the room while I read this to my sister; when I have done I'll call you.' We left the room. Miss D. went up stairs and put on her things, for she had come down undressed. We were out of the room about a quarter of an hour; Miss Mary then called us in. When we had come in she said to her sister, 'You must sign your hand to this piece of paper,' that was her expression. Miss Frances said, 'I will, if you'll support me.' We then raised her up in bed." . . . "Miss Frances then signed her name to the paper, Miss Mary shewed her where to sign it, and we were supporting her with the pillow behind her at the time, but she was not otherwise helped in signing her name. When she had signed the paper, she gave it back to her sister, and we laid her down again; she seemed very much exhausted. She so signed the paper in presence of Miss D. and myself; she could not have sat up to sign it if we had not been present supporting her as we did. Miss Mary then said to Miss D. and me, 'I want you to sign your names to this bit of paper for a witness,' and we did so. Miss D. at least wrote her name and my name also, because of my not being able to write, and then I made a cross. Miss D. and I so signed the paper in Miss Frances' presence, no doubt, so far as its being in the same room, but it was not where she could see us, for, as we had laid her down, her back was towards the table at which we signed; and if her face had been [779] turned our way, the curtains of her bed were that closed as would have prevented her seeing us at the table."

The witness spoke at different stages of her evidence to the deceased being sensible at the time of the execution. On the ninth interrogatory she stated: . . . "The deceased lay with her back to the table at which we signed. The night in question was excessively cold, and the bed curtains (the curtains of the bed in which the deceased lay dying) were kept closely drawn, as well to keep the cold as the glare of the candle from the deceased, during the whole time I and my fellow witness were putting our signatures to the paper. The deceased could not by possibility have seen

through the curtains, for they were lined, nor could she by possibility have so turned herself in bed unassisted as to have given herself the means of partially undrawing the curtains so as to have seen us sign the paper. She could not turn herself in the bed unassisted any part of that night."

The above version given by Jane Grevatt was supported by the other attesting witness, Martha Davies. As to the actual execution and attestation, Martha D. deposed: . . . "Miss Frances" [the testatrix] "signed the paper in the joint presence of Mrs. Grevatt and myself, and she was certainly present so far as being in the same room at the time I signed my name, and Mrs. Grevatt put her mark to the paper, but it was impossible that she could have seen us do it, for as we had laid her down in bed after her signing, she lay on one side with her face towards the door, looking therefore in a contrary direction from where we stood; and she was [780] then far too helpless to turn herself round to look; besides, the curtains of the bed, which were drawn, stood between us and her."

The evidence in chief was confirmed on the ninth interrogatory. . . . "The bed curtains were kept closely drawn, as well to keep out from her the cold as the glare of the candle, during the whole time that we were putting our signatures to the will. She could not by possibility have so turned herself in bed unassisted as to have given herself the means of partially undrawing either of the curtains so as by any possibility to have seen me and my fellow witness attest the will."

Harding and R. J. Phillimore argued that there was sufficient proof of the capacity of the testatrix.

Addams, in opposition to the will of December, 1848, after contending that there was no evidence to corroborate the drawer of the will, who was an interested witness, that the deceased knew and understood the contents of the paper propounded, argued that the paper was not duly attested within the meaning of the act. He contended that the case of *Newton and Thomas v. Clarke* (2 Curt. 320) would not apply; that in that case the testator might by an effort have seen the witnesses subscribe; that in the present instance that was impossible; that the bare subscribing the will by the witnesses in the same room did not necessarily imply it to be in a testator's presence; it might be in a corner of the room, in a clandestine and fraudulent way, *Longford* [781] v. *Eyre* (1 P. Wms. 740). Even if no fraud be perpetrated, the circumstances of a case must be considered; the size of the room must be taken into account; an attestation, for instance, in Westminster-hall, in the Long-room of the Customs'-house, or in the Rotunda of the Bank, would not of itself be sufficient; if attestation in the same room be set up, the onus probandi lies on the party propounding to shew the testator did or could have seen the transaction.

Harding and R. J. Phillimore in reply. Every case is distinguishable in minute circumstances. Were a Court to enter into trifling variations in every case, the result would be that no principle of law would be laid down. *Newton v. Clarke* did not make the law, but continued it; that case is only a formal decision under the Wills' Act; the law was settled under the Statute of Frauds in *Casson v. Dade* (1 Bro. C. C. 99). The present case cannot in principle be distinguished from *Newton v. Clarke*.

Cur. adv. vult.

July 13th.—*Judgment*—*Sir Herbert Jenner Fust*. . . . There is another question, namely, whether there has been a due compliance with the act. The witnesses are at variance in their statements. Mary Tribe, the drawer of the will, and an interested witness, swears the curtains of the bed in which the testatrix lay were not closed, and that the attesting witnesses signed in the testatrix's sight; [782] on the other hand, the attesting witnesses swear not only that the curtains were closed, but that it was from the circumstances they state physically impossible that the testatrix could have seen them sign. I must take the statement of the attesting witnesses to be the correct version; that not only were the curtains closed, but that had they not been closed, it was impossible, from the state in which the testatrix was, for her to have turned herself in her bed so as to have seen the witnesses sign. Under this state of circumstances what difference would there have been, on principle, if the witnesses had signed the will down stairs? The decision in *Newton v. Clarke* (2 Curt. 320) was, I consider, right; but were I to hold the attestation in the present case good, I should go infinitely beyond that case. I cannot consider that there has here been a due compliance with the requisites of the statute, consequently I pronounce against the will propounded, that of December, 1848; but beyond recommending the opposing party to pay the costs, I give no order respecting them.

[783] THOMSON AND BAXTER *against* HEMPENSTALL. Prerogative Court, March 13th, July 19th, 1849.—A testator having left several wills, by the last executed in 1844 revoked all former wills “except my will bearing date the 13th December, 1831, which relates exclusively to the reversion in fee of the Tong Castle Estate.” No will was found fully answering that description: the will of December 13th, 1831, revoked in 1835, did not relate “exclusively” to the reversion in fee of that estate; the only will which did relate “exclusively” to the reversion in fee of that estate bore date May 22nd, 1839. Held, upon construction and the state of testator’s family, that the will of 1831 was not revived, and that the will of 1839 was intended. Probate decreed of the will of 1844 alone, as the will of 1839, relating to real estate only, was not propounded.

[S. C. 7 Notes of Cases, 141; 13 Jur. 914. Distinguished, *Newton v. Newton*, 1861, 12 Ir. Ch. R. 132.]

George Durant, late of Tong Castle, in the county of Salop, Esq., died on the 29th November, 1844, possessed of personal estate of the value of about 22,500l., and of real estate estimated from 7000l. to 14,000l.; he was also entitled to the reversion in fee of, and in the Tong Castle estate, expectant upon the failure of issue of his late son, G. S. E. Durant.

On the death of the deceased, a great variety of testamentary papers was found, of which it is necessary to particularize the following only:—

A will executed on the 13th December, 1831, and revoked in 1835.

A will executed on the 22nd May, 1839.

A will executed on the 7th February, 1844.

In the will of the 7th February, 1844, which was the last executed by the testator, there is the following clause:—“And hereby revoking all former wills, codicils, and testamentary dispositions by me, at any time or times heretofore made (except my will, bearing date the thirteenth day of December, 1831, which relates exclusively to the reversion in fee of the Tong Castle Estate), I declare this to be my last and only will.”

No will was found among the many testamentary papers, fully answering to the description of the one referred to in the above recited clause, [784] but the two wills above particularized do so, each in part. The will of 1831 relates to the Tong Castle estate, but also disposes of all the rest of the testator’s real and personal estate; the will of 1839 relates exclusively to the reversion in fee of the Tong Castle estate, but bears a different date from that specified in the clause of revocation above cited.

Messrs. Thomson and Baxter, two of the executors named in the will of 1844, prayed probate of that will alone, and opposed the will of 1831. Mr. Hempenstall^(a)¹ propounded the said papers of 1844 and 1831 as together containing the last will.

The will of 1839, referring to real estate alone, was not propounded.

The other facts of the case are sufficiently set forth in the judgment. Witnesses were examined in support of the allegation.

Harding and Bayford argued for Mr. Hempenstall. Haggard and Jenner for Messrs. Thomson and Baxter.

The argument and cases referred to are not here [785] given, as the Court founded its decision on principles which were not referred to by counsel.

Cur. adv. vult.

July 19th.—*Judgment*—Dr. Lushington.^(a)² George Durant, of Tong Castle, in

(a)¹ In the first place, a decree was issued at the instance of the executors named in the will of 1844, citing Mr. Stanley (the surviving executor named in the will of 1831) to appear and shew cause why probate of the will of 1844, as alone containing the last will and testament so far as regarded the whole of the personal estate, should not be granted to them. Mr. Stanley appeared and propounded the will of 1831, to which the executors of the will of 1844 gave in a responsive allegation, shortly after which, namely, early in the year 1847, Mr. Stanley died. The widow and such of the children of Mr. Durant as were beneficially interested in the residue of the will of 1831, declined to propound that will, as a larger interest was given them under the will of 1844; but, after considerable delay, Mr. Hempenstall, a legatee in the will of 1831, appeared, when the suit was commenced *de novo*.

(a)² Dr. Lushington sat in the Prerogative Court, and disposed of several cases in and after Hilary Term in this year, as Sir Herbert Jenner Fust was indisposed.

the county of Shropshire, died on the 29th day of November, 1844. He made many wills and testamentary instruments, some of which I must particularly notice; there are other such instruments which do not appear to me to have any direct bearing on the question which I have to decide.

Messrs. Thomson and Baxter are two of the executors named in the will, executed by the testator on the 7th February, 1844; they pray probate of that will, exclusive of all other testamentary papers. The other party in this cause is Mr. Hempenstall, who is a legatee in the will, bearing date 13th December, 1831; he prays probate of both these instruments as together containing the will.

The present question to be decided arises from the following passage, with which the will of 1844 concludes:—"Revoking all former wills, codicils, and testamentary dispositions, by me at any time or times heretofore made (except my will bearing date the 13th December, 1831, which relates exclusively to the reversion in fee of the Tong Castle estate)—I declare this to be my last and only will."

The operation of this clause is purely a question [786] of construction. It is clear that all wills are revoked, excepting the one described by the testator; that one so described is revived and in effect republished; but, on considering this case, I must remember that I have to deal with a paper made under the statute. Apparently this passage is not subject to doubt, for the instrument referred to is described by its date and its contents. If any doubt can be raised, it must arise from facts and circumstances dehors the will of 1844; in other words, if there be a doubt, it is a latent ambiguity.

Questions which arise with reference to latent ambiguities are often of great difficulty, but the principles which ought to govern are, I apprehend, satisfactorily settled. It must be my duty rigidly to adhere to the principles so fixed; it cannot, however, be necessary to do more than simply to state such of the rules which apply to this particular case, as they are to be found in Sir James Wigram's admirable treatise on the Admission of Extrinsic Evidence, for it would be a waste of time to travel through all the cases, the substance of which is given in that work. It is quite obvious that, in considering the operation and effect of a revoking clause, I must be guided by the same principles as apply to the interpretation of a devise or bequest; these are all equally the construction of a written instrument.

In looking, then, for the true construction of the passage in question, I first direct my attention to the will bearing date the 13th December, 1831; I find it to be a will contained in twenty-six sides of paper, and comprising very numerous devises and [787] bequests, consequently, not according with the description given by the clause in the will of 1844, namely, a will which relates exclusively to the reversion in fee of the Tong Castle estate, though the will of 1831 does contain a devise of the reversion of that estate.

In the next place, there is a will dated 22nd May, 1839, which does relate exclusively to the reversion in fee of the Tong Castle estate, but disposes of it in a different manner from the will of 1831.

I now look back to the clause of the will of 1844, and remember that it is a description of a will to be revived, but only in accordance with the statute. The will of 1831 corresponds in date with the description of the instrument to be revived; the will of 1839 with the description of the contents.

The question, properly put, is not which will the testator intended in his own mind, but which instrument the clause in the will of 1844 most properly designates in respect to the contents of all the three instruments, and to all other facts and circumstances which, according to the rules of construction, I am at liberty to take into consideration.

One of the admitted rules of construction is that "Every claimant under a will has a right to require that a Court of Construction, in the execution of its office, shall by means of extrinsic evidence place itself in the situation of the testator, the meaning of whose language it is called upon to declare" (Wigram, &c., p. 76). Then, what would be the consequence of decreeing probate of the will of 1831? Manifestly it would [788] be to destroy in many respects the operation of the will of 1844, and to throw, contrary to the expressed intention of the testator, the whole of his testamentary intentions into confusion, which, from the context of the will of 1844, it is clear he could not, and did not, contemplate; whereas, on the other hand, to reject that construction and hold that the clause of 1844 applies to the will of 1839 would

carry into effect the testator's intentions. Would not the testator have said, "I meant by the description in the clause of the will of 1844 the will of 1839?" Is not the Court at liberty so to interpret it? I am not aware of any rule or case to prohibit me from adopting that interpretation.

What, after all, is a devise in a will but a description of the devisee and the thing devised? What is a revocatory clause, but a description of the instrument revoked, and of the instrument, if any, intended to be revived? and are not doubts in both cases to be solved by the same rule? The description of a will by its date cannot be more conclusive than the description of a devisee by name; and how, when a doubt arises as to the person intended as devisee, is the case treated by a Court whose duty it is to construe the instrument? It has been and is a maxim of construction that *veritas nominis tollit errorem demonstrationis*; so in this case it might be said that the truth of the date would do away with the errors in the description. But see how Mr. Baron Parke, in delivering the opinion of all the Judges in the House of Lords, expressed himself in the case of *Lord Camoys v. Blundell* (1 Cl. & Finn. (N. S.) 786).

[789] "It may be conceded that, where a devisee is described by his Christian and surname, and some other distinctive circumstance, and no person answers both descriptions, and there is nothing in the rest of the will or the admitted evidence to shew who was meant, the name would prevail, and the descriptive circumstance would be rejected. But the maxim "*veritas nominis tollit errorem demonstrationis*" (Bacon's Maxims, 25) is not inflexible, as has been explained by Lord Chief Justice Gibbs, in the case of *Doe v. Huthwaite* (2 B. Moore, 323). For if it be clear, upon the due construction of the will with reference to the evidence of the state of the family as known to the testator, that the meaning of the testator, as expressed by the will, was that the person described, and not the person named, was to take, the description will prevail over the name; for the rule in question has no other object than to assist in discovering the meaning of the will, and is not applicable when it leads to a construction contrary to the expressed meaning of the testator.

"Here, then, the question would be, supposing even this were a devise for a person by name, whether the context and the evidence of the state of the family do not cause the description to prevail over the designation by name? We think the context, coupled with that evidence, clearly denotes that the name of 'Edward' is a mistake."

Lord Lyndhurst, in delivering his opinion on that case, says (1 Cl. & Finn. (N. S.) 799) . . . "that it was a question of description, and one part of the description being [790] inconsistent with the rest of the description, the question was, which part of that description, taking the whole together, ought to prevail. Upon that ground the Judges have decided, and upon that ground my opinion is in conformity with the opinion they have expressed." He adds, "We were bound by the evidence as it appeared to us; and upon the evidence we were of opinion that the description, which is in conformity with the conclusion to which the learned Judges have come, ought to prevail, having no doubt of what the testator's intention was."

It appears to me that this authority, confirmed by the opinions of the Lord Chancellor, and supported by those of Lord Lyndhurst and the Vice Chancellor of England, enables me satisfactorily to dispose of this case. Surely, if the context and evidence may cause the description to prevail over the designation by name of a devisee, the context and evidence may give preponderance to the description over the date inserted.

I am well aware that the description in the clause of the will of 1844 has been attempted to be impugned by pleading that there were no special instructions for the word "exclusively," and that Mr. Phillips, the attorney, who prepared the will, has been examined to prove that averment; but in whatever way I view that part of the case, my opinion remains unchanged. For, in the first place, I doubt greatly whether I can receive any evidence to shew that there were no instructions for the word "exclusively;" and, secondly, if I could, it would not follow that the testator did not read the instrument, and approve of the word "exclusively" being in-[791]-serted. It is not to be supposed that he gave special directions for the precise words, for it seldom happens that testators give instructions for particular words. Testators give, as this testator did, general instructions, leaving it to their solicitors to employ their own expressions. Nothing would be more dangerous were the Court to receive evidence as to the precise terms in order to exclude some word from a will, because

the testator had not specially directed the particular word to be employed. But, again, supposing there was abundant evidence to shew, not only that the word "exclusively" was inserted without instructions, and even that the testator did not know of its insertion, but still more, that I could on principle strike out that word—I say, supposing all this, for I put it merely hypothetically and not with the idea that I could adopt such a proposition—what would be the result? Clearly this, and this only, that the descriptive words would apply with less stringency to the will of 1839 than with the word "exclusively" inserted; still, the words which relate to the reversion of the Tong Castle estate would apply much more strongly to the will of 1839, which relates to that estate alone, than to the will of 1831, which does indeed dispose of that reversion, but does so only *inter alia*. I should, even on that supposition, entertain no doubt; I should think still that that, which was *de facto* wholly and entirely correspondent with the description, was the instrument referred to, and not the will of 1831, which answered the description in part only.

In addition to the arguments, arising from the contents of the three instruments, I have a right [792] and, indeed, am bound to look at the facts and circumstances in evidence in the cause; I mean the inferences to be drawn from the state of the testator's family, coupled with the contents of the will of 1831. Mr. Phillips, in answer to the eighth interrogatory, says, "The said deceased had had other lawful children besides those inquired of in the second interrogatory; such other children being," naming four. "They did all respectively die in his lifetime without leaving issue, and they had all died previous to the month of January, 1844, but as to the particular dates of their deaths I cannot answer." Now, every one of these children who died between 1831 and 1844 was a devisee or legatee named in the will of 1831; and could it have been the intention of the testator to revive an instrument in favour of children dead? Is it possible he could have so intended? It would be contrary to all probability, I might say to all common sense, to suppose the testator intended to revive a will in favour of children, who were dead before he proceeded to execute the will of 1844.

I am of opinion, therefore, that I ought not to decree probate of the will of 1831. I found my judgment solely on the contents of the will of 1844, the will of 1839, and the will of 1831, coupled with the evidence of the state of the testator's family when he made the will of 1844. I leave out of consideration everything else which appears in this cause. I am satisfied that the evidence on which I rely is legitimate evidence, and I refer to none upon which, as I think, the least doubt can rest.

I believe that the judgment I now give is consonant with the doctrine laid down by the best [793] authorities and not, that I know of, opposed to any decision. The case of *Payne and Meredith v. Trappes* (ante, p. 583) was adverted to in the argument; but that decision does not appear to me in any degree to militate against the conclusion I have come to in this cause. Had I entertained any such opinion, I should, of course, have paused before I came to any final conclusion. I think, however, that a few words will shew a clear distinction between the two cases.

In the case of *Payne and Meredith v. Trappes* the testator had executed a codicil, dated November 9th, 1839, and declared it to be "a codicil to his will, made by Charles Meredith, Esq., of 8 New Square, Lincoln's Inn, dated May 12th, 1837." Now this description was an accurate description of the will referred to, for there was a will of that date prepared by Mr. Meredith. It was suggested that the will intended by the testator was a will bearing date October 17th, 1838, and that the reference to the will, May 12th, 1837, was a mistake. The principal argument went not upon a question of construction, but upon the circumstance of the testator having destroyed a copy in duplicate of the will of May 12th, 1837: other circumstances were also referred to as tending to support the averment that such a mistake had been made. It appears, however, to me, not only that that case was well decided, but that no evidence could, under the circumstances, have set up the will of 1838; because, though evidence of a certain class—of the state of the testator's family and property—might be admitted to declare the meaning of that which the testator had written, of a passage found in the written instrument, which might possibly tend to shew that, by the words written, the testator did not intend to publish the will of 1837, yet by no possibility could evidence be admitted to shew that he had published the will of 1838 by those words written in that codicil: there might be evidence, *de facto*, to shew intention, but there could not be legal evidence to shew intention

carried into effect in that instrument, for there were no words which could by possibility express republication of the will of 1838. To have pronounced, therefore, for the will of 1838 would have been, not to give effect and meaning to what was written, but to what was intended to be written, yet was not written; and as by no legal principle, of which I am cognizant, could the clause in question, in a will made under the statute, be struck out, of necessity there was given to it the only meaning the words could bear.

The circumstances of the present case are different; because, as I have already endeavoured to explain, the description of the instrument to be revived may apply to the will of May 22nd, 1839, and not to the will of 1831, by construction only, founded on admissible evidence, without adding to the passage to be construed.

I am not aware of any other case, decided in this or any other Court, which it is necessary I should mention. I found my judgment upon very high authority, namely, upon the decision I have referred to in the House of Lords. For these reasons I pronounce for the will of 1844, and refuse probate of the will of 1831. Probate is not prayed [795] of the will of 1839, as it relates exclusively to real estate, and therefore it is not necessary I should make any decree respecting it. The costs of both parties must come out of the estate.

HAYNES against HILL. Prerogative Court, June 5th, July 20th, 1849.—A codicil (C) duly executed in 1847, and commencing “By this codicil to my will,” held not to include, under the term will, unattested additions written subsequently to the operation of the Wills Act, as they were not prior to the execution of C in law, either a part of the will, or codicils, and were not specified or referred to in C.

[S. C. 7 Notes of Cases, 256; 13 Jur. 1058. Considered, *Allen v. Maddock*, 1858, 11 Moore, P. C. 460. Referred to, *In the Goods of Drummond*, 1860, 2 Sw. & Tr. 8.]

Mr. George Haynes died on the 21st January, 1849; after his death were found the following testamentary papers:—

A will executed on the 9th April, 1833 (A).

An addition thereto signed by the testator the 5th November, 1833 (A 1).

Another addition signed by the testator the 1st January, 1836 (A 2).

Another addition signed by the testator the 2nd December, 1840 (A 3).

Another addition signed by the testator the 1st December, 1840 (A 4). [Sic as to date.]

Another addition signed by the testator the 12th June, 1843 (A 5).

Another addition signed by the testator the 4th February, 1844 (A 6).

Another addition signed by the testator the 16th December, 1844 (A 7).

A codicil duly signed by the testator and attested the 11th March, 1847 (C).

Motion was made for all the above-mentioned testamentary papers, on the ground that, though the additions beginning with A 3 and ending with A 7 inclusive were not, as required by the [796] statute, attested, they were necessarily, it was contended, rendered valid by the codicil (C), a duly executed and attested instrument, which ran thus:—

“By this codicil to my will, I bequeath to my dear wife the three thousand pounds independently of all other bequests in my said will which has been or will be received under the will of Mr. William Kirkby, which I direct my dear brother-in-law, the Rev. Peter Fraser, or his nominee, to invest on approved security, and to pay the interest to my said dear wife for the term of her natural life, and afterwards to pay the principal sum to my dear daughter Frances Elizabeth for her sole use and benefit.”

The motion was refused, and it was directed that the papers be propounded.

The allegation in substance pleaded that the will (by which was intended all the instruments excepting C) consisted of six sheets of brief paper attached to each other; that the body of the will terminated about the middle of the fifth sheet; that the sixth or outside sheet, at the date of the execution of A, was endorsed, “Will of George Haynes, Esq. ;” that A 1 and A 2 were subsequently written on, and occupied the remainder of the fifth sheet, A 3 the back thereof, and A 4, A 5, A 6, and A 7 one side of the sixth sheet. It was also pleaded that these six sheets were sealed up in an envelope (B), and that the packet was delivered in June, 1847, out of the custody and possession of the testator, and so continued during his life.

It was further pleaded that the codicil (C) was [797] not enclosed with the

other papers, but was found after the testator's death locked up in his private writing case.

The executors and residuary legatee in trust renounced; on which the suit was promoted, and all the testamentary papers were propounded by the relict of the deceased, who was appointed by A the residuary legatee for life, against Emily Graham Hill (wife of Giles Hill), one of the children of the deceased, and one of the residuary legatees substituted; in whose behalf the additions, A 3 to A 7, both inclusive, were opposed.

Haggard and Jenner, in opposition to the allegation propounding all the instruments, argued: Additions, to form a part of a republished will, must either be duly executed according to the statute, or, in the instrument of republication, be expressly referred to, *Habergham v. Vincent* (2 Ves. jun. 228); *Smart v. Prujean* (6 Ves. jun. 560); *Croker v. The Marquis of Hertford* (4 Moore's P. C. C. 339). There is nothing to shew on the face of the codicil (C) that the testator intended to include under the denomination of "will" the unattested papers A 3 to A 7, therefore they can form no part of the probate.

Dodson, Q. A., and Phillimore, jun., in support of the allegation. The cases cited on the other side are distinguishable from the present. *The Marquis of Hertford's case* had reference to instruments written on separate papers and to instruments to be written; here all the [798] additions in question immediately follow A, A 1, and A 2, of which there is no dispute; all together with A 7 inclusive are endorsed on the last sheet "Will of George Haynes, Esq." In no part of the papers in question are they denominated codicils—the testator mentions them as parts of his will; they are to be regarded in the same light as additions written on a margin of a will, or as inter-lineations, which are rendered valid by a subsequent execution. C, the first of the number denominated a "codicil," being duly executed and attested, republishes the "will," which the testator clearly intended to extend to the additions (Jarman, vol. 1, p. 80).

Cur. adv. vult.

July 20th.—*Judgment*—*Sir Herbert Jenner Fust*. That the testator intended all the papers propounded should be taken as his will I have not a shadow of a doubt, but it is clear that the unattested memoranda, by whatever name they may be called, written subsequently to the time at which the Wills Act came into operation, cannot, standing by themselves, be entitled to probate.

The paper C, the first denominated a codicil, is a duly executed instrument and is the last in point of date; the question is whether it cures the defects in the imperfect instruments alluded to.

The paper C commences with these words—"By this codicil to my will I bequeath," &c.; there is no mention in that document of any other paper than his "will," which in legal language consisted of A, A 1, and A 2. The codicil then is a repub-[799]-lication of those instruments, but it cannot be carried further, for no other instruments formed the will of the testator at the time when C was executed.

I confess I cannot discover any distinction in principle between *The Marquis of Hertford's case* and the present. I cannot consider the "additions" in question as entitled to probate, for at no time were they a will or a codicil.

Having expressed my opinion as to what the ultimate result of this case will be, I direct the allegation to be reformed, by striking out those articles which plead and refer to the documents A 3 to A 7 inclusive.

The allegation was reformed as directed, and, with the consent of both parties, as there was no question between them as to A, A 1, A 2, and C, the reformed allegation was rejected, and Mrs. Haynes took administration with those papers annexed.

[800] DASENT *against* DASENT. Consistory Court of London, July 11th, 1849; Feb. 9th, 1850.—An attempt was made, at the suit of a wife for a divorce, to serve the husband with a citation taken out in October, 1848, at his last known place of residence, which was within the jurisdiction of the Court. It subsequently appeared he left that residence in March, 1847. A decree by ways and means was, on the return of the citation, executed at that house, and at the parish church. On the 5th February, 1849, he was personally served in the West

Indies. The Court on motion pronounced the husband in contempt, "for the purpose of carrying on the proceedings, and placing the evidence on record."—It was stated there was no jurisdiction in the West Indies to enable the wife to institute a suit.—Eventually a sentence of divorce was pronounced. The proceedings throughout were in *pœnam*.

[S. C. 7 Notes of Cases, 126; 13 Jur. 832. Referred to, *London County Council v. Dundas*, [1904] P. 28; *Perrin v. Perrin*, [1914] P. 136.]

On motion.

This was a cause of divorce by reason of cruelty and adultery, promoted by Elizabeth Dasent against Bury Irwin Dasent, her lawful husband, described as of the parish of St. James, Westminster. The citation was extracted in October, 1848.

On the 17th of November, 1848, a proxy was exhibited for Mrs. Dasent; and the citation was brought in with a special certificate endorsed, stating that an officer attended at 11 Pall Mall, in the parish of St. James, Westminster, the last known place of residence of Mr. Dasent, for the purpose of serving the citation personally on him; that the officer was informed that he had left that residence and it was not known there where he was at that time, but it was reported he had left England and was in the West Indies. The officer was referred to the brother of Mr. D.; that gentleman refused to inform the officer where he was, but stated he knew where he was, and was in communication with him, and would forward any communication.

On application, the Judge decreed a decree by [801] ways and means to issue, and on the 18th January, 1849, that decree was returned with a certificate endorsed, stating that the decree was duly executed on the 11th January, by affixing it on the outer door of the last known usual place of residence of Mr. D., to wit, 11 Pall Mall, and also on the outer door of the parish church. It further stated that, though every possible inquiry had been made respecting the residence of Mr. D., no more information than that he had gone to some place in the West Indies could be obtained.

On the 21st April, 1849, the citation was brought in, personally served on Mr. D. at Kingstown, in the island of St. Vincent, on the 5th of February preceding.

Mrs. D., describing herself as residing at 82 Sloane Street, Chelsea, in an affidavit sworn the 20th June, 1849, stated that she was married to Mr. D., party in this cause, in February, 1845, and that the issue of the marriage was an only child, born in November in that year. That about two months after her marriage she was compelled to leave her husband by reason of his cruel treatment of her, but at the expiration of one month was prevailed upon, by his entreaties and promises of amendment, to return to cohabitation. That they then resided together for about fourteen months, when Mr. D. left England for Germany, where he remained for about two months. That he then returned to England, but remained in concealment for about half-a-year, at the expiration of which, viz. in March, 1847, he proceeded to the island of St. Vincent in the West Indies, where, to the best of her knowledge and belief, he has since resided. [802] That in the end of May, or the very beginning of June, 1846, while living with her husband at No. 11 Pall Mall, where he practised as a surgeon, she was struck by him with such violence as to be knocked down and bruised severely; that she was then only withheld from taking legal proceedings against him by his threatening (which she believed it was in his power to execute) to deprive her of the care of her only child. She lastly stated that she was not apprised of any adulterous connexion having been formed by her husband, or of any act of adultery committed by him, until the month of October, 1848.

On the above facts the Court was applied to, to pronounce the husband cited in contempt for the purpose of proceeding, in order to put upon record proof of the cruelty and adultery.

Addams in support of the motion. To grant the present application, the Court will be carrying the case a little further only than that of *Collett v. Collett* (3 Curt. 726). The circumstances of the two cases differ, I admit, in these respects—Mr. Collett was residing in London at the time when the citation was issued, and went abroad a few days only before an attempt was made to serve him in London; he had also a house in London; Mr. Dasent had no place of residence in London when the citation was issued; but the cases agree in this respect—Mr. C. and Mr. D. were personally served abroad. In the case of *Tenducci* (cited in the judgment of

Collett v. Collett (3 Curt. 731)), personal notice of the proceeding was served on the husband at Naples.

[803] By the Court. How was the jurisdiction of the Court of Arches founded in that case?—Ans. By letters of request, I apprehend. By the Court. Is there any ecclesiastical jurisdiction in the West Indies to try such a case as this?—Ans. None whatever. Unless the wife be allowed to proceed here, she can have no redress.

Judgment—Dr. Lushington. I think it is in furtherance of justice that I should grant the present application. I pronounce the husband in contempt, at least for the purpose of carrying on the proceedings and placing the evidence on record, but I do not go the length of saying I will pronounce a final sentence in the cause.

The proceedings were carried on throughout in poenam.

Nov. 12th.—The libel was admitted, and afterwards witnesses were examined and publication passed.

Feb. 9th, 1850.—Addams, on the case coming on for hearing, submitted that the marriage was established and that the charges were fully proved. He prayed a sentence of divorce.

The Court observed that the only obstacle in the way was the matter of the jurisdiction, but said I have fully considered that question, and I think it right that I should pronounce for the divorce. I do so accordingly.

REPORTS of CASES ARGUED and DETERMINED in the ECCLESIASTICAL COURTS at DOCTORS' COMMONS. By J. E. P. ROBERTSON, D.C.L., Advocate. Vol. II. Containing Cases from June 1849 to July 1853. London, 1850.

[1] REPORTS OF CASES ARGUED AND DETERMINED IN THE ECCLESIASTICAL COURTS AT DOCTORS' COMMONS.

GORHAM against THE BISHOP OF EXETER. Arches Court, August 2nd, 1849.—In a proceeding by duplex querela by a clerk, presented to a benefice, against his diocesan for refusing him institution, it was alleged, in return to a monition with intimation, by the bishop, called upon to shew a reasonable and lawful cause why the clerk should not be instituted, that the presentee was of unsound doctrine respecting the efficacy of the sacrament of baptism, inasmuch as he held in his examination that spiritual regeneration is not conferred in that sacrament—that infants are not made therein members of Christ and children of God, contrary to the teaching of the Church of England in her Articles and liturgy. Held, that baptismal regeneration is the doctrine of the Church of England, and that infants immediately at baptism receive spiritual regeneration, and that the bishop had shewn sufficient cause why he should not institute the presentee.—1849, February 17th. The space of twenty-eight days, specified in the 95th canon, for a bishop to inquire into “the sufficiency and qualities of every minister after he hath been presented unto him to be instituted into any benefice,” is not an absolute limitation rendering an examination after that period void. A bishop is entitled to a reasonable time for such examination. The canon is directory, there are no prohibitory words to confine a bishop to the space of twenty-eight days.

[S. C. 13 Jur. 238, 887: see (in Privy Council) Moore’s Special Report; Br. & Fr. 64; 14 Jur. 443.]

This was a proceeding in the form of a duplex querela brought by the Rev. George Cornelius Gorham against Henry Lord Bishop of Exeter, for refusing him institution to the living of Brampford Speke, in the county of Devon, and diocese of Exeter.

[2] On the 29th of May, 1848, Mr. Gorham made oath “that he is in priest’s orders of the United Church of England and Ireland—that in the month of November, 1847, he was duly presented to the vicarage of Brampford Speke, in the county of Devon and diocese of Exeter, by letters patent under the Great Seal of Great Britain, bearing date the 2nd day of that month—that he forthwith applied to the bishop of that diocese for institution to the said vicarage, and that the said Bishop of Exeter did by writing under his hand, bearing date the 21st day of March, in the present year, notify to the deponent his refusal to admit him to the said vicarage. The deponent lastly made oath that twenty-eight days at the least have expired since he first tendered his presentation to the bishop, and since the bishop refused to grant him institution thereupon.”

Dodson, Q. A., on the 3rd and 15th June, 1848, prayed a duplex querela against the Bishop of Exeter. He cited, on the first and second application, can. 95; Oughton (vol. 1, tit. 157, 158); The Clerk’s Assist. (c. 19); Watson (c. 21); Blk. Comm. (bk. 3, c. 16); Ayliffe (p. 233).

Sir Herbert Jenner Fust directed the monition with intimation to be issued.

The following is a copy thereof:—

Herbert Jenner Fust, Knight, Doctor of Laws, Official Principal of the Arches Court of Canterbury, lawfully con-[3]-stituted, to all and singular clerks and literate persons whomsoever and wheresoever in and throughout the whole province of Canterbury, greeting. It has been declared to us in our office aforesaid, on behalf of the Reverend George Cornelius Gorham, clerk, that he is aggrieved, as his complaint to us sheweth; inasmuch as although the vicarage of the parish church of Brampford Speke, in the county of Devon, diocese of Exeter, and province of Canterbury, has been for the last twelve months or thereabouts, and still is, vacant and without a vicar, by the natural death of the Reverend Mudge, clerk, the late incumbent thereof; and although the said Reverend George Cornelius Gorham, clerk, was and is rightly and duly presented to the said vacant vicarage and parish church of Brampford Speke aforesaid by Her Most Gracious Majesty Queen Victoria, the true and undoubted patron of the said vicarage, and although the said Reverend George Cornelius Gorham, clerk, exhibited and tendered in due time and place letters of presentation to the aforesaid vicarage, under the Great Seal of Great Britain, to the right reverend father in God, Henry, by divine permission Lord Bishop of Exeter, and hath claimed to be admitted with all convenient speed to the said vicarage and parish church aforesaid, and to be instituted into and invested in the vicarage of the same, together with all its rights, members, and pertinents, according to the power, form, tenor, and effect of the aforesaid letters of presentation; and that he be entrusted with the cure and direction of the souls of the parishioners thereof, and that he be inducted into and charged with the real, actual, and corporal possession of the said parish church, and all its rights and pertinents; and although the said Reverend George Cornelius Gorham, clerk, has sought and demanded with all earnestness and humility more than once, or at least once, that right and justice be done to him in the premises by the said right reverend father in God, Henry, by divine permission Lord Bishop of Exeter, and although he has offered himself ready and prepared to subscribe the three articles as required by the thirty-sixth canon in that behalf, to make the declaration required by the Act of Uniformity, and to take all necessary oaths as by law required; and although the said Reverend George Cornelius Gorham, clerk, was and still is capable and duly qualified, as well by his private character, [4] age, and learning, as also by the purity, probity, and integrity of his life, to be instituted into, invested in, and admitted into the said Church, with all its rights, members, and pertinents, and for such and as such he was and still is called, held, considered, accounted, and reputed to be openly, publicly, and notoriously. Nevertheless, the said right reverend father in God, Henry, by divine permission Lord Bishop of Exeter, who was well acquainted with all and each of the premises; and who ought therefore in virtue of the premises to have admitted the aforesaid Reverend George Cornelius Gorham, clerk, into the vicarage and parish church aforesaid, declined and refused to do right and justice in that behalf, or unjustly and unrighteously (saving always all due reverence and honour) has delayed and still delays so to do, to the no small prejudice and inconvenience of the Reverend George Cornelius Gorham, clerk, the party complaining. Wherefore the said Reverend George Cornelius Gorham, clerk, has humbly prayed us that we would be pleased to grant him, so far forth as is fitting, a remedy in this behalf according to the exigency of the law. And whereas we are willing to extend our aid to the said party complaining to us as aforesaid: We do therefore hereby authorize, empower, and strictly enjoin and command you jointly and severally, to monish or cause to be monished peremptorily (so far as is befitting his honour and reverence) the right reverend father in God, Henry, by divine permission Lord Bishop of Exeter (whom we do so monish by the tenor of these presents), that he within the space of fifteen days from the service of this monition (and of which we assign him five for a first monition, five for a second, and five for the last and peremptory monition) admit the said Reverend George Cornelius Gorham, clerk, to the said vicarage and parish church aforesaid, and institute and invest the said Reverend George Cornelius Gorham, clerk, in the vicarage aforesaid, with all its rights, members, and pertinents; and also cause the said Reverend George Cornelius Gorham, clerk, to be inducted into the real, actual, and corporal possession of the same, and also to minister or cause to be ministered to the party complaining, in all and each of the premises, and whatever concerns them as to the law and justice shall

appertain; otherwise that if at the expiration of the aforesaid fifteen days the said Reverend George Cornelius Gorham, clerk, be not [5] admitted into and invested in the said vicarage and parish church aforesaid, and if right and justice shall not have been administered to him in that behalf, you cite or cause to be cited peremptorily (with all due reverence) the aforesaid right reverend father in God, Henry, by divine permission Lord Bishop of Exeter, to appear personally, or by his proctor duly constituted, before us our surrogate or some other competent judge in this behalf, in the common hall of Doctors' Commons, situate in the parish of Saint Benedict, near Paul's Wharf, London, and place of judicature there, on or before the sixteenth day after he shall have been served with these presents, if it shall be a general session, bye-day, or additional Court day of the said Arches Court; otherwise on the general session, bye-day, or additional Court day of the said Court next ensuing, and shew a reasonable and lawful cause, if he have any, why (the right having devolved upon us through such his refusal and denial of justice) the said Reverend George Cornelius Gorham, clerk, ought not to be admitted into the said vicarage and parish church of Brampford Speke aforesaid, and be rightly, lawfully, and canonically instituted into the same, with all its rights, members, and pertinents, and inducted into the real, actual, and corporal possession of the same, and justice be administered to him the aforesaid Reverend George Cornelius Gorham, clerk, in the premises, by us and by our authority in due course of law (justice so requiring). And that you intimate or cause to be intimated peremptorily to the aforesaid right reverend father in God, Henry, by divine permission Lord Bishop of Exeter (whom we do by the tenor of these presents so intimate), that if he do not appear at the aforesaid time and place, or appearing do not set forth a reasonable and lawful cause to the contrary, we, our surrogate, or some other competent judge in this behalf, will proceed and intend to proceed to admit and institute the said Reverend George Cornelius Gorham, clerk, to the vicarage and parish church aforesaid (the absence, or rather the contumacy, of the said right reverend father in God, Henry, by divine permission Lord Bishop of Exeter, notwithstanding). We, therefore, command you as above to inhibit or cause to be inhibited peremptorily (with all due reverence) the aforesaid right reverend father in God, Henry, by divine permission Lord Bishop of Exeter, or his [6] vicar-general in spirituals and all others in general whom we by these presents do inhibit, that they or either of them do not, pending the business of this undiscussed complaint, attempt or make, or cause to be attempted or set forth, any thing to the prejudice of the party appealing or complaining in and about the premises, or any thing respecting them under pain of the law. And whatsoever shall be done in the premises, you shall duly certify us, our surrogate, or some other competent judge in this behalf, together with these presents. Dated at London the 15th day of June, in the year of our Lord, 1848.

WM. TOWNSEND, Registrar.

On the 3rd July, 1848, an appearance was given for the Bishop of Exeter, on whose behalf, on the 23rd October, an act on petition was given in, wherein it was pleaded:—

That in the month of November, 1847, the Reverend George Cornelius Gorham was presented by the Crown to the said vicarage of Brampford Speke, in the county of Devon and diocese of Exeter, and soon after applied to the Lord Bishop of Exeter for institution to the said vicarage, who thereupon proceeded to examine the said Reverend George Cornelius Gorham, in order first to ascertain his sufficiency and fitness to hold the said vicarage, as he was both of right entitled and in duty bound to do, as well by the statutes of the realm as by the constitutions and canons of the Church: And it was further alleged, that it appearing to the said lord bishop, in the course of his said examination, that the said Mr. Gorham was of unsound doctrine respecting that great and fundamental point, the efficacy of the sacrament of baptism, inasmuch as the said Mr. Gorham held and persisted in holding that spiritual regeneration is not given or conferred in that holy sacrament—in particular, that infants are not made therein members of Christ and the children of God—contrary to the plain teaching of the Church of England in her Articles and liturgy, and especially contrary to the divers offices of baptism, the office of confirmation, and the catechism, severally contained in the Book of Common Prayer and administration of the sacraments and [7] other rites and ceremonies of the Church, according to the use of the United Church of England and Ireland, the said lord bishop refused on that account to institute the said Mr. Gorham to the said vicarage. And it was submitted that the holding of unsound doctrine concerning the

said sacrament by the said Mr. Gorham was and is a good and sufficient cause of such the said lord bishop's refusal to institute him to the said vicarage. And it was further alleged that the said Mr. Gorham hath since himself written, and caused to be printed and published, an account of the whole of what passed between the said lord bishop and himself in reference to and in the course of his said examination, in a book entitled "Examination before Admission to a Benefice by the Bishop of Exeter, followed by Refusal to Institute, on the Allegation of Unsound Doctrine respecting the Efficacy of Baptism, edited by the Clerk examined, George Cornelius Gorham, B.D., Vicar of St. Just-in-Penwith, Cornwall, presented Vicar of Brampford Speke, Devon, and formerly (for eighteen years) Fellow of Queen's College, Cambridge," such book containing in full (among other things) the several questions put by the said lord bishop to the said Mr. Gorham in the course of his said examination, and his the said Mr. Gorham's several answers to the said questions; and in part supply of proof of the premises, the proctor for the bishop craved leave to refer to the said book so written and published, brought into the registry of this Court: wherefore it was prayed that the Right Honourable the Judge would dismiss the said Lord Bishop of Exeter from all further observance of justice in this cause, and condemn the said Reverend George Cornelius Gorham in the costs thereof.

In answer to the act, on behalf of Mr. Gorham, the book brought in was admitted to have been published by Mr. Gorham, and the contents thereof to be true and accurate. And it was alleged that Mr. Gorham, Bachelor in Divinity of the University of Cambridge, and for nearly eighteen years a Fellow of Queen's College in that university, was, on the 10th of March, 1811, made a deacon in the United Church of England and Ireland, and that on the 23rd of February, 1812, he was ordained a priest of the said Church. That from the period aforesaid, Mr. Gorham discharged the sacred duties devolving upon him as a minister in the said Church, at different periods, in six several [8] dioceses as a licensed curate, for a period of thirty-five years, and that on no single occasion, during such time, did he ever incur the reprehension of any of the bishops in whose dioceses he officiated. That in January, 1846, Mr. Gorham was presented by the Lord Chancellor, on behalf of the Crown, to the vicarage of St. Just-in-Penwith, in the county of Cornwall and diocese of Exeter, then containing a population of upwards of seven thousand souls. That on the 6th of February in the said year he was instituted to the said vicarage by the said Lord Bishop of Exeter, without any previous examination, and that he still continues to hold the said vicarage, and that no attempt whatsoever has been made to deprive him thereof by reason of his holding any alleged unsound doctrine. That in June, 1847, the living of Brampford Speke, in the county of Devon, also in the diocese of Exeter, and containing a population of about four hundred souls only, was offered by the said Lord Chancellor, on behalf of the Crown, to Mr. Gorham. That for the purpose of facilitating his being presented to the said last-mentioned living, Mr. Gorham, in compliance with the wishes of the Lord Chancellor (though not required to do so by the constitution or canons of the Church of England) forwarded to the said lord bishop for his signature a testimonial of good conduct and sound doctrine in the usual form by three beneficed clergymen of the said diocese of Exeter. That the said bishop, having added to his counter-signature of the said testimonial certain remarks, reflecting upon the conduct and expressing apprehensions of the doctrinal soundness of Mr. Gorham, and various ineffectual attempts having been made to induce him to withdraw the same, the testimonial was forwarded to the Lord Chancellor, with the remarks thereon; and, that subsequently, Mr. Gorham received his presentation to the said living under the Great Seal of Great Britain, bearing date the 2nd of November, 1847. That on or about the 6th of November, 1847, application having been made by Mr. Gorham to the said Bishop of Exeter for institution to the said benefice of Brampford Speke on as early a day as might be convenient; and Mr. Gorham having personally presented himself in Exeter at the bishop's registry on the 8th day of the said month, and having then and there tendered his presentation to the secretary of the said bishop, an appointment was thereupon made by the bishop (who [9] was then also in Exeter on the said day) for Mr. Gorham to wait upon him on the 12th day of the said month, subject to the convenience of Mr. Gorham, but unaccompanied with any allusion therein to any intended examination. That two further applications for institution were made by Mr. Gorham on or about the 9th and 10th days of the said month, and that in reply thereto an intimation was for the

first time conveyed to Mr. Gorham, in a letter from Mr. Ralph Barnes, acting as the bishop's secretary, bearing date the 13th of November, 1847, that it was the intention of the said bishop to examine Mr. Gorham previously to instituting him to the said living. That Mr. Gorham repeatedly urged the said bishop to commence his intended examination immediately, but did so without effect. That subsequently, through the same channel, by letter, bearing date the 15th of December, 1847, the said bishop appointed Friday, the 17th of December aforesaid, to receive Mr. Gorham at Bishopstowe, when the time limited by the 95th canon, within which such examination shall be made, had expired, the day aforesaid, videlicet the 13th of November, being the date of the first intimation of any intention to examine Mr. Gorham, and the 15th of December being the first and only specific appointment made by the said bishop for that purpose; that on Friday the 17th of December, at half-past ten A.M., the time appointed by the said bishop, Mr. Gorham presented himself at Bishopstowe, the residence of the said bishop, for examination; but nevertheless under verbal protest, in the presence of the said bishop, the Rev. William Maskell, his domestic chaplain, and Ralph Barnes, Esq., his secretary, and which protest was afterwards reduced into writing at the request of the said bishop. That the examination of Mr. Gorham was continued from half-past ten A.M. until half-past six P.M. of the said day. That on the following day, videlicet Saturday, the 18th of December, the examination was resumed by the said bishop at noon, and continued till half-past eleven at night, with the intermission of three-quarters of an hour only. That the said examination was continued on the 20th of December from half-past ten A.M. until six P.M., on the 21st of December from half-past one P.M. until half-past six P.M., and on the 22nd of December from half-past eleven A.M. to half-past five P.M. That such the examination having been from and after the said last-mentioned day suspended [10] under remonstrance from Mr. Gorham, was resumed on the 8th of March, 1848, and continued on the 9th and 10th days of the same month, on which last-mentioned day it was declared by the said bishop to be ended. That in the course of the said examination one hundred and forty-nine questions were proposed by the said bishop and answered by Mr. Gorham (with the exception of a few to which he objected, and for not answering which he assigned his reasons at large), as appears in the said book. That in addition to the hours so occupied at the residence of the said bishop, portions of five other days intervening between the 30th of December in the said year and the 7th of January of the following year, were also employed by Mr. Gorham at a lodging in Torquay in answering questions proposed to him by the said bishop, and in perusing a book by which they were accompanied. And it was further expressly alleged in reference to the manner in which such examination was conducted at the said bishop's residence that each question proposed and each answer given thereto was reduced into writing both by the Rev. William Maskell, chaplain to the said bishop, and also by the said Mr. Gorham (with the exception of answers 1 to 7 inclusive, and of the answers 77 and 78, and the observations on questions 79 to 85, which Mr. Gorham transcribed in duplicate without the assistance of the said chaplain), and that the copy of each question and answer so made by the said chaplain or by Mr. Gorham, and delivered by him to the said chaplain, was retained by the said bishop and still remains in the possession of his lordship. That several conversations also passed from time to time between the said bishop and the said Mr. Gorham during such examination, and having special reference to the same, certain of which were by agreement reduced into writing by Mr. Gorham and the said bishop's chaplain, and the copies of such conversation so as aforesaid made by his chaplain were retained by the said bishop and still remain in the possession of his lordship. And it was further expressly alleged that in the said book so brought in as aforesaid, and now remaining in the registry of this Court, is contained, to wit, from page 63 to page 218 (both inclusive), a full, true, and accurate account of all the questions and answers that were given in the course of the said examination, and also of the conversations occurring therein between the said lord [11] bishop and Mr. Gorham, that is to say, so far as the same by agreement were reduced into writing at the time, together with a true and accurate copy of the protest and remonstrances made by Mr. Gorham in writing. That from page 33 to 44 *h* of such book, both inclusive, is contained a true and accurate copy of the testimonial so as aforesaid forwarded to the said bishop, together with the remarks by him appended thereto, and also of certain letters written in reference thereto by Mr. Gorham and the said bishop and also of two letters written,

addressed, and sent by the Lord Chancellor, and referring to the remarks of the said bishop appended to the said memorial, one of such letters having been addressed to Mr. Gorham and the other to the said bishop. That from page 47 to page 58 of the said book (both inclusive) is contained a true copy of the presentation of Mr. Gorham to the said vicarage of Brampford Speke, also of certain letters addressed by him to the said bishop and his secretary in reference to his institution thereto, and of certain answers written by the said bishop, or by his secretary and under his authority, to Mr. Gorham. That such the copies of the said several letters are true and faithful transcripts of their originals, the said original letters, in so far as they were addressed to Mr. Gorham, being in readiness to be produced if required. That the protest under which the examination was submitted to by Mr. Gorham was of the exact tenor recited in the said book at pages 96, 97, and 98, and the remonstrances were of the exact tenor recited in pages 141, 142, 143, 144, 159, and 160. That the examination, conversations, and remonstrances therein contained are faithfully recorded, and on comparison would be found severally to correspond with the several duplicates or copies thereof retained by the bishop as aforesaid. Wherefore by reason of the premises, and referring to the contents of the said book so brought in as aforesaid, and to be further verified by Mr. Gorham if need be, it was denied that the said Lord Bishop of Exeter was of right entitled, either by the statutes of the realm, or by the constitutions and canons of the Church, to proceed to examine Mr. Gorham at the time when such examination began, to wit, Friday the 17th of December, 1847, for it was alleged that Mr. Gorham having on the 8th of November, 1847, tendered to the said lord bishop his presentation to the said vicarage, the said [12] bishop was not willing or ready to proceed to such examination, though repeatedly urged so to do by Mr. Gorham, until Friday the 17th of December 1847 (being above twenty-eight days after the said presentation was duly tendered), contrary to the true intent and meaning of the 95th canon. That although Mr. Gorham submitted to the said examination, yet that he did so under protest, and out of respect merely to the said bishop; but nevertheless reserving to himself the right to make all legal objections to the proceedings of the said bishop in due and proper time and place. And it was further distinctly and emphatically denied that Mr. Gorham, in his examination, as recorded in the said book, did maintain, or has at any time maintained, unsound doctrine respecting the efficacy of the sacrament of baptism, or that he has held or persisted in holding any opinions thereon at variance with the plain teaching of the Church of England in her Articles and liturgy as wrongfully laid to his charge on the part and behalf of the said Lord Bishop of Exeter. And it was further explicitly and expressly denied that Mr. Gorham either held or persisted in holding that infants are not made in baptism members of Christ and the children of God, as untruly charged on the part of the Lord Bishop of Exeter, and it was alleged that Mr. Gorham did not maintain any views whatsoever contrary to the true doctrine of the Church of England as dogmatically determined in her Articles, familiarly taught in her catechism and devotionally expressed in her services, it having been his desire and endeavour throughout that examination to explain the language both of her Articles and liturgy (in compliance with the express directions of the Church herself) by such just and "favourable construction" as would secure an entire agreement, not only of each with the others, but of all alike with the plain tenor of holy scripture, declared by the said Articles to be of paramount and absolute authority. And it was lastly expressly alleged and affirmed that Mr. Gorham on several occasions presented himself to the said bishop for institution, and was on all occasions ready and prepared to subscribe the three articles as required by the 36th canon in that behalf, and to make the declaration required by the Act of Uniformity in the words prescribed by that act, and to take all the necessary oaths as by law required, and that there is not contained in the said ex-[13]-amination, or to be fairly inferred therefrom, any just or legal ground for the refusal of the said Bishop of Exeter to institute Mr. Gorham to the vicarage of Brampford Speke aforesaid. Wherefore it was prayed that Mr. Gorham may be forthwith instituted to the said vicarage of Brampford Speke, and that the said Bishop of Exeter may be condemned in the costs of these proceedings.

In reply, on behalf of the Lord Bishop of Exeter, it was admitted that the examination of Mr. Gorham by the said lord bishop, in order to ascertain his fitness and sufficiency to be admitted to the said benefice of Brampford Speke, did, as alleged, commence more than twenty-eight days after his presentation to the said benefice had

been first tendered to the bishop; to wit, by the instrument of presentation being lodged with the bishop's secretary, which it was admitted was done (and the said examination to have commenced) on the days set forth respectively. But it was expressly alleged that Mr. Gorham, neither at the expiration of the said twenty-eight days required to be admitted to the said vicarage of Bramford Speke, nor previous to or at the commencement of his said examination refused or declined to submit thereto; but, on the contrary, that he was or expressed himself as being perfectly ready and willing to submit to such examination. And it was denied that Mr. Gorham, now that in the result of such examination he has been found unfit to be admitted to the said benefice, has any right whatever to object to such the time of its commencement, although not having been commenced (as the fact is) within the time mentioned in the canon referred to. And it was further alleged that from the 20th of November, 1847, to the 15th of December in that year, the said lord bishop was out of his diocese in attendance upon his duty as a Peer of Parliament then assembled, and that by reason of such his attendance, and of other the circumstances of the case, referred to in the correspondence, &c., contained in the aforesaid book, the said lord bishop proceeded to such his examination of Mr. Gorham within a reasonable time after his presentation to the said benefice had been first tendered to him as aforesaid, being all which the law required the said lord bishop to do in that behalf, notwithstanding the canon referred [14] to. And it was denied that Mr. Gorham did not, and on the contrary distinctly and emphatically alleged (or repeated) that he did, in the course of his said examination maintain and persist in maintaining unsound doctrine in respect to the sacrament of baptism, and did hold and persist in holding divers opinions thereon at variance with the plain teaching of the Church of England in her Articles and liturgy. Lastly, it was admitted that a verbal protest (so called) was made by Mr. Gorham previous to the commencement of his aforesaid examination by the said lord bishop, and that afterwards a written protest was drawn up at the said lord bishop's instance or request.

On the 31st January, 1849, the question raised on Mr. Gorham's answer to the act was argued, namely, whether, on reference to the construction of the 95th canon, the bishop had a right to commence the examination of Mr. G. on the 17th December, 1847, as twenty-eight days had elapsed from the 8th November, 1847, the day on which Mr. G. tendered his presentation to the bishop.

Addams for the Bishop of Exeter. The 95th canon was made to avoid "some inconveniences" which remained, notwithstanding the constitution of Archbishop Langton in 1222. Prior to that constitution a bishop had a pecuniary interest in delaying institution; but by it such interest was limited, and finally entirely taken away by 28 Hen. 8, c. 11. According to Langton's constitution a bishop could not delay to institute a presentee "*dum tamen idoneus sit*" beyond two months, otherwise he was to restore the profits; the 95th canon reduces the two months to twenty-[15]-eight days, although the bishop's interest had been taken away by the statute. The object of the canon is to prevent a presentee from being kept out of the receipt of the profits of the living unnecessarily—to prevent the living from lapsing by delay of the bishop, and also to prevent the right of the bishop to examine being defeated by the issue of a duplex querela till twenty-eight days had elapsed from tendering the presentation. There are no words in the canon to prohibit a bishop from commencing an examination after twenty-eight days: the right of a bishop to examine is recognised in the 39th canon. The text writers, Godolphin (Rep. Can. c. 24, s. 3), Degge (pt. 1, c. 2), and Watson (c. 20) agree that a bishop is entitled to a "reasonable" or "convenient time" to examine and inquire. Supposing a presentee to be an atheist or deist, would a bishop, if twenty-eight days had elapsed, be bound to institute? Even if the examination were irregular, the rule, *quod fieri non debet, factum valet*, will apply. The delay was quite as much for the convenience of Mr. G. as of the bishop.

Robinson on the same side. The examination is not a nullity. The right to examine is *pro bono ecclesiæ*. The 95th canon purports to be framed *alio intuitu* than that alleged in the pleadings on the other side. The title of the canon is "The Restraint of Double Quarrels." The obvious meaning of the canon is to restrain the [16] presentee himself from setting the Court in motion till the bishop has had an opportunity to ascertain his fitness. The twenty-eight days are a substitution for the two months under the old constitution, the object of which is explained by Lyndwood

(lib. 3, c. 6). There are no prohibitory words in the canon. The common law allows the bishop a "competent time" to examine (Hobart, p. 317). The bishop may be ill, or on a visitation, or attending his duties in Parliament.

Bayford for Mr. Gorham. The examination in question simply respects a matter of doctrine—such an examination stands on a very different footing to that on which it did in ancient times, when the Constitution of Langton was framed, and Lyndwood wrote his glosses. Subscription to the 39 Articles now required renders the examination of a presentee of less importance: there is a security against heresy. Before subscription was required a bishop could not delay to institute beyond two months, provided the presentee was "idoneus." The "idoneitas," according to Lord Coke (2 Inst. 631), consists in divers exceptions, but in effect they are resolvable into questions of morals and learning. Institution is fully treated of also in the Constitution of Otho, tit. 29; but all these constitutions tend to the same point, the object of which is to preserve the rights of patron, bishop and clerk; it is an important object that a church should not remain vacant for an indefinite time. [17] Anciently, there was no limitation as to time, but the Constitution of Langton limited the time to two months; subsequently, the 95th canon further restricted the bishop to twenty-eight days. His right to examine is therefore limited as to time, which cannot be waved by the clerk; he cannot consent to give the bishop more time than the canon has fixed. It was said that as the examination has taken place, it cannot now be considered void; the answer is, it was conducted under a protest.

Deane on the same side. The interpretation of the 95th canon as to time may be assisted by reference to statutes of limitation. There are three questions, 1st. What does the canon bar? 2nd. Has Mr. Gorham waved his right to avail himself of the canon? 3rd. Is the bishop under any legal disability to avail himself of his right? The words of the canon, "abridge and reduce," taken with the word "only," are as prohibitory as can be short of negative words. If those words be not taken to be prohibitory their meaning is not apparent. 2ndly, Mr. G. has done nothing to wave his right. 3rdly. It was said the bishop was attending his duties in Parliament; but that is no defence—he might have examined Mr. G. in London. The jurisdiction of a bishop as to examination and institution is not local; "it follows the person of the ordinary or bishop wheresoever he is" (Godolph. Repert. c. 3, s. 15).

Cur. adv. vult.

[18] Feb. 17th, 1849.—*Judgment*—*Sir Herbert Jenner Fust*. The form of proceeding by duplex querela adopted in this case is one by no means of frequent occurrence; I think I may venture to say that for upwards of a century past no instance of the kind is to be met with. It is clear, however, from works on practice—Oughton, Clerke's Praxis, &c.—that this form of proceeding was in former times, at least, well known; (a) and, I believe I may add, it is the only one which can afford a remedy to a clerk aggrieved by a refusal of institution to a living to which he has been duly presented.

With the merits of the case—the soundness or unsoundness of Mr. Gorham in the doctrine of baptism—I have nothing at present to do. The question which I have now to determine arises incidentally, and is raised by Mr. Gorham in his answer to the act on petition, namely, whether in reference to the construction of the 95th canon the bishop had on the 17th December, 1847, a right to commence the examination of Mr. G., as twenty-eight days and upwards had elapsed from the 8th November, 1847, the day on which Mr. G. tendered his presentation to the bishop.

The words of the canon are, "Albeit by former [19] constitutions of the Church of England, every bishop hath had two months' space to inquire and inform himself of the sufficiency and qualities of every minister after he hath been presented unto him to be instituted into any benefice; yet, for the avoiding of some inconveniences, we do now abridge and reduce the said two months unto eight and twenty days only." It was contended on these words that a bishop is strictly limited and confined to

(a) Bishop Buckridge, in his sermon preached at the funeral of Bishop Andrews in 1626, states that Bishop Andrews "endured many troubles by quare impedit and duplex querela in resisting simony." There must be recorded in the registry of the Court of Arches many causes by duplex querela; but, unfortunately, for want of calendars or indexes to the records and of a proper arrangement of the papers, they are, in effect, wholly inaccessible. The want of such calendars is an evil in almost every Court.

twenty-eight days for the purpose of ascertaining the qualifications of a minister—that the Bishop of Exeter had no right to call on Mr. G., at the time he did, to undergo his examination, which was submitted to under protest, and that every thing that passed during his examination is a mere nullity.

The title of the canon is "The Restraint of Double Quarrels:" certainly, so much as I have read of the canon has nothing to do with that title; but the canon proceeds—"In respect of which abridgment we do ordain and appoint, that no double quarrel shall hereafter be granted out of any of the archbishop's courts at the suit of any minister whosoever, except he shall first take his personal oath, that the said eight and twenty days at the least are expired, after he first tendered his presentation to the bishop, and that he refused to grant him institution thereupon; or shall enter into bonds with sufficient sureties to prove the same to be true, under pain of suspension of the granter thereof from the execution of his office for half a year toties quoties (to be denounced by the said archbishop), and nullity of the double quarrel aforesaid, so unduly procured, to all intents and purposes what-[20]-soever." This part of the canon is important, inasmuch as it contains no limitation whatever of the bishop's right to examine; its purport is to restrain the complainant from obtaining the double quarrel till he made oath that twenty-eight days had expired. The canon concludes, "Always provided, that within the said eight and twenty days the bishop shall not institute any other to the prejudice of the said party before presented, sub poena nullitatis."

The construction which is contended for of the canon in behalf of Mr. Gorham would lead to very important and serious consequences; it would go to this extent that, whatever might be disclosed to a bishop respecting a clergyman after the lapse of twenty-eight days from the tender of his presentation—for instance, that he is an atheist, or has been guilty of the grossest misconduct; still the bishop is bound and confined to the twenty-eight days, and cannot, under any circumstance, enter into an inquiry of the truth of the allegations, but must proceed to institute him, though the day after the bishop might be entitled to take steps to remove him from his benefice. These are consequences, undoubtedly, very serious; still to this extent the construction contended for tends; it remains for me to consider whether that construction is well founded, and in order to arrive at a just conclusion I must review the general law concerning institution.

When a presentation is tendered, it ought, generally speaking, to be accompanied with the letters of orders and testimonials of good life and [21] behaviour; if satisfied with them; and likewise of the sufficiency and qualities of the individual, the bishop may proceed to take the subscriptions pointed out by the 36th canon and afterwards to institute him. Nevertheless it is a duty incumbent on the bishop to take care that he is satisfied of the sufficiency and qualities of the candidate for the benefice. It is not a mere right and privilege which the bishop possesses, it is a trust which he is bound to execute for the public benefit, and, if he have any doubt on the matter, it is his duty, according to the 39th canon, to ascertain "upon due examination," that the party is worthy of the office. Unless therefore there be something stringent in the argument to compel me to adopt the construction contended for of the 95th canon, I should find it extremely difficult to say that the bishop was precluded from commencing or continuing the examination in question after the twenty-eight days had elapsed.

In the outset, I may observe there are no prohibitory words in the canon—there are no words which say the bishop shall not after the twenty-eight days examine. In arguing on the words of the canon, in order to make out that the bishop is limited to the twenty-eight days, various statutes of limitation were cited by one of the learned counsel as, in his opinion, furnishing an analogy; but they, as it seems to me, furnish no analogy whatever, inasmuch as in every one of those statutes there are words absolutely prohibitory. In respect to time, all that the canon does is to abridge the two months, previously allowed, to twenty-eight days; beyond that [22] the canon does not go; it does not prohibit or nullify an examination commenced or continued subsequently to that time. By the general law the bishop had a right to inquire and inform himself of the sufficiency of a candidate for institution; I can discover no words to deprive him of that right.

In order, however, to clear up the question it may be well to mention some of the rights which originally appertained to a bishop. Godolphin (Rep. Can. c. 3) tells

us that "Every bishop, many centuries after Christ, was universal incumbent of his diocese, received all the profits, which were but offerings of devotion, out of which he paid the salaries of such as officiated under him;" in support of which proposition he refers to the learned Selden. In process of time, however, separate benefices were formed, and revenues allotted to the incumbents; still the bishop was in law entitled to apply to his own use the profits of a benefice during a vacancy thereof; and, though that right was abused, there was no law to compel him to institution, till the particular constitution, which is the foundation of the 95th canon, was passed.

Of the many constitutions issued by Archbishop Langton in the year 1222, is the following, alluded to in the 95th canon:—"Cum (Lynd. lib. 3, tit. 6), secundum Apostolum, et infra. Statuimus, ut si quis ad Ecclesiam aliquam, nullo Contradicente, præsentetur Canonice, Episcopus præsentatum ipsum, dum tamen idoneus sit, nequaquam admittere differat ultra duos menses." Lyndwood observes in his gloss: "Hæc constitutio [23] est ejusdem cujus et præcedens, et habet duo dicta." . . . "Ponit enim statutum, et pœnam non servantis, &c." What that penalty is the constitution states: "Alioquin quicquid ex eadem ecclesia post factam præsentationem fuerit forte perceptum, illi, cum institutus fuerit, restituatur, quatenus fructus illi ad Episcopum pervenerunt." This constitution we see lays down the law with a certain proviso, to which I will presently more particularly refer, that no bishop shall defer institution beyond two months, and then the penalty for non-observance of the law: he shall restore to the person who shall be instituted all the fruits received by him during the vacancy. There is nothing here to deprive the bishop of his right to examine; so far from that there are words in the constitution, the proviso I alluded to, which clearly establish the duty of the bishop to ascertain the fitness of the candidate for institution. The words are "dum tamen idoneus sit;" the very expression denotes that it is the duty of the bishop to examine into the fitness—to ascertain that the party is idoneus. Accordingly, we find in Lyndwood, in his gloss on the word, "Et nota, quòd in hac idoneitate quoad beneficium curatum considerari debet, inter cætera, ætas promovendi" . . . "et quòd sit commendandus scientia et moribus, &c." This scientia is not, as was contended in argument, mere knowledge; correctness and soundness of doctrine are implied. Again, in the gloss on the words "duos menses;" "Tum textus iste præsupponat præsentationem esse canonice factam, personamque præsentatum esse idoneam, quare non ordinavit præsentatum statim debere admitti, [24] cum absque causa rationabili non debent ecclesiæ diu vacare?" . . . "Credo, quòd Constituentem movere potuit, quòd licet ab initio recepta tali præsentatione non appareat contradictor, tamen non debet præsentatum mox admittere, quia inter præsentationem patroni, et admissionem Episcopi debet cadere temporis intervallum, et hoc propter examinationem quam post præsentationem clerici sibi factam debet episcopus facere, et non repente admittere, &c."

After the above extracts it is useless to multiply instances from the canon law; it is clear from the Constitution of 1222 and the gloss thereon that it is the duty of a bishop to examine into the fitness of a candidate for institution, and that, had he delayed so to do beyond two months after the presentation, he could not have retained for his own use the profits during the vacancy; but there are no words to limit him in his examination to the term of two months. Moreover, I do not find any difference on this subject amongst text writers; I have looked into Godolphin, Degge, Watson, and Ayliffe, and many others; they all speak to it being the duty of a bishop, independently of the canon, to examine a presentee before institution. Godolphin (Rep. Can. c. 24) states, "Examination is that trial or probation which the bishop or ordinary makes before his admission of any person to holy orders or to a benefice, touching the qualification of such persons for the same respectively." After stating some of the regulations respecting the examination for orders he proceeds:—"So also when the clerk is presented by the patron of the advowson, before he be admitted as clerk to serve the cure, the ordinary is to examine him of his ability: for if upon his examination he be found unable to serve the same, or be criminous, the ordinary may refuse to admit and institute him into the benefice. By the ancient canons, the bishop hath two months' time to inquire and inform himself of the sufficiency and quality of every clerk presented to him, as appears by the canon in 1 Jac. c. 95; but by the said canon it is ordained that the said two months shall be abridged to twenty-eight days only. Upon sufficient inquiry and examination the ordinary may accept or refuse the clerk presented; and regularly all such matters

as are causes of deprivation are also causes of refusal," and in support of this last proposition, the 5th Rep. 58 a. (*Specot's case*), is referred to; therefore mere scientia et mores are not enough, for, according to Lord Coke, the bishop, should he find anything which would be sufficient cause to deprive a clerk, may hold that to be a sufficient cause for refusing institution.

On the important point at issue—whether the bishop must commence the examination within the period of twenty-eight days—Godolphin, (3) of the same chapter, says, "Examination of the clerk is to be done at a convenient time within six months;"—all the text writers I have mentioned agree in this;—"for the Ordinary cannot refuse to examine the clerk during all the six months, and so suffer a lapse to incur to himself; for by so doing the patron should lose his presentation, and the ordinary take [26] advantage of his own wrong." From this, it appears, that the object in limiting the time to the bishop is to prevent the lapse of the living to himself; (a) if the examination were delayed to a later period, there might not be time, upon notice of rejection by the bishop, for the patron to nominate another clerk. He proceeds: "But if the ordinary, when the clerk comes to be examined, sedet circa curam pastorem, he is not then obliged to leave the business in hand, and presently examine the clerk, but he may appoint a convenient time and place for the examining of him. This examination by the diocesan, touching the conversation and ability of such as were ordained to preach the word of God, or presented to a benefice, is enjoined by the Provincial Constitutions, Lyndw. de Hæreticis." Many more passages in Godolphin and other authors of repute might, were it necessary, be cited to shew that a bishop is entitled to take a "convenient" or "competent time" to examine a clerk presented; but according to the argument adduced for Mr. Gorham, if a bishop were employed "circa curam pastorem"—in a visitation—or other important business—he must lay everything aside to examine [27] the clerk within twenty-eight days. Independently of authorities to the contrary, the argument seems to me untenable; it is unreasonable to suppose that a bishop is to lay all other business aside for the convenience of an individual.

In the present instance, it appears the Bishop of Exeter was summoned to Parliament, which, as a spiritual peer, he was bound to attend. He was engaged in such a matter as justified him in postponing the examination, possibly with some inconvenience to Mr. Gorham, but certainly with no real loss either to him or the patron. In former times there were motives which might have influenced, and did, in some instances, influence bishops in delaying institution, and on that account the Constitution of Langton, which I have already cited, was framed; and though that constitution may not perhaps have entirely abated the evil, it is clear all temptation in respect of pecuniary profits was subsequently removed by 28 Hen. 8, c. 11, which provides for the restitution of the first fruits in time of vacation to the next incumbent. I cannot discover anything in this case to lead me to suppose that the Bishop of Exeter improperly delayed the examination; he could have no pecuniary interest, and lapse could not occur—as the patron is the Crown; in fact in no case, if a bishop defer the examination of a clerk duly presented till the six months have expired, would a lapse occur to him.

It seems to me that the meaning of the twenty-eight days in the 95th canon is that, until that number of days has expired after a tender of a presentation, a clerk cannot obtain a duplex querela, [28] but after that interval, if a bishop refuse or delay the institution he may be called upon to assign the reason. So, in the present instance, Mr. Gorham might without having allowed four months to elapse have obtained a duplex querela at an earlier date, and the bishop would probably have returned that he had not examined the clerk as he was engaged in other public

(a) This proposition, which probably rests on the authority of Godolphin alone, seems to be questionable. If it be true that lapse must accrue gradatim (Aycliffe, p. 333), and that no one can take advantage of his own wrong (Aycliffe, p. 334, who cites Rolle), it seems impossible that lapse could accrue from the delay of a bishop to examine. The editor is inclined to submit that the object of the canon, as far as it is a restraint upon a bishop (not here to mention the proviso in the last paragraph of the canon), is twofold, namely, to prevent a presentee from being kept out of the receipt of the profits of the living, and to prevent a parish from being deprived of an incumbent for an indefinite time.

business. I am asked to pronounce that the bishop had no right to commence the examination after the twenty-eight days, but it seems to me quite impossible that I can so construe the canon. I apprehend that, as far as the bishop is concerned in the matter of the examination, the canon is directory; there are no prohibitory words to confine him to the particular space of twenty-eight days, and I think it contrary to reason that such an examination should be so restricted.

Upon these grounds, being of opinion the bishop was not precluded, I overrule the prayer made in behalf of Mr. Gorham, that I would hold that the bishop had no right to enter into the inquiry after the expiration of twenty-eight days; consequently, I cannot proceed to institute Mr. Gorham according to that prayer.

The main question was argued in the months of February and March, 1849, on the pleadings and the matters contained in the book therein referred to. The arguments were continued for six days by Addams and Robinson for the Bishop of Exeter, and by Bayford and Deane for Mr. Gorham. The general bearing of those arguments may be collected from the judgment. Those persons, who are desirous to see the more matured arguments as delivered [29] at the bar of the Privy Council, may consult the report of the case on appeal by Mr. Moore, who has engaged to furnish the arguments of counsel corrected or supplied by themselves—an advantage which the editor of this volume has not received.

August 2nd, 1849.—*Judgment*—*Sir Herbert Jenner Fust*. The case which the Court has now to decide was most elaborately argued in the early part of this year. The nature of the question, the vast body of learning imported into the discussion, and the important result to which the decision may possibly lead, have created in the mind of the public a more than ordinary interest, and, as may be imagined, in the mind of the Court, a corresponding anxiety and sense of responsibility.

Greatly as it is to be lamented, when any difference of opinion in religion arises between those professing themselves members of the same Church—still more is it to be lamented when the parties litigant stand in the relation, as in the present instance, of a beneficed clergyman and his diocesan.

The circumstances out of which the present proceedings originated are these: Mr. Gorham, an ordained minister of the Church of England and Ireland, a Bachelor in Divinity, was presented to the vicarage of St. Just, in the county of Cornwall, and diocese of Exeter, in the month of January in the year 1846, by the then Lord Chancellor. On that occasion Mr. Gorham, on presenting himself for institution to the Bishop of Exeter, produced [30] such testimonials, as to his learning, ability, moral conduct and sound religious principles, that the bishop did not think it necessary to subject him to an examination with a view of ascertaining for himself the correctness of those testimonials. Mr. Gorham accordingly was instituted and inducted, and entered upon the duties of that benefice, which he still continues to possess. Circumstances, however, occurred which made it desirable for him to exchange that living for another, and he was presented by the Lord Chancellor to the vicarage of Brampford Speke, in the county of Devon and the same diocese of Exeter, in the month of November in the year 1847. On the 6th of that month Mr. Gorham wrote to the Bishop of Exeter, requesting his lordship to appoint an early day for his admission to that benefice, and suggesting that, as he was not removing into another diocese, neither a testimonial, nor the exhibition of his letters of Orders, was requisite, but at the same time stating he should cheerfully comply with his lordship's wishes as far as practicable in those matters. An interchange of letters thereupon took place between Mr. Gorham and Mr. Barnes the bishop's secretary, to which it is not necessary at present to refer, further than to state that the bishop declined to institute Mr. Gorham to the living of Brampford Speke until he had had an opportunity of satisfying himself as to Mr. Gorham's qualifications and fitness for that charge.

This determination on the part of the bishop appears to have originated from certain expressions made use of by Mr. Gorham, in the course of cor-[31]-respondence with his lordship, from which he, whether rightly or wrongly, conceived that some doubts existed as to the soundness of Mr. Gorham's religious principles, and more particularly with respect to baptism, which, in his lordship's letter, was stated to be the foundation of all Christian doctrine. Whether the suspicions of the bishop had any sufficient foundation or not is immaterial to the present question. It is sufficient to state that the examination of Mr. Gorham did take place, and the result of that examination forms the subject of the present inquiry.

It may be proper here to state that the Lord Chancellor, in exercising his official patronage in the Church, very properly requires that the intended presentee to a benefice should produce a testimonial from three beneficed clergymen of the neighbourhood in which he resides, and that such testimonial should be countersigned by the bishop of the diocese. Mr. Gorham having obtained the testimonial from three beneficed clergymen, as required, forwarded it to the bishop, but his lordship not only declined to affix his signature but apprized the Lord Chancellor of his doubts as to the soundness of Mr. Gorham's religious views on certain points of doctrine, and upon the margin of that document wrote certain observations expressive of his impressions on that point. The testimonial of the three beneficed clergymen runs thus: "We, whose names are hereunto written, testify and make known that George Cornelius Gorham, clerk, Bachelor in Divinity, late Fellow of Queen's College, Cambridge, now vicar of St. Just, in Pen-[32]-wyth, in the county of Cornwall and diocese of Exeter, about to be presented by your lordship to the vicarage of Brampford Speke, in the county of Devon, and said diocese of Exeter, hath been personally known to us from June, 1846, to the date of these presents: that we have had opportunities of observing his conduct; that during the whole of that time we verily believe that he lived piously, soberly, and honestly—nor have we at any time heard anything to the contrary thereof; nor hath he at any time so far as we know or believe, held, written, or taught anything contrary to the doctrine or discipline of the United Church of England and Ireland; and, moreover, we believe him in our consciences to be, as to his moral conduct, a person worthy to be presented to the said benefice. In witness whereof, we have hereunto set our hands this 12th day of August, in the year of our Lord 1847." This is signed by the three clergymen whose names appear at the bottom of the instrument.

The memorandum of the bishop, to which I have alluded as written in the margin, is in these words:—"The clergymen who have subscribed this testimonial are highly respectable; but, as I consider the bishop's counter-signature of such a document, if it be unaccompanied by any remark, as implying his own belief that the party, to whom it relates, has not 'held, written, or taught anything contrary to the doctrine or discipline of the United Church of England and Ireland;' and as my own experience unfortunately attests that the Rev. George Cornelius Gorham did, in the course [33] of the last year, in correspondence with myself, hold, write, and maintain what is contrary to the discipline of the said Church; and as what he further wrote makes me apprehend that he holds also what is contrary to its doctrine, I cannot conscientiously counter-sign this testimonial." It appears that this testimonial, with the comment of the bishop thereon, was sent to Mr. Gorham; that some correspondence upon the subject took place between them; that the bishop declined to take any other course than that which he had already adopted; and that Mr. Gorham, after some time, communicated the circumstance to the Lord Chancellor, by a letter dated the 11th of September, 1847, and also in an additional letter, dated the 21st of the same month.

Now the Lord Chancellor, having considered the statements in the two letters, together with the testimonial and the comment by the bishop, on the 11th of October in the same year informed Mr. Gorham that he proposed to sign the fiat for his presentation notwithstanding, declining, on his part, to enter into the question which had arisen between the bishop and Mr. Gorham; and on the same day the Lord Chancellor wrote to the bishop, informing him that he had thought it right to sign the fiat for presentation, adding that, having been furnished with the most satisfactory testimonials from various quarters in favour of Mr. Gorham, he, the Lord Chancellor, did not think it became him to take upon himself the office of deciding conflicting opinions.

As to the propriety of the decision of the Lord Chancellor not to take such an office on himself, [34] there cannot be two opinions: he deemed it right to satisfy himself, by the best means in his power, of the due qualifications of the person intended to be presented to the benefice; and although the testimonial was not sanctioned by the bishop, he wisely and rightly, if I may so speak, considered "that, whatever power the law may give to the bishop, upon the ground of life or doctrine, over the presentee, must follow, and not precede the presentation;" and accordingly, as I have already intimated, a presentation was made out and tendered to the bishop, who declined to proceed to institute Mr. Gorham till he had been subjected to an examination.

Whether the bishop exceeded the discretion with which he is entrusted, or exer-

cised that discretion wisely, by adding to his declaration of the respectability of the clergymen who signed the testimonial, the representation of his impressions with respect to Mr. Gorham's qualifications for the benefice, whether the testimonial ought to have been considered by his Lordship simply as a record of the respectability of those clergymen whose signatures were attached, or whether something more was due from him to the Lord Chancellor, who had required the testimonial to be countersigned, are matters into which the Court will not enter. All that it will venture to say is it may possibly admit of some doubt whether the bishop was not justified in considering his counter-signature, to a testimonial of this kind, as attesting more than the mere respectability of the clergymen whose signatures it bore. But be that as it may, the bishop determined to [35] proceed to an examination of Mr. Gorham, and the examination having been commenced upon the 17th of December, in the year 1847, was proceeded with upon the 18th, 20th, 21st, and 22nd of the same month, and after an interruption of some duration was renewed on the 8th of March in the year 1848, continued on the following day, and finally terminated on the 10th of that month. On the 11th Mr. Gorham was informed that the bishop declined to institute him to the living of Brampford Speke, and on the 21st of the same month a formal notice to that effect was given to Mr. Gorham, assigning, as the reason for refusal, unsound doctrine, without entering into the particulars of that unsoundness. There the matter rested till the month of June following, when a monition was extracted from the registry of this Court on behalf of Mr. Gorham, in which it was stated in substance that he had been presented to the living of Brampford Speke; that he had offered himself to the Lord Bishop of Exeter for institution; that he was prepared to sign the three articles required by the 36th canon, to make the declaration required by the Act of Uniformity, and to take all oaths as by law required; and that although he was, and still is, capable and duly qualified, as well by his private character, age, and learning, as also by the purity, probity, and integrity of his life, to be instituted into, invested in, and admitted into, the said church with all its rights, members, and pertinents, nevertheless the Lord Bishop of Exeter, who was well acquainted with all and each of the premises, and who ought, therefore, in virtue of the [36] premises, to have admitted the aforesaid Reverend George Cornelius Gorham, clerk, into the vicarage and parish church aforesaid, declined and refused to do right and justice in that behalf—or, in the formal words of the monition, “unjustly and unrighteously—saving always all due reverence and honour—has delayed, and does delay, to institute him to that benefice.”

The tenor of the monition was to call upon the bishop to institute Mr. Gorham within the time therein specified to the vicarage of Brampford Speke, or to shew cause why Mr. Gorham should not be instituted into it, and intimating that if the lord bishop did not appear, or, if appearing, he did not set forth lawful cause to the contrary, the Court would proceed to admit and institute Mr. Gorham to the vicarage and parish church aforesaid, in the absence of the bishop in pain of his contumacy. This monition having been served upon the Bishop of Exeter, he appeared thereto by his proctor, who prayed to be heard on his petition—the object of which was to state the grounds upon which his lordship sought to justify his refusal to institute Mr. Gorham. That act on petition Mr. Gorham answered by his proctor, and a reply was given on behalf of the bishop.

Before entering into the merits of the case, I must make some observations on the form in which the question has been brought before the Court. Upon a prior occasion I took the opportunity of stating that the proceeding by act on petition was neither convenient nor consistent with practice, and I have not been satisfied by any thing [37] which has since occurred that the opinion I then threw out was erroneous: on the contrary, I am more strongly convinced that the formal proceeding, by plea and proof, is not only the most proper mode, but that it is best calculated to bring the real question immediately before the Court. Here the pleading is, as is usually the case in an act on petition, vague and loose; the answer to it is also of the same character; but had the proceeding by plea and proof been adopted, the Court would then have had the entire case brought clearly and distinctly to its notice—the doctrine of the Church of England, upon which it was meant to rely on behalf of the bishop, would have been specifically and precisely stated, as well as those points of doctrine which it is said Mr. Gorham has impugned. As the pleadings stand it was not without foundation stated in the course of the argument that it is extremely difficult to collect and discover

what are Mr. Gorham's real opinions on the subject of baptismal regeneration—the question with which alone, as it will presently appear, the Court has to deal.

Moreover, the evidence which has been produced, if evidence it may be called, is most unsatisfactory. It consists merely of one short affidavit by Mr. Gorham; no affidavit on the part of the bishop at all, but a book is annexed to his act on petition, containing upwards of 250 pages of introduction, correspondence, and 149 questions addressed to Mr. Gorham, with his answers to those questions: upon this so-called evidence the whole case turns; and the Court is left to find its way, as well as it can, and to ascertain what is the doctrine of the [38] Church of England, and what are the points on which Mr. Gorham is stated to have expressed and entertained opinions contrary to that doctrine. I say this is not a convenient mode of proceeding, nor is it the correct mode according to the practice of the Court.

I am well aware of the difficulty in which, from the want of precedents in a case of this description, the parties may have been placed; but still recourse might have been had to those books of practice to which we are in the habit of almost daily resorting—I mean Clarke and Oughton. There it would have been found that the proceedings should have been by plea and proof on the one side, as well as on the other. The form of proceeding is distinctly set forth by Oughton, under the head "*De causis beneficialibus*," Vol. 1, p. 237, &c.; it would, however, be a waste of time to refer more particularly to those works, as the evil to which I have adverted could not, in this instance, have been remedied by the Court; for it had no opportunity of ascertaining the form of the proceeding till the case was ready for hearing.

In the course of the argument it was made a question who is to be considered the party proceeding in the case—upon whom the onus probandi lies. Now, though I think that question not very material, still, inasmuch as Mr. Gorham has, in his affidavit, to lead the monition, alleged that his presentation was offered to the bishop, that the bishop delayed to institute him, though he was qualified by age, by ordination, by presentation, by an offer to do all that he was required by law to do [39] before he was instituted to that living, I am bound to say Mr. Gorham made out a *prima facie* case, which called for an answer on the part of the bishop to justify his refusal to institute him.

I now proceed to see what the pleadings are on each side. On behalf of the bishop it is represented "that Mr. Gorham having in the month of November, 1847, been presented by the Crown to the vicarage of Brampford Speke, in the county of Devon and diocese of Exeter, soon after applied to the Lord Bishop of Exeter for institution; that his lordship proceeded to examine Mr. Gorham in order first to ascertain his sufficiency and fitness to hold the said vicarage, as he was both of right entitled, and in duty bound to do, as well by the statutes of the realm as by the constitutions and canons of the Church." [Though the right of the bishop to examine was not positively denied, it was asserted by Mr. Gorham's counsel to be an unprecedented act, under the circumstances of Mr. Gorham's position in the church, that the bishop should have proceeded to examine him as to his sufficiency to hold the vicarage.] It was then alleged, on behalf of the bishop, "that it appeared to him, in the course of the examination, that Mr. Gorham was of unsound doctrine respecting that great and fundamental point, the efficacy of the sacrament of baptism, inasmuch as he held, and persisted in holding, that spiritual regeneration is not given or conferred in that holy sacrament, in particular, that infants are not made therein members of Christ and the children of God," [these then are the points on which Mr. Gorham is alleged to [40] be of unsound doctrine,] "contrary to the plain teaching of the Church of England in her Articles and liturgy, and especially contrary to the offices of baptism, the office of confirmation, and the catechism, severally contained in the Book of Common Prayer, and administration of the sacraments, and other rites and ceremonies of the Church, and on that account the lord bishop refused to institute Mr. Gorham to this vicarage; and it is further alleged that the holding of that unsound doctrine concerning that sacrament by Mr. Gorham was a good and sufficient cause for the lord bishop's refusal to institute him to the vicarage." Then the book already mentioned by the Court, which is stated to contain the whole of the examination of Mr. Gorham before the bishop, is referred to in supply of proof.

Such is the case set up on behalf of the bishop in justification of his refusal to institute Mr. Gorham. In consequence of this course of pleading it must be obvious the Court has been forced to travel through the various questions and answers, and

other particulars contained in the volume, in order to ascertain for itself, as well as it can, what the doctrine of the Church of England is, and also in what respects Mr. Gorham holds opinions contrary thereto.

The answer of Mr. Gorham to the statement of the lord bishop is to this effect: first of all, there is an admission that "the book brought in by the bishop's proctor contains a true and accurate account of what passed, and then it is alleged that Mr. Gorham, a Bachelor in Divinity of the University of Cambridge, and for nearly eighteen years a [41] Fellow of Queen's College in that university, was made deacon in the United Church of England and Ireland on the 10th of March, 1811, and that in the month of February, 1812, he was ordained a priest of that Church. That Mr. Gorham discharged the duties devolving on him as such minister in six several dioceses as a licensed curate for a period of thirty-five years, and that on no single occasion during such time did he ever incur the reprehension of any of the bishops in whose dioceses he officiated. It is further alleged that Mr. Gorham was presented to the living of St. Just by the Lord Chancellor on behalf of the Crown in the year 1846, and that the lord bishop instituted him without previous examination." [It does not follow from these averments that the Bishop of Exeter was not justified in adopting the course he did in examining Mr. Gorham, though no imputation was cast upon him in the former instance, when the bishop was satisfied with the testimonial produced as to his fitness and qualification to hold the living of St. Just.] "That he continues in possession of that vicarage, and that no attempt has been made to deprive him thereof by reason of his holding any alleged unsound doctrine. That in June, 1847, he was offered the living of Brampford Speke by the Lord Chancellor on behalf of the Crown, and the testimonial signed by three beneficed clergymen, with the bishop's remarks, to which the Court has already adverted, is referred to. That various ineffectual efforts were made to induce the bishop to withdraw his remarks, but that the testimonial with the said remarks was forwarded to the Lord Chancellor. That on the 2d [42] of November, 1847, the presentation to Brampford Speke was made out, and Mr. Gorham on the 8th of that month presented himself at the bishop's registry, and prayed to be instituted to that benefice; that he also made other similar applications; that in reply thereto an intimation was for the first time conveyed to him in a letter from the bishop's secretary, dated 13th of November, 1847, that it was the intention of the bishop to examine him previously to instituting him. That the bishop was repeatedly urged, if he meant to proceed to an examination, to commence immediately, but that no day was fixed till the 15th of December, when the 17th of that month was appointed. The plea then states that Mr. Gorham attended at the time appointed for his examination; that he underwent the examination, though under protest—the days then are specified on which the examination took place and the length of time occupied on each of those days, the number of questions put, amounting to 149, with their answers. That the questions proposed, and the answers given to them, were reduced into writing by the chaplain of the lord bishop and Mr. Gorham, and that the same are now in the possession of the lord bishop. That several conversations took place between his lordship and Mr. Gorham, which were also reduced into writing; that the same also is in the possession of the bishop; that the book already referred to contains a full, true, and accurate account and copy of all the questions, answers, conversations between the bishop and himself, the protest, testimonial of the three beneficed clergymen with the bishop's remarks, and also of certain letters [43] which passed in regard to the subject of this suit; and that such originals as are in the possession of Mr. Gorham will, if required, be produced. That by reason of the premises, and referring to the contents of the said book so brought in, he denied that the said Lord Bishop of Exeter was of right entitled, either by the statutes of the realm, or by the constitutions and canons of the Church, to proceed to examine him the said Reverend George Cornelius Gorham at the time when such examination began, for that by reason of the 95th canon the period in which he might have been examined according to law had elapsed." [The construction of this canon was made the subject of a preliminary discussion before the Court, and the Court was of opinion that the lord bishop was not deprived of the exercise of that discretion with which he is entrusted by law, even though the twenty-eight days allowed by the canon had expired.]

Mr. Gorham's plea further states "that he distinctly and emphatically denies that he, in his examination, as recorded in the book referred to, did maintain, or has at

any time maintained, unsound doctrine respecting the efficacy of the sacrament of baptism, or that he has held or persisted in holding any opinion thereon at variance with the plain teaching of the Church of England in her Articles and liturgy, as wrongfully laid to his charge on the part and behalf of the said bishop. He further explicitly and expressly denies that he held or persisted in holding that infants are not made, in baptism, members of Christ and the children of God, as untruly charged on the part of the Lord [44] Bishop of Exeter; and that he did not maintain any view whatever contrary to the true doctrine of the Church of England, as dogmatically determined in her Articles, familiarly taught in her catechism, and devotionally expressed in her services; it having been his desire and endeavour throughout that examination to explain the language both of her Articles and liturgy (in compliance with the express directions of the Church herself), by such just and favourable construction as would secure an entire agreement, not only of each with the others, but of all alike, with the plain tenor of holy scripture, declared by the said articles to be of paramount and absolute authority. That he presented himself on several occasions to the bishop for institution, and was, on all occasions, ready and prepared to subscribe the three articles, as required by the 36th canon, in that behalf, and to make the declaration required by the Act of Uniformity in the words prescribed by that act, and to take all the necessary oaths as by law required, and that there is not contained in the said examination, or to be fairly inferred therefrom, any just or legal ground for the refusal of the said Bishop of Exeter to institute him to the vicarage of Brampford Speke aforesaid."

The bishop's reply to Mr. Gorham's answer is, in substance, a repetition of what he had before stated, namely, "that Mr. Gorham did maintain and persist in maintaining unsound doctrine, did hold and persist in holding divers opinions contrary to the Articles and liturgy."

Such is a general outline of the pleadings on the one side and the other; and though many complaints [45] were made by the counsel on each side, I must say I think no one has so great a right to complain as the Court itself, which is left, by reason of the form of pleading adopted, to find its way as well as it can through 149 questions and answers, divided and subdivided, and occupying no less than 156 pages, in order to ascertain precisely in what respects Mr. Gorham maintains, as charged, doctrines and opinions at variance with the Church.

The arguments of counsel, which extended, I think, over no less than thirty-four hours (of which fifteen were occupied by the leading counsel for Mr. Gorham), have doubtless thrown considerable light upon the subject; but though those arguments were most able, and supported by a vast body of learning, still that part of the arguments, on the one side and the other, which had relation to the opinions of ecclesiastical authors, and occupied by far the greatest portion of the time, has tended, in no slight degree, to increase the difficulties with which it is the lot of the Court to contend.

A great deal was said in respect to the bishop having required Mr. Gorham to undergo an examination; and though his lordship's power to require an examination was certainly not denied, it was stated to be an unprecedented act. I presume it is not a very common course for a clergyman of long standing, in possession of a benefice, to be called upon, on being presented to another benefice in the same diocese, to undergo an examination, as it is to be supposed, from the circumstance of the previous institution, that the bishop was satisfied with his character, [46] learning, and sound doctrine; but circumstances may occur, and will occur, to render that course necessary; and experience in these Courts tells us that the opinions of some clergymen have, unfortunately, after their institution, undergone a change; that the subscription, in the first instance, to the Articles of religion, as required by the canon, and the making of the declaration according to the Act of Uniformity, are not altogether to be depended upon as proof of the soundness of religious principles at the present day.

It was also urged that the lord bishop prolonged the examination beyond that which the nature of the case required. The only remarks I will here make are, that the course of an examination must always depend on the nature of the answers given; that, in the present instance, the bishop was the proper judge of what was necessary; and it is reasonable to suppose that the length of the examination would have been much curtailed had the answer to even the first question been of a different character.

I pretend not to determine, or to offer an opinion, whether there was or was not a greater or less degree of courtesy observed, or respect shewn, on one side or the other. It is not within my province to notice what the bishop may have said in any of his charges referred to in argument, or in any of his letters addressed to a clerk, even to Mr. Gorham himself. It is not my duty to consider whether it is an offence in the diocese of Exeter to allude to the Church as a "National Establishment," or to advertise for a curate "free from Tractarian error." These are matters extremely well suited for [47] declamation, and may be calculated to raise in the minds of some persons a prejudice against the bishop; but they cannot, and ought not, to have any weight in the mind of a judge.

Dismissing, then, all such topics from my mind, I proceed to consider the question which I am called upon to decide: that question is allowed to be, What is the efficacy of baptism in the case of infants only? Although the question is admitted to be confined to this single point, the doctrines of infant and adult baptism are so mixed up together in the volume containing Mr. Gorham's examination that it has become a matter of extreme difficulty to the Court to separate the one from the other, and to select those passages which are to be the test of Mr. Gorham's opinions in regard to infant baptism, as distinguished from the doctrines of the Church.

I am particularly anxious, in the outset, to have it distinctly understood that I guard myself against being supposed to offer any opinion on the purely theological point at issue between the parties. I am not going to pronounce an opinion whether unconditional regeneration, in the case of the baptism of infants, is or is not a doctrine deducible from the sacred writings: it is no part of the duty of the Court, nor is it within the province of the Court, to institute any such inquiry. All that the Court is called upon to do is to endeavour to ascertain whether the Church has determined any thing upon the subject, and, having done so, to pronounce accordingly.

The authoritative declaration of the Church constitutes the law which this Court is bound to follow [48] implicitly, without indulging in any opinion of its own as to its correctness or erroneousness. The Court is to administer the law as it finds it laid down. I repeat, therefore, I desire it to be distinctly understood that the observations I am about to make are to be considered as applied to the doctrine of the Church solely, as far as I am able to ascertain that doctrine, without any allusion to those passages of holy writ which are supposed to refer to the effect of baptism on those to whom it is administered.

Having thus endeavoured to guard myself from being misunderstood, from being supposed to enter into the purely theological and scriptural argument, I must consider whether the Church has pronounced any declaration on the question at issue, and, also, to what source I am bound to look. Mr. Gorham, it appears, takes his stand upon the Articles; the bishop takes his upon the Articles and formularies of the Church conjointly. Having said thus much, I proceed to collect, as well as I can from the volume before me, what are Mr. Gorham's views; and I think his answer to the very first question addressed to him by the lord bishop tends, in some degree, to account for the protracted examination to which he was subjected. The first question is in these words (see p. 63 of the book): "Prove from scripture that baptism and the Supper of the Lord are severally necessary for salvation: 1st, of baptism; 2dly, of the Lord's Supper."

To this question, by no means accurately framed to draw out a specific answer, Mr. Gorham gives the following answer: "I do not find in scripture [49] that the necessity of baptism to salvation is declared in terms so absolute as this proposition." He then proceeds in a long discourse on the question of baptism, in which we have a reference to the words of scripture, "'Except a man be born of water and of the Spirit, he cannot enter into the Kingdom of God.' If the allusion be to baptism (which, however, had not then been instituted), it undoubtedly affirms the necessity of complying with that solemn institution, where no unavoidable impediment intervenes. Having been ordained of Christ it cannot be slighted without the awful consequence of disobedience to his express command." He then draws his own conclusion with respect to the first point—baptism, that it is not indispensably necessary, that it was only generally necessary as a duty to be observed; and the same observation, he says, applies to the text, "He that believeth and is baptized shall be saved." Then as to "the Supper of the Lord," the second point. "The participation of the Supper of the Lord is stated in scripture in the same manner, as generally

necessary, not essentially requisite, to salvation." This answer evidently suggested to the bishop the necessity of being more precise in his further questions. Accordingly, we find the second question framed in this form: "Does our Church hold, and do you hold, that baptism and the Supper of the Lord are generally necessary to salvation—in terms as absolute as this proposition?" The word "severally" was in the former question introduced; here the word "generally" is substituted. To this Mr. Gorham thus answers—"Our Church does hold this doctrine, and I hold [50] it of course;" that is, baptism and the Supper of the Lord are generally necessary.

The 3rd question is—"Does our Church hold, and do you hold, that by the express words of our Lord in the text, John iii. 5, 'Except a man be born of water and of the Spirit, he cannot enter into the Kingdom of God,' we may perceive the great necessity of the sacrament of baptism where it may be had?" The answer is—"The Church states this in her service for adult baptism; and the statement containeth in it nothing contrary to the word of God." Reference is made to the 36th canon: "Your Lordship has already had my subscription to this acknowledgment on my institution to St. Just; for my assent to the whole Book of Common Prayer includes my assent to this part of it."

The 4th question is—"In the homily of Common Prayer and the Sacraments it is said that, 'According to the exact signification of a sacrament, baptism and the Supper of the Lord are visible signs expressly commanded in the New Testament, whereunto is annexed the promise of free forgiveness of our sins, and of our holiness and joining in Christ:' do you hold this to be godly and wholesome doctrine?" Then the bishop gives this intimation to Mr. Gorham. "This question is proposed in the words of the homily; not thereby to intimate that you are bound to assent to it without reserve, because of the authority of the homilies." To this Mr. Gorham replies: "My subscription to the Articles, and among them to the 35th, appears to me to involve a sufficient reply to this question. [51] I prefer, and I claim the privilege of giving my assent to the two books of homilies, generally, as containing 'a godly and wholesome doctrine and necessary for these times'" [that is in the times in which they were published], "to my basing any particular doctrine upon any detached sentence taken out of these books. In claiming this privilege, I by no means intend to intimate that I 'assent with reserve' to this passage. On the contrary, I consider it as expressing a wholesome truth, when fairly construed; but as it has been often adduced in controversies on the efficacy of the sacraments," &c. . . . "I fully assent to the wholesome truth contained in this quotation when fairly brought into connexion with the ARTICLES OF OUR CHURCH on the nature and efficacy of the Sacraments." These words printed in capital letters seem to intimate on the part of Mr. Gorham that he rests his case in an especial manner on the Articles, that he is disposed to make them the principal standard by which he wished to be judged.

Then follow the questions which specially raise the point under the consideration of the Court; the 5th, 6th, and 7th questions are put by the lord bishop in this manner: "Does our Church hold, and do you hold, that every infant baptized by a lawful minister with water in the name of the Father, and of the Son, and of the Holy Ghost, is made by God, in such baptism, a member of Christ, the child of God, and an inheritor of the Kingdom of Heaven?" The 6th is—"Does our Church hold, and do you hold, that such children, by the laver [52] of regeneration in baptism, are received into the number of the children of God, and heirs of everlasting life?" The 7th is—"Does our Church hold, and do you hold, that all infants, so baptized, are born again of water and of the Holy Ghost?" These questions were proposed separately to Mr. Gorham: he answers them collectively in the manner following:—"As these three questions all imply the same description of answer, I will discuss them together; and, generally, I reply that these propositions being stated in the precise words of the ritual services or of the catechism, undoubtedly must be held, by every honest member of the Church, to 'contain in them nothing contrary to the word of God, or to sound doctrine, or which a godly man may not with a good conscience use and submit unto, or which is not fairly defensible, . . . if it shall be allowed such just and favourable construction as in common equity ought to be allowed to all human writings, especially such as are set forth by authority.'" Here I may observe that Mr. Gorham does not give a precise answer to the question proposed to him, he scarcely answers for himself, but adopts, in part only, certain

words to be found in the preface to the Book of Common Prayer, with the qualification, which he makes still more emphatic than the original by his use of italics—"if it shall be allowed such just and favourable construction as in common equity ought to be allowed to all human writings, especially such as are set forth by authority." Then he goes on thus: "Now the 'just and favourable construction' of passages like these (occurring in services intended for popular use), which, [53] taken in their naked verbatim, might appear to contradict the clearest statements of scripture, and of the Church herself, must be sought, chiefly, I., by bringing them into juxta position with the precise and dogmatical teaching of the Church in her explicit standard of doctrine, the Thirty-nine Articles; in the next place, II., by comparing the various parts of her formularies with each other; and, collaterally, III., by ascertaining the views of those by whom her services were reformed, and her Articles sanctioned."

Such are the means proposed by Mr. Gorham of seeking the "just and favourable construction" of the ritual services of the Church—a course adopted, in part at least, by his learned counsel, who brought forward a great deal of learning to shew what were, in his view, the opinions of the reformers of the Church, in accordance with which opinions, as he contended, the formularies of the Church must be construed; and he laboured with great learning, endeavouring, as I understood, to establish that the reformers were Calvinists, and that, in accordance with that system, the Articles and the formularies of the Church, framed by those persons, must be interpreted. I have no intention, at present, at least, of directing my attention to this branch of the argument, or of following Mr. Gorham through his three heads or divisions, in which he considers the efficacy of the sacraments not merely in infants, but in adults; it is sufficient for me to observe that I have no intention of carrying my inquiry beyond the real question, namely, the case of the baptism of infants.

[54] With a view to ascertain the doctrine of the Church on any subject, no one, I think, can doubt that it was rightly stated by the learned counsel for Mr. Gorham that the Thirty-nine Articles are, in the first place, to be consulted; and when, on inquiry, it is found that they leave nothing short, but speak on any point of doctrine plainly, precisely, and definitely, then there can be no occasion to search further. This position was fortified by a reference to several writers, and amongst the number to Rogers, chaplain to Archbishop Bancroft. That learned author, in his preface, s. 35, to his work on the Articles,^(a) states, "The purpose of our Church is best known by the doctrine which she doth profess; the doctrine by the Thirty-nine Articles established by Act of Parliament; the Articles, by the words whereby they are expressed, and other purpose than the public doctrine doth minister, and other doctrine than in the said Articles is contained, our Church neither hath nor holdeth; and other sense they cannot yield than their words do impart. The words be the same, and none other, than erst and first they were; and therefore, the sense the same, the Articles the same, the doctrine the same, and the purpose and intention of our Church still one and the same."

To the same effect are the passages cited by the learned counsel from other writers and commentators—from Bishop Hall and Archbishop Whitgift. [55] The latter, in his preface to "The Defence of the Answer to the Admonition," London edit., 1574, fol., says, "It were but a needless labour to make any particular recital of those points of doctrine which this Church of England at this day doth hold and maintain, for they be at large set out in sundry English books, and especially in the Apology of the Church of England and the Defence of the same" [alluding to Bishop Jewell's Apology and Defence]; "summarily also collected together in the Book of Articles, agreed upon in the Convocation at London, anno 1562."

Again, to the same effect are the quotations from Bishops Prideaux and Stillingfleet. The latter, in his "Unreasonableness of Separation" (Pt. II. sect. 1, p. 95, London, 1681), observes . . . "The Doctrine of the Church of England is contained therein [in the Thirty-nine Articles]; and whatever the opinions of private persons may be, this is the standard by which the sense of our Church is to be taken."

(a) The title of the work referred to is "The Faith, Doctrine, and Religion professed and protected in the Realm of England, and Dominions of the same, expressed in Thirty-nine Articles," &c., London, 1661, of which there was an earlier edition. There were two other treatises at least on the subject of the Articles by Thomas Rogers.

There are passages quoted from other writers by the learned counsel, but they are all to the same effect.

Primâ facie, then, the Thirty-nine Articles are the standard of doctrine; they were framed for the express purpose of avoiding a diversity of opinion, and are, as such, to be considered, and, in the first instance, appealed to, in order to ascertain the doctrine of the Church. But if they fall short, if they are silent on any particular point, to what then are we to resort? Are we to resort to the supposed opinions of those by whom the Articles may have been framed and the formularies of the Church [56] compiled, or are we to appeal to the formularies themselves. We have it, I think, most clearly and distinctly stated by one whose authority, I presume, will not be questioned—I mean Bishop Burnet, in his “Pastoral Care,” at the commencement of C. VI., that “The truest indication of the sense of a Church is to be taken from her language in her public offices; this is that which she speaks the most frequently and the most publicly. Even the articles of doctrine are not so much read, or so often heard of, as her liturgies are. And as this way of reasoning has been of late made use of, with great advantage, against the Church of Rome, to make her accountable for all her public offices in their plain and literal meaning, so I will make use of it on this occasion. It is the stronger in our case, whose offices, being in a tongue understood by the people, the argument from them does more evidently conclude her.”

Again, Dr. Waterland, whose extensive learning entitles him to some weight, states: (a)—“The Church’s public acts are open and common, and he is the best Church of England man that best understands the principles there laid down, and argues closest from them; the rest are but assertions, fancies, or practices of private men, and are not binding on us.”

To the same effect is Bishop Conybeare, in “the Case of Subscription to Articles of Religion consi-[57]-dered;” a treatise contained in the 3rd vol. of the “Enchiridion Theologicum,” Oxford edit., 1792, speaking of the mode in which ambiguities of language are to be solved, at p. 262, he says: “If words singly and separately taken are loose and indeterminate, yet their sense may be fixed by the circumstances of the Article in which they are found, and expressions of themselves doubtful may become certain by considering their coherence with other parts of the proposition.” . . . At p. 263: “But if expressions should occur, which cannot be determined by passages in other Articles, then will it be proper to inquire whether they may be fixed by our public liturgy, or by any other monuments which have the sanction of ecclesiastical authority. The propositions set forth in any of our Articles ought to be understood in such a sense as is consistent with every other determination of the Church; because the Church cannot be supposed to intend one thing in some of her public acts and the direct contrary in others: to which we may add that those who subscribe the Articles of religion are obliged to admit those other determinations also; and consequently must subscribe them in such a sense as will make them agree and be consistent with each other.” . . . Again, p. 267: “Where the meaning of the Articles is already fixed by some public act of the Church, there no liberty can be allowed of altering the sense of it, and of adjusting it to our own interpretations of Scripture. . . . He who subscribes one Article equally subscribes the rest; and, what is more, equally professes submission to every other determination of the Church,” &c.

[58] The positions contained in these extracts, independently of the high respect due to those from whom they emanated, rest not only upon the principles of common sense, but also upon judicial authority. I find that my Lord Brougham, in delivering the judgment of the Superior Court in *Escott v. Mastin* (4 Moore, P. C. at p. 137), on the question of lay baptism, observed, in reference to the opinions of many distinguished divines cited by counsel, that “the question is not to be decided by a reference to the opinions, however respectable, of individuals eminent for their learning, or distinguished by their station in the Church.” This doctrine alone, then, is sufficient for my guide.

Taking this principle so laid down by the Judicial Committee, I proceed now to

(a) These precise words have not been discovered by the editor in Dr. Waterland’s works; their substance, however, is to be met with repeatedly in his “Case of Arian Subscription Considered,” and the supplement thereto. See vol. ii. pp. 281-401 of his works; edit. 1823.

consider whether there is anything doubtful upon the question of the efficacy of infant baptism, so as to render it necessary to have recourse to any authority beyond the Articles treating on the subject; for should it be necessary to look to any other source for assistance, it is clear I must look to other declarations of the Church as manifested in her services and offices.

The 25th Article thus commences:—"Sacraments ordained of Christ be not only badges or tokens of Christian men's profession, but rather they be certain sure witnesses and effectual signs of grace and God's good will towards us, by the which he doth work invisibly in us, and doth not only quicken, but also strengthen and confirm our faith in him. There are two sacraments ordained of Christ our Lord in [59] the Gospel; that is to say, baptism and the Supper of the Lord." [I pass over the other five sacraments of the Romish Church, as they relate not to the present inquiry; the Article proceeds],—"The sacraments were not ordained of Christ to be gazed upon or to be carried about, but that we should duly use them; and in such only as worthily receive the same they have a wholesome effect or operation; but they that receive them unworthily, purchase to themselves damnation, as St. Paul saith."

It was suggested in the course of the argument that the latter part of the Article which I have just read applies only to the Sacrament of the Lord's Supper. That suggestion seems to me to be perfectly immaterial, but I will take it that the passage does apply to both sacraments alike; since worthy reception, whatever that expression may mean, is, if I mistake not, according to the doctrine of the Church as contained in this Article, as necessary to baptism as it is to the Supper of the Lord.

It is to be observed, however, that this Article leaves it doubtful what worthy reception is. "Faith and repentance," says Mr. Gorham, "are necessary—are prerequisites to the sacrament of baptism as well as to that of the Lord's Supper." But where does Mr. Gorham find that? Certainly not in this Article.

Again; how is the 27th Article to be construed? "Baptism is not only a sign of profession and mark of difference whereby Christian men are discerned from others that be not christened, but it is also a sign of regeneration or new birth, whereby, as by an instrument, they that receive baptism rightly are [60] grafted into the Church; the promises of forgiveness of sin, and of our adoption to be the sons of God by the Holy Ghost, are visibly signed and sealed; faith is confirmed and grace increased by virtue of prayer unto God." We have here described what baptism is, and what are its effects. But how does the Article proceed? "The baptism of young children is in any wise to be retained in the Church, as most agreeable with the institution of Christ."

Now, the first question which suggests itself to one's mind is—if faith is to be confirmed, and grace increased by virtue of prayer unto God—how is it that young children are to be baptised? They can have neither faith nor repentance. They cannot have faith, because they know not the promises; they cannot have repentance because they have not committed actual sin. They may have faith and repentance in after life, but in infancy they can have neither the one nor the other; the one they cannot have for want of understanding; the other they cannot have, and are not required to have, since they have not been guilty of actual sin.

Comparing, then, the 25th and 27th Articles together, it is clear, I think, that we find no solution of the point—what constitutes worthy reception. We must appeal, then, to some other source—to some other authority; but what is that to be? Is it to be to the opinions of private individuals? I apprehend what I have already stated is quite sufficient to dispose of any such suggestion. I apprehend that the authoritative declarations of the Church are the source to which we must look for an explanation of what is meant by worthy reception, what is [61] meant by "regeneration," and what is also meant by the direction given, that "the baptism of young children is in any wise to be retained in the Church, as most agreeable with the institution of Christ." We must find from these sources the means by which children are to be brought within the description of those who are to be regenerated, to be "as by an instrument" . . . "grafted into the Church," and become persons to whom "the promises of forgiveness of sin" and of their "adoption to be the sons of God by the Holy Ghost are visibly signed and sealed."

Before, however, entering into a consideration of this part of the case, it may be as well to see what more Mr. Gorham has to suggest. Now, it will be seen, on reference

to his answers to other questions to which I am about to refer, that he tells us that children "being born in sin" cannot as such be worthy recipients; that "worthy reception" is necessary in order to produce beneficial effects from the administration of the rite of baptism; that children being born in sin cannot receive the sacrament of baptism with beneficial effect. Thus much I think appears from what follows. The 15th question is: "Not taking here into account what it may have pleased God to give to any infants before baptism, does our Church hold, and do you hold, that the entering of infants into these stipulations by their representatives is necessary to their receiving the spiritual grace of baptism?" The bishop pressed Mr. Gorham upon this point, as in former answers he, in substance, stated that the stipulations for repentance and faith are required to be [62] entered into on behalf of infants about to be baptized. The answer to the 15th question is—"Our Church holds, and I hold, that no spiritual grace is conveyed in baptism, except to worthy recipients, and as infants are by nature unworthy recipients, 'being born in sin and the children of wrath,' they cannot receive any benefit from baptism, except there shall have been a prevenient act of grace to make them worthy." Such is the hypothesis of Mr. Gorham—that in order to bring infants within the description of "worthy recipients" there must be "a prevenient act of grace." He proceeds with his answer—"Baptism is the sign or seal, either of the grace already given, or of the repentance and faith which are stipulated, and must be hereafter exercised." According to this, Mr. Gorham does not admit that it is by baptism or through baptism that grace is conferred; but he maintains there must be "a prevenient act of grace" conferred either before, at, or after baptism, in order to render infants worthy recipients, and, without that, baptism has no beneficial effect.

The 18th question is thus pointedly put: "Has the Church not declared her mind, that infants baptized by a lawful minister, in the name of the Father, and of the Son, and of the Holy Ghost, do receive the spiritual grace of baptism, even if they have not entered into the stipulations by their representatives?" The answer is: "The Church has declared that to infants privately baptized, the grace and mercy of Christ is not denied; in this case of emergency, I consider that stipulations, though not formally made by sponsors, are made by [63] implication through those who earnestly desire their baptism, and by the person who administers it; which implied stipulations the Church requires to be formally adopted as soon as the circumstances will suffer it. This case of 'present exigence' cannot, therefore, be fairly urged as an exception to the requirements of the Church." Mr. Gorham thus proceeds to state the grounds on which he founds his answer: "In the catechism the Church puts the question, 'Why, then, are infants baptized, when by reason of their tender age they cannot perform them?' (the 'promises' made by their sureties)—without limitation to infants baptized under any particular circumstances. It is a question stating a difficulty in its broadest and most general character.

"Now the answer which the Church gives brings us of necessity to one of three conclusions: Either, 1st, the Church intended unworthily to evade the principal difficulty; namely, the case of infants baptized in emergency, without the formal stipulations, the exaction of which is declared in the answer to solve the difficulty proposed. Or, 2dly, she intended to impose a charitable silence on her members, with regard to so nice and curious a point, shutting up all further search in the promises of God, as generally set forth in holy scripture. Or, 3dly, she intended to embrace that case in her general answer, and to consider that the stipulations were implied, under these urgent circumstances (to be hereafter absolutely entered into if more favourable circumstances permitted), though they were not formally given. The 1st of these suppositions, [64] of course, I dismiss peremptorily. The 2d hypothesis would put an end to all further inquiry into the subject. The 3d conclusion, therefore, which I adopt, is the only solution which is possible, if I am required to declare my view of the meaning of the Church."

The 19th question proposed by the bishop follows in the same course: "Does the Church hold, and do you hold, that infants, so baptized, are regenerated, independently of the stipulations made by their representatives or by any others for them?" Mr. Gorham says, "If such infants die before they commit 'actual sin,' the Church holds, and I hold, that they are 'undoubtedly saved.'" The answer does not end here, but thus proceeds, "And therefore they must have been regenerated" [by what means? mark what follows]; "they must have been regenerated by an act of grace prevenient

to their baptism, in order to make them worthy recipients of that sacrament. This case is ruled by the Church." This last passage or sentence Mr. Gorham explains in a note. "I mean—it is ruled that they were actually regenerated, and that they are 'undoubtedly saved.'" Then he continues his answer. "But, if the infant lives to a period in which it can commit 'actual sin'—the declaration of regeneration must be construed according to the hypothetical principle which I have stated in my replies 5, 6, 7, to questions V., VI., VII. That part of the question which relates to sponsorship, in these cases, I have replied to in the answer to question 18, so far as the mind of the Church can be ascertained."

Such, then, is the answer which Mr. Gorham [65] gives to this question. He admits (for he cannot deny it in the face of the declaration of the Church) that baptized infants who die before they commit "actual sin" are "undoubtedly saved," a doctrine or position which must rest on the ground that they are worthy recipients—otherwise the sacrament could not produce the benefit declared; however, he resorts to the hypothesis of a "preventient act of grace." Whether there may be a "preventient act," or whether there may be an act concurrent with the rite, or whether there may be an act subsequent to the rite, are points on which the Court is not called upon to express an opinion; it is sufficient for it to observe that Mr. Gorham's position is that it is not by baptism, or through baptism, that grace is conferred.

Having already considered such of the "Articles of Religion" as have a bearing on the question before me, I now proceed to the formularies of the Church, which, as I have said, must be my guide and authority in ascertaining its doctrines. With respect to these formularies, the first to which my attention must be directed is undoubtedly the office for "The Ministration of Public Baptism of Infants." Mr. Gorham's position in respect to that office is, that its language is to be considered as hypothetical—conditional upon the fulfilment of certain promises which are to be made for children in baptism by their godfathers and godmothers—that it contains language which requires a "just and favourable construction;" namely, that of charitable hope on the part of the Church.

On turning to this office we find the first rubric [66] contains an admonition, which shews the great importance attached to this sacrament by the Church; that it is necessary, at all events that it is highly important, it should be administered at the earliest time, is apparent from the rubric prefixed to the office for "The Ministration of Private Baptism of Children."

Now the first rubric of the office of public baptism is in these words: "The people are to be admonished that it is most convenient that baptism should not be administered but upon Sundays, and other holy days, when the most number of people come together; as well as for that the congregation there present may testify the receiving of them that be newly baptized into the number of Christ's Church, as also because in the baptism of infants every man present may be put in remembrance of his own profession made to God in his baptism. For which cause also it is expedient that baptism be ministered in the vulgar tongue," &c. After the 2nd and 3rd rubrics, which prescribe the number of godfathers and godmothers, the notice to be given to the curate, and the part of the service at which those concerned are to attend at the font, the service thus proceeds: "The priest," shall inquire whether the child has been already baptized or not; and if they answer "no," then he is directed to proceed as follows:—"Dearly beloved, forasmuch as all men are conceived and born in sin; and that our Saviour Christ saith, None can enter into the Kingdom of God, except he be regenerate and born anew of water and of the Holy Ghost; I beseech you to call upon God the Father, through our Lord Jesus Christ, that of his bounteous mercy he will grant to [67] this child that thing which by nature he cannot have; that he may be baptized with water and the Holy Ghost, and received into Christ's Holy Church, and be made a lively member of the same."

The exhortation and the instruction to the congregation assembled, for what they shall pray, are—"To call upon God the Father, through our Lord Jesus Christ, that of his bounteous mercy he will grant to this child that thing which by nature he cannot have," as born in sin; he must be released from that sin before he can be received into Christ's Holy Church; and the mode of delivery from that sin is to pray to God "that he may be baptized with water and the Holy Ghost," not simply water, but also with "the Holy Ghost, and received into Christ's Holy Church and be made a lively member of the same."

Then follows the prayer: "Almighty and everlasting God, who of thy great mercy didst save Noah and his family in the ark from perishing by water; and also didst safely lead the children of Israel, thy people, through the Red Sea, figuring thereby thy holy baptism; and by the baptism of thy well-beloved Son Jesus Christ, in the river Jordan, didst sanctify water to the mystical washing away of sin" [here are the grounds]; "We beseech thee, for thine infinite mercies, that thou wilt mercifully look upon this child; wash him and sanctify him with the Holy Ghost; that he, being delivered from thy wrath, may be received into the ark of Christ's Church; and being steadfast in faith, joyful through hope, and rooted in charity, may so pass the waves of this troublesome world, that finally he may come to the land of everlasting life, [68] there to reign with thee world without end; through Jesus Christ our Lord, Amen."

The object of the prayer is "that he may be washed and sanctified with the Holy Ghost, that he being delivered from wrath may be received into the ark of Christ's Church."

The next prayer is: "Almighty and immortal God, the aid of all that need, the helper of all that flee to thee for succour, the life of them that believe, and the resurrection of the dead; we call upon thee for this infant, that he, coming to thy Holy Baptism, may receive" [what?] "remission of his sins by spiritual regeneration. Receive him, O Lord, as thou hast promised by thy well-beloved Son, saying, Ask, and ye shall have; seek, and ye shall find; knock, and it shall be opened unto you: so give now unto us that ask; let us that seek find; open the gate unto us that knock; that this infant may enjoy the everlasting benediction of thy heavenly washing, and may come to the eternal kingdom which thou hast promised by Christ, our Lord." Therefore it is, that this child may receive remission of his sins by spiritual regeneration, not regeneration simply, but spiritual regeneration, the congregation pray.

Then follows the Gospel, taken from St. Mark, ch. x. v. 13, and after it the "Exhortation," the latter part of which is in these words: . . . "Doubt ye not, therefore, but earnestly believe, that he will likewise favourably receive this present infant, that he will embrace him with the arms of his mercy; that he will give unto him the blessing of eternal life, and make him partaker of his everlasting kingdom. Wherefore we being thus per-[69]-suaded of the good will of our heavenly Father towards this infant, declared by his Son Jesus Christ; and nothing doubting, but that he favourably alloweth this charitable work of ours in bringing this infant to his holy baptism; let us faithfully and devoutly give thanks unto him, and say, Almighty and everlasting God, heavenly Father, we give thee humble thanks for that thou hast vouchsafed to call us to the knowledge of thy grace and faith in thee: increase this knowledge, and confirm this faith in us evermore. Give thy Holy Spirit to this infant, that he may be born again and made an heir of everlasting salvation; through our Lord Jesus Christ, who liveth and reigneth with thee and the Holy Spirit, now and for ever."

This is followed by an address to the godfathers and godmothers, reminding them for what they have prayed, and after referring to the promise of Christ, it proceeds . . . "Wherefore, after this promise made by Christ, this infant must also faithfully for his part promise by you that are his sureties (until he comes of age to take it upon himself), that he will renounce the devil and all his works, and constantly believe God's holy word, and obediently keep his commandments." Questions are then addressed to the godfathers and godmothers in the name of the child, and the answers of the godfathers and godmothers are given.

The prayer, "O merciful God, grant that the old Adam in this child may be so buried, that the new man may be raised up in him," &c., follows; then the prayer for the sanctification of the water—"Almighty, everliving God, whose most dearly [70] beloved Son Jesus Christ, for the forgiveness of our sins did shed out of his most precious side both water and blood; and gave commandment to his disciples, that they should go teach all nations, and baptize them in the name of the Father, and of the Son, and of the Holy Ghost; regard, we beseech thee, the supplications of thy congregation, sanctify this water to the mystical washing away of sin;" [the Court had its attention particularly directed in the course of the argument to the word "mystical" as explaining all that was previously prayed for; that it was not an actual washing away of sin, but a mystical, or, as it was afterwards expressed, a sacramental washing away of sin; that the purifying of the child was sacramentally and not

spiritually. I do not, I confess, exactly see the force of this observation; some mystery, something beyond that which exactly meets the eye is to be the mystical washing away of sin by the sanctification of the water]. "And grant that this child, now to be baptized therein, may receive the fulness of thy grace, and ever remain in the number of thy faithful and elect children; through Jesus Christ our Lord."

The portion of the service to which I have hitherto referred precedes the baptism of the infant. The child is then baptized in the name of the Father, and of the Son, and of the Holy Ghost. He is received into the congregation with the sign of the cross; after which the priest addresses, by order of the Church, the congregation thus: "Seeing now, dearly beloved brethren, that this child is regenerate, and grafted into the body of Christ's Church" [here is a declaration that the thing is [71] now done, that the child is regenerate], "let us give thanks unto Almighty God for these benefits, and with one accord make our prayers unto him, that this child may lead the rest of his life according to this beginning." Then the Lord's Prayer is said, after which follows: "We yield thee hearty thanks, most merciful Father, that it hath pleased thee to regenerate this infant with thy Holy Spirit, to receive him for thine own child by adoption, and to incorporate him into thy Holy Church." The priest and congregation in the first instance prayed that God would be pleased, at the baptism of the infant, to grant that he might be regenerated by the Holy Spirit—might be received by incorporation into the Holy Church: and here we see they thank God that he has been so received in the following words:—"And humbly we beseech thee to grant that he, being dead unto sin, and living unto righteousness, and being buried with Christ in his death, may crucify the old man, and utterly abolish the whole body of sin; and that, as he is made partaker of the death of thy Son, he may also be partaker of his resurrection; so that finally, with the residue of thy Holy Church, he may be an inheritor of thine everlasting kingdom; through Christ our Lord."

Then an exhortation is given to the godfathers and godmothers as to their duty, which concludes the service in these words: "Ye are to take care that this child be brought to the bishop to be confirmed by him so soon as he can say the Creed, the Lord's Prayer, and the Ten Commandments, in the vulgar tongue, and be further instructed in the Church Catechism set forth for that purpose."

[72] It was argued, on behalf of Mr. Gorham, that the reason why the Church admits an infant to baptism in the form prescribed is, that although he cannot perform the requisites for baptism, although he cannot have faith and repentance, yet he is baptized on the presumption or hypothesis that he will do all that is promised for him by his sponsors; that he will renounce the world, the flesh, and the devil, when he comes to years of discretion, and is of sufficient capacity to understand what has been promised for him.

Now, I confess it does not appear to me that that which is contended for is the true construction of the language of the baptismal service for infants. I confine myself to the case of infants; for the case of adults is totally different. It is allowed, without question, both by the bishop and Mr. Gorham, that in the latter case the declarations of the Church are all on the hypothesis that they (adults) are sincere in their professions of faith and repentance; that they intend to perform, and will perform, to the utmost of their ability, all they themselves undertake: but in the case of infants the declaration in the service of public baptism, of which we are now speaking, is positive, precise, and distinct, that the child "is regenerate," and thanks are returned to God for that benefit.

I turn now to the office for "The Ministration of Private Baptism of Children." In respect to it, it was contended that, inasmuch as it is an office administered only in a case of "great necessity," nothing with respect to the efficacy of baptism without stipulations can be fairly drawn from that [73] formulary—that, though there is an omission of godfathers and godmothers, there is implied a promise on behalf of the baptized.

Here, again, I confess I differ in opinion from the learned counsel. Though this office is to be administered only in "great cause and necessity," is it not one in which the Church intended to declare that the child so baptized is entitled to all the benefits of an infant publicly baptized? Otherwise, why should the Church direct that "so many of the collects appointed to be said before in the form of public baptism, as the time and present exigence will suffer," are to be made use of? If the child is baptized in the name of the Father, and of the Son, and of the Holy Ghost—if thanks are

given to God that it hath pleased him "to regenerate this infant" with his Holy Spirit, "to receive him" for his own child "by adoption, and to incorporate him" into his Holy Church—then is the full effect of baptism given to the infant so baptized; the baptism is complete in itself, without the intervention of godfathers and godmothers. The same declaration as to the regenerate state of the infant is made, though not absolutely prayed for, as in the case of public baptism; otherwise the Church would not have gone on to declare—"and let them not doubt but that the child so baptized is lawfully and sufficiently baptized, and ought not to be baptized again." The administration of the sacrament is complete immediately after the child is baptized with water in the name of the Father, and of the Son, and of the Holy Ghost. If this were not so, said the learned counsel for the bishop, the child ought to [74] be taken to the church on recovery and baptized again, inasmuch as it would not, according to the argument on the other side, have received the full benefits of baptism: I must say I think there is something in that observation. But, according to the Church, that which is directed to be done afterwards is not a repetition of the baptism, as we shall presently see.

Again, it was said the Church puts baptism, whether public or private, on the same footing; for it is required the child should be brought into the church, if it should live, for certain purposes: but what are they? The direction of the rubric is, . . . "Yet, nevertheless, if the child, which is after this sort baptized, do afterwards live, it is expedient that it be brought into the church, to the intent that if the minister of the same parish did himself baptize that child, the congregation may be certified of the true form of baptism by him privately before used; in which case he shall say thus—I certify you that, according to the due and prescribed order of the Church, at such a time and at such a place before divers witnesses, I baptized this child." But if the child was baptized by any other person, certain questions are to be addressed to those present, in order to ascertain that the due form and order of the Church had been followed in the baptism: "By whom was this child baptized? Who was present when this child was baptized? Because some things essential to this sacrament may happen to be omitted through fear or haste, in such times of extremity; therefore I demand further of you, With what matter was this child baptized? [75] With what words was this child baptized?" Therefore, the matter and the words are the essential parts of the baptism. The rubric then directs, "If the minister shall find, by the answers of such as bring the child, that all things were done as they ought to be; then shall not he christen the child again," &c.; but he is to certify the congregation in the words of the Church—"I certify you that in this case all is well done, and according unto due order, concerning the baptizing of this child; who, being born in original sin, and in the wrath of God, is now, by the laver of regeneration in baptism, received into the number of the children of God, and heirs of everlasting life." Here is a declaration positive and precise in a case where there were no sponsors (though Mr. Gorham says their stipulations are implied), that this child, so baptized in the name of the Father, and of the Son, and of the Holy Ghost, with water, "is now, by the laver of regeneration in baptism, received into the number of the children of God, and heirs of everlasting life; for our Lord Jesus Christ doth not deny his grace and mercy unto such infants." The form of private baptism, I say, shews that what is required to be done in the church, if the child live, is a matter of order and decency—that neither godfathers nor godmothers are an essential part of baptism, because the rubric to which I have already referred states that the child "is lawfully and sufficiently baptized." What room is there then for stating that either of the offices of public or private baptism of infants is merely conditional, or founded [76] upon an hypothesis? True it is, if the child should live to become a responsible being and commit actual sin, then he may pass from the benefits given in baptism; in this state, faith and repentance would be requisite, in order—not to regenerate him, for that has already been done, according to the declaration of the Church in baptism—but to renovate and bring him back into that state in which he was placed by baptism.

But, to put the point beyond all doubt, we have a positive declaration on the part of the Church—not a mere hypothetical or charitable hope—in these words: "It is certain, by God's Word, that children which are baptized, dying before they commit actual sin, are undoubtedly saved." It is not a suppositive declaration of the Church. According to her interpretation of God's word she declares, "It is certain, by God's

word, that children which are baptized, dying before they commit actual sin, are undoubtedly saved." Mr. Gorham admits (see p. 85 of his book) that the Church has ruled that children who have been baptized, and die before committing actual sin, are "undoubtedly saved." I cannot understand how any qualification can be engrafted on these words: the Church bases the declaration on "God's word." I cannot understand upon what principle the declaration of the Church is to be considered a mere charitable hope: the supposition is that the child dies without committing actual sin; and the declaration in the service is that the child "is regenerated by the Holy Spirit;" that he is "the child of God;" that he is "incorporated [77] into the Church." In the face of this express language it is, I confess, to me extremely difficult to understand it in Mr. Gorham's qualified sense.

There is, however, another baptismal service remaining to be considered, namely, "The Ministration of Baptism to such as are of Riper Years, and are able to answer for Themselves."

This formulary had not a place in our Prayer Book until it was introduced on the review after the Restoration. The ground of its introduction is stated, in the preface to the Book of Common Prayer, to be by reason of "the growth of anabaptism, through the licentiousness of the late times crept in amongst us," that it "is now become necessary, and may be always useful for the baptizing of natives in our plantations, and others converted to the faith." This service was said to be on the same footing and of the same character with the other two, which I have already considered; and it was asked why, if one form out of the three is hypothetical, the other two are not equally so? It appears to me that there is a sufficient answer to that question. In the case of the public baptism of those of riper years, they who apply for baptism have not only committed actual sin and have need of repentance, but they also know that such is the case; moreover, they are to be "instructed in the principles of the Christian religion" before they are permitted to partake of that holy sacrament. They therefore come in their own right, they enter into the promises in their own names, with a profession of a sincere intention to perform all they undertake. Again; infants, who promise by their sureties, in partaking [78] of baptism, if they die "before they commit actual sin," are "saved" according to the declaration of the Church; but those of riper years, who have been instructed in the principles of religion, who know what they have to perform and make the promises in their own persons, are necessarily considered as entitled to the benefits of baptism upon the supposition only that they are sincere in their promises of faith and repentance; when they offer themselves for baptism and its benefits, they must so do either hypocritically or sincerely, but the Church cannot know whether they are sincere or not; it can judge only of their outward conduct. There is then, I say, this marked distinction; that the Church knows in the case of the infant that it cannot have committed "actual sin" before baptism; whereas, in the case of the adult, it can only rely upon his outward profession of faith and repentance.

It does appear to me, then, that no legitimate argument can be drawn from the hypothetical sense or charitable judgment with respect to adults, to justify the application of the same to the case of infants, who, it is positively declared, are "by God's word" saved if they have been baptized and die before they commit actual sin. I say no argument can be drawn from the one case to the other; in the case of the baptism of those of riper years, the Church can act only on the charitable supposition that the parties are sincere. I say the two services are most materially distinguished; they substantially differ, on separate and distinct grounds, the one from the other.

[79] In respect, however, of the services of the Church, the question at issue rests not here. After children have been baptized, and they have arrived at a sufficient age to be instructed and to learn the principles of the Christian religion, they are, amongst other things, to be instructed in the Church catechism, which thus commences: "What is your name? Who gave you this name?" The answer to the latter question is, "My godfathers and godmothers in my baptism, wherein I was made a member of Christ, the child of God, and an inheritor of the Kingdom of Heaven." This is in strict conformity with the declaration made at the time of baptism—the services are, we see, in the outset, in accordance with each other. Then, as to the next question: "What did your godfathers and godmothers then for you?" "They did promise and vow three things in my name. First, that I should

renounce the devil and all his works, the pomps and vanities of this wicked world, and all the sinful lusts of the flesh," which is, in effect, the same with the renunciation of "the carnal desires of the flesh" in the baptismal service. "Secondly, that I should believe all the Articles of the Christian faith. And thirdly, that I should keep God's holy will and commandments, and walk in the same all the days of my life." "Question. Dost thou not think that thou art bound to believe and to do as they have promised for thee? Answer. Yes, verily; and by God's help so I will. And I heartily thank our heavenly Father, that he hath called me to this state of salvation," [that is, the state in which I was placed by baptism, no longer a child of wrath, but a child of [80] grace; I was born in sin, but by baptism was free,] "through Jesus Christ our Saviour. And I pray unto God to give me his grace that I may continue in the same unto my life's end." "Continue"—there is no doubt, no hypothesis, here expressed as to the state in which the child was placed by baptism. He prays for grace that he may continue; that he may not fall away from that state; that he may not, by sin, lose that grace which was conferred on him in his baptism.

The child is then desired to say the Articles of his belief, the commandments, and, after the Lord's Prayer, the Catechism proceeds to the questions on the sacraments, which were added after the Restoration. "Question. How many sacraments hath Christ ordained in his Church? Answer. Two only, as generally necessary to salvation, that is to say, Baptism and the Supper of the Lord. Question. What meanest thou by this word sacrament? Answer. I mean an outward and visible sign of an inward and spiritual grace given unto us, ordained by Christ himself, as a means whereby we receive the same, and a pledge to assure us thereof." Here is, in effect, the same language—spiritual grace given; baptism is a sacrament ordained by Christ as a means whereby we receive the same, that is, the grace given to us. I cannot understand how a doubt can be raised on the baptismal services, or upon these words. "Question. How many parts are there in a sacrament? Answer. Two; the outward visible sign, and the inward spiritual grace. Question. What is the outward visible sign or form in baptism? Answer. Water; wherein the person is baptized, in the name of the [81] Father, and of the Son, and of the Holy Ghost. Question. What is the inward and spiritual grace? Answer. A death unto sin and a new birth unto righteousness:—Regeneration, by the Holy Ghost, for the remission of sins:—"for being by nature born in sin, and the children of wrath, we are hereby made the children of grace. Question. What is required of persons to be baptized? Answer. Repentance, whereby they forsake sin; and faith, whereby they steadfastly believe the promises of God made to them in that sacrament." Then follows this—"Question. Why, then, are infants baptized, when, by reason of their tender age, they cannot perform them? Answer. Because they promise them both by their sureties, which promises, when they come to age, themselves are bound to perform."

The Church, then, we see, admits infants to partake of the sacrament of baptism upon the supposition that, if they should live and arrive at years of discretion, they will take upon themselves the performance of those vows which were made by their sureties in baptism. But the state of those children who die before "they commit actual sin" is, as I have already observed, declared at the end of the baptismal service, namely, "It is certain, by God's word, that children which are baptized, dying before they commit actual sin, are undoubtedly saved." They must be "baptized"—they must die "before they commit actual sin" to bring them within that declaration. "Prevenient grace" is not the mode—the Church says nothing about prevenient grace; but if they live—"when they come to age," the [82] Church says they are bound to perform the promises of their sureties.

The same doctrine runs through all the catechisms which were referred to in the course of the argument. I cannot understand that Dean Nowell teaches any other doctrine whatever; but I will refer to his catechism to be found in the *Enchiridion Theologicum*, Oxford edition, 1792, vol. ii. pp. 212-216: the passage on the subject runs thus:—"M. De baptismo ergo primum die quid censeas. A. Quum naturâ filii iræ, id est, alieni ab Ecclesiâ, quæ Dei familia est, simus, baptismus veluti aditus quidam nobis est, per quem in eam admittimur;" [admitted into Christ's Church by means of baptism]—"unde et testimonium etiam amplissimum accipimus, in numero domesticorum, adeoque filiorum Dei nos jam esse; imo in Christi corpus quasi cooptari, atque inseri, ejusque membra fieri, et in unum cum ipso corpus coalescere." [Taken into and inserted as it were in Christ's body, made members of Christ, and

engrafted into one body with him.] “M. Sacramentum antea dicebas duabus constare partibus, signo externo, et arcana gratia. Quod est in baptismo signum externum? A. Aqua in quam baptizatus intingitur, vel eâ aspergitur, in nomine Patris, et Filii, et Spiritus Sancti. M. Quæ est arcana et spiritualis gratia? A. Ea duplex est; remissio videlicet peccatorum, et regeneratio, quæ utraque in externo illo signo, solidam et expressam effigiem suam tenent. M. Quomodo? A. Primum, quemadmodum sordes corporis aqua, ita animæ maculæ per remissionem peccatorum eluuntur; deinde regenerationis initium, id est, naturæ nostræ [83] mortificatio, vel immersio in aquam, vel ejus aspersione exprimitur. Postremo vero, quum ab aquâ, quam ad momentum subimus, statim emergimus, nova vita, quæ est regenerationis nostræ pars altera atque finis representatur.” [In accordance with all the baptismal services, and the Catechism of the Church.] “M. Videris aquam effigiem tantum quandam rerum divinarum efficere. A. Effigies quidem est, sed minimè inanis aut fallax; ut cui rerum ipsarum veritas adjuncta sit atque annexa.” [It is not an empty or deceitful sign.] “Nam sicuti Deus peccatorum condonationem et vitæ novitatem nobis vere in baptismo offert, ita a nobis certo recipiuntur. Absit enim ut Deum vanis nos imaginibus ludere atque frustrari putemus.” [They are not mere signs, but beneficial signs—“effectual signs of grace.”] “M. Non ergo remissionem peccatorum externâ aquæ lavatione aut aspersione consequimur? A. Minimè: nam solus Christus sanguine suo animarum nostrarum maculas luit atque eluit. Hunc ergo honorem externo elemento tribuere nefas est.” [As expressed in one of the quotations by the learned counsel, attributing this to water merely.] “Verum Spiritus Sanctus conscientias nostras sacro illo sanguine quasi aspergens, abstersis omnibus peccati sordibus, puros nos coram Deo reddit. Hujus vero peccatorum nostrorum expiationis oblationem atque pignus in sacramento habemus?” [Sacramental!] “M. Regenerationem vero unde habemus? A. Non aliunde quàm a morte et resurrectione Christi; nam per mortis suæ vim vetus homo noster quodammodo crucifigitur et mortificatur, et naturæ nostræ vitio-[84]-sitas quasi sepelitur, ne amplius in nobis vivat et vigeat. Resurrectionis verò suæ beneficio nobis largitur, ut in novam vitam ad obediendum Dei justitiæ reformemur. M. An gratiam hanc omnes communiter et promiscue consequuntur. A. Soli fideles hunc fructum percipiunt: increduli vero oblatas illie a Deo promissiones respuendo, aditum sibi præcludentes, inanes abeunt, non tamen ideo efficiunt, ut suam sacramenta vim et naturam amittant.” [The faithful alone receive the benefit of baptism. So we also say in adult baptism that those, who are not sincere in their faith and repentance, receive no benefit from the administration.] “M. Rectus ergo baptismi usus quibus in rebus sit situs breviter edissere. A. In fide et penitentiâ.” [Faith and repentance—that is the doctrine of our Church; “Repentance whereby we forsake sin, and faith whereby we steadfastly believe the promises of God made to us in that sacrament.”] “Primum enim Christi nos sanguine a cunctis purgatos sordibus Deo gratos esse, spiritumque ejus in nobis habitare certa fiducia cum animis nostris statutum habere oportet. Deinde in carne nostra mortificanda, obediendoque justitiæ divinæ, assiduè omni ope et opera est entendum, et pia vita apud omnes declarandum nos in baptismo Christum ipsum quasi induisse, et ejus Spiritu donatos esse.” [Then comes the question why infants are baptized; the answer is, as it appears to me, in conformity with our Catechism, “Because they promise them both by their sureties, which promise, when they come to age, themselves are bound to perform.”] “M. Quum infantes hæc, quæ commemoras, hactenus per ætatem præstare non [85] possint, qui fit ut illi baptizentur? A. Ut fides et poenitentia baptismo præcedant, tantum in adultis, qui per ætatem sunt utriusque capaces, exigitur; infantibus vero promissio Ecclesiæ facta per Christum, in cujus fide baptizantur, in præsens satis erit, deinde postquam adoleverint, baptismi sui veritatem ipsos agnoscere, ejusque vim in animis eorum vigere, atque ipsorum vita, et moribus representari omnino oportet.”

Dean Nowell, in the passages I have read, appears to me to put the case on the same footing as the Church Catechism does; namely, that, in the case of adults, faith and repentance must precede baptism; but that in the case of infants the promises made by their sureties are accepted, though, if they come to age, they themselves must then perform them. I cannot discover any sensible difference between the doctrine of our Church as set forth in her Catechism and the passages I have referred to in Nowell's catechism.

But when the child has come to years of discretion, and is instructed in the

principles of religion, and of the nature of the promises made for him in baptism, he is then to be brought to be confirmed by the bishop.

Now the preface to the Order of Confirmation states the reason why this service was framed; it is . . . "to the end that children, being now come to the years of discretion, and having learned what their godfathers and godmothers promised for them in baptism, they may themselves, with their own mouth and consent, openly before the Church, ratify and confirm the same, and also promise that by the grace of God they will evermore endeavour [86] themselves faithfully to observe such things, as they, by their own confession, have assented unto." Then the question is put by the bishop—"Do ye here, in the presence of God, and of this congregation, renew the solemn promise and vow that was made in your name at your baptism; ratifying and confirming the same in your own persons; and acknowledging yourselves bound to believe and to do all those things which your godfathers and godmothers then undertook for you?" After the question is answered, what is declared in the prayer? "Almighty and everliving God, who has vouchsafed to regenerate these thy servants by water and the Holy Ghost, and hast given unto them forgiveness of all their sins; strengthen them, we beseech thee, O Lord, with the Holy Ghost the Comforter, and daily increase in them thy manifold gifts of grace, the spirit of wisdom and understanding; the spirit of counsel and ghostly strength; the spirit of knowledge and true godliness; and fill them, O Lord, with the spirit of thy holy fear, now and for ever." In this service, also, we see it is declared that children are "regenerate by water and the Holy Ghost," and that their sins are forgiven; which positions are directly in accordance with the declarations contained in the baptismal services and in the Church Catechism. They all shew that it is by baptism that children become "regenerate," and their sins are forgiven.

These are the services upon which great stress was laid by the learned counsel for Mr. Gorham. They appear to me by no means to shew, as was contended, that the whole doctrine of the Church is [87] hypothetical, and involves merely a charitable hope; the declarations are positive. Taking, then, the words of these services in their natural and literal sense, I am of opinion that the doctrine of regeneration in the baptism of infants is established.

There may be a difficulty in ascertaining what is meant by the word "regeneration"; whether it implies an absolute change of nature, character, and feelings, or whether it implies only a change of state and of relation; that is, a change of state from "a child of wrath to a child of grace." It appears to me that the meaning of the word is sufficiently explained by the terms made use of—regeneration "by water and the Holy Ghost;" for the remission of sins is given by means of the administration of water and the Holy Ghost accompanying it. It is nothing to say that there may be cases in which the sign may be received without the thing signified: that may be often so in the case of adults; but the Church can only express a charitable hope that it is not so—that they are sincere in their promises of faith and repentance; and if they are sincere, then the Church declares that they are members of Christ's Church, that their sins are forgiven, in other words, that they receive the benefits of baptism.

It seems to me, from all the consideration I have been able to give the subject, that the word regeneration does not mean and imply such a total change of character as to preclude persons baptized from ever or finally falling, but that the word means such a change of station, character, and relation as places them in a new situation—from children of wrath to [88] children of grace—whereby they become members of Christ and inheritors of the kingdom of heaven. This view, I find, accords with the sentiments of distinguished divines; of that number is a living prelate (a) of the Church, who says: "No reasonable doubt can be entertained that it" [the word "regeneration"] "was appropriated to that grace, whatever may be its nature, which it bestowed on us in the sacrament of baptism (including perhaps occasionally, by a common figure of speech, its proper and legitimate effects, considered in conjunction with it), from the beginning of Christianity to no very distant period of ecclesiastical history. In those few passages of the ancient Christian writers, where it bears another signification, it is evidently used in a figurative manner, to express such a

(a) Dr. Bethell, Bishop of Bangor, in his "General View of the Doctrine of Regeneration in Baptism," pp. 6, 8, 3rd edit.

change as seemed to bear some analogy in magnitude and importance to the change effected in baptism. At the time of the Reformation the word was commonly used in a more loose and popular way to signify sometimes 'justification,' sometimes 'conversion,'—or the turning from sinful courses—sometimes 'repentance,' or that gradual change of heart and life, which is likewise called 'renovation.' Hence, in popular language, it came to signify a great and general reformation of habits and character; and the words 'regenerate' and 'unregenerate' were substituted for the words 'converted' and 'unconverted,' 'renewed' and 'unrenewed,' 'righteous' and 'wicked.' In modern times we have been taught that 'regeneration' is a thing quite unconnected [89] with baptism" [that is Mr. Gorham's position]; "that it may take place in that sacrament, as well as at any other time, but that to suppose it, in any proper sense, dependent on it, is an unreasonable and unscriptural opinion."

The same learned prelate, to whom I have just referred, gives (*ibid.* C. II. pp. 14, 15) a summary of the view taken by Dr. Waterland in his celebrated discourse, to be found in vol. vi. pp. 341-380 of his works, edit. 1823. "Regeneration is distinguished from renovation. Regeneration is a change of the whole spiritual state; renovation, a change of inward frame or disposition; which in adults is rather a qualification or capacity for regeneration than regeneration itself. That in infants regeneration necessarily takes place without renovation, but in adults renovation exists (or at least ought to exist) before, in, and after baptism."

"Regeneration," he proceeds, "is the joint work of the water and of the Spirit, or, to speak more properly, of the Spirit only; renovation is the joint work of the Spirit and the man."

"Regeneration comes only once—in or through baptism. Renovation exists before, in, and after baptism, and may be often repeated. Regeneration, being a single act, can have no parts, and is incapable of increase. Renovation in its own nature progressive. Regeneration, though suspended as to its effects and benefits, cannot be totally lost in this present life. Renovation may be often repeated and totally lost." Dr. Waterland illustrates the doctrine thus: "Grown persons coming to baptism properly [90] qualified, receive at once the grace of regeneration; but, however well prepared, they are not regenerate without baptism. Afterwards, renovation grows more and more within them by the indwelling of the Holy Spirit. As to infants, their innocence and incapacity are to them instead of repentance, which they do not want, and of actual faith, which they cannot have: and they are capable of being born again, and adopted by God, because they bring no obstacle. They stipulate, and the Holy Spirit translates them out of a state of nature into a state of grace, favour, and acceptance. In their case regeneration precedes, and renovation follows after, and they are the temple of the Spirit, till they defile themselves with sin."

There is one other distinguished divine to whom I will refer as to the meaning of the term regeneration in baptism. I allude to Bishop Van Mildert, who, in the sixth of his Bampton Lectures, at pp. 195, 196, 2d edit., says: "... the word regeneration, in the scriptural usage of it, means only our initiation, or entrance, by baptism, into that covenant, which gives us new privileges, new hopes, and a new principle of spiritual life, placing us in a totally different state from that to which by nature only we could ever attain. The expression, therefore, cannot, without a direct violation of the verbal analogy of scripture, be applied to any operation that takes place subsequent to that baptismal change, with which alone it perfectly corresponds." Such is the view taken by Bishop Van Mildert—a view which, it is unnecessary to observe, is in per-[91]-fect keeping with the language of the Church, as used in her baptismal services, "Grant to this child that thing which by nature he cannot have."

It appears to me most clearly and distinctly, from the services themselves, that infants are regenerated in baptism in the proper sense of the word, and are placed in a state in which they are made "partakers of the kingdom of heaven." True it is they may forfeit their title, they may fall away from the grace imparted to them, commit sin, grow up and persist in it, and may die without faith and without repentance: in such cases the grace bestowed in baptism would be lost. But in the case of those who die immediately after baptism they are regenerate, and are undoubtedly saved, because they die "before they have committed actual sin." Upon this part of the case I cannot entertain the least doubt. The words of the services themselves, I repeat, shew that the infant is regenerated in and through baptism; the declaration of the Church to that point is positive and precise.

I must now consider some other arguments which were adduced on behalf of Mr. Gorham.

Reference was made to the burial service, which, it was said, must be taken to be, beyond controversy, a service expressive of a charitable hope; that it was framed on the hypothesis that the person deceased was duly prepared for death, and therefore that the body is committed to the earth "in sure and certain hope of the resurrection to eternal life." I confess it does not appear to me that any strong inference is to be deduced by analogy from that office. The Church must necessarily assume, with respect to the person dead, that God has taken [92] him, as it is said, "unto himself;" the meaning of which I apprehend to be that God has removed him from this world in the state in which he then was, of which state the Church cannot judge, to a world in which there is no possibility of committing sin. We pray that we may rest in Christ, "as our hope is this our brother doth." This prayer is founded in hope; founded on the hypothesis that the deceased, however wicked, may have repented of his sins. The priest cannot pronounce how the person died—whether he was or was not a repentant sinner; whether he is to be eventually received into the kingdom of heaven, or whether he is to suffer punishment for his sins and transgressions. Nevertheless, the Church expresses a hope that "this our brother doth" rest in Christ. I cannot see that this service affords much aid to the question in which Mr. Gorham is concerned.

In the next place. The Articles, it was contended, are not to be construed by the formularies; it was argued that when a clergyman is required by law to make a public declaration of his assent to the Articles and the Book of Common Prayer, the assent is not in the same terms in each case—that in the case of the Articles he declares his unfeigned assent to them, and subscribes them as "agreeable to the word of God" (can. 36); whereas, in the case of the Book of Common Prayer, he declares his unfeigned assent and consent to the use only of that book, and subscribes it as containing "nothing contrary to the word of God;" in other words it was argued that it was merely to the use of that book, [93] and not to the doctrines contained therein, that he assents and consents. I apprehend if a clergyman assents and consents to make use of the book, that he assents and consents likewise that it "containeth in it nothing contrary to the word of God" or contrary to the Articles which are stated to be "agreeable to the word of God"—in short, that he acknowledges the truth of what is contained in that book. He cannot excuse himself by saying I consent merely to use it; the declaration is too strong—"I do here declare my unfeigned assent and consent to all and every thing contained and prescribed in and by the book," &c.; (a) he appears to me to make a declaration that he believes what is contained in that book. I apprehend, then, that as the Book of Common Prayer contains "nothing contrary to the word of God," and as the Articles are "agreeable to the word of God," the two cannot be construed in opposition but must be construed together.

Again, another important question was raised by the learned counsel for Mr. Gorham, the discussion of which occupied a considerable portion of time, namely, What were the opinions of the Reformers? It was contended they embraced the opinions of Calvin; that, therefore, it could not have been intended by them to declare in such positive terms, as the words import in the baptismal and other services of the Church, that infants are by baptism regenerate.

In the first instance, advantage was taken of a statement made by the learned counsel of the bishop that Cranmer had never changed his opinion with [94] respect to baptism—that it always remained the same. I think the learned counsel of Mr. Gorham has very successfully argued against that position, and has shewn that Cranmer did change his views, and necessarily must have done so; but at the same time I must remark that I think the learned counsel for the bishop never intended his assertion to be carried to the extreme length his words seemed to imply.

That the Reformers individually embraced the whole doctrines of Calvin is, I think, a matter of very great doubt. It cannot be denied that the doctrines of Calvin made a certain progress in this country. Cranmer, Ridley, and Latimer, and many others may have, to a certain degree, embraced some of the principles of Calvin; but the question is, To what extent? Did they believe in, or rather, did they teach his tenets on predestination, election, final perseverance, reprobation? I was, in

effect, told that Cranmer was a Calvinist, that his principles and opinions are to be gleaned from those with whom he associated in the work of the Reformation, that he is responsible for Peter Martyr and Martin Bucer, whom he placed in the Divinity Chairs at Oxford and Cambridge. How far Martin Bucer, how far Peter Martyr carried Calvin's principles, and how far they were embraced by Cranmer and the rest of the Reformers, I stop not to inquire; but as Cranmer and his associate Ridley are generally supposed to have had an active share in framing our Articles and service books in the reign of Edward VI., we may be able, at least to some extent, to ascertain their views, or, perhaps more properly, the sentiments of our Church.

[95] The learned counsel for Mr. Gorham said that, in his opinion, the 17th Article (for there is no more than a verbal difference between that Article of 1552 and 1562) determined this question. Let us see and consider the Article in its own words. "Predestination to life is the everlasting purpose of God, whereby (before the foundations of the world were laid) he hath constantly decreed by his counsel, secret to us, to deliver from curse and damnation those whom he hath chosen in Christ out of mankind, and to bring them by Christ to everlasting salvation, as vessels made to honour. Wherefore they, which be endued with so excellent a benefit of God, be called according to God's purpose, by his Spirit working in due season: they through grace obey the calling: they be justified freely: they be made sons of God by adoption: they be made like the image of his only begotten Son, Jesus Christ: they walk religiously in good works; and, at length, by God's mercy, they attain to everlasting felicity.

"As the godly consideration of predestination, and our election in Christ, is full of sweet, pleasant, and unspeakable comfort to godly persons, and such as feel in themselves the working of the Spirit of Christ, mortifying the works of the flesh and their earthly members, and drawing up their mind to high and heavenly things as well because it doth greatly establish and confirm their faith of eternal salvation to be enjoyed through Christ, as because it doth fervently kindle their love towards God":—[one would suppose that the compilers of the Articles and the Church, had they embraced the entire tenets of Calvin, would have gone on to declare this an [96] article of faith, but instead of that, what do they say?]"—"So, for curious and carnal persons, lacking the Spirit of Christ, to have continually before their eyes the sentence of God's predestination, is a most dangerous downfall, whereby the devil doth thrust them either into desperation or into wretchedness of most unclean living no less perilous than desperation. Furthermore, we must receive God's promises in such wise as they be generally set forth to us in Holy Scripture; and in our doings that will of God is to be followed which we have expressly declared unto us in the word of God." We see then that the compilers, and I may add the Church, determine nothing with respect to predestination and election; they say it "is full of sweet, pleasant, and unspeakable comfort to godly persons," but with respect to "carnal persons," for them "to have continually before their eyes the sentence of God's predestination is a most dangerous downfall, whereby the devil doth thrust them either into desperation or into wretchedness of most unclean living no less perilous than desperation."

It was allowed that this particular question was left open by the Reformers; but it was said it was so left open for the purpose of embracing and inducing as many as possible to sign the Articles. I cannot adopt that opinion; I think the Reformers must, if they had entertained the doctrines of absolute predestination and election, have expressed themselves in terms which could have left no doubt as to their meaning; they hardly, I think, could have been guilty of endeavouring to lead any into the belief that those were doctrines of faith to be [97] received, without declaring themselves in plain language.

We here see to what extent Cranmer and Ridley did not proceed on the 17th Article. Have they elsewhere, in any of the services or offices of the Church, in effect said, in the words of Bishop Hopkins,^(a) "God promises pardon and remission of sins to all that believe and repent; but he promises grace to believe and repent only to those whom, by his absolute covenant, he has engaged to bring through faith and

(a) As cited by Archbishop Sumner in his "Apostolical Preaching," p. 75, 8th edit. The doctrinal works of Bishop Hopkins have been described by a learned prelate as being "a kind of digest of Calvinistic common places."

repentance to salvation?" Did they go to the extent of what was afterwards laid down in the Synod of Dort, as expressed in her 6th Article of the first chapter, (b) . . . "secundum quod decretum electorum corda, quantumvis dura, gratiose emollit, et ad credendum inflectit; non electos autem justo judicio suæ malitiæ et duritiæ relinquit." . . . According to this Article, the hearts of the elect, however hard, are to be graciously softened and turned to faith; but those who are not among the number of the elect are to be left to a judgment justly due to their hardness of heart. Again, what is the 7th Article of that synod? "Est autem Electio immutabile Dei propositum, quo, ante jacta mundi fundamenta, ex universo genere humano, ex primævâ integritate in peccatum et exitium suâ culpâ prolapso, secundum liberrimum voluntatis suæ benèplacitum, ex merâ gratiâ, certam quorundam hominum multitudinem, aliis nec meliorum, [98] nec digniorum, sed in communi miseriâ cum aliis jacentium ad salutem elegit in Christo," &c. These are, in substance, the doctrines of Calvin, and are to be found in his Institutes; but did our Reformers go to that extent? It appears to me that, whatever may have been the opinions of some of the Reformers on any of these points, their opinions have not been expressed in the language of Calvin, with which they must have been sufficiently acquainted. But is it possible that Cranmer and Ridley, who are said to have had some share in preparing the service books set forth in the reign of Edward the Sixth, could have adopted the principles of Calvin, and, at the same time, have been parties concerned in the preparation and compilation of the baptismal offices, and the confirmation service, contained in those books—offices which, as far as the present question is concerned, vary in no important respect from the offices contained in our present Book of Common Prayer? Even, however, if such a charge could be made good against them—that they expressed opinions privately at variance with those declared publicly in the offices of the Church—it would, I apprehend, be my duty to be guided by such public declarations.

But I do not collect even from the passages which were cited from the private writings of Cranmer or Ridley that they entertained the doctrine of predestination and election. Some of the Reformers, individually, may have done so; but it is clear they have not declared those views either in the services of the Church or in the Articles. I say they have not so declared themselves in the Book of Common [99] Prayer; for I find in the service of confirmation the declaration (afterwards in substance transferred to a rubric at the end of the service for the public baptism of infants) "that it is certain by God's word that children, being baptized (if they depart out of this life in their infancy), are undoubtedly saved." I say they have not so declared themselves in the Articles, that that clearly appears most assuredly on reference to the 17th Article of the Church, that, in respect to the Articles generally, there is not, with the exception of some verbal alterations, any substantial difference between the Articles of 1552 and those of 1562, and in respect of the question in hand—the effects of infant baptism—there is not, as far as I recollect, any variation at all.

But, again, to suppose that such of the Reformers who were concerned in compiling our service books entertained or taught the doctrine "that the elect only have faith and repentance, and that they only have the hope of forgiveness of sin," would be a contradiction, as it appears to me, to the whole structure of the Book of Common Prayer. What says the second service book of Edward the Sixth: "At what time soever a sinner doth repent him of his sin from the bottom of his heart, I will put all his wickedness out of my remembrance, saith the Lord;" or, as the introductory sentence now stands, "When the wicked man turneth away from his wickedness that he hath committed, and doeth that which is lawful and right, he shall save his soul alive." Again, in "the absolution" . . . "he pardoneth and absolveth all them which truly repent, and unfeignedly believe his Holy Gospel." Lastly, in in-[100]numerable passages therein contained, we pray that God will give his grace and his Holy Spirit to all—not confined "to the elect, whose fate is fixed and determined, and was so long before they came into existence."

We know that in the reign of Queen Mary a vast number of the clergy left this country and went to Germany, where they imbibed, during their residence, Calvinistic tenets, which in the reign of Elizabeth they brought back with them. That such was

(b) See Sylloge Confessionum, &c., p. 372, Oxon. 1804.

the fact was clearly made out by the learned counsel of Mr. Gorham, who, in support of that position, referred to Wood's *Historia et Antiquitates Universitatis Oxoniensis*, vol. i. p. 296, fol. edit., as evincing that, from the authors studied at that University in the latter part of the reign of Elizabeth, the tenets of Calvin were in vogue. The same, too, was shewn in respect of the University of Cambridge by reference to Strype's *Life of Whitgift*, bk. iv. cc. 14, 17, 18. Still these two bodies can be regarded in no other light than as private individuals.

A good deal was said about Archbishop Bancroft; or rather not so much of him as of Mr. Rogers, his chaplain; but I think there is good reason to doubt whether Archbishop Bancroft's opinions were accurately expressed by his chaplain, if we take as our authorities Clarendon's *History of the Rebellion*, vol. i. p. 156, oct. edit. 1826, and Cardwell's *Conferences*, p. 185. [The passages were read at length by the learned Judge.]

There are some, undoubtedly, whose names stand very high, who go the length that to receive the benefits of baptism there must be, in all cases, faith [101] and repentance. Martyr and Bucer may have gone to that extent; but I do not think Cranmer is to be made responsible for all they may have said and taught, though he did consult them in reference to the first service book of Edward the Sixth. It may be that, in the year 1549, when that book was published, the German Reformers generally entertained the doctrine of predestination, but I apprehend they did not adhere to that doctrine for any length of time. I find it stated by Burnet, in his *History of the Reformation*, vol. ii. p. 234 (Oxford edit., 1829), speaking of the effects of the Calvinistic doctrine of decrees: "The Germans soon saw the ill effects of this doctrine; Luther changed his mind about it, and Melancthon openly writ against it. And since that time the whole stream of the Lutheran churches has run the other way. But both Calvin and Bucer were still for maintaining the doctrine of these decrees; only they warned the people not to think much of them, since they were secrets which men could not penetrate into; but they did not so clearly shew how those consequences did not flow from such opinions. Hooper and many other good writers did often debort the people from entering into these curiosities; and a caveat to that same purpose was put afterwards into the Article of the Church about predestination."

It is quite impossible, however, for the Court to follow the learned counsel for Mr. Gorham through all the quotations he cited from the immense number of writers of the period of the Reformation and subsequent thereto. It must be allowed that, though many of them were persons of great learn-[102]-ing, there were some equally eminent who entertained different views. In this conflict of opinions the Court would be placed in the greatest possible difficulty in determining the question before it if it had no other guide.

But I am of opinion that to the private views of individuals, however eminent, I am not at liberty to attend. Their opinions can have no binding effect upon my judgment. So long as the Articles and the services of the Church are reconcilable, and not only reconcilable but necessarily consistent, I must construe them together. If a doctrine is laid down in the baptismal and other services and in the rubrics, all of which were confirmed by Act of Parliament and adopted by convocation, I must look to that source for my guide, if the Articles are silent on the point, and not indulge in fancy, explaining it by the opinions expressed by private individuals.

It may be said that there is no evidence to shew that Mr. Gorham comes within the description of those who entertain Calvinistic opinions. Mr. Gorham undoubtedly says that our Church has determined that those children who are baptized, and die before they commit actual sin, are undoubtedly saved. But then Mr. Gorham will not allow that benefit to be by regeneration in baptism: he says that it is by "prevenient grace," without which they could not be "worthy recipients;" and that, if not "worthy recipients," they could not receive the sacrament with advantage. That I take to be the doctrine Mr. Gorham holds; but, in order to justify that position, his learned counsel maintained that [103] the Reformers were Calvinists, and that, therefore, we must construe the services and Articles in a Calvinistic sense.

Now I am not aware that it is necessary for me to occupy more time upon this case. I have endeavoured to ascertain what the doctrine of the Church of England on infant baptism is, and whether Mr. Gorham entertains opposite views to the Church. It is clear from the passages I have read from the book containing his examination—

from the whole tenor of his examination, as well as of his learned counsel's argument—that Mr. Gorham does oppose the Church's doctrine of baptismal regeneration. He says the child may receive "an act of grace," and must receive "an act of grace," before it receives the sacrament of baptism with beneficial effect; he maintains that that "act of grace" is not conferred by baptism, though it may take place before baptism, in baptism, or after baptism. It was said that the sign is not the thing signified. Undoubtedly it is not; but the Church has declared that the thing signified is given immediately at baptism, though, according to Mr. Gorham's counsel, that doctrine may appear to have some resemblance to the Romish doctrine of the *opus operatum*. In the case of infants there is no obex in the way: when they are baptized they receive the benefit, whatever it may be; and that benefit is declared to be, according to the teaching of the formularies of the Church, "Spiritual Regeneration." Therefore I say that as the doctrine of the Church of England undoubtedly is that children baptized are regenerated at baptism, and are undoubtedly saved if they die without committing [104] actual sin, Mr. Gorham has maintained and does maintain opinions opposed to that Church of which he professes himself a member and minister. The only remaining question is, Has the bishop shewn sufficient cause why he should not institute Mr. Gorham to the vicarage of Bramford Speke? I am clearly of opinion that the bishop has, by reason of the premises, shewn sufficient cause; that consequently he is entitled to be dismissed, and must be dismissed, according to the usual course, with costs.

From the above judgment there was an appeal to the Judicial Committee of the Privy Council, at whose Bar the cause was argued on four days in December, 1849. On the 8th March, 1850, the judgment of the Court of Arches was reversed.

On the 16th March, 1850, the cause was remitted to the Judge of the Court of Arches "with all its incidents, emergents, dependents, and things adjoined thereto and connected therewith," . . . "to the end that right and justice may be done and administered," . . . according to the sentence of the Privy Council and Her Majesty's confirmation thereof, . . . "any inhibition heretofore issued to the contrary notwithstanding."

Subsequently to the remission of the cause a rule nisi for a prohibition, to prohibit the Judge of the Court of Arches and the Archbishop of Canterbury from carrying into execution the order of Her Majesty in Council, was applied for, in the Courts of Queen's Bench and Common Pleas, and refused. A similar application was afterwards made to the Court of [105] Exchequer, by which Court the rule was granted, but on the 8th July, 1850, that rule was discharged.

July 20th, 1850.—On the 20th July, 1850, in obedience to a monition from the Court of Arches to the Bishop of Exeter, the letters of presentation were brought in; but the Judge rejected a protest (a) of the bishop [106] which accompanied those letters; and

(a) The following is a copy of the protest:—In the name of the Holy Trinity.—Amen. We, Henry, by Divine permission Bishop of Exeter, having been monished by this venerable Court of Arches to bring into the registry of the same the presentation made to us by Her Majesty Queen Victoria as patron of the vicarage of Bramford Speke in our said diocese, commanding us to institute the Reverend George Cornelius Gorham, clerk, Bachelor of Divinity, to the church of the said parish, and to the cure and government of the souls of the parishioners of the same—which presentation aforesaid notwithstanding we have found it to be our duty to refuse to admit and institute the said Reverend George Cornelius Gorham to the said church and cure of souls, inasmuch as it hath manifestly appeared to, and hath been adjudged by, us, after due examination had, that the said clerk was, and is, not fit to be entrusted with such cure of souls, by reason of his having held and continuing to hold certain false and unsound doctrines, contrary to the pure Catholic faith, and to the doctrines set forth and taught in the Thirty-Nine Articles of the Church of England, and in the Book of Common Prayer and administration of the sacraments, according to the use of the said Church, against which our refusal to institute him, as aforesaid, the said clerk did prosecute his suit called duplex querela in this said venerable Court, and such suit was by the same, after due hearing, solemnly refused and rejected, whereupon the said clerk did appeal to the judgment of Her Majesty in Council, and Her Majesty in Council hath remitted the cause to this venerable Court, declaring that we the said bishop have not shewn sufficient cause why we did not institute the said George Cornelius Gorham to the said

expressed some doubt as to his power to give institution without the [107] fiat of the Archbishop of Canterbury. In consequence of that doubt the fiat of his Grace was [108] obtained, and, on the 6th August following, the Judge granted institution to Mr. Gorham.

IN THE GOODS OF WILLIAM MILLIGAN, Deceased. Prerogative Court, Nov. 8th, 1849.—A letter written by a seaman in the merchant service in the Margate Roads, unattested, containing dispositive words, held, under sect. 11 of the Wills Act, to be his will.—Justifying security is not required when a party cited has not a prior claim to a grant.

[S. C. 7 Notes of Cases, 271; 13 Jur. 1011.]

Motion.

William Milligan, master of a merchant vessel, died at sea on the 16th May, 1849. He left London in command of his vessel on the 3rd August, 1848, and on the 5th of that month, when in the Margate Roads waiting for a fair wind, wrote, addressed, and [109] sent by post, to his wife a letter purporting to contain his will, which she received, bequeathing to her all his property, but he appointed no executor. The letter was sworn to be in the handwriting of the deceased; it was headed "Margate

vicarage of Brampford Speke, and commanding that right and justice be in this Court done in this matter pursuant to the said declaration, do hereby, in obedience to the monition of this Court, bring into the registry of the same the said presentation—

Under protest, that whereas Her said Majesty, before she remitted the said cause to this Court with the declaration aforesaid, did refer the same to the Judicial Committee of Her Majesty's said Council to hear the same and to make their report and recommendation to Her Majesty thereupon; and the said Judicial Committee did accordingly hear the said cause, and make their report and recommendation after hearing the same, that Her Majesty should remit the said cause with the declaration aforesaid; but such their report and recommendation was notoriously and expressly founded on a certain statement of the doctrines held by the said George Cornelius Gorham, as it appeared to them the said Judicial Committee, which statement was in the terms following:—

"That baptism is a sacrament generally necessary to salvation, but that the grace of regeneration does not so necessarily accompany the act of baptism that regeneration invariably takes place in baptism; that the grace may be granted before, in, or after baptism; that baptism is an effectual sign of grace, by which God works invisibly in us, but only in such as worthily receive it—in them alone it has a wholesome effect; and that without reference to the qualification of the recipient, it is not in itself an effectual sign of grace: that infants baptized, and dying before actual sin, are certainly saved; but that in no case is regeneration in baptism unconditional."

And whereas the above recited statement, on which the said Judicial Committee did so expressly found their said report and recommendation to Her Majesty, was set forth by them as a just and true and sufficient statement of the doctrine held by the said George Cornelius Gorham, notwithstanding he had declared (A. 15) that "as infants are by nature unworthy recipients, being born in sin, and the children of wrath, they cannot receive any benefit from baptism, except there shall have been a prevenient act of grace to make them worthy;" and had solemnly re-affirmed the same (A. 70) when his attention was by us specially called thereto, in order that he might correct it, if he thought fit; and notwithstanding that he, the said George Cornelius Gorham, had further declared (A. 19) of "baptized infants, who, dying before they commit actual sin, are undoubtedly saved," that "therefore they must have been regenerated by an act of grace prevenient to their baptism, in order to make them worthy recipients of that sacrament." Again (A. 27) "the new nature must have been possessed by those who receive baptism rightly; and therefore possessed before the seal was affixed,"—meaning thereby before baptism was given. Again (A. 60) "that filial state" (meaning thereby "adoption to be the sons of God") "though clearly to be ascribed to God, was given to the worthy recipient before baptism, and not in baptism," manifestly contradicting thereby the said Articles of Religion, and the doctrine of the said Book of Common Prayer, as set forth in its offices of public and private baptism of infants and of confirmation, and especially in the Catechism, or "instruction to be learned of every person, before he be brought to be confirmed by the bishop." Notwithstanding, too, that the Lord Bishop of London, who was summoned by command of Her Majesty to attend

Roads, 5th August, 1848," and commenced "My dear Margaret, Thus far on my journey, it is now blowing strong gales," . . . "Life is uncertain, in the event of we being parted for ever in this world I wish you to have, and bequeath, everything that I am in possession of, goods, money, ships or land, or all debts due me, or all moneys coming by any way whatsoever," . . . "I have not made any will," &c. The letter was signed by the deceased but not attested; no other paper of a testamentary nature was found.

The deceased died without child or parent, leaving, together with his wife, three brothers his only next of kin. One of the brothers signed a proxy of consent to the administration, with the will annexed, being granted to the widow, and a decree with the usual intimation was issued against the other brothers, resident in Van Diemen's Land.

Phillimore, R. J. This case comes under the 11th sect. of the Wills Act. The paper is dispositive; the objections which applied in the case of *Passmore v. Passmore* (1 Phill. 216) do not apply in the present instance.

Judgment—*Sir Herbert Jenner Fust.* I am of opinion that the 11th sect. of the Wills [110] Act applies to seamen whether in the Queen's or merchant's service. There is no doubt the deceased intended to dispose of all his property to his widow.

the hearing of the said appeal, and who did attend the same accordingly, having been requested by the said Judicial Committee to read and consider the said report and recommendation, before it was laid before Her Majesty, did thereupon read and consider the same, and, after such reading and consideration thereof, did say and advise the said Judicial Committee to this effect, that he could not consent to the said report and recommendation, because the said George Cornelius Gorham holds that remission of sins, adoption into the family of God, and regeneration, must all take place in the case of infants, not in baptism, nor by means of baptism, but before baptism, an opinion which the said Lord Bishop declared to the said Judicial Committee appeared to him to be in direct opposition to the plain teaching of the Church and utterly to destroy the sacramental character of baptism, inasmuch as it separates the grace of that sacrament from the sacrament itself: which said heretical opinions so held by the said George Cornelius Gorham, and thus by the said Lord Bishop of London expressly brought to the notice of the said Judicial Committee, and the manifest contradiction of the said opinions to the teaching of the Church plainly pointed out, were nevertheless wholly omitted by the said Judicial Committee in the statement of the doctrine which appeared to them to be held by the said George Cornelius Gorham, on which statement they professed to found their report and recommendation to Her Majesty as aforesaid: now we, the said Henry, Bishop of Exeter, taking the premises into our serious and anxious consideration, and furthermore considering that the judgment of Her Most Gracious Majesty in Council in the said appeal was pronounced solely in reliance on the statement made in the report and recommendation of the said Judicial Committee, as being a just, true, and sufficient statement, do, by virtue of the authority given to us by God, as a bishop in the Church of Christ, and in the Apostolic branch of it planted by God's Providence within this land, and established therein by the laws and Constitution of this realm, hereby solemnly repudiate the said judgment, and declare it to be null and utterly without effect in foro conscientiae, and do appeal therefrom in all that concerns the Catholic Faith to "the Sacred Synod of this nation when it shall be in the name of Christ assembled as the true Church of England by representation."

And further, we do solemnly protest and declare that whereas the said George Cornelius Gorham did manifestly and notoriously hold the aforesaid heretical doctrines, and hath not since retracted and disclaimed the same, any archbishop or bishop, or any official of any archbishop or bishop, who shall institute the said George Cornelius Gorham to the cure and government of the souls of the parishioners of the said parish of Brampford Speke, within our diocese aforesaid, will thereby incur the sin of supporting and favouring the said heretical doctrines, and we do hereby renounce and repudiate all communion with any one, be he who he may, who shall so institute the said George Cornelius Gorham as aforesaid.

Given under our hand and episcopal seal this twentieth day of July, in the year of our Lord one thousand eight hundred and fifty.

(L. S.)

H. EXETER.

There are dispositive words contained in the paper, "I wish you to have, and bequeath," &c. The words "I have not made any will," &c., imply, I have not made any other or more formal disposition of my property by will. I decree administration with the will annexed. Justifying security is not required, as the parties cited have not a prior claim to the grant. Had the parties cited been entitled to the grant, justifying security must have been given.

IN THE GOODS OF HOOD HANWAY CHRISTIAN, ESQ., Deceased. Prerogative Court, Nov. 8th, 1849.—The initials of attesting witnesses to a testamentary paper are a sufficient subscription under the Wills Act; they are not required to sign their names.

[S. C. 7 Notes of Cases, 265. Referred to, *Charlton v. Hindmarsh*, 1859, 1 Sw. & Tr. 440. Applied, *In the Goods of Blewitt*, 1880, 5 P. D. 117.]
Motion.

H. H. Christian, Esq., a Rear Admiral in the Royal Navy, died on the 31st Aug. 1849, leaving a will and a codicil bearing date the 14th February, 1848. The will was written on a sheet of letter paper, and the dispositive part terminated in the middle of a line on the second page, with the word "company." Under that line, at a very short distance, was written the attestation clause, and then followed the signature and seal of the testator, together with the signatures of the witnesses; there was no space left under those signatures for an addition in the second page.

[111] Directly after the execution of the will one of the three attesting witnesses suggested to the testator that he had not mentioned his daughters in his will; whereupon, in the presence of the witnesses, he wrote a codicil in the following manner and form:—After the word "company" (the last dispositive word in the will) he wrote "my daughters being all"—those words filled the last line of the will, and between that line and the attestation clause of the will he crowded in—"provided for by my marriage settlement whom I"—there was no more space for writing on the second page, so at the top of the third page he concluded the codicil in these words—"request my son will present with mourning and rings"—immediately underneath followed the signatures of the testator and of the same three witnesses, who attested the will, but they, instead of writing their names as they did to the will, affixed to the codicil merely their initials.

Addams moved for probate of the will and codicil.

Judgment—*Sir Herbert Jenner Fust*. I have before me the affidavit of one witness only; in such an extraordinary case all the witnesses ought to have joined. The attesting witnesses to the so-called codicil have affixed their initials only; however, I have no doubt in the matter, though I believe this is the first instance under the act of the witnesses so signing. I am [112] not aware that the witnesses can be required to sign their names; I am of opinion that there is a sufficient subscription on their parts, and therefore I decree probate as prayed.

IN THE GOODS OF FREDERICK HEARN, Deceased. Prerogative Court, Nov. 8th, 1849.—A will having, after an unfinished testimonium clause, a blank space of one inch eight-tenths, then on the left of that page an attestation clause extending half the width of the page, and opposite to the fourth line of the attestation clause the signature of the testator, which stood at the distance of very nearly three inches below the last line of the testimonium clause, held not to be "signed at the foot or end."

[S. C. 7 Notes of Cases, 266.]
Motion.

Frederick Hearn, who died on the 20th Aug. 1849, left a will by which all his real and personal estate were disposed of; the personalty was under the value of 200l. An executor was appointed, and the will was dated as hereinafter described.

The will was written throughout with the lines at a uniform distance of 3-10ths of an inch apart, on a sheet of foolscap paper, three sides of which were filled, and also four lines of the fourth side; then followed a testimonium clause, which ran in these words:—"In witness whereof I the said Frederick Hearn have to this my last will and testament set my hand the"

The word "the" extended to the edge of the paper on the right; then there was a space under the testimonium clause of one inch and 8-10ths, and afterwards followed

an attestation clause with the signatures of the testator and attesting witnesses, together with the date thus:—

<p>[113] "Signed by the testator Frederick Hearn, in the presence of us, present at the same time, who have hereunto subscribed our names as witnesses in the presence of the said testator and of each other.</p>	<p>Arthur Podmore William Almond FREDERICK HEARN March 5th, 1844."</p>
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The attesting witness Arthur Podmore swore that he and his fellow witness signed after the testator affixed his signature. The testator's signature stood immediately opposite to the fourth line of the attestation clause, and at a distance of very nearly three inches from the last line of the testimonium clause.

Addams moved for probate.

Judgment—Sir Herbert Jenner Fust. The question is, whether the will is "signed at the foot or end thereof." I hardly know what to do with cases involving this question. There is a considerable space between the conclusion of the will—the testimonium clause—and the signature of the testator. I cannot discover a reason why the testator did not sign near to the testimonium clause, for which there is ample room. I am afraid I must hold, after the decision of the Privy Council in *Smee v. Bryer*, though with much regret, that the testator's signature is not "at the foot or end." I must reject the motion for probate.

[114] IN THE GOODS OF JOHN HILL, ESQ., Deceased. Prerogative Court, Nov. 8th, 1849.—A codicil having after the last dispositive words a blank space of one inch, then an attestation clause occupying the entire width of that page, and immediately after that clause the signature of the testator, held not to be "signed at the foot or end."

[S. C. 7 Notes of Cases, 269.]

Motion.

John Hill died leaving a will bearing date the 13th November, 1812, and two codicils bearing date respectively the 20th March, 1838, and the 19th September, 1848. All the property was disposed of and an executor appointed. No question arose respecting the will or the first codicil.

The second codicil, written by the testator on a sheet of foolscap paper, contained many alterations which were accounted for. This codicil occupied two pages and a part of the third page of the sheet. At the foot of the first and second pages the signature of the testator was placed. The third page commenced "I give and bequeath my law library to my eldest son;" the last word extending to the edge of the page. Under that line there was a space of one inch; then followed an attestation clause occupying the width of the page, and afterwards the signatures of the testator and the attesting witnesses.

Phillimore, jun., moved for probate. He submitted that there was not an unreasonable space between the words bequeathing the law library and the attestation clause, and that the attestation clause following so near might be regarded as a part of the will.^(a)¹

[115] *Judgment—Sir Herbert Jenner Fust.* I have, undoubtedly, held when the attestation clause immediately follows the disposition of the property, and the signature of a testator immediately follows such attestation clause, that the signature there placed is a sufficient compliance with the statute. In this case, however, the attestation clause does not immediately follow, and there is ample space between it and the words disposing of the library for the testator's signature. I cannot discover a reason why he did not sign his name in that space after those dispositive words. If I grant this motion, where can I stop? I must reject the motion for probate of the second codicil.^(a)²

^(a)¹ See *In re Standley, Deceased*, 1 Robert. 755.

^(a)² On this day there were motions for probate of other wills and codicils, involving precisely the same question as the above case furnishes, save that there were greater spaces between the final dispositive words and the attestation clauses. The editor may here state he intentionally omits to report all questions of execution when the will is written on a printed form, as those forms have been found in practice to increase the difficulties in complying with the requisites of the statute; they ought not, therefore, to be taken, he submits, as a test.

[116] IN THE GOODS OF ROBERT AMISS, Deceased. Prerogative Court, Nov. 8th, 1849.—A will, being subscribed by two of the attesting witnesses, capable of writing, with marks, held to be sufficiently subscribed by them. Administration with the will annexed was granted to the residuary legatee for life, as, though the will contained sundry directions to executors, their names were specified only under the testator's signature.

[S. C. 7 Notes of Cases, 274. Discussed, *Charlton v. Hindmarsh*, 1859, 1 Sw. & Tr. 440.] Motion.

Robert Amiss died on the 25th June, 1849, leaving a will executed on the 18th of the same month, by which all his property was disposed of, and sundry directions were given to executors whose names were not set forth in the body of the will.

The will was written on half a sheet of foolscap paper and occupied the two entire pages. On the day of the execution, but prior thereto, certain interlineations were made, and the following paragraph, which brought the writing to the bottom of the second page, was also added, according to the direction of the testator, save the name of the testator and the crosses opposite to the names of two of the attesting witnesses :—

Fifty pounds

"I hereby bequeath ~~one hundred pounds~~ to my son John Amiss, to be given to him after the sale previous to the property being disbursed as above and Fifty pounds 12

months after { my Signature
ROBERT AMISS
Executor Thomas Beard ✕
Executrix Louisa Amiss ✕ "

"Witness John Howarth.

John Howarth, Thomas Beard, and Louisa Amiss, after giving an account in their affidavits of the preparation of the will and the due execution by the testator, stated, they being all present "at the same time attested such the execution of the said will; the said J. H., by writing his names, as the same now appear, and the said T. B. and L. A., by making a cross opposite their respective names, in [117] the presence of the said testator and of each other, and that the said T. B. and L. A. attested the said will by making a cross, instead of writing their names to the said will, in consequence of the want of space for writing their said names, and of their names being already written thereto by the said J. H."

Robinson moved for probate.

Judgment—*Sir Herbert Jenner Fust*. I am of opinion that this will is duly executed, except in respect of the appointment of the executors, whose names appear only under the testator's signature. At first sight, the two crosses opposite to the names of Thomas Beard and Louisa Amiss would appear to have been made without an object; but, from the affidavit, it seems they were made by two of the attesting witnesses for their signatures as attesting the execution. I consider such signatures by the witnesses sufficient, and therefore decree, without the appointment of executors, administration with the will annexed to the widow as residuary legatee for life.

[118] BASKCOMB *against* HARRISON. Prerogative Court, Nov. 8th, 1849.—A next of kin, being assigned to declare whether or not she opposed scripts A, B, and C (a will with two codicils), "or any or either, and which if any," declared she opposed C, the second codicil, on the face of which she had no interest. Held, on a suggestion contained in her affidavit of scripts, that other intermediate papers had been executed by the testator and were in existence, that she had interest sufficient to entitle her to oppose C, but she must declare whether she opposed A and B.—A next of kin, qua next of kin, cannot oppose a paper without some interest, however small or remote.

[S. C. 7 Notes of Cases, 275; 13 Jur. 1012.]

On petition.

This was a business of proving the last will (A), bearing date the 21st July, 1843, with two codicils thereto (B and C), bearing date respectively the 14th April, 1845, and the 9th April, 1849, of Henry Baskcomb, Esq., promoted by G. H. Baskcomb, the son of the deceased, the sole executor named in the first codicil (B), against Anne Euphemia Harrison (wife of E. M. Harrison, Esq.), the natural and lawful daughter of the testator.

The proctor for the executor exhibited an affidavit of his party as to scripts, with scripts marked A, B, C, D, and E annexed. D and E were unattested papers,

written respectively in 1843 and 1847. The proctor for the testator's daughter likewise exhibited an affidavit as to scripts, in which affidavit, after admitting the existence of A, B, and C, Mrs. H. swore that she had been informed and believed that the testator, some time prior to the 4th December, 1848, made and executed a codicil to his will (A), and also in the latter end of the year 1848, or the beginning of the year 1849, made and executed a further codicil, but of the dates or contents of such codicils she had no knowledge—that she believed such two codicils were in existence and uncanceled at the date of the testator's death—and that all his papers have since his death been, [119] as she believed, in the custody, power, or possession of G. H. B., the other party in the cause.

The proctor for Mrs. H. was assigned to declare whether he would oppose or not the scripts A, B, and C, or any or either, and which, if any, on which he declared he opposed the script C, to which the proctor of the executor objected and prayed to be heard on his petition. In the petition it was alleged that the testator died on the 14th April, 1849, leaving, duly executed, a will with two codicils, A, B, and C; that by his will, after confirming an indenture of settlement dated the 23rd June, 1843, made for the benefit of his wife, son and daughter (Mrs. H.) and her issue, he named his wife, son, and J. W. J. D. universal legatees in trust of his personal estate, and his wife residuary legatee for life, and he also, after the decease of his wife, substituted his son as his sole residuary legatee of all the trust property. It was alleged that, by the first codicil, the testator did not alter the disposition of his property, but merely altered the aforesaid appointment of executors, by appointing his son sole executor; that, by the second codicil, he directed a certain sum to be purchased out of his residuary estate, into the names of trustees, to be held by them in trust to apply the interest and dividends thereof for ever to certain charitable uses, and also bequeathed certain legacies to his servants; it was alleged that the testator died a widower; and it was expressly alleged that under the aforesaid indenture of settlement, mentioned in the will, a certain sum was settled upon certain trusts for the benefit of the testator's daughter, Mrs. H., and her [120] issue, and that Mrs. H. had no interest whatever under the said will and codicils of the deceased, and that the second codicil, declared to be opposed on her behalf, does not prejudice or affect her interest in any way whatever, but, on the contrary, is prejudicial to the interest of the testator's son; and lastly it was alleged that Mrs. H. hath no interest whatever at law, or in equity, or according to the practice of this Court, to oppose the codicil, and that she ought not to be permitted to oppose it.

In answer, it was submitted that Mrs. H. had a right to oppose the pretended second codicil to the pretended will, and that whether the same was, or was not, prejudicial to her interest it was for her to determine, and not for the opposite party to determine.

Harding and Bayford for Mr. B., the executor. Mrs. H., the daughter, might have opposed all the testamentary papers, but she has not thought fit to do so. She cannot oppose the second codicil as all the legacies thereby bequeathed are to be paid out of the residue in which she has no share. A party to have a right to oppose an instrument must have an interest, Oughton (tit. vi. s. 4), *Wright v. Rutherford* (2 Lee, 226). The interest may be remote, still there must be some interest, *Kipping and Barlow v. Ash* (1 Robert. 270).

Addams for Mrs. H., the daughter. When a party is not a next of kin, an interest [121] must be shewn, but when next of kin there is a right to oppose. Mrs. H. was assigned to declare whether she would oppose any of the papers; she has made her selection. If C be valid it would be useless to oppose the other papers, as they are confirmed by it. [By the Court. I want some authority cited to shew that a next of kin has the right contended for. Mrs. H. ought to declare whether she will oppose the will, otherwise there may be an infinity of suits.] I do not see the necessity of opposing the will, for the reasons I have assigned; but in Mrs. H.'s affidavit of scripts she swears she believes there are intermediate papers, and she does not admit the validity of the will.

Judgment—*Sir Herbert Jenner Fust*. I cannot accede to the proposition that a next of kin has a right to oppose any paper he may think fit; some interest, however remote, is necessary. The question is whether there is sufficient ground set forth in the present instance.

I should have been inclined to hold, had it not been for Mrs. H.'s affidavit as to

scripts to which the Court is in the habit of attending, that on the face of the papers A, B, and C there would not be sufficient ground to enable her to oppose the codicil C. However, in her affidavit she has sworn that she believes there are intermediate papers in existence executed in 1848 and 1849. These papers may possibly affect those now before me. I cannot, therefore, go the length of saying the daughter has not an interest until their contents are known. Still, [122] I am of opinion that she is bound to say whether she will oppose the will and first codicil. I am disposed to pronounce that she has an interest, and, therefore, I overrule the petition, but I assign her to declare whether she opposes the papers A and B. I reserve the question of costs.

IN THE GOODS OF ELIZABETH MARY MAYO WHITTLE, OTHERWISE ELIZABETH WHITTLE, Spinster, Deceased. Prerogative Court, Nov. 27th, 1849.—A will, having, after the testimonium clause written continuously with the dispositive part of the will, a space in the last line of the testimonium clause sufficient for the signature of the testatrix, and under that line a space of nearly half an inch, and then an attestation clause followed immediately by the signature of the testatrix, held to be “signed at the foot or end.”

[S. C. 7 Notes of Cases, 290.]

Motion.

E. M. M. Whittle died on the 9th October, 1849, leaving a will, bearing date the 2nd May in the same year. The will was written lengthwise, on one side of a sheet of letter paper, with the lines apart at a uniform space throughout. All the property was disposed of and an executor appointed, and then followed a testimonium clause, in the last line of which stood only “of our Lord, 1849.” There was sufficient space in the remainder of that line for the signature of the testatrix, but the space was left blank. Immediately under the figures “1849,” at a distance of rather more than four-tenths of an inch, commenced the attestation clause, and after that followed directly the signature of the testatrix and of the attesting witnesses.

Jenner moved for probate.

[123] *Judgment*—*Sir Herbert Jenner Fust*. Unfortunately cases involving the question whether the will is “signed at the foot or end thereof” multiply apace. I confess I know not what to do with them; I cannot conjecture to what extent the Judicial Committee of the Privy Council will go. The solution offered by Mr. Justice Williams, in the last edition of his work on Executors, does not afford much assistance, for what is a “reasonable” or “an unreasonable space?” This case certainly differs materially from that of *Smee v. Bryer*; still it is extremely difficult to say what space may be left. Here there is space enough after the testimonium clause for the testatrix’s signature, but instead of being there placed it follows the attestation clause. If I am to construe the statute so rigidly as to say that this will is not duly signed, I fear I shall have to upset almost every will. There is great danger in opening the door, nevertheless I cannot say that, according to the principle of common sense, the signature in this case is not at the foot or end. I am inclined to hold that the execution in this instance is a good execution, but I cannot at present lay down a precise rule for dealing with this question.

[124] IN THE GOODS OF AMY BATTEN, Spinster, Deceased. Prerogative Court, Nov. 27th, 1849.—A will containing on the first page the appointment of an executor, a disposition of the entire property, a testimonium clause with a part of an attestation clause immediately following, but not sufficient space for the whole of that clause, the second page blank, and on the third page the remainder of the attestation clause with the signatures of the testatrix and witnesses immediately following, held to be “signed at the foot or end” as the attestation clause was, under the circumstance of the case, to be considered as a part of the will.—An affidavit of one attesting witness to the due execution of a will is sufficient, unless more than one witness make an affidavit as to alterations in a will; in that case both or all must also join in deposing to a due execution, if an affidavit to that circumstance be required.

[S. C. 7 Notes of Cases, 288.]

Motion.

Amy Batten died on the 2nd November, 1849, leaving a will bearing date the 6th October, 1848. The will was written on a sheet of letter paper, and on the first page

were contained the appointment of an executor, a disposition of the entire property, a testimonium clause, and a part of an attestation clause. The last word of the testimonium clause did not extend to the edge of the paper, but there was not space left in that line for the signature of the testatrix. The attestation clause commenced with another line, and for want of space a part thereof only was inserted on the first page. The lines throughout were at a uniform distance apart, and under the last line of the first page was a space of half an inch. The second page was left blank, and at a distance of one inch three-tenths from the top of the third page the remainder of the attestation clause, which was in itself imperfect, followed, together with the signatures of the testatrix and of the attesting witnesses. One only of the attesting witnesses made an affidavit to supply the deficiency in the attestation clause.

[125] Bayford moved for probate of the paper.

Judgment—*Sir Herbert Jenner Fust*. The question here is whether the paper is "signed at the foot or end." There is a material difference, I think, between this case and that of *Snee v. Bryer*. Generally, the signature of a testator should be placed directly after the testimonium clause; but when the attestation clause immediately follows the testimonium clause, I consider there is ground for an exception to the rule. The present is one of those cases in which the attestation clause may be taken as forming a part of the will. The circumstance of the second page being blank is of no consequence. I am of opinion that this paper is entitled to probate.

On a former day I expressed my opinion that, when an affidavit is required, both witnesses should join; and though I still entertain that opinion I am not disposed to lay that down as a rule in all cases, as I understand much inconvenience would at times follow therefrom. However, when both or all the attesting witnesses make an affidavit as to alterations, &c. in the body of a will, I shall certainly require, if it be necessary that the affidavit should extend to the matter of a due execution, all the witnesses to join in that likewise; otherwise, the circumstance of one witness alone deposing to the execution would lead to a surmise that some difference on that point existed amongst the witnesses.

[126] *HOLBECH against HOLBECH*. Prerogative Court, Nov. 27th, 1849.—An allegation propounding a will, occupying with the testimonium and attestation clauses two pages, save three-tenths of an inch, and having at the head of the third page a blank space of two inches two-tenths, after which stood the signature of the testator, close to the left side of that page, and opposite to the second line of the testimonium clause, as set forth in the case, rejected on the ground that the will was not "signed at the foot or end."

[S. C. 7 Notes of Cases, 294.]

Hugh Holbech, Esq., died in the month of June, 1849, leaving a holograph will, executed on the 29th April, 1845, of which he did not name an executor, but appointed his wife universal legatee. The deceased died without child, leaving behind him his widow and his father surviving, the only persons entitled to his personal estate in case he died intestate.

The will was written on a sheet of notepaper, and the dispositive part, together with the testimonium and attestation clauses, occupied two pages; there remained at the foot of the second page a blank space of three-tenths of an inch. There was a blank space at the top of the third page of two inches two-tenths, then followed the signature and seal of the testator, and afterwards the signatures of the witnesses. The testimonium and attestation clauses, with the signatures presented, when the second and third pages lay open, an appearance thus—

"In witness thereof

I hereunto set my hand

and seal this twenty-ninth day of April,
in the year of our Lord eighteen hundred
and forty five,

signed and acknowledged

by the testator as and for his last will
and testament, in our joint presence of
each other, have subscribed our names as
witnesses."

HUGH HOLBECH.

(LS)

Francis Francis.

James Gerrard.

[127] The writing on the second page extended in width to the fold of the sheet designated by the above perpendicular line, the brackets on the third page were close

to the fold, and the names immediately followed. The signature of the testator stood as above precisely in a line with the word "hand."

Haggard, on the 9th August, 1849, moved for administration with the will annexed to the widow as universal legatee; the Court rejected the motion and directed the paper to be propounded.

Phillimore, in opposition to the allegation, relied on *Smee v. Bryer*, and contended that the Judicial Committee of the Privy Council, in deciding that case, intended the statute should be construed strictly, and that, by reason thereof, the allegation should be rejected.

Haggard, in support of the allegation, contended that the paper in question does not present the same appearance as the one propounded in *Smee v. Bryer*, and that, as the Judicial Committee did not lay down a principle on determining that case, it was not in point.

Judgment—*Sir Herbert Jenner Fust*. There is, perhaps, scarcely space at the bottom of the second page of the paper propounded for the testator's signature, but at the top of the third page there is a large blank, and there is no part of the will on that page, I mean no dispositive words. [128] The present paper seems to me to be much of the same description as the paper propounded in *Smee v. Bryer*, though there is some slight difference. I must say I think this case comes within the scope of *Smee v. Bryer*. I am of opinion that the paper is not signed within the meaning of the act; I consequently reject the allegation.

EVANS against TYLER. Prerogative Court, Dec. 1st, 1849.—An executor, in an act on petition, objected to a co-executor, appointed in the same will, being joined with him in the grant of probate, on the ground of incapacity. The act on petition was opposed and directed to be reformed. On the affidavits adduced in support of the pleadings of each party, the Court held the incapacity was not established, and overruled the petition.

[S. C. 7 Notes of Cases, 296; 13 Jur. 413. Applied, *In the Goods of Espinasse*, 1879, 3 L. R. Ir. 185.]

On petition.

Jane Tyler died on the 10th October, 1848, a widow, in the eightieth year of her age, leaving behind her a son, a party in this suit, and a married daughter, her only next of kin.

Mrs. Tyler had by two wills, dated respectively the 30th December, 1837, and the 2nd June, 1848, appointed her son sole executor; but by her last will, dated the 9th September, 1848, together with a codicil of the 30th of the same month, she joined with him in the executorship the Rev. Dr. Evans, who was appointed also in her last will, as well as in the will of June, 1848, aforesaid, sole trustee of her real estate.

In behalf of Mr. Tyler it was prayed that probate be granted to him as one of the executors, to which, on behalf of Dr. Evans, an objection was raised; [129] he prayed probate, and also to be heard on his petition in objection to the grant to Mr. Tyler.

An act on petition was given in, and the principal grounds assigned in the act against the grant to Mr. T. were as follows—the words in italics were introduced on the reformation of the act:—

That Mr. T., who was, at the death of the testatrix, aged fifty-nine, and had resided with her for some time before and up to the date of her death, "was always a person of considerable weakness of intellect and incapable of the due management of himself and his affairs, and was ever so esteemed, as well by others generally as by the testatrix, whose expressed intention it was, on that very account, to place him in the care and under the protection of Dr. Evans;" that immediately on the death of the testatrix he disappeared from her house, and was found at a public-house a few days afterwards by Dr. E. "*in such a state of mind as to be quite incapable of taking care of himself*;" that through the instrumentality of certain persons who, it was alleged, were endeavouring to obtain probate nominally for the benefit of Mr. T., but really for their own purposes, he, Mr. T., was removed and placed under restraint by those persons in the house of one who refused all access to Mr. T.; that Mr. T., on the day following his removal as last mentioned, while out walking with the person having

the care of him, "suddenly attempted the life" of that person, "by stabbing him in the throat with a large clasp-knife"; lastly, it was alleged that Mr. T. "*was a dangerous lunatic on the said day, and acted as and was treated as such,*" &c.

[130] Annexed to the act, in support of some of the averments therein contained, was the following letter from the testatrix, dated the 26th February, 1848, and addressed to Dr. Evans:—

"Reverend Sir,—I take the liberty of addressing a letter to you respecting my son. I am about settling my affairs, and find it necessary that I should appoint a trustee to act for him in the case of my death or inability, being now in my eightieth year. He will have a good property, but totally unable to carry on an account. He has been twelve years and a half with your uncle, and is acquainted with you, which induces me to apply to you to take him under your protection. I will appoint a person to receive the rents, and to pay into your hands for his purpose, and paying you all expenses and trouble. Be pleased to reply to this, and not let it go further, for people are watching to take advantage. He is well-disposed and sober, but does not like to take trouble. On hearing from you I will write further," &c. &c.

Feb. 3rd.—Harding, on behalf of Mr. Tyler, opposed the admission of the act as irrelevant. He referred to Williams on Executors, pt. 1, bk. 3, c. 1, for the purpose of shewing who are incapable of being executors, and argued that, according to the facts as pleaded, Mr. T. did not come within the class of those who could be excluded from the office; his case was one of connate incapacity, and not of supervening insanity.

Addams, in support of the act, on behalf of Dr. [131] Evans, argued that sufficient was pleaded to shew that Mr. T. was a dangerous lunatic.

Judgment—*Sir Herbert Jenner Fust.* The nature of the question, the form of proceeding by act on petition on such a question, and an opposition to the admission of an act, constitute a case somewhat novel in this Court. Objections to the admission of acts may not be uncommon in the Court of Admiralty, but in this Court they are certainly unusual.

Prima facie, all who are nominated to the office of executor by a testator are entitled to a grant of probate. To exclude any one very stringent grounds must be alleged.

In the present case it is clear from the letter of the testatrix, dated the 26th February, 1848, and annexed to the act, that she considered her son required to be looked after, and it is equally clear she was of opinion that he was unable to keep accounts; notwithstanding these defects she thought proper to constitute him an executor. How, then, can I say he is unfit, unless some supervening circumstance has arisen? The facts as stated in the act are not sufficient to satisfy me as to the unfitness of Mr. T. to take the office of executor. His exact state is not distinctly pleaded, though I am led to infer, from what was stated in argument, he is a dangerous lunatic. To exclude him from the grant his lunacy, or idiocy, or whatever else may be the ground, must be distinctly pleaded. However, should it be hereafter established that he is in con-[132]finement, and that all access is refused to Dr. E., I may possibly be satisfied with less proof as to his actual state than I should be were access allowed to Dr. E.; but proof of mere weakness of mind will not be sufficient.

I direct such parts of the act as attribute motives to third parties to be struck out, and that it be distinctly alleged that Mr. T. is incompetent to act; the ground to be set forth of that incompetency I leave Dr. E.'s advisers to determine. The prayer must be that a power be reserved to Mr. T., in case of recovery from his insane state, or whatever else it may be; the prayer in effect now is to exclude Mr. T. altogether; that I cannot grant. The act must be reformed.

In regard to the further proceedings in this case it is sufficient to state, as the case is reported in reference to the legal question only, the following facts:—The act was reformed—an answer was given in, and that was followed by a reply and rejoinder; on behalf of Dr. E. six affidavits were given in, and on behalf of Mr. T. fifteen; the cause was argued on the evidence on the 17th and 22nd November, and on the 1st December the Court delivered judgment.

Dec. 1st.—*Judgment*—*Sir Herbert Jenner Fust.* Each party in this cause is applying for probate. There is no question as to the validity of the will, or to the appointment of either party by the testatrix to the office of executor; but Dr. Evans applies [133]

for the grant to himself alone, on the ground that Mr. Tyler is incompetent, by reason of his mental state, to act; on the other hand, Mr. T. maintains that he is competent, and prays that probate may be granted to him as one of the executors.

It appears to me that though this case was said, in the course of argument, to be one *primæ impressionis*, it does not involve any principle which has not been acted upon in a variety of instances. I will, however, for the sake of convenience, at once refer to Mr. Justice Williams' valuable work on Executors.

That learned writer, in pt. 1, bk. 3, c. 1, says: "Generally speaking, all persons, who are capable of making wills, and some others besides, are capable of being made executors." That is the general rule which he illustrates, and then he mentions the exceptions. In speaking of infants, he states—"an infant may be appointed executor," . . . "but if an infant be appointed sole executor, by statute 38 Geo. 3, c. 87, s. 6, he is altogether disqualified from exercising his office during his minority, and administration cum testamento annexo shall be granted to the guardian of such infant, or to such other person as the spiritual Court shall think fit, until such infant shall have obtained the age of twenty-one years." Again, "Idiots and lunatics are incapable of being executors or administrators; for these disabilities render them not only incapable of executing the trust imposed in them, but also, by their insanity and want of understanding, they are incapable of determining whether they will take upon them the execution of the trust or not. [134] Therefore it has been agreed that if an executor become non compos, the spiritual Court may, on account of his natural disability, commit administration to another." Again, treating of temporary administrations, bk. 5, c. 3, s. 6, the learned writer states, "If the executor be disabled from acting, as if he becomes lunatic, or incapable of legal acts, then on the principle of necessity, there shall be a grant of a temporary administration with the will annexed. Where a sole executor or administrator becomes a lunatic, it is the ordinary practice of the Court to make a limited grant to his committee for his use and benefit during his lunacy." . . . "It is also the practice of the Ecclesiastical Court to grant administration for the use and benefit of a lunatic, though the person alleged to be so has not been found a lunatic by inquisition. When such a case occurs the Ecclesiastical Court requires affidavits stating the fact of lunacy, and that no inquisition has been had, and, of course, no committee appointed: the Court then grants administration to the next of kin of the lunatic for the use and benefit of the lunatic pending the lunacy, and it requires sureties in double the amount of the property, and such sureties must justify."

I have referred to these passages, and many other quotations might, were it necessary, be adduced, in order that it may appear clearly that I have jurisdiction to inquire into the capacity of an executor, as well as into the capacity of a testator; it is desirable that no erroneous notion should prevail on this point.

[The learned Judge then proceeded to investigate [135] the evidence adduced, and having so done he came to the conclusion that there was not evidence to justify him in saying that Mr. T. was unfit to take the office. He overruled the petition of Dr. E., pronounced for Mr. T.'s fitness, and left each party to pay his own costs.]

IN THE GOODS OF MARY DAWSON (Wife of the Right Hon. G. R. Dawson), Deceased.

Prerogative Court, Dec. 5th, 1849.—A feme covert having a power of appointment by will over a certain sum, appointed by her will that sum to trustees, upon trust to pay the interest thereof to her sons during her husband's life, and at his death to divide the principal amongst her sons who survived her, but did not name an executor. Administration, with the will annexed, was granted to the husband, under the circumstances of the case, though the practice in the registry was to make such a grant to those having the interest.

[S. C. 7 Notes of Cases, 317; 13 Jur. 1084.]

Motion.

Mrs. Dawson died on the 15th January, 1849. Under the will of her father she had a power of appointment by will over a sum of 10,000*l.* On the 23rd July, 1847, she made her will, and appointed the said sum of 10,000*l.* to the trustees, or trustee for the time being of that sum, upon trust, during the lifetime of her husband, to pay the interest thereof equally between such of her sons as should be then living, and at his death to divide the principal between such of her sons as should have survived her, their executors, administrators, and assigns.

There was no executor appointed, and no other property than the 10,000l. was in any way dealt with or mentioned in the will.

Application was made in the registry for administration with the will annexed to be granted to the husband of the deceased, but that was refused on the ground that the practice then was to make such grants, not to the husband, but to those having the interest under the will.

Haggard contended that the practice in the registry was erroneous, and that the husband was entitled to the grant. He relied on *Salmon v. Hays* (4 Hagg. Ecc. 386), and suggested that the practice in the registry arose from a misapprehension of *Fielder v. Hanger* (3 Hagg. Ecc. 769) which is a case of a different character.

Judgment—*Sir Herbert Jenner Fust*. There seems to be in the registry some misapprehension in respect of the decision in *Fielder v. Hanger*. In that case, which is one of a different description from the present, the wife died intestate. The husband took administration and died, leaving goods unadministered; his executors applied for a grant de bonis non, which grant was also claimed by one of the wife's relations. Sir John Nicholl, in making his decree, undoubtedly observed that the grant ought to follow the interest, but he also said that the whole interest in that estate was vested in the husband's representatives, and, even if the husband had not taken out administration, he should have made the same decree, unless it had been shewn that the entire property belonged to the wife's next of kin. In *Salmon v. Hays*, which is a case in [137] point, the same learned Judge observed that where there is no appointment of an executor in a feme covert's will the husband is, generally, entitled to the administration with that will annexed. Notwithstanding this decision it seems the practice has not been in accordance with it. I do not mean to lay down any special rule until all the cases have been looked up, and it has been ascertained whether grants have been made by decree of the Court so as to warrant the practice in the registry. In the present case there is sufficient to satisfy me that the wife intended her husband to have some control, for the principal is not to be divided till after his death. I am of opinion, under the circumstances of this case, that the husband is entitled to the grant of the administration with the will annexed, and I accordingly decree it; had there been another party applying for the grant, I should have required the question to be argued.

BRYAN AND OTHERS *against* WHITE AND HENSON. Consistory Court of London, Feb. 9th, 1850.—An executor having taken probate of a will, dated the 24th August, 1849, was cited at the instance of legatees under a former will to bring in the probate, and shew cause why the same should not be revoked. Probate was brought in, and his proctor was authorized to propound, &c. On motion the Court dismissed the executor, who was a witness to the will, from the suit, in order to his being examined as a witness, without requiring him to renounce his office.

[See further, p. 315, post.]

Motion.

William Stokes died on the 25th August, 1849, leaving a will, bearing date the 24th of the same month, and thereof appointed George White and [138] Thomas Henson executors, who both took probate on the 1st September following.

On the 5th January, 1850, a decree issued at the instance of three legatees named in a will of the deceased, bearing date the 23rd August, 1849, citing the executors of the will of the 24th August, 1849, to bring in the probate, and shew cause why the same should not be revoked.

On the 19th January the probate was brought in, proxies were exhibited, and both proctors were assigned to bring in affidavits of scripts. The proctor for Messrs. White and Henson was authorized by the proxy to propound the will, &c.

Nothing further had been done in the cause.

Mr. Henson, who was a nude executor, was one of the witnesses to the will of which he had taken probate.

The Court was moved to dismiss Mr. Henson from the suit, in order that he might be examined as a witness in the cause.

Dodson, Q. A., in support of the motion, cited *Jackson and Wallington v. Whitehead* (3 Phill. 577).

By the Court. But supposing Mr. H. has intermeddled with the effects of the deceased?

Dodson. Before the Wills Act it was required that an executor should swear that he had not intermeddled before he could renounce in order to be a witness, but now that is not necessary, see sect. 17. All that is at present required is that he [139] should be dismissed from being a party in the cause. It is not necessary he should renounce the office of executor, or take the oath as formerly.

Addams opposed the motion.

Judgment—*Dr. Lushington*. The only question is whether I am to retain Mr. Henson as a party in the cause, or to dismiss him in order that he may be examined as a witness. I see no legal objection to dismiss him, and I conceive it is my duty to dismiss him, as his evidence may be necessary to the due administration of justice; I therefore do so accordingly.

IN THE GOODS OF SARAH BEADON (Wife of V. Beadon, Esq.), Deceased. Prerogative Court, Feb. 26th, 1850.—A will made in virtue of a power of appointment, and having after the testimonium clause a blank space of two inches eight-tenths, and then the signature of the testatrix, held not to be “signed at the foot or end.”

[S. C. 7 Notes of Cases, 376.]

Motion.

Mrs. Beadon, lately deceased, by virtue of a power of appointment given her by settlement previously to marriage, made a will, entirely in her own handwriting, on the 1st September, 1848, in accordance with the terms of the said settlement, and appointed her husband the executor.

[140] The will was written on foolscap paper, and occupied two entire pages, with a part of the third, and concluded with a testimonium clause. After that clause there was a blank space of two inches eight-tenths, and then followed the signatures of the testatrix and of the attesting witnesses.

Addams moved for administration, with the will annexed, to be granted to the husband.

Sir Herbert Jenner Fust said—I reject this motion.(a)

IN THE GOODS OF LEWIS HENRY, OTHERWISE LOUIS HENRIE SHADWELL, ESQ., Deceased. Prerogative Court, Feb. 26th, 1850.—A will, the dispositive part of which ended on the second page, having a blank space, under the last line, of one inch three-tenths, and at the head of the third page the words “signed by me, in the presence of the undersigned,” immediately after which followed the signature of the testator, and then an attestation clause, with the signatures of the witnesses, held not to be “signed at the foot or end.”

Motion.

L. H. Shadwell, Esq., barrister-at-law, died on the 9th December, 1849, leaving a will, entirely in his own handwriting, bearing date the 3rd July, [141] 1848, by which he disposed of all his property, and appointed executors thereof.

The will was written on a sheet of note paper, and ended on the second page, under the last line of which there was a blank space of one inch three-tenths. At the head of the third page appeared “signed by me, in the presence of the undersigned,” immediately after which was placed the signature of the testator, and then followed an attestation clause, with the date of the execution, and the signature of the witnesses.

Phillimore, jun., moved for probate.

Judgment—*Sir Herbert Jenner Fust*. The question is whether the will is “signed at the foot or end;” I cannot say that it is. There is ample space for the signature of the testator after the dispositive part of the will on the second page. It may be cruel, and I may be acting contrary to the opinion of some lawyers, to say that this paper is not signed according to the provisions of the statute; but I consider myself

(a) On this day there were other motions rejected involving precisely the same point as in *Re Hill*, ante, p. 114, with this difference only, that the blank spaces between the conclusion of the will and the attestation clauses were greater than in the case of *Hill*.

bound by the decision of the Judicial Committee in *Smee v. Bryer*. There is no part of the will on the third page. I cannot consider it as "signed at the foot or end;" therefore I reject the motion, and leave those interested to propound the paper if they should think fit.

[142] DIMES *against* CORNWELL, CORNWELL AND LYON. IN THE GOODS OF EDMUND WATERS, ESQ., Deceased. Prerogative Court, Feb. 26th, 1850.—A residuary legatee, who had renounced administration de bonis non of an alleged insolvent estate, permitted to retract that renunciation, and to take the administration in preference to a nominee of creditors representing a large amount of debt.

[S. C. 7 Notes of Cases, 380; 14 Jur. 252.]

Motion.

Edmund Waters died on the 18th October, 1839, leaving a will and codicil; he did not appoint any executor, but named his three sons, his daughter, and his grandchildren residuary legatees.

On the 2nd December, 1839, administration, with the will and codicil annexed, was granted to the deceased's son, R. F. Waters, as one of the residuary legatees, and the property was sworn under 4000l. He intermeddled in the deceased's goods, but died on the 2nd September, 1848, leaving some part thereof unadministered. The other two sons and the daughter of the testator, by proxies filed in the registry in April, 1849, renounced their right to the administration de bonis non. Subsequently thereto citations were issued against the other residuary legatees at the instance of two creditors, who each claimed the administration, and on their behalf sundry proceedings were had. By order of the Court the matter was directed to stand over with the view of ascertaining whether some other person, a creditor, might not be selected and approved of. An appearance was then given for a third creditor who was interested for himself and other creditors in a sum exceeding 60,000l., when the daughter (Mrs. Hind) of the testator applied to be allowed to [143] retract her renunciation and to take the administration de bonis non.

Dodson, Q. A., supported Mrs. H.'s application.

Harding in opposition cited certain dicta of Sir J. Nicholl in 3 Phill. 381. He admitted he knew of no case precisely in point.

Judgment—Sir Herbert Jenner *Fust*. This is an application from one of the residuary legatees to be allowed to retract her renunciation of the administration. This application is opposed by a creditor who is stated to have, with other creditors, claims on the estate to a very large amount. I will assume the estate to be insolvent; still, according to the practice of the Court, a residuary legatee is allowed to retract his renunciation before a grant be made to another. It is only when there is no one else, according to law, to take a grant that a creditor is entitled. It cannot, even in the case of an insolvent estate, be said that a residuary legatee has no interest, for some of the debts may be questioned, some of the creditors may make unjust demands. I am of opinion that the residuary legatee is entitled to the grant, and I decree the administration de bonis non to her upon her retracting her renunciation, but I make no order as to costs.

[144] IN THE GOODS OF HELEN HENDERSON, Spinster, Deceased. Prerogative Court, Feb. 26th, 1850.—Administration, with a copy of the will annexed, of a party domiciled in Scotland, granted in conformity with the grant of the Court of competent jurisdiction in Scotland, though the Judge of the Prerogative Court entertained great doubt as to the correctness of the grant in Scotland.

[S. C. 7 Notes of Cases, 378.]

Motion.

Helen Henderson died a spinster on the 18th October, 1848, domiciled in Scotland, leaving an informal will without date, wherein no executor was named, but the residue of her property was disposed of, one-half to her nephew, and the other half to the children of a niece, deceased. The Commissary Court of Aberdeen, being the Court of competent jurisdiction for the purpose, granted confirmation of the will on the 27th November, 1849, to the natural and lawful sister, and only next of kin of the deceased, by which grant she was appointed executrix dative qua nearest in kin.

The deceased died possessed of no property within the province of Canterbury in

which she had any beneficial interest, but, inasmuch as there were vested in her name in trust 500l. of the book debt loan of the East India Company, a representation to the deceased by authority of the Prerogative Court was necessary.

On the 2nd January, 1850, the Court was moved to decree letters of administration, with a copy of the will from the Court of Aberdeen, to the sister and only next of kin to the deceased, in conformity with the grant of that Court. The surrogate desired that the motion should stand over.

[145] Robertson, on the 26th February, renewed the application.

This Court usually follows the grant of a foreign Court of competent jurisdiction, even when the form of the foreign grant is not in accordance with the practice of this Court. *Larpen v. Sindry* (1 Hagg. Ecc. 382); *In re Cringan* (1 Hagg. Ecc. 548); *Viesca v. D'Aramburu* (2 Curt. 277).

Judgment—*Sir Herbert Jenner Fust*. I have no difficulty in acceding to this motion though I have great doubt whether the sister of the deceased is not executrix; but, as the Court in Scotland has put its own construction on the will, I shall let the administration pass as prayed.

BAILEY *against* BRISTOWE. Prerogative Court, Feb. 26th, 1850.—The attorney, to whom administration had been granted on behalf of the relict of a deceased, being cited at the instance of the relict residing abroad to exhibit an inventory and account, appeared under protest, alleging that the Court has not jurisdiction to require an account between a principal and agent; held that the attorney was bound to comply with the citation.

[S. C. 7 Notes of Cases, 386; 14 Jur. 298.]

Act on protest.

Thomas Bailey of Newfoundland died on the 5th November, 1832, intestate, leaving his wife and several children, all residing in Newfoundland, surviving.

[146] On the 7th May, 1835, letters of administration were granted to James Bristowe, and James Bristowe, the younger, brokers, as the lawful attorneys of Mrs. Bailey. The effects of the deceased within the province of Canterbury were sworn under 1500l., and Messrs. Bristowe entered into the usual bond with two sureties, dated the 4th May, 1835; on the 10th June following, Mr. Bristowe died, leaving Mr. Bristowe, the younger, surviving.

Various applications were made to Mr. Bristowe for an account, and for payment of the monies of the deceased received by him, but without effect; and much delay was occasioned by reason of Mrs. Bailey residing abroad.

On the 3rd September, 1849, a citation at the instance of Mrs. Bailey was issued, calling on Mr. Bristowe to appear and exhibit an inventory and account. The citation was personally served, and eventually he appeared under protest.

In the act it was alleged on behalf of Mr. Bristowe that it is competent for Mrs. Bailey to apply for and obtain letters of administration to be granted to herself, and thereby to revoke the appointment of Mr. Bristowe as her attorney, or the power of attorney only, and appoint a fresh attorney in his stead; that the acts of Mr. B., as attorney of Mrs. B., are in law to be considered as the acts of Mrs. B. herself, and that the records of the Court furnish no instance in which it has heretofore issued any similar citation, or interfered in any such manner between principal and agent; lastly, that the Court has no power or jurisdiction.

In the answer it was alleged that Messrs. Bris-[147]-towe, by the administration bond duly executed by them and their sureties, respectively covenanted to make, or cause to be made, a true and perfect inventory of all the goods, &c. of the intestate, which should come into their hands or possession, or of any other person for them, and would exhibit the same at the time therein mentioned, and further would make, or cause to be made, a true and just account of their administration at the time therein also mentioned; it was submitted that it is within the undoubted right and jurisdiction, and is the practice of the Court to call for and enforce the production of an inventory and account from all persons, acting as administrators, under the authority of letters of administration, at the suit and instance of any person entitled in distribution to, or having any possible or contingent interest in the due administration of, the personal estate.

In the reply, it was submitted that the bond was entered into and executed by Messrs. Bristowe, as the attorneys of Mrs. Bailey and in her place, and that the true

purport of the bond was and is to protect creditors, and others having an interest in or claim against the estate of the intestate, and not to protect the interest of Mrs. B. against her own agent.

Bayford, in support of the protest, argued that the acts of an attorney are the acts of his principal; that Mrs. Bailey has another remedy, not only in other Courts, but also in this; that the obvious mode would be to revoke Bristowe's appointment as agent, [148] to take the grant herself, and then call for an account in respect of which the powers of this Court are limited; she has a complete remedy elsewhere. The case is one *primæ impressionis*.

Jenner in support of the citation. What remedy there may be elsewhere is beside the question. The Court has ordinary jurisdiction in reference to an inventory and account; the administration bond would be a mere nullity if they could not be called for. The present is not a case *primæ impressionis*; *Dormoy v. Hutcheon*,^(a) *In re* [149] *Anne Dormoy, Deceased*, and *In re Richard Bailey, M.D., Deceased*, is in point.

Judgment—*Sir Herbert Jenner Fust*. I should like to have some authority produced for the assertion that an attorney, who has entered in his own name into an administration bond, cannot be called on to exhibit an inventory and account. I do not know that I have not the power *ex officio* to call for them; however, most assuredly, I am bound *ex debito justitiæ* to require their production at the instance in this case of the widow. She has a right to know what debts have been paid, what debts remain undischarged, and what surplus there is, before she takes on herself the office of administratrix. This is, undoubtedly, a case in which the Court will interfere, unless expressly prohibited. The decrees which were issued in the case of *Dormoy v. Hutcheon*, referred to by counsel, clearly shew that Sir John Nicholl entertained no doubt on the subject. I have no hesitation in overruling the protest; I assign Bristowe to appear absolutely and to bring in an inventory and account, and, with the view to discourage similar objections, I condemn him in costs.

[150] LAIT *against* BAILEY. Prerogative Court, Feb. 26th, 1850.—A party having been admitted to sue as a pauper was, on facts respecting an income, proved against him by the proctor assigned to him, dispaupered.

[S. C. 7 Notes of Cases, 388; 14 Jur. 378.]

On petition.

A suit under the above title was depending respecting the validity of a will, when a proctor, who, up to a certain date, acted for Mr. Lait, withdrew, on which Mr. Lait, as the proctor for the opposite party waved his objection, was admitted to sue

(a) Not reported as to this point. The cases were these—On the 12th July, 1828, letters of administration, with the will annexed, of the goods of Anne Dormoy, late of the island of St. Martin, in the West Indies, widow, were granted to Thomas Hutcheon, as the attorney, for the use and benefit of G. B. D., one of the children of the deceased then residing in the West Indies. J. E. Cremony, the sole executor, having been cited, did not appear, and no residuary legatee was named in the will.

In the same month of July, 1828, letters of administration, with the will annexed, of the goods of Richard Bailey, late of the island of St. Martin, doctor of medicine, were granted to the said T. H. as the administrator of the goods of Anne Dormoy, who was, whilst living, the daughter and one of the residuary legatees named in the will of Dr. Bailey, for the use and benefit of the said G. B. D. The executors and residuary legatees named in the will all died without proving.

On the 23rd December, 1831, two decrees were issued at the instance of the said G. B. D., citing Thomas Hutcheon to appear and exhibit inventories and accounts in the goods of Anne Dormoy, and in the goods of Dr. Richard Bailey. Both decrees were served, but no further proceedings were taken under them, in consequence of arrangements made after Mr. H. voluntarily brought in the letters of administration with the wills annexed in each case, and alleged that no suits were pending in any Court in which he, as the representative of either of the deceased persons, was a party; the grants were then revoked.

It appears that Hutcheon had misappropriated the funds of the parties and had become a bankrupt. The proceedings were instituted in order to actions at law being brought against the sureties on the administration bonds, but those actions were compromised upon a sum being paid by the sureties.

In respect to the subsequent grant, *In re Anne Dormoy*, see 3 Hagg. Ecc. 767.

in forma pauperis. On a counsel and proctor being assigned to Mr. Lait, according to the usual course, the proctor so assigned prayed to be heard on his petition in objection to Mr. Lait being permitted to prosecute his suit as a pauper.

In the act it was alleged that Lait, under the will of J. L., dated in 1829, propounded by the opposite party in the cause, took a devise of a freehold of the value of several hundred pounds, and under another will of the deceased, dated in 1830, propounded by Lait, he took a devise of a freehold of considerable value, and also the residue of the deceased's property, amounting at least to 800l.; that, inasmuch as Lait would take property, whichever will was pronounced for, he might raise funds to carry on the suit; it was further alleged that Lait's wife was in the receipt of a separate income amounting to 40l. per annum, arising from house property, in which income he participated, as well as in the income derived by his wife and daughter from the business of dressmakers; and, lastly, it was alleged that Lait was in the possession of goods of some value.

[151] In the answer it was stated that he, Lait, sold all his interest in May, 1841, of the freehold referred to in the act to W. Pope; that the freehold in both wills is one and the same estate; that it was impossible for him to borrow money upon the residuary bequest in the will of 1830, as probate had not been granted; that the house property of his wife was settled to her sole and separate use; that the business of his wife and daughter was so precarious as to be insufficient to procure the necessaries of life for the family; and, lastly, that he had no goods whatever.

In the reply it was denied that Lait in May, 1841, sold the freehold to Pope, and it was alleged that, though that property was sold by auction at the date specified, it was bid for by Pope, and purchased by him as the agent of Lait, and by his (Lait's) directions, who himself subsequently completed the purchase on his own behalf, and was to a recent date in possession of the same.

In the rejoinder it was denied that Pope was, at the sale of the property, Lait's agent, it was alleged that Pope purchased on his own account, and that afterwards Lait's wife re-bought the reversion with money given to her by her mother for that purpose, and that the property, ever since September, 1848, when she came into possession, has been unproductive from being unoccupied; and, lastly, it was alleged that the property of Lait's wife was quite insufficient to provide for the daily support of himself, wife, and five children.

In support of the act a joint affidavit was made by Pope, a grocer; Legge, an auctioneer; and Smith, describing himself a messenger, and a second affi-[152]-davit was made by Pope; in opposition thereto there was a joint affidavit made by Lait and his wife.

Stonestreet, on behalf of the proctor, submitted that the case, as set up in the act, was established by the affidavits adduced by him, and that, consequently, the case came within the principle laid down by Sir John Nicholl in *Lovekin v. Edwards* (1 Phill. 179).

Judgment—*Sir Herbert Jenner Fust.* I am clearly of opinion from the affidavits adduced that Mr. Lait is not entitled to sue in the character of a pauper. Pope swears that in March, 1841, he attended a sale by auction held by the assignee of Lait, then a bankrupt, that, by the direction of Matilda, the wife of Lait, he, as the agent of Lait, bid for and purchased a freehold cottage, that he paid a portion of the deposit-money, which was afterwards repaid him by Lait, who also completed the purchase; Pope also swears he himself never had possession of the cottage, but that in June last the same was in the occupation of Lait, and that he never purchased of Lait any property. Legge swears that in July last, at a sale, Lait bought in furniture, &c., to the value of 30l. and upwards, and that such furniture is still in his possession, and that he has a cottage at present unlet, but, when let, worth 18l. per annum; and Smith swears that Lait's wife has house property, let to tenants, producing full 70l. per annum. Opposed to this [153] joint affidavit there is an affidavit made by Lait and his wife, from which, and other circumstances, I collect there is some arrangement between them. It is possible that Lait may not be worth 5l. after the payment of his just debts, still it is clear he is not in that situation of life to entitle him to gratuitous services in carrying on his suit, to the injury, should he fail, of the opposite party. I am clearly of opinion that Lait has no claim to sue as a pauper, and, accordingly, I rescind the decree by which he was admitted a pauper, and by which a counsel and proctor were assigned to him.

KING against KING. Consistory Court of London, Feb. 28th, 1850.—A party, in her personal answers to a libel, is not bound to answer to articles which, though not on the face of them criminatory, may, by possibility, furnish a link in the evidence against herself.

[S. C. 7 Notes of Cases, 396 ; 14 Jur. 276. Referred to, *Redfern v. Redfern*, [1891] P. 139.]

This was a cause of divorce, by reason of adultery, brought by the Honourable Robert King against the Honourable Ann Gore King, his wife.

The libel originally consisted of thirty-two articles, but by direction of the Court the 28th and 29th articles were struck out, when the admission of the libel was opposed.

The first, second, and third articles pleaded the marriage, the certificate, and the cohabitation of the parties; the fourth to the twenty-seventh inclusive pleaded facts to lead up to the adultery [154] charged; the remaining articles, after the reformation of the libel, were the usual formal pleas as to identity, diversity, and jurisdiction.

The answers of Mrs. King to the libel were called for, and she was assigned to give them in; after answering to the three first articles, her answers followed in these words:—

“To the fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, and thirtieth positions or articles of the said libel this respondent answering says, she is advised, and submits, that by the rules of law, and the practice of this Court, she is not bound to answer any or either of the matters and things therein respectively pleaded and set forth.”

The admission of these answers was opposed as being insufficient.

At the suggestion of the Court, in order to avoid the necessity of going through the several articles of the libel, the sixteenth, which ran in these words, was taken as a specimen of the other articles, to test the asserted insufficiency of the answers:—

“That in the commencement of the year one thousand eight hundred and forty-eight it became absolutely necessary for the said Honourable Robert King to proceed, in person, to London, to raise money for the liquidation of his debts; that he, accordingly, proceeded to London, accompanied by Monsieur Adolphe Villeneuve (who was a friend of the said Vicomte St. Jean) partly on account of his, the said [155] Honourable Robert King's state of health, and partly to assist him in his negotiation for a loan of money. That upon their arrival in London, on or about the twenty-fourth of the month of February, in the said year, they took up their residence at the Piazza Hotel, Covent Garden.”

Haggard and Harding opposed the answers as insufficient. The articles in the libel are of a mixed character; some charge adultery, others do not. Mrs. K., though not bound to criminate herself, is still bound to answer fully to other matters in the plea. The doctrine in respect to answers is to be found in *Dysart v. Dysart* (3 Curt. 544), *Schultes v. Hodgson* (1 Add. 111). The rule respecting answers in Chancery may furnish some analogy, see *Chambers v. Thompson* (4 Bro. C. C. 434) and *Finch v. Finch* (2 Ves. 493).

Jenner and Bayford, in support of the answers. The charge of adultery is the only issue to be tried. If the 16th article of the libel bears not upon the question, why was it inserted? It is a link in the chain. In *Smith v. Smith* (not reported, Arches, 1813), where the articles were, like the present, of a mixed character, Sir J. Nicholl held the party was not bound to answer any part. There is a wide distinction between suits for cruelty and adultery; *Dysart v. Dysart* is of the former class, and has nothing to do with the present question; *Schultes v. Hodgson* relates to the construction of a statute. A party [156] in a suit is no more bound to criminate himself than a witness in a cause.

Judgment—*Dr. Lushington*. The right of a party to exact answers depends on the form of proceeding. If the suit be prosecuted by articles, on no account can answers be at all exacted. In a civil cause a contrary rule prevails, answers are due; but engrafted on that rule is this exception, that the party giving in his answers is entitled to object to answer to so much of a plea as may criminate him.

The question which I have now to determine is whether the husband is entitled to fuller answers to his libel. When I suggested to counsel to confine themselves to

the 16th article of the libel, I did so considering that the validity of the arguments would be better tried on that than the other articles. Looking at the averments standing in that article, without reference to any other part of the libel, it would certainly be extremely difficult for me to say there is any circumstance which could criminate the wife; but, unless those averments tend in some way to establish the charge against her, I cannot understand why they were introduced. The chain of evidence is to be completed by a variety of links; how far any one may be important or unimportant I am not yet in a position to determine. I do not consider I have a right to assume that any one fact in plea may not tend to establish the lady's guilt; I cannot say that there is an averment in the 16th article which may not afford a link to assist in the proof of the charge. [157] Were I to say that Mrs. King must answer that article, I am by no means clear I should not be requiring her to furnish matter tending to criminate herself; that I have no right to do. The husband must prove his own case; the onus is not to be thrown on the opposite party. I know of no case which militates against the position I take; the observations of Sir J. Nicholl in *Schultes v. Hodgson* (1 Add. 111) were obiter; they were made in a case of a different character; and the cases in Chancery referred to have little or nothing to do with the present question. I am strongly of opinion that the objections to the answers cannot be sustained.

NICHOLL *against* THOMAS. Arches Court, March 2nd, 1850.—When a doubt may exist whether debts, under peculiar circumstances, constitute bona notabilia, the Court will decide in favour of their being bona notabilia.

[S. C. 7 Notes of Cases, 407; 14 Jur. 227.]

Appeal.

This was originally a cause in the Consistorial Court of St. David's respecting the validity of the will, bearing date the 17th May, 1848, of David Thomas Bowen Davies, Esq., of Maesyerigie, in the county of Carmarthen, who died on the 24th May in the same year.

The will was propounded by Thomas Thomas, the sole executor therein named, and was opposed by Mrs. Nicholl, the deceased's sister and only next [158] of kin; on the 24th April, 1849, the Judge of the Consistorial Court pronounced sentence in favour of the will, and from that sentence an appeal was interposed.

The usual preliminary steps were taken in the appeal, and the proctor of the appellant was assigned to libel, but before the libel was given in, it was discovered that there was other property besides that in the diocese of St. David's, which it was supposed constituted bona notabilia.

On behalf of Mrs. Nicholl an act on petition was delivered, which was followed by an answer and a reply. The substance of the pleadings is as follows:—

That in addition to the property which the deceased left in the diocese of St. David's, wherein he died, there were two persons debtors to him by simple contract resident at the time of his death out of the said diocese, to wit, J. W. and H. L.; that J. W., on the 18th February, 1847, then resident at Laugharne, in the said diocese, became the purchaser of some farming stock of the deceased, sold by auction, for which he gave his promissory note of that date for the sum of 15l. 9s., in liquidation of the debt, payable in four months, but which promissory note has not been taken up or the amount paid; that H. L., also on the said 18th February, 1847, then resident near Swansea, in the county of Glamorgan, also became the purchaser of some other farming stock of the deceased, for which he gave his bill of exchange of that date for the sum of 49l. 15s. 6½d., to the said deceased, payable at eight months, but which bill of exchange has not been taken up or the [159] amount paid; that the said J. W. in October, 1847, quitted Laugharne, and was at the time of the death of the said deceased resident within the diocese of London, but has since embarked for Australia; that the said H. L. in November, 1847, quitted his residence near Swansea, and was at the time of the said deceased's death resident within the diocese of Bristol; that the aforesaid promissory note is in the hands of Messrs. Wilkins, of Carmarthen, bankers, who had discounted the same for the deceased in his lifetime, and the aforesaid bill of exchange is in the hands of Messrs. Morris of the same place, bankers, who also had discounted the same for the deceased in his lifetime, &c.

In answer to the act, it was alleged on behalf of the executor that the whole of the property of the deceased was, at the time of his death, situate within the diocese

of St. David's; that the promissory note and bill of exchange, referred to in the act, having respectively been discounted, were regularly indorsed and transferred over by the deceased to the bankers, by whom they were respectively discounted, and the cash for the same was received by the deceased during his lifetime; that the deceased at the time of his death had not any beneficial interest whatever in either; that the same by the transfer thereof by the deceased ceased to be his property and became the property of the said bankers respectively.

In reply it was alleged that, inasmuch as the said securities were dishonoured when payment was due, the amount of each then became demandable from the deceased and is now recoverable by the holders of the securities from the estate of the deceased; [160] that, as the said securities were severally given to the deceased for goods sold and delivered, upon their dishonour the deceased's right to sue the several purchasers upon the original consideration, which had been suspended in the meantime, revived, by means whereof the said several purchasers became and now are debtors to the estate; lastly, that the deceased's interest was suspended only, not lost or extinguished, at the time of his death.

Addams and Harding argued in support of the petition, and referred to *Sledman v. Gooch* (1 Esp. 4), *Ex parte Blackburne* (10 Ves. 206); *Tempest v. Ord* (1 Madd. 89); *Puckford v. Maxwell* (6 T. R. 52); *Ward v. Evans* (2 Ld. Raym. 928). That the bankers considered the deceased liable, reference was made to an affidavit in which it was sworn they gave notice to him of the dishonour. They contended that if a doubt exist as to the law, the Court should decide the securities to be bona notabilia, otherwise it might be impossible to sue the debtors.

Jenner and Twiss contra. They referred to *Bunney v. Poyntz* (1 Nev. & Mann. 229) and *Horncastle v. Farran* (3 B. & Ald. 497).

Judgment—*Sir Herbert Jenner Fust*. In respect to the facts there is no dispute; it is admitted that certain goods were sold and delivered, and that payment for them up to the present time has not been made, either to the vendor in his life-[161]-time or to the bankers, who now hold the notes or securities. It further appears that the securities were dishonoured when they became due, and that notice of that fact was given in each instance by the banker to the deceased, and payment demanded of him; so much one of the affidavit states. It is also admitted that the debtors were, at the date of the deceased's death, not resident in the diocese wherein he died; one was residing in the diocese of London—the other in the diocese of Bristol. There can be no doubt that bills of exchange constitute bona notabilia; but there may be a question as to the effect of the indorsement on the paper since it was dishonoured. The cases cited in argument do not appear to me to be specific as to the state of the law here involved—whether the debtors are responsible to the representative of the deceased, or to the bankers, but I presume they will be protected against two actions. I agree to the observation, made by counsel, that when, in a case like the present, a doubt may exist, the safer course is to decide in favour of bona notabilia. In the present instance, therefore, I hold these securities to constitute bona notabilia. I feel a difficulty as to the form of my judgment by reason of the prayer of the appellant: though no libel has been given in, the better course, I think, will be to dismiss the appeal; I do so accordingly.

[162] *BRENCHLEY against STILL AND RACKHAM AND LYNN*. Prerogative Court, March 16th, 1850.—On a question whether a testatrix signed her name before or after the witnesses subscribed, one of the attesting witnesses deposed throughout her examination to the impression on her mind that the testatrix signed after them; the other, in the first instance, likewise deposed to the same effect, but after having inspected the paper she deposed that the testatrix signed before them: held, under the circumstances of the great experience the testatrix had had in executing wills—of her having sent to a solicitor for instructions in regard to the paper in question—and of the paper on the face of it appearing to be duly signed and attested, that the presumption is that the instrument was executed in conformity with the requisites of the statute.—1849, July 3rd.—A codicil, not containing any disposition of property but simply revoking all former wills, is of a testamentary character, and, if proved, is entitled to probate.—1849, Nov. 17th.—It is not sufficient to plead the want of mind, memory, and

understanding of a testator, without pleading some fact to lead up to the incapacity alleged.

[S. C. 16 Jur. 226. Referred to, *In the Goods of Hicks*, 1869, L. R. 1 P. & D. 684.

See further, p. 441, post nomine, *Brenchley v. Lynn*.]

This was a cause of proving the codicil, bearing date the 14th May, 1847, to the will of Elizabeth Lynn, wife of the Reverend James Lynn. The suit was promoted by Mary Ann Brenchley, widow, the sister and only next of kin of the deceased, and the party entitled to letters of administration, with the said codicil annexed, of the goods, over which the deceased had a power of disposition, against the said Reverend James Lynn, the husband of the deceased, and also against Robert Still and Willoughby Breare Still Rackham, the surviving executors named in the will with two codicils of a prior date, respectively parties cited to see proceedings.

The following is a copy of the codicil in question:—

"This is a codicil to the last will and testament of me, Elizabeth, the wife of the Reverend James Lynn, of Caldbeck, in the county of Cumberland, clerk. Whereas I have, by my last will and testa-[163]-ment in writing, or by some instrument in the nature of a will by me duly executed by me, and made in pursuance of some power or authority vested in me by my marriage or some other settlement, appointed and disposed of the real and personal estates over which I have a power of disposition by will, or some part or parts thereof, to or in favour of my husband, or some of his family: and whereas I am desirous to revoke and make void my said will and disposition aforesaid and to die intestate, in order that all my property, both real and personal, may go to and devolve upon my heirs or next of kin according to the nature and quality thereof, the same as if I had made no will and had died utterly intestate. Now, therefore, I, the said Elizabeth Lynn, do, by this instrument in writing, revoke, annul, and make void my said will in toto, and all the gifts, dispositions, clauses and directions therein, absolutely, so that I may die intestate, both as to my real and personal estate. And I make and execute this codicil or instrument in writing in pursuance, and in exercise of, all powers and authorities whatsoever which can enable me to make the revocation aforesaid, and make this a valid instrument and disposition. In witness whereof, I have at the foot thereof signed my name the 14th May, 1847.

"Signed and published by the said Elizabeth Lynn, in the presence of us the undersigned, present at the same time, who hereby subscribe our names in her presence as witnesses. } ELIZABETH LYNN.

"Catherine Dawson,

"Esther Ruddick."

[164] The allegation propounding the codicil was on the 3rd July, 1849, after opposition, admitted; and on the 17th November following a responsive allegation on behalf of Mr. Lynn was given in, opposed and rejected. The grounds of the opposition in each instance, together with the reasons assigned by the Judge for his decisions, are recapitulated and sufficiently set forth in the judgment on the final hearing of the cause.

The attesting witnesses, as well as the drawer of the codicil, were examined.

The question was whether the testatrix signed her name before or after the witnesses subscribed.

The cause was argued by Addams and Twiss in support of the codicil, and by the Queen's Advocate and Harding contra.

Judgment—*Sir Herbert Jenner Fust*. This case was before the Court at two previous stages; first, July 3rd, 1849, upon the admission of the allegation propounding the paper in question, dated the 14th May, 1847; secondly, Nov. 17th, 1849, on the admission of a responsive allegation.

On the first occasion it was contended that as the allegation propounded a paper merely revoking former testamentary papers, and not containing any disposition of property, the paper was not to be regarded in the light of a testamentary instrument, and for that reason it was argued the allegation ought to have been rejected. I, however, was of opinion that as the instrument purports to be a codicil, though simply revoking all former wills, and [165] contains and expresses the intention of

the testatrix to die intestate, the instrument, on the face of it, is of a testamentary character, and as such would be entitled, if proved, to probate.

Afterwards, an allegation was offered on behalf of the husband of the testatrix, in opposition to a grant of probate, pleading certain matters in connexion with her marriage settlement, and also that she, at the time of the execution of the codicil, was not of sufficient mind, memory, and understanding to know and understand the effect and operation thereof, and was not capable of giving instructions for, or of making and executing the said codicil, or any testamentary disposition, with reference to the powers under which she could legally make and execute the same, and the covenant by which she was restricted from revoking or altering her will, bearing date the 21st May, 1834, or of doing any act of that or the like nature requiring thought, judgment and reflection, without competent professional assistance. On that occasion I delivered my opinion that the matters pleaded in reference to the settlement were irrelevant, and that it was not sufficient to plead the want of mind, memory, and understanding, in the absence of any fact to lead up to the incapacity of the deceased; however, I gave the learned counsel an opportunity, which was declined, of pleading facts, should there be any, from which I might justly infer the incapacity alleged.

Such were the opinions expressed by the Court at the earlier stages of this cause.

I have now to deal with the evidence adduced in support of the codicil, which, on the face of it, [166] appears to have been duly executed. The real question is, whether the testatrix signed her name before or after the witnesses subscribed.

Respecting the intention of the deceased there can be no doubt. Whatever may have been the extent of affection and regard which led to the union of the testatrix with Mr. Lynn, it is clear, from the evidence of Ruddick, who had been for some time in the family, that the same degree of affection did not continue. It appears that Mr. Lynn, who was in possession of two livings, was principally resident at one, leaving his wife to reside at the other, and that she made frequent complaints of that circumstance, considering herself treated as a lodger in her husband's house. I think, assuming the facts, as stated by Ruddick, to be true, there was no very great improbability that this lady should revoke her former testamentary papers made in favour of her husband. But be that as it may, the paper propounded does most expressly declare her intention that the former instruments shall not take effect.

The former will and codicils, which are very numerous, were duly executed by the deceased, it is said, under professional advice and assistance. Had she adopted the same course in respect to the paper propounded, and sent for Mr. Jamieson or some other person to attend her, instead of writing merely for the form of a codicil, it would have been more prudent. I think, however, considering the knowledge the deceased must have gained by the execution of thirteen or fourteen different testamentary papers, the presumption *prima facie* is, she [167] would follow the example previously set by her professional adviser, and execute this testamentary instrument in the same manner as the others had been executed. It is certainly true that, notwithstanding a previous knowledge of the right mode of proceeding, we do find many instances in which, with that knowledge, the execution is irregular, and not in compliance with the Act of Parliament, yet it is quite clear that, as in this instance, where the attestation clause records the requisites of the act as complied with, it is to be presumed, unless the contrary be shewn, that the execution took place in conformity with the law.

Now, the law affecting this case is perfectly clear; there is no dispute about it. Should it clearly turn out on the evidence that the witnesses subscribed before the deceased signed her name, then there would not be a due execution of the instrument.

Let us see, then, the account given of the manner in which the instrument was prepared and executed. Esther Ruddick, who had lived some time in the family as cook and housekeeper, states that the deceased and her husband did not live happily together, and that Mrs. Lynn much complained that he left her too much alone, spending his time away from her, and that she was treated only as a lodger. She says, in her evidence on the 4th article, "At Christmas, 1846, Mr. Lynn left his wife to go to Keswick; he did not return to Caldbeck for twenty weeks; Mrs. Lynn called it twenty weeks, and I am sure it was so. I have often heard the said deceased complain of her husband's treatment of leaving her alone, and she has told me that if he [168] left her alone in that way she would revoke all her wills." Here, then, is

positive proof of the deceased's intention to revoke all wills—not simply that she would die intestate, but revoke all wills, and the effect of the paper propounded is that all previous testamentary papers are revoked. The witness continues, "Either about the end of April or the beginning of May, 1847, I was going to Penrith to buy some clothes, and she asked me if I knew a lawyer living there. I told her I knew a Mr. Jamieson, and she asked me if I would take a letter for her. I told her I would, and I did, and I left the letter with Mr. Jamieson at the time, and he was very busy, and I promised to call again for the answer. In about an hour and a half I called again, and he gave me a sealed letter, which I was to give to Mrs. Lynn. The deceased told me to ask his charge and to pay him. I asked him his charge; he told me five shillings, and I paid him. When I went home the deceased asked me if I had got it done for her, and what his charge was. I then gave her the sealed letter," and so forth. Such is the manner in which the instructions were conveyed to the deceased, who was entirely unacquainted with Mr. Jamieson, and he with her. Mr. Jamieson states that the purport of the letter he received, now lost, was that he should draw up an instrument revoking any will or codicil, or other document, Mrs. Lynn might have previously signed, and he states he prepared an instrument in accordance with those directions. Mr. Jamieson deposes—"I said to Ruddick, unless this paper is properly executed by Mrs. Lynn, all that I have done will go for [169] nothing, and I then told her it must be executed in this manner:—Mrs. Lynn must sign her name at the foot, pointing to the place where she was to sign, and she must sign it in the presence of two witnesses, and the two witnesses must sign their names here, pointing to the place where they were to sign. When Mrs. Lynn has signed her name in the presence of the two witnesses, they must then, before they leave her presence, sign their names, pointing to below the attestation clause; if all this is not done the instrument will be of no use. I repeated this two or three times, and Ruddick stated she perfectly understood me."

So far, then, as Mr. Jamieson was concerned, special cautions and directions were given to the witness Esther Ruddick as to the mode in which the paper was to be executed. It is certainly true there is no evidence to be found in the case that those instructions were communicated by Ruddick to her mistress. I must, therefore, in the absence of evidence, take it for granted that the special instructions and cautions were communicated by Ruddick to Mrs. Lynn.

I will now return to the evidence of Ruddick to see how Mrs. Lynn proceeded when the packet from Mr. Jamieson was given to her. Ruddick says—"She took the packet and put it into her pocket-book, and put that into her pocket. A few days after this, about the beginning of May, the deceased, who had sent for Catherine Dawson, who had formerly lived in her husband's service, requested me and Catherine Dawson to witness her revocation, as she called it; at the same time the deceased pro-[170]duced the paper, which I had given her, from her pocket-book. She told us it was a revocation of her last will and testament." Now, the deceased knew the necessity of having two witnesses present at the execution of the instrument, for she sent for Catherine Dawson to attend as a second witness. "I think Catherine signed first, I then signed my name, and I think Mrs. Lynn then signed her name." The only fact here plainly spoken to by Ruddick is that she signed her name after Catherine Dawson; the rest is all "I think." "I remember the deceased observing 'what a bad pen it was.' I recollect distinctly she took the pen I had used, and made the observation I have just mentioned." This might have been a strong circumstance, undoubtedly, to fix the recollection of the witness, if nothing else had occurred during the execution to which it could apply; but, according to the witnesses, the date was inserted either before or after the execution; therefore the observation of the deceased, in reference to the quality of the pen, may have been made on her taking the pen from Ruddick after she had subscribed, for the purpose of inserting the date, and not for the purpose of making her signature to the instrument. She says, "I remember we all three were present together, and we all signed one after the other, and I think Mrs. Lynn signed last, but it was all signed before we left the room." Now, surely, there is nothing very positive in this; it is merely "I think." "After the will was signed she asked Catherine when she would take it to Mrs. Parkes, at Ambleside. Mrs. Parkes is an old servant of Mrs. Brenchley's family, [171] and is housekeeper to her. Catherine said she would take it any day, and the deceased gave her the paper, having first sealed it up in a letter, and Catherine

promised to take it the next day." Then she goes on to depose to the perfect capacity of the deceased, and to the secrecy which was enjoined, in which both the witnesses agree.

So far Ruddick gave her evidence before she had seen the codicil; but, afterwards, in accordance with the usual course, the paper was produced to her, and then she stated, "I have now inspected the script, marked No. 1, annexed to the affidavit as to scripts," and so forth. She describes the paper, and adds—"That is the very paper I so saw the deceased sign. I recognise it by my signature, 'Esther Ruddick,' to it. I remember the deceased observing that she must date it, and I think she put the date in before we signed our names; but I can't help thinking the deceased must have signed after I had signed my name: she did it." What the words "she did it" mean I do not exactly know. The witness may have intended to depose simply to the fact that the testatrix did sign her name, or she may have intended to go further and state that the testatrix signed after the witnesses had subscribed. After all, what is the evidence of this witness but loose recollection? Nothing certain is to be collected. Even after she had inspected the paper she says, "I remember the deceased observing that she must date it, and I think she put the date in before we signed our names; but I can't help thinking the deceased must have signed after I had signed my name." This amounts to nothing more than a [172] strong impression that this was the order in which the transaction took place. There is nothing like certainty. It is in every part of the relation, "I think," and "I think," with the exception of the observation made by the deceased at some stage of the business as to the badness of the pen. Upon this witness's testimony, therefore, the question at issue is, as it appears to me, left open.

The second witness, in order of examination, is Catherine Dawson. She says, "I remember last May two years Sarah Kirsup, Mrs. Lynn's maid, came to my house and told me her mistress wanted to see me, and I was to bring over some riband. My sister and I keep a shop where we sell ribands, &c. I went the next day in the evening with the riband, and I was shewn into Mrs. Lynn's sitting-room, where I found her and Esther, the cook and housekeeper. The deceased asked me if I had brought the riband," and so forth. "She then told me she wanted me to sign a paper, which she took out of a small desk that was always on the table. She told me it was a codicil to her last will and testament to revoke all her former wills. She then gave me the paper, and told me where to sign my name, and I signed my name. I then made way for Esther to sign her name, and then Mrs. Lynn took the paper and she signed her name. I am not sure, but I think I saw her put in the date as well; however, she did not sign her name until after we had signed ours." Both the witnesses, therefore, before they saw the paper, had the same impression on their minds, that they subscribed before the deceased signed her name. If this were [173] so, undoubtedly the will would not be duly executed; but, from what afterwards appears in the evidence of this witness, the propriety is clearly shewn of producing the instrument, respecting which witnesses are deposing, in order that they may, by a sight of the paper, be enabled either to confirm or correct their previous deposition.

The witness continues, "I distinctly remember we were all present at the time, and we signed in each other's presence, and before either of us left the room. After it was signed she folded it up and asked me if I would take it to Ambleside, and give it Mrs. Parkes, her sister, Mrs. Brenchley's housekeeper, which I promised her to do, and the next day she gave me a packet, and a letter for Mrs. Parkes, which I delivered to Mrs. Parkes, and she wrote a reply, which I delivered to the deceased. After we had signed the will, the deceased expressly desired us not to tell anybody what we had been doing. I have kept many secrets for Mrs. Lynn, and I did this, for I did not tell anybody. The deceased was at the time of perfectly sound mind, as much as I am at this moment. She was put out by her husband, but her mind was as perfect as it could be. I cannot recollect the day of the month, but I am certain it was last May two years."

At this stage the script was shewn to the witness, and then, after identifying it, she states, "I remember the deceased telling me where I was to sign, and telling Esther to sign under me, and she then observed, and I must not sign in the same place, and then I saw her sign. I now distinctly recollect that the said deceased wrote something before we [174] signed our names, and I have no doubt it was her

signature; because, after we had signed, I distinctly remember the deceased saying that it was not dated"—that she distinctly remembers—"and she must have put in the date after we had signed;" that may or may not be a good reason, but she distinctly recollects—she has no doubt—that she saw her sign, in fact, "before we signed our names." She had previously sworn she saw her sign, but now she swears, "She must have put in the date after we had signed, and that was all she did after we had signed. In fact," continues the witness, "I was so flurried at first I did not distinctly remember; but when I saw the paper I then recollected all the business." So that upon the sight of the paper itself this witness deposes to the fact that she does recollect the whole of the business. The date does appear to be inserted—the 14th May, 1847; and the names of Catherine Dawson and Esther Ruddick are subscribed as attesting the execution of the codicil, which has the name of the deceased signed at the foot.

Such is the account given by the witnesses of the whole course of the transaction. The first witness examined, Esther Ruddick, thinks that the deceased signed after them, and persists rather in that as being the impression on her mind, even after she had seen the instrument. She speaks of the insertion of the date, but thinks that was made before they signed their names. But the witness, Catherine Dawson, when she had seen the paper, although, in the first instance, she deposed, as to the course of the transaction, to the same effect as Ruddick, yet, [175] after seeing the paper, she says—"I then recollected all the business," and "she [the deceased] must have put in the date after we had signed, and that was all she did after we had signed."

What, then, is the legal effect of this evidence? It was contended that the Court must be satisfied beyond all doubt that the codicil was executed by the deceased in due form, that she had signed her name in the presence of the two witnesses, and that the two witnesses afterwards signed their names and attested the execution in the presence of the deceased. I confess in my mind I have very little doubt what was the real course of the transaction. I have very little doubt, looking at all the circumstances of the case, seeing the deceased had previously executed thirteen or fourteen instruments in reference to the marriage settlement, under the immediate superintendence of her professional advisers; I say that circumstance must at least have impressed upon her mind the propriety of executing the instrument in a formal manner. But that is not all; she sent to a solicitor for a form of instructions to enable her to carry into effect her intention to revoke all the former instruments. Is not, then, the presumption strong that the deceased would take the right course in executing the codicil in question? I cannot conceive that any presumption to the contrary arises from the appearance of the paper. Is this presumption to be repelled by the mere loose recollection of witnesses whether they did or did not sign their names before the deceased had signed hers? The presumption is, in all cases, when on the face of an instrument the name is signed in the proper place, and is [176] attested by two witnesses, that all has been rightly done. True it is those circumstances are not conclusive. The onus probandi is upon the person who sets up the instrument; but in a case where the testatrix had previously executed a multitude of testamentary papers with reference to a settlement, and had recourse to a professional gentleman to prepare the paper in question, who gave special directions as to the mode of execution, and we find the testatrix exceedingly careful in pointing out to the witnesses the spot where they must sign their names, the presumption is very strong that the instrument was duly executed. I have no doubt the transaction did take place in the manner in which it was intended it should take place, and in compliance with the requisites of the statute. Grievous, indeed, would be the state of the law if, upon the loose recollection of witnesses as to the order in which the execution took place, the intentions of the testatrix were to be defeated.

Difficulties must arise in many cases where witnesses are deposing after a considerable period of time from the transaction in question. Where both attesting witnesses positively declare that they did not sign their names till after the testator had signed, the case is conclusive, unless there be evidence to contradict them. Where the witnesses differ, the Court must judge which is the more likely to be correct in the account given. Where the witnesses depose with doubt and hesitation, the Court must look at all the circumstances, and see on which side the preponderance of probability rests. In former cases, where the witnesses have deposed, the one positively that the will was not executed in [177] the testator's presence, and the other as

positively declared that it was, the Court has given the preponderance to the witness deposing affirmatively in accordance with the statement set forth in the attestation clause. In this case both witnesses, in the first instance, considered that the transaction took place in the manner they at first represented; but the second of the witnesses positively declares, after seeing the paper, that she distinctly remembers that the date, and not the signature of the testatrix, was inserted after they subscribed, and she accounts for her previous mistake by stating she was at first flurried.

Under these circumstances I am clearly of opinion that the Court is bound to pronounce for the validity of the instrument: accordingly I pronounce for its validity, and decree probate of it. I have no doubt about the case, not the least in the world.

I may here state I have no reason to presume that the witnesses have not given what they thought a true account of the transaction, though their memories have fluctuated. I say this, rather, because the account Ruddick gives of the grounds on which the paper was executed is not very favourable to Mr. Lynn. I have no reason to suppose that the witnesses have been tampered with, or have attempted to conceal the real course of the transaction. I give no order as to costs.

From this sentence an appeal was made on the part and behalf of the Rev. James Lynn to the Queen in Council.

[178] IN THE GOODS OF THE REV. AND HON. THOMAS DAWNAY, Clerk, Deceased. Prerogative Court, March 19th, 1850.—A will, having after the testimonium clause an attestation clause, extending half the width of the sheet, with the testator's signature to the right of that clause but one inch four-tenths beneath it, and a space of two inches eight-fenths blank between the testimonium clause and his signature: held to be "signed at the foot or end."

[S. C. 7 Notes of Cases, 439; 14 Jur. 318.]

Motion.

The deceased died on the 8th January, 1850, leaving a will bearing date the 30th September, 1847, by which all his property, amounting in the province of Canterbury alone to 80,000*l.*, was disposed of, and executors were appointed.

The will was written on brief paper, consisting of five sheets, every one of which was signed by the testator, and the lines were, throughout, at a uniform distance apart of three-tenths of an inch. After the testimonium clause followed at the same distance the attestation clause, commenced at the left hand of the sheet and extended rather beyond half the width of the sheet. The signature of the testator was to the right of the attestation clause, but one inch four-tenths beneath it; and the space immediately on the right of the sheet, between the testimonium clause and the testator's signature, was two inches eight-tenths.

Deane moved for probate.

Sir Herbert Jenner Fust observed that if, according to the suggestion of the Judicial Committee of the Privy Council in *Smee v. Bryer*, common sense is to govern the question whether a testator's signature is at the foot or end of a will, common [179] sense intimates that the will in this case is signed within the meaning of the statute; accordingly the Court directed the probate to pass.

IN THE GOODS OF SARAH WELCH, Widow, Deceased. Prerogative Court, March 19th, 1850.—A will, having a blank space of six-tenths of an inch between the testimonium and attestation clauses, the latter extending not half the width of the page, with the testatrix's signature half an inch beneath and to the right of the attestation clause, and at a distance of two inches six-tenths below the last line of the will: held to be "signed at the foot or end."

[S. C. 7 Notes of Cases, 441.]

Motion.

The deceased died on the 22nd January, 1850, leaving a will bearing date the 18th of the same month, whereof an executor was appointed.

The will was written on a sheet of brief paper. Under the last line of the testimonium clause, at a distance of six-tenths of an inch, commenced an attestation clause on the left side of the sheet, but not occupying half the width of the sheet; beneath the attestation clause, at a distance of half an inch, but to the right of that clause, was placed the signature of the testatrix, between which signature and the last line of the will there was a blank space of two inches six-tenths.

Dodson, jun., renewed the motion for probate, which had been, on a previous day, applied for, when the Court directed that the case should stand over.

Sir Herbert Jenner Fust observed that the testatrix might have signed her name higher up; but [180] as her signature was close under the attestation clause, which immediately followed the testimonium clause, he should allow probate to pass.

IN THE GOODS OF ELIZABETH WOODS, Spinster, Deceased. Prerogative Court, March 19th, 1850.—A first codicil, with the remainder of the testimonium clause terminating on the second page of the sheet under which termination was a blank space of seven-tenths of an inch, then a full attestation clause extending half the width of that page, and opposite to the lower part of the attestation clause, at a distance of three inches and two-tenths from the termination of the testimonium clause, the testatrix signed: held to be entitled to probate, together with the will and second codicil, respecting which there was no question.—A third codicil, with the testimonium clause terminating on the second page, under which clause was a blank space of three inches three-tenths, and with the testatrix's signature, at a distance of six inches seven-tenths from the top of the third page, opposite to the lower part of the attestation clause, commencing nearly half way down the third page, rejected, as not "signed at the foot or end thereof."

[S. C. 7 Notes of Cases, 435.]

Motion.

Elizabeth Woods died on the 17th February, 1850, leaving a will with three codicils thereto bearing date respectively the 21st November, 1835, the 14th July, 1843, the 6th January, 1848, and the 14th February, 1850.

The will was a strictly formal instrument. The first codicil was written on a sheet of foolscap paper; the lines were at a uniform distance of three-tenths of an inch apart; the first page terminated with a part of the testimonium clause, and under the last line of that page was a blank space of one inch seven-tenths; at the top of the second page was a blank space of one inch five-tenths, and then followed the remainder of the testimonium clause, namely, the words "eight hundred and forty-three;" immediately under those words was another blank space of seven-tenths of an inch, and then fol-[181]-lowed a full attestation clause extending half the width of the page, opposite to the lower part of which clause, and at a distance of three inches two-tenths below the words cited of the testimonium clause the testatrix placed her signature; the attesting witnesses signed beneath the attestation clause.

The second codicil was a duly executed paper. The third codicil was written on a sheet of foolscap paper, and occupied with the testimonium clause the first and a part of the second page, the remainder of which page contained a blank space of three inches three-tenths. The attestation clause commenced nearly half way down the third page, but did not extend the whole width of the page; opposite to the lower part of that clause, at a distance of six inches seven-tenths from the top of the third page, the testatrix signed her name; the codicil was duly attested.

Deane moved for probate of the will, and three codicils to the executors.

Judgment—*Sir Herbert Jenner Fust*. In regard to the will there can be no question. With respect to the first codicil, though there is a short interval between the testimonium and attestation clauses, I am of opinion that that codicil is duly executed, otherwise, were I to pronounce against it, I should have to pronounce against half the wills prepared by professional men. The second codicil does not admit of a question; but, in reference to the third, I must say I cannot, on principle, [182] distinguish it from *Smee v. Bryer* (1 Roberts. 616). I therefore consider myself bound to decree probate of the will with the first and second codicils, rejecting, of course, the third.

IN THE GOODS OF JAMES FILGATE PRENTICE, THE ELDER, Deceased. Prerogative Court, March 19th, 1850.—A will, having a blank space of one inch three tenths between the testimonium and attestation clauses, the latter clause extending half the width of the page, with the signature of the testator opposite to the last line but one of the attestation clause, and at a distance beneath the last line of the testimonium clause of three inches eight-tenths, held to be "signed at the foot or end.

[S. C. 7 Notes of Cases, 440.]

Motion.

The deceased died on the 1st December, 1849, leaving a will executed on the 18th September, 1845. All the property was disposed of and executors were appointed.

The will was written on foolscap paper, with the lines throughout at a uniform distance of three-tenths of an inch apart; after the testimonium clause there was a blank space of one inch three-tenths, and then commenced on the left side of the page and extended half the width only of the page a full attestation clause, opposite to the last line but one of which clause, and at a distance of three inches eight-tenths beneath the last line of the testimonium clause, the testator signed his name.

The date of the will had been altered, and there were various obliterations and insertions unexecuted and unattested on the face of the paper, but all the [183] changes were sworn to have been made long subsequent to the execution.

Jenner renewed the motion for probate, which had, on a previous day, been applied for, when the Court directed that the motion should stand over.

Judgment—*Sir Herbert Jenner Fust.* The only question here is whether the blank space between the testimonium and attestation clauses is so great, and the signature of the testator so low down, as to render his signature to be not in sufficient compliance with the statute. There is a little more space between the testimonium and attestation clauses than is necessary; but I cannot say that the signature is not "at the foot or end" of the will; therefore I direct probate to pass.

[184] *HAY against WILLOUGHBY AND HILL.* IN THE GOODS OF THOMAS HARRISON, Deceased. Prerogative Court, March 19th, May 27th, June 22nd, 1850; Jan. 16th, 1851.—W. H. W. and W. H. became sureties in an administration bond for an administrator with a will annexed, who afterwards illegally converted to his own use the goods of the testator, and left the country. On behalf of a legatee, motion was made for a decree against the representative of W. H. W., then deceased, and W. H., citing them to shew cause why the bond should not be permitted to be sued for at common law and attended with. A decree, with intimation, was issued and duly served, but no appearance was given. Leave was given for the bond to be attended with. Subsequently the Court was moved to extend that permission to a Court of Equity, as well as common law, and, on an affidavit as to the necessity from the solicitor of the legatee who had filed a bill in Chancery, the motion was granted.—Motion for an administration with a will annexed during the absence from the country of the administrator refused on the ground that the 38 Geo. 3, c. 87, applies to executors alone.

[S. C. 14 Jur. 750.]

Motions.

Thomas Harrison died on the 26th February, 1847, leaving a will, and thereof appointed E. S. and W. B. executors and universal legatees in trust. They survived the testator, and duly renounced probate, as well as administration with the will annexed, &c.; whereupon, in August, 1847, letters of administration with the will annexed were granted to William Henry Willoughby, the father and guardian lawfully assigned to Charles Harrison Willoughby, then a minor, who was by the terms of the will interested in the residue of the personal estate of the testator.

C. H. W., on the 14th February, 1848, attained the age of twenty-one; and, on the 9th April, 1848, letters of administration were granted to him, having, previously, together with the said W. H. W. and William Hill, as his sureties, executed the usual bond, dated the 27th March, 1848, in the sum of 3000l.

The said W. H. W., the former administrator, and subsequently one of the sureties, died in Ja-[185]-nuary, 1849, and on the 28th April following, letters of administration with the will annexed of his goods were granted to Emily Willoughby, his relict and the residuary legatee.

A portion of the personal estate of the deceased, Thomas Harrison, had been sold by the said W. H. W. for the payment of debts, but there remained the sum of 1400l. three per cent. consols.

In January, 1849, Margaret Hay and Frances Harrison, since deceased, annuitants and also legatees named in the will of Thomas Harrison, filed a bill in Chancery against the said C. H. W. amongst others for the due administration of the estate of the said T. H., and on the 25th April following, a distringas was served on the Bank

of England not to permit the transfer of the said sum of 1400*l.* stock; when it was found that the same had been sold out by the said C. H. W., and that he had quitted the country, appropriating the proceeds of the sale to his own use.

In verification of the above statement, an affidavit was made by the solicitor acting on behalf of the plaintiffs in the suit in Chancery.

Addams moved for a decree to issue, at the instance of the said Margaret Hay, citing the said Emily Willoughby, widow, and William Hill to shew cause why the bond, entered into by W. H. W., deceased, and William Hill, together with C. H. W., should not be permitted to be sued for at common law or otherwise, and, on the same being so sued, for the said bond to be attended with.

[186] Sir Herbert Jenner Fust observed that the application, in respect of one, was against the representative, and said, as the decree is only to shew cause, I do not see why it should not be issued to that extent.

On the same day, in reference to the above facts, Addams also moved the Court to decree letters of administration with the will annexed of the goods of the said Thomas Harrison to the nominee of the said Margaret Hay, during the absence from this country of the said C. H. W., for the purposes of the said suit in Chancery, or in such other form as to the Court might seem expedient.

Sir Herbert Jenner Fust, after observing that the statute of the 38 Geo. 3, c. 87, applies to executors only, said I am afraid to extend the application of the act. I cannot grant this motion.

The above mentioned decree to shew cause with intimation was issued, and duly served on the said E. W. and W. H., but no appearance was given. On the 11th May following the Court was moved to direct the bond to be attended with, but it ordered that the motion should stand over. On the 27th May the Court gave leave for the bond to be attended with, as prayed, on its being sued for at common law.

Subsequently to the 27th May Mrs. Hay was advised that her best course would be to proceed against the said E. W. in a Court of Equity.

June 22nd.—Addams, on a statement of the necessity, moved the Court to extend the order made on the 27th [187] May, by directing the bond to be attended with as well, if sued upon, in a Court of Equity, as if sued in suit in a Court of Common Law.

Sir Herbert Jenner Fust said this application is something new. I do not like to depart from established usage; and I do not know why I should in the present instance. I know nothing about the proceedings in equity. Is Mrs. Willoughby legally liable? No circumstance, that I am aware of, has arisen to prevent Mrs. Hay obtaining justice in a Court of Common Law. I shall not depart from the usual practice and make a new order.

Jan. 16th, 1851.—The motion was renewed on this day, and supported by an affidavit from Mr. G., who stated he was the acting solicitor of Mrs. Hay, as well in proceedings depending in Chancery concerning the estate of Thomas Harrison, deceased, as in an action commenced in June, 1850, in the Court of Exchequer, against Emily Willoughby on the administration bond, and William Hill. He further made oath that the writ issued in the said action, bearing date the 22nd June, 1850, was not served on the said E. W. until the 21st October following, in consequence of the agent employed to serve the same having been unable to meet with the said E. W., who, the deponent has been informed and believes, purposely kept out of the way in order to prevent such service. And he further made oath that an appearance having been entered to the said action on behalf of the said E. W., and a declaration filed, he, the deponent, on the 15th December, 1850, received pleas, of which a true copy is an-[188]-nexed. And he further made oath that the effect of such plea is to impose upon Mrs. Hay the burthen of proving what the personal estate of William Henry Willoughby, deceased, consisted of, or at least that he possessed a sufficient personal estate to meet the whole, or a part of his liability on the said administration bond. And he further made oath that he verily believes that the said W. H. W. left behind him a considerable personal estate, of which the said E. W., as his administratrix, has possessed herself, and that she is now accountable for a sum sufficient to meet the whole, or at any rate a part, of the liability of the said W. H. W. on the said bond, but that unless the said Mrs. Hay is permitted to obtain from the said E. W., through the medium of a Court of Equity, an account of such personal estate, she will have great difficulty, and, in all probability, will be quite unable to disprove

the pleas given in on behalf of the said E. W., which pleas this deponent believes to be false.

Sir Herbert Jenner Fust said—I have reconsidered this application in reference to the affidavit before me, and am of opinion I am now in a condition to grant the motion.

[189] TOPHAM AND OTHERS *against* TOPHAM AND OTHERS. Prerogative Court, March 19th, 1850.—An allegation propounding a paper containing a specific bequest, and an appointment of executors written below the testatrix's signature, and interposed between the signatures of the attesting witnesses, rejected.
[S. C. 7 Notes of Cases, 272.]

Allegation.

Martha Topham died a spinster, without a parent, in the year 1849, leaving a will by which the residue was not disposed of, bearing date the 16th July in the same year.

The will was written on a sheet of note paper, and filled the sheet. The fourth page is in these words:—

“William Thomas Scott, and Frederick James Harrold, each to have a suit of black.”

“MARTHA TOPHAM

“Elizabeth Rogers, witness.

“To Mary, my gold chain. I appoint Frederick James Harrold and William Thomas Scott, executors, Ann Maria Scott, executrix.

“Witness, Ann Maria Scott.”

The passage between the names of the attesting witnesses, Rogers and Scott, occupied in the original five entire lines and a part of a sixth.

Ann Maria Scott and Elizabeth Rogers made oath that she, Scott, wrote the will as far as “to have a suit of black” inclusive, from the dictation of the testatrix—that the testatrix thereupon signed the paper in their joint presence—that Rogers thereupon attested and subscribed the paper in the presence of the deceased and Scott—that the latter then, from the further dictation of the deceased, [190] wrote the addition beneath the signature of Rogers, and immediately thereupon attested and subscribed “the said paper writing” beneath the said addition, in the presence of the testatrix and Rogers, all being present together during the writing and execution of the paper.

Harding, on the 8th November, 1849, moved for administration, with the will annexed, without the addition, written between the signatures of the attesting witnesses.

Sir Herbert Jenner Fust rejected the motion. The paper was subsequently propounded.

Addams opposed the admission of the allegation. The first question is, where does the will end? The second, supposing the termination of the will to be “a suit of black,” is, whether both witnesses have attested and subscribed as required. [Per Curiam. I think the paragraph between the signatures of the witnesses is a continuation of, and not an addition to, the will.] That view, then, disposes of the case; the will is not signed by the testatrix at the foot or end.

Harding in support of the allegation. The position of the signatures of the witnesses is of no importance; they may sign on any part of the instrument. The question is whether the Court may not reject the paragraph between the signatures of the witnesses, and hold the will to terminate with “a suit of black.” In *In re Howell* (2 Curt. 342) and *In re [191] Davis* (3 Curt. 748) the Court held certain clauses, written beneath the signatures, not to be testamentary. There is no case which precisely comes up to the present; the difficulty arises from the bequest of “my gold chain.”

Judgment—Sir Herbert Jenner Fust. The decisions on motion referred to certainly do not come up to the present case, and I know of no one which does. In those cases there were no dispositive words beneath the testatrixes' signatures, but here there are. It seems to me that both the bequest of the gold chain and the appointment of executors were an after-thought. Had Miss Scott signed immediately after Mrs. Rogers, it is possible, though I express no opinion, that I might have held the execution complete, and the will to terminate with “a suit of black.” Here it seems to me that Miss Scott merely attested the clause beneath the signatures of the testatrix and Mrs. Rogers, and that clause clearly has not been executed or attested by the testatrix

and Mrs. Rogers; in other words, the entire will has neither been attested by Miss Scott nor signed at the foot or end by the testatrix. It will be, I think, for the benefit of all parties that I should reject the allegation, and not put them to the expense of examining witnesses who can throw no additional light on the subject. I accordingly reject this allegation, and decree the costs out of the estate.

[192] IN THE GOODS OF ANN SWINDIN, Widow, Deceased. Consistory Court of London, March 20th, 1850.—A will, having an additional bequest to a legatee inserted, by which the sense of the paragraph, as that bequest stood, was interrupted, held to be entitled to probate, with such additional bequest, as the attesting witnesses knew not whether the same was or was not written previously to the execution.—It is not the duty of a Court of Probate to raise obstacles and make the Wills Act more difficult of compliance than it is.

Motion.

Ann Swindin died in February, 1850, leaving a will, entirely in her own handwriting, executed on the 17th April, 1849; executors were appointed, but the residue was not disposed of.

The will occupied two entire pages and a part of the third page of a sheet of letter paper. The last paragraph on the second page commenced—"It is my express wish should be forwarded to my niece, Mrs. George Brown, my gold watch, seals, and eye-glass, residing at Great Longstone, near," the word "near" extended to the fold of the sheet, and then the remainder of the description of the place of residence was carried to the top of the third page, "Bakewell, Derbyshire," &c. Under the last line on the second page of the said paragraph was written (the lines were at an equal distance apart throughout) "and a new Prayer Book, Church Service, and the sum of fifty pounds;" these words occupied an entire line.

The attesting witnesses, after stating in the affidavit that the will was duly executed, continued, "And these deponents having inspected the said will, and particularly the last line of the second page thereof in the words following, to wit, 'And a new [193] Prayer Book, Church Service, and the sum of fifty pounds,' further made oath that, at the time of the execution of the said will, they made no particular observation of the state or contents thereof, and they are unable to depose whether the said words, or any of them, were or were not written previously to the execution of the said will, or at what time they were written, as they now appear.

Robinson moved for probate of the will with the words "and a new Prayer Book," &c.

Judgment—*Dr. Lushington*. There is no evidence to shew when the words, which interrupt the grammatical structure of the paragraph, were written. The attention of the attesting witnesses has been directed to them, and they know nothing of the matter. Under this circumstance I consider it is no part of my duty to raise obstacles and make the Wills Act more difficult of compliance than it is already. I decree probate of the paper as it stands.

[194] IN THE GOODS OF SARAH WHITE, Widow, Deceased. Prerogative Court, April 26th, 1850.—Generally, if the signature of a testator be on the same page as that on which the will concludes, and placed after the conclusion, that will be a sufficient compliance with the statute.—A will having a blank space of one inch three-tenths between the testimonium and attestation clauses, the latter extending more than half the width of the page, and beneath that clause, at a distance of one inch eight-tenths, but to the right, the mark of the testatrix placed at a distance of five inches seven-tenths below the last line of the testimonium clause; held to be "signed at the foot or end."

[S.C. 7 Notes of Cases, 543.]

Motion.

Sarah White died, leaving a will executed on the 7th January, 1850. Executors were appointed, but no residuary legatee was named.

The will was written on a sheet of foolscap paper, and occupied two pages and a part of the third. The last line on the second page consisted of a part of the testimonium clause in these words—"In witness whereof I have hereunto set"—under these words, which occupied an entire line, was a blank space of six-tenths of an inch, and at the head of the third page was the remainder of that clause,

extending to two entire lines and a part of a third line. There was then a blank space of one inch and three-tenths, after which was placed an attestation clause extending rather more than half across the page, and beneath it, at a distance of one inch and eight-tenths, but to the right, was the mark of the testatrix; a blank space of five inches and seven-tenths intervened between the last line of the testimonium clause and the signature or mark of the testatrix.

Twiss moved for probate; he cited *In re Whittle, Deceased* (ante, p. 122).

[195] *Judgment*—*Sir Herbert Jenner Fust*. The question here is whether the will is signed at the foot or end. I have repeatedly expressed the difficulty I feel in extracting any rule from the judgment of the Judicial Committee in *Smee v. Bryer*; but, after some reflection, I think I shall in no respect impugn that decision when I say that generally, provided the signature of a testator is on the same sheet or page as that on which the will concludes, I mean when there is a part of the will above his signature, there is, as to that point, a reasonable compliance with the statute. I cannot, however, lay down a universal rule, much less can I pretend to say what will, in all cases, constitute the conclusion of a will. Sometimes the testimonium clause may in my opinion form the conclusion, sometimes the attestation clause; though when there is a testimonium clause the testator's signature ought to be as near to the end of it as possible.

Applying, then, that principle to the present case, I am of opinion that the testimonium clause is the conclusion of the will, and that though there is a considerable blank space between the testimonium and attestation clauses, and a still greater between the former clause and the testatrix's signature, that the will is signed "at the foot or end."

[196] IN THE GOODS OF CHARLES HOLLAND, Deceased. Prerogative Court, April 26th, 1850.—A will, having a blank space of one inch six-tenths between the testimonium and attestation clauses, the latter extending rather more than half the width of the page, with the testator's signature opposite to the centre of it, and at a distance of two inches four-tenths from the last line of the testimonium clause, held to be signed "at the foot or end."

[S. C. 7 Notes of Cases, 549.]

Motion.

Charles Holland died on the 5th December, 1849, leaving a will dated the 26th March, 1849. An executor was appointed, and the residue of the property was disposed of.

The will was written on a sheet of foolscap paper, and occupied two pages. After the testimonium clause there was a blank space of one inch and six-tenths, and then followed an attestation clause extending rather more than half across the page. The signature of the testator was placed opposite to the centre of the attestation clause, and at a distance from the testimonium clause of two inches four-tenths.

Harding moved for probate.

Sir Herbert Jenner Fust observed that there is a large space between the testimonium and attestation clauses, between which the testator might have signed his name; but in as much as there is a considerable part of the will above the signature of the testator in the same page, he considered that the case of *Smee v. Bryer* did not apply—that the case came under the rule laid down in *White's case*; consequently the paper was entitled to probate.

[197] IN THE GOODS OF SARAH SUSANNAH HOWELL, Widow, Deceased. Prerogative Court, April 26th, 1850.—A will, commenced in 1840, with many alterations and blanks appearing, and the residue not disposed of, and having after the appointment of an executor a blank space of four inches seven-tenths, after which followed "this my last will and testament is now signed by me Sarah Susannah Howell, on this 10th day of July, 1844," immediately beneath which were the signatures of the testatrix and attesting witnesses, with an imperfect attestation clause, held that the rule in *White's case* did not apply, as the Judge considered the testatrix did not intend her will to be concluded: probate refused.

[S. C. 7 Notes of Cases, 550.]

Motion.

Sarah Susannah Howell died on the 27th March, 1850, leaving a will signed by
E. & A. III.—41*

her, and attested on the 10th July, 1844. Executors were appointed, but the residue of the property was not disposed of.

The will occupying three pages of a sheet of foolscap paper was commenced by the testatrix, as the first paragraph intimated, on the 12th February, 1840. There were many interlineations and obliterations, but they were not executed. After the appointment of one of the executors on the third page, there was a blank space of four inches seven-tenths, and then followed "this my last will and testament is now signed by me Sarah Susannah Howell on this 10th day of July, 1844," immediately beneath which were the signatures of the testatrix and attesting witnesses with an imperfect attestation clause. Completely covering the blank space above described was a slip of paper affixed with seals at one end; it purported to be a codicil signed by the testatrix on the 27th November, 1849, but was not attested; there were two other loose memoranda without the signatures of either the testatrix or witnesses.

The attesting witnesses deposed that, by reason [198] of the will having upon the occasion of the execution thereof "been produced to and attested by them in such manner, that the concluding words thereof and the space required for such their attestation and for the signature of the said deceased were alone visible to them at such time, they could not, and did not observe whether any or either of the several interlineations, strikings through, erasures or other alterations, now appearing in the first and second pages thereof, were at that time so made or written in the will, nor whether the blank space in the third page was at such time left therein, or the testamentary memorandum [of November, 1849] affixed thereto; but they expressly say that none of such alterations were made in, nor was any such memorandum affixed to, the will in their presence at the time of the execution."

It appeared, however, by an affidavit of a member of the family that, by reason of a marriage and a death of certain legatees, some at least of the alterations in the will were made subsequently to September, 1848.(a)

Harding moved for probate without the alterations; he referred to *White's case* (ante, p. 194), in reference to the position of the testatrix's signature.

Judgment—*Sir Herbert Jenner Fust*. It is true that the signature of the testatrix is [199] placed on the same side of the paper as that on which the will, as it stands, concludes; but, when I laid down the rule in *White's case*, I expressly guarded myself from saying that that rule is to be of universal application; I had it in my mind at the time to make the present case an exception. This paper was commenced as far back as the year 1840, it was probably written at intervals, various alterations appear, and blanks were left, as I conceive, for further alterations and additions, for though the paper was signed in 1844, I do not think that the testatrix had intended her will to be concluded. Under the circumstances, I do not consider that *White's case* is here applicable. Accordingly, I reject the motion, and leave those interested to propound the paper, should they think fit.

IN THE GOODS OF GEORGE HAMBLY ROWE, Deceased. Prerogative Court, April 26th, 1850.—When there is space sufficient for the signature of a testator on the same page as that on which the will concludes, and his signature is not there placed, a will is not duly signed.—A will, having in the last line of the second page a blank space of four inches three-tenths, and under that line a blank space of nearly three-tenths of an inch, with the signature of the testator at a distance of two inches three-tenths from the top of the third page, held not to be "signed at the foot or end."

[S. C. 7 Notes of Cases, 545.]

Motion.

G. H. Rowe died on the 4th March, 1850, leaving a will dated the 23rd April, 1849. Executors were appointed, and the residue of the property was dis-[200]-posed of. The property was under the value of 5000l.

The will was written on a sheet of letter paper, with the lines at a uniform distance apart of three-tenths of an inch throughout. The second page concluded with the appointment of executors and the date of the will, but the writing on the

(a) Singularly, the style of handwriting, the pen used, and the colour of the ink, give the appearance of the will with all the alterations being written at one and the same time.

last line did not extend to the fold of the sheet, there was a space blank of four inches three-tenths, and under that line there was a space blank of nearly three-tenths of an inch. At the head of the third page was a general attestation clause on the left side, with the names of the witnesses, and beneath their names, but to the right, at a distance of two inches three-tenths from the top of the page, which was left blank, the testator signed his name.

Jenner moved for probate.

Judgment—*Sir Herbert Jenner Fust*. There is room for the testator's signature at the foot of the second page, not ample, but still sufficient. I cannot discover any real distinction between this and *Mr. Shadwell's case* (ante, p. 140). The witnesses, undoubtedly, have attested the signature of the testator, but nothing beyond that; with the exception of the writing on the third page, the sheet of paper might have contained nothing else, there is no part of the will on the third page. I have already observed that when a testator's signature is on the [201] same page as that on which the will ends, though there may be a space between the conclusion and his signature, generally, there would be a good execution; but when there is space sufficient for the signature on the same side as that on which the will concludes, and the signature is not placed there, but on another page, I consider the will is not duly executed. Accordingly I reject this motion.(a)

CONNELLY *against* CONNELLY. Arches Court, May 9th, Nov. 13th, 1849; March 23rd, 1850.—An allegation, responsive to a libel in a suit for restitution of conjugal rights brought by the husband against the wife, Americans by birth and parentage, pleading, *inter alia*, as a bar to the suit, that the husband and wife, whilst resident in Rome, had there been lawfully separated, and that the wife had with her husband's consent become professed in religion in England, was rejected on the ground that the allegation, if proved, would not be a bar to the sentence prayed by the husband.—On appeal to the Judicial Committee of the P. C. the sentence of the Court of Arches was reversed.

[S. C. 7 Notes of Cases, 444; 14 Jur. 437: reversed, 1851, 7 Moore, P. C. 438.

Referred to, *Armylage v. Armylage*, [1898] P. 178.]

On admission of a responsive allegation.

This was a cause of restitution of conjugal rights promoted by the Rev. Pierce Connelly, described as of Albury, in the county of Surrey, against Cornelia Augusta Connelly, described as of Hastings, in the county of Sussex, and diocese of Chichester.

[202] The cause was brought by letters of request from the chancellor of the diocese of Chichester.

The history of the parties to the suit, and of the circumstances which led up to it, are fully detailed in the allegation in question.

After the decree was personally served and an appearance given, a libel was given in on behalf of Mr. Connelly wherein it was pleaded that the parties to the suit were married on the 1st of December, 1831, "in the city of Philadelphia, in the United States of America, at the residence of Lewis Duval, Esq., in that city, and according to the rites and ceremonies of the Protestant Episcopal Church in the said United States, the same being identical with the rites and ceremonies of the Church of England as by law established in this country, by the Right Rev. Father in God, William White, D.D., Bishop of the Protestant Episcopal Church in the diocese of Pennsylvania, in the said United States, and in holy orders of the Church of England, and duly consecrated by the Archbishop of Canterbury for the time being as a bishop of that Church," &c. It was also pleaded that five children, three of whom are now living, were the fruit of the marriage; that Mr. and Mrs. Connelly cohabited together in the United States and afterwards in Rome till June, 1846; that in September, 1846, they came over to England wherein they both have ever since resided, but that Mrs. Connelly, in October, 1847, without any lawful cause, withdrew herself from cohabitation with her husband, and has ever since that day refused to return to cohabitation with him.

(a) Cases determined subsequently to the above, under 1 Vict. c. 26, s. 9, on the question whether a will be duly signed by a testator "at the foot or end" of the will, though prepared for the press, are withdrawn, in consequence of the provisions contained in "The Wills Act Amendment Act" (15 Vict. c. 24), passed the 17th June, 1852.

[203] The libel was admitted without opposition and the marriage was confessed.

Responsive to the libel an allegation, on behalf of Mrs. Connelly, was given in, (a) which was opposed and directed to be reformed, as will subsequently appear: when reformed it stood as follows:—

First.—That Pierce Connelly and Cornelia Augusta Connelly, his wife (formerly Cornelia Augusta Peacock, spinster), respectively parties in this cause, were born respectively of American parents at Philadelphia, in the State of Pennsylvania, one of the United States of America, and intermarried at Philadelphia aforesaid on the 1st day of December, 1831, according to the rites of the Protestant Episcopal Church of the United States in America, being at that time respectively members of that Church. And this was and is true, and so much the said Pierce Connelly, the other party in this cause, knows or has heard and in his conscience believes and confesses to be true. And the party proponent alleges and propounds all things in this article and in the following articles of this allegation contained jointly and severally.

Second.—That the said Pierce Connelly, who at the time of his said marriage was a priest in holy orders of the Protestant Episcopal Church of the United States in America, with cure of souls in Pennsylvania, immediately after his marriage was appointed rector of the church at Natchez, in the State of [204] Mississippi; that accordingly in the same month of December, 1831, the said Pierce Connelly and his said wife went to and took up their residence at Natchez aforesaid, and continued to be so resident at Natchez from such time until the month of October, 1835. And this was and is true, &c.

Third.—That for some time previous to the said month of October, 1835, the said Pierce Connelly, and also, through his inducement or with his perfect approval, the said Cornelia Augusta Connelly had been disposed to become Roman Catholics, but that the said Pierce Connelly was desirous in the first instance of considering the points in controversy between the two Churches, with such aids and assistances as he might be able to procure at Rome itself; that accordingly in the said month he and his said wife quitted Natchez and went to New Orleans, thence to embark for Europe, on their way to Rome, but where, to wit, at New Orleans, they were detained accidentally for about six weeks. And the party proponent expressly alleges and propounds that whilst so at New Orleans, in the month of November, 1835, she, the said Cornelia Augusta Connelly, having by degrees become and then being a thorough convert to the Roman Catholic faith, became unwilling to embark for Europe until she had made a formal profession of that faith, which she did at New Orleans accordingly, abjuring the Protestant faith, and being formally received thereon into the Roman Catholic Church. And the party proponent further expressly alleges and propounds that the said Cornelia Augusta Connelly took that step with the full sanction and approval of her hus-[205]-band, the said Pierce Connelly, who was present on the occasion of her reception and of her making her first communion as a member of the Roman Catholic Church. And this was and is true, &c.

Fourth.—That in December, 1835, the said Pierce Connelly and his said wife embarked for Europe on their way to Rome, for the purpose aforesaid, and where they arrived on the 24th day of February, 1836; and that there, on Palm Sunday, the 27th day of March in that year, the said Pierce Connelly was also, on his solemn abjuration of the Protestant faith, received into the Roman Catholic Church; that in January, 1838, the said Pierce Connelly and his said wife, having in the interval been resident successively at Rome, Vienna, and elsewhere on the continent of Europe, returned to America, and settled at Grand Coteau, in the State of Louisiana, where they continued to be resident from such time until the month of May, 1842. And this was and is true, &c.

Fifth.—That in the month of October, 1840, whilst resident in Grand Coteau aforesaid, the said Pierce Connelly proposed to his said wife that thenceforth they should live in constant and perfect chastity, abstaining from sexual intercourse with each other, in order to the more fully devoting themselves mutually to the service of God, and with a special view to his, the said Pierce Connelly's, then declared wish

(a) The allegation, as originally given in, before its reformation, consisted of those articles, exhibits, and parts of exhibits, not included in brackets, thus []. The exhibits were not pleaded in a formal manner as they now appear; they were simply referred to.

and intention in that case to take holy orders in the Roman Catholic Church. That the said Cornelia Augusta Connelly acceded to such her said husband's proposal, and that a verbal agreement to that effect was then entered into between them, and [206] which agreement was ever after steadfastly maintained. And this was and is true, &c.

Sixth.—That, in furtherance of the said Pierce Connelly's said declared wish and intention, and as probationary to the final separation hereinafter mentioned, in the month of May, 1842, the said Pierce Connelly placed his said wife in a convent, to wit, the Convent of the Sacred Heart at Grand Coteau aforesaid, and again left America, and proceeded a second time to Rome, for the avowed purpose of further proving himself as to his vocation to the ecclesiastical state, and in order, if proved, to make certain preparations in that behalf antecedently necessary, in respect of his being a married man, by the laws of the Roman Catholic Church. And this was and is true, &c.

Seventh.—That in the month of July, 1843, the said Pierce Connelly returned to Philadelphia, in the neighbourhood of which place his wife, the said Cornelia Augusta Connelly, rejoined him, she having for that purpose by his order left the Convent of the Sacred Heart at Grand Coteau, where he had placed her as aforesaid, and where she had resided during his absence. That in the following month, to wit, August, 1843, the said Pierce Connelly, accompanied by his said wife, quitted Philadelphia, and again proceeded to Rome, at which city they arrived together on the 7th day of December, 1843, and where they lived together, to wit, in the same house, but observing perfect chastity, as aforesaid, until Easter Monday, to wit, the 8th day of April, 1844; that the sole object of such their visit to Rome was the obtaining of a formal decree tantamount to or in effect being a sentence of separation from each [207] other, such being necessary in order to their carrying out their several ulterior objects, to wit, on the part of the said Pierce Connelly, that of embracing the ecclesiastical state or taking holy orders in the Church of Rome aforesaid, and on the part of his said wife, that of entering into religion in that Church or becoming a nun: that accordingly a petition of the said Pierce Connelly, embodying the requisite statements, and setting forth such their several objects, was presented to the then Pope Gregory XVI., and was by him referred, with all necessary faculties, to the Cardinal Vicar General and Judge Ordinary of Rome, who, after duly examining into the facts of the case, pronounced in effect a sentence of separation accordingly, and that thereupon, to wit, on Easter Monday, the 8th day of April, 1844, the said Pierce Connelly placed his said wife in the convent of the Sacred Heart Trinita dei Monti at Rome, and on the following day he entered himself in the Collegio di Nobili in that city, and on the then next day, to wit, the 10th day of April, 1844, received the first clerical tonsure, and assumed the ecclesiastical dress. And this was and is true, &c.

[Eighth.—That in part supply of proof of the premises pleaded and set forth in the next preceding article, and to all other intents and purposes in the law whatsoever, the party proponent doth exhibit and hereto annex, and prays to have here read and inserted and taken as part and parcel hereof, a certain paper writing now marked with the letter A, and doth allege and propound the same to be an official copy, extracted from the Register Book of Decrees [208] of the Court of the Vicariate of Rome, of the petition presented by the said Pierce Connelly to the Pope Gregory XVI., the Papal rescript thereon, and the form of the vow of chastity in and by the said rescript prescribed, and afterwards taken in pursuance thereof, together with a notarial translation of the said petition, rescript, and form of vow, and doth allege and propound that all and singular the contents of the said exhibit were and are true; that all things were had and done as in the said exhibit is contained; that Peter Connelly therein mentioned and Pierce Connelly, party in this cause, was, and is, one and the same person, and not divers, and that "his wife Cornelia," in the said exhibit mentioned, and Cornelia Augusta Connelly, also party in this cause, was and is one and the same person, and not divers. And this was and is true, &c.]

[Ninth.—That, in further supply of proof of the premises in the said article pleaded and set forth, and to all other intents and purposes in the law whatsoever, the party proponent doth exhibit and hereto annex, and prays to have here read and inserted, and taken as part and parcel hereof, a certain paper writing marked B, and doth allege and propound the same to be an official copy, extracted from the Register Book of Decrees of the Court of the Vicariate of Rome, of the proceedings had by the

Cardinal Vicar of Rome and his delegate, in pursuance of the before-pleaded petition and Papal rescript, together with a notarial translation thereof; that all and singular the contents of the said exhibit were and are true; that all things were had and done as in the said exhibit is contained; that Peter Connelly therein [209] mentioned, and Pierce Connelly, party in this cause, was and is one and the same person, and not divers, and that Cornelia Pico therein mentioned, and Cornelia Augusta Connelly, also party in this cause, was and is one and the same person, and not divers. And this was and is true, &c.

Tenth.—That, by the month of June, 1845, the said Pierce Connelly had completed his course of study, and was about to take holy orders in the Roman Catholic Church; that it being necessary, however, according to the canons of the Roman Catholic Church in that behalf, that his wife, the said Cornelia Augusta Connelly, should first bind herself by a solemn vow of perpetual chastity, she, the said Cornelia Augusta Connelly, accordingly, to wit on the 18th day of the said month, pronounced, or took with the requisite formalities, and signed, a solemn written vow (in the French language) of perpetual chastity, being the very vow prescribed by the Papal rescript as before pleaded, and that she so did, with the full knowledge and approbation (testified by his signature at the foot of such written vow) of her husband the said Pierce Connelly, although she had previously warned him of the difficulties and trials of the state into which he was about to enter, and had represented to him the nature of the obligations to which he was about to bind himself irrevocably, and offered to release him from all such difficulties and trials by returning to their previous mode of life, and thereby sacrificing any wish or will of her own; that the said Pierce Connelly persisted, however, notwithstanding such warnings and representations, and accordingly, to wit on the [210] 22nd day of the said month of June received sub-deacon's orders, and on the 29th day of the said month deacon's orders, and on the 16th day of July following priest's orders, all of the Church of Rome, at the hands of the aforesaid Cardinal Vicar of Rome. And this was and is true, &c.

[Eleventh.—That, in part supply of proof of the premises in the next preceding article pleaded and set forth, and to all other intents and purposes in the law whatsoever, the party proponent doth exhibit and hereto annex, and prays to have here read and inserted, and taken as part and parcel hereof, a certain paper writing marked C, and doth allege and propound the same to be an original duplicate of the vow of perpetual chastity, pronounced, or taken by the said Cornelia Augusta Connelly, as in the said article is set forth; that the signature "Pierce Connelly" thereto set and subscribed was and is of the true and proper handwriting and subscription of the said Pierce Connelly, party in this cause, and is so well known or believed to be by divers persons, of good character, credit, and reputation, who have frequently seen the said Pierce Connelly write and subscribe his name to writings, and who have thereby, or by other means, become well acquainted with the manner and character of his handwriting and subscription. And this was and is true, &c.]

[Twelfth.—That in further supply of proof of the premises, in the said article pleaded and set forth, and to all other intents and purposes in the law whatsoever, the party proponent doth exhibit and hereto annex, and prays to have here read and inserted, and taken as part and parcel hereof, a certain paper [211] writing marked D, and doth allege and propound the same to be and contain an official certificate in the Latin language, issued by the Cardinal Vicar aforesaid, of the successive ordinations of the said Pierce Connelly, in accordance with the said Papal rescript, and by the authority therein conceded, together with a notarial translation thereof, that "Petrus Ignatius Connelly," in the said letters of ordination mentioned, and Pierce Connelly, party in this cause, was and is one and the same person, and not divers. And this was and is true, &c.]

Thirteenth.—That in May, 1846, the said Pierce Connelly left Rome and came to England, where he became and officiated as private chaplain to the Roman Catholic Earl of Shrewsbury; that in the previous month of April, in the same year, the said Cornelia Augusta Connelly also left Rome, in the first instance for Paris, and that from Paris, after being three months there (to wit, in the Convent of the Assumption at Paris) she also came to England, and in the month of October following founded at Derby, in that county, a community of religious women (since removed to Hastings in Sussex, and of which she afterwards became and now is the superioress), under the title of the "Congregation of the Holy Child Jesus;" that the said Cornelia Augusta

Connelly had brought with her to England rules for the government of such (then intended) community, which had been submitted to and sanctioned by competent ecclesiastical authority before she quitted Rome. And this was and is true, &c.

Fourteenth.—That the time having arrived and the necessary [212] arrangements having been made for the said Cornelia Augusta Connelly's completing her entrance into religion by taking the necessary vows of poverty and obedience, supplementary to that of chastity, thentofore taken by her as aforesaid, the said Cornelia Augusta Connelly, on the 21st day of December, 1847, solemnly took the vows of poverty and obedience (at the same time renewing or repeating her former vow of perpetual chastity), in the house then occupied by the aforesaid community at Derby as aforesaid, in the presence and with the sanction of the Roman Catholic ordinary of that house and community. And this was and is true, &c.

[Fifteenth.—That in part supply of proof of the premises pleaded and set forth in the next preceding article, and to all other intents and purposes in the law whatsoever, the party proponent doth exhibit and hereto annex, and prays to have here read and inserted and taken as part and parcel hereof, a certain paper writing now marked with the letter E; and doth allege and propound the same to be and contain a true copy of the vows of poverty and obedience pronounced and taken by the said Cornelia Augusta of Connelly; that the same hath been faithfully copied from the original vows preserved of record in the congregation of the Holy Child Jesus at Hastings, in the county of Sussex aforesaid, and hath been carefully collated and examined with the said original now there remaining, and hath been found to agree therewith; that all and singular the contents of the said exhibit were and are true, and all things were so had and done as therein contained, and that Cornelia Connelly therein men-[213]-tioned and Cornelia Augusta Connelly, party in this cause, was and is one and the same person, and not divers. And this was and is true, &c.]

Sixteenth.—That early (in particular in the month of April) in the year 1847 the said Pierce Connelly had been anxious, and had so expressed himself, that the said Cornelia Augusta Connelly should take the aforesaid vows of poverty and obedience without delay; that later however in that year the said Pierce Connelly dissented from the said vows being so taken by his said wife, on the ground that he was responsible for debts contracted by her, and himself drew up and sent to the Reverend Doctor Asperti, the spiritual director of the aforesaid community, to be by him presented if necessary to the ordinary of the said community, a written protest against the vows being so taken by his said wife; that the said protest was sent by the said Pierce Connelly to the said Doctor Asperti from Alton Towers (at which place it was written), the residence of the aforesaid Earl of Shrewsbury, and at which place the said Doctor Asperti a few days afterwards met the said Pierce Connelly at his request, when and where the several matters connected with such, the taking of the vows aforesaid by the said Cornelia Augusta Connelly and the said Pierce Connelly's expressed dissent therefrom for the reason expressed, were discussed by and between the said Pierce Connelly and the Reverend Doctors Winter and Asperti then and there present; that in the result the said Pierce Connelly withdrew his said protest, and signified his wish that it should not be (as the same accordingly was not) presented to the ordinary or any [214] step taken thereupon, the result of the whole being that the said Cornelia Augusta Connelly solemnly took the aforesaid vows of poverty and obedience, at the same time renewing her former vow of perpetual chastity at the time and in manner as pleaded in the fourteenth article of this allegation. And this was and is true, &c.

[Seventeenth.—That in part supply of proof of the premises in the next preceding article pleaded and set forth, and to all other intents and purposes in the law whatsoever, the party proponent doth exhibit and hereto annex, and prays to have here read and inserted, and taken as part and parcel hereof, a certain paper writing now marked with the letter F, and doth allege and propound the same to be and contain the original protest in the said article mentioned; and that the names "Pierce Connelly" thereto set and subscribed were and are of the true and proper handwriting and subscription of Pierce Connelly, party in this cause, and are so well known, or believed to be by divers persons of good character, credit, and reputation, who have frequently seen the said Pierce Connelly write and subscribe his name to writings, and who have thereby or by other means, become well acquainted with the character of his handwriting and subscription, and that the names Henry Winter set and subscribed to the said original protest were and are of the true and proper handwriting and subscription

of the Reverend Dr. Winter of Alton, in the county of Stafford, and so well known, or believed to be by divers persons of good character, credit, and reputation, who have frequently seen the said Reverend [215] Dr. Winter write and subscribe his name to writings, and who have thereby, or by other means, become well acquainted with the manner and character of his handwriting and subscription. And this was and is true, &c.

Eighteenth.—That in the month of January, 1848, the said Pierce Connelly again went abroad, and again visited Rome during such his absence from this country, but whereto he returned in the month of May in that year, and shortly after such his return, to wit late in the said month, or in the beginning of June following, the said Pierce Connelly presented himself at the convent at Derby (the community having since only removed to Hastings as aforesaid), and then and there required and insisted upon an interview with the said Cornelia Augusta Connelly; that no preventive whatever to such required interview was interposed, save by the said Cornelia Augusta Connelly herself, who declined to see the said Pierce Connelly, and so communicated to him through the medium of the aforesaid Dr. Asperti, and whose “affectionate sympathies” with him on that occasion the said Pierce Connelly afterwards (to wit on the 5th day of June) acknowledged in a letter or note of that date. And this was and is true, &c.

[Nineteenth.—That, in part supply of proof of the premises in the next preceding article pleaded, the party proponent doth exhibit, hereto annex, and prays to have read and inserted, and taken as part and parcel hereof a certain paper writing marked No. 2, and doth allege and propound the same to be the original letter or note in the said article mentioned; [216] that the whole body, series, and contents of the said letter, together with the subscription thereto, are of the true and proper handwriting and subscription of the said Pierce Connelly, party in this cause, and are so well known, or believed to be by divers persons of good character, credit, and reputation, who have frequently seen the said Pierce Connelly write, and also write and subscribe his name, and who have thereby, or by other means, become well acquainted with the character of his handwriting and subscription. And the party proponent expressly alleges and propounds that by the words “Reverend Mother,” in the said letter or note, was meant and intended the said Cornelia Augusta Connelly, party in this cause. And this was and is true, &c.]

Twentieth.—That notwithstanding the premises, on the 25th day of January last (1849) the said Cornelia Augusta Connelly was served (to wit, at Hastings, in Sussex, whither the aforesaid community, of which she the said Cornelia Augusta Connelly was the superioress, had then removed as aforesaid, and at which place it was then established) with a decree by letters of request from this Court in a suit for restitution of conjugal rights, at the promotion of the said Pierce Connelly. And this was and is true, &c.

[Twenty-first.—That the following are the rules of the Roman Catholic Church applicable to the question at issue between the parties in this cause, derived from and regulated by written laws or canons in that behalf, and of which the principal are to be found in the Decretals, liber iii. titulus xxxii. De Conver[sione] Conjugatorum, to wit: First. That a husband and wife, post matrimonium consummatum, may lawfully separate by mutual consent, in order that they may enter into religion severally, to wit, by the husband taking holy orders, and the wife making a vow of perpetual chastity and entering a religious house or there being professed and taking the veil. Second. That a separation founded on such mutual consent, and for such purpose as aforesaid, ever after such orders have been taken and such vow or profession made, though not annulling such matrimonium consummatum, debars the parties “in perpetuum ab omni usu ejusdem,” and from that time forth “alter alterum repetere non potest.” Third. That a separation of husband and wife by mutual consent for such views and objects as aforesaid must be approved of and allowed by the Pope, upon the petition of the parties, and his rescript of such approval and allowance upon the religious profession of the husband and wife severally, or the ordination of the husband, and the vow or religious profession of the wife as aforesaid, has all the force of a judicial sentence, such rescript being deemed a conditional sentence from the time of its issue, but having its full force and vigour from the moment that the conditions mentioned or referred to in the rescript have been fulfilled. And so much was and is well known to the Judges and

advocates presiding or practising in Roman Catholic Ecclesiastical Courts, and others of reputation for their skill and knowledge of the law as there administered, and is also laid down by divers authors of eminence and [218] authority on that subject. And this was and is true, &c.]

[EXHIBIT A,

Referred to in the Eighth Article of the Allegation.

Translated from the Latin.

I, the undersigned, Secretary of the Court of the Vicariate, of the city of Rome, do certify by these presents that in the Register of Decrees for the year of grace 1845, at page 233 and following ones, deposited at the office of the said Vicariate, are found the entries of the following tenor, to wit:—

Translated from the Italian.

Most Blessed Father,—Since the time when Peter Connelly, a native of Philadelphia, after having been nine years a minister of the sect of the Episcopalians, was so happy as to abjure his errors here at Rome in 1836, and to unite himself to the true Church of Jesus Christ, together with his wife Cornelia, both of them had nothing more at heart than to live up to the sanctity of the faith they had embraced, and to follow without reserve the suggestions of that Divine grace which had drawn them with such mercy to the only ark of salvation.

The constant and powerful motions of this heavenly grace had the effect of producing the steadfast resolution which, three years and a-half ago, they both formed, with the fullest mutual consent, to [219] live in a state of perfect chastity, a resolution to which they have ever since adhered, in order thus to prepare themselves for the grace of the religious vocation to which they both felt themselves drawn by the Lord. During these three years they have sought to learn still more fully the Divine will by persevering prayers to the Giver of all light, and by submitting themselves entirely to the guidance and counsels of enlightened and pious directors who, in America as well as here in Rome, have always recognised in both of them the most evident signs of the heavenly call. It may suffice here to mention only the Right Reverend Bishop Flaget, of Kentucky, in whose approbation of the matter there are some extraordinary particulars.

The two married parties therefore being now in Rome, and everything tending by the Divine goodness to facilitate the speedy execution of their most steadfast determination, they respectfully submit to your Holiness what has been done to that end. The wife of the petitioner, being now thirty-four years of age, has already been accepted in the Convent of the Ladies of the Sacred Heart at Trinita déi Monti, where she will enter as a postulant on making at once a solemn vow of perpetual chastity.

The petitioner, aged thirty-nine years, has also been graciously accepted by the Reverend the Superior General of the Society of Jesus, for the purpose of entering as a member of that body, to which he feels himself specially called by the Almighty. A provision has also been made in the most suitable manner for the education and future welfare of the three children granted to them by [220] Divine Providence. The son, of eleven years of age, is placed at the College of Stonyhurst in England, which is under the management of the Jesuit Fathers; and the Earl of Shrewsbury has expressly engaged to take special care of him. The daughter, aged nine years, is being educated in the aforesaid Convent of the Sacred Heart here in Rome, where her mother is to take the veil.

There is also a son three years of age, who will be placed in due time where he may be taken care of, and be brought up with every attention, and may also receive, while his tender years require it, the assistance of his mother herself. The Prince Borghese has been pleased to take a generous interest in the future welfare of this last-mentioned child; and, besides this, the petitioner will assign a capital out of his own private estate for the benefit of each of the said children.

Thus the Divine goodness, by graciously and powerfully directing matters to their end, now enables the two married parties to complete at once that perfect sacrifice of themselves to which the same Divine goodness strongly impels and leads them, as was recently the case with the two married parties, Mr. and Mrs. Chaudet,

natives of Switzerland, who were converted to the Catholic faith, the one having joined the Lazarists, and the other having become a novice in the Convent of the Sacred Heart.

In order to accomplish the wishes of your humble petitioner there remains one favour which he now implores from your Holiness. With the acquiescence of the very Reverend the Superior General of the Society of Jesus, he proposes, before entering [221] that body, to be promoted to the priesthood; and, therefore immediately afterwards, during the present Lent, to take minor orders. It is necessary, however, that your Holiness should be pleased to permit the petitioner to be promoted to the aforesaid orders here in Rome, by the hands of his Eminence the Cardinal Vicar, without having recourse to the Bishop of Philadelphia for letters dimissory, which would occasion a very long delay, and might perhaps give rise to some embarrassment in so delicate an affair.—On the cover. To his Holiness our Sovereign Lord Pope Gregory XVI. By the within written Petitioner. 15th March, 1844. To the Cardinal Vicar with Faculty.

Translated from the Latin.

Upon audience of His Holiness, the 16th day of March, in the year 1844. His Holiness has graciously acceded hereto, and granted to me, the relator, the requisite faculties to this effect, that without letters dimissory from the Right Reverend the Bishop of Philadelphia, the petitioner may be promoted to Holy Orders as far as to that of Presbyter inclusive at Rome, for this special reason, that he is considered as no longer having his domicile in the diocese from which he came, not having resided therein since his conversion to the Catholic Church. But as respects the mode and time to be appointed for his ordination, His Holiness has considered, that it will be proper to confer with the very Reverend Father the Superior General of the Society of Jesus. Finally, he has ordered, that before the petitioner be promoted to the Holy Order [222] of Sub-Deacon, his wife must take the vow of chastity.—C. Cardinal Vicar.

Here follows another entry, as under, namely:—]

Translated from the French.

(a) Almighty and Eternal God, I, Cornelia, the lawful wife of Peter Connelly, trusting in Thine infinite goodness and mercy, and animated with the desire of serving Thee more perfectly, with the consent of my husband, who intends shortly to take Holy Orders, do make to Thy Divine Majesty a vow of perpetual chastity at the hands of the Reverend Father Jean Louis Rozaven, of the Society of Jesus, delegated for this purpose by His Eminence the Cardinal Vicar of His Holiness for the city of Rome, supplicating Thy Divine goodness, by the precious blood of Jesus Christ, to be pleased to accept this offering of Thy unworthy creature as a sweet smelling savour, and that as Thou hast given me the desire and the power to make this offering to Thee, so Thou wouldest also grant me abundant grace to fulfil the same.—Rome, at the Convent of the Sacred Heart of Jesus, on the 18th of the month of June, in the year 1845.

Translated from the Latin.

So it is—Jean Louis Rozaven, of the Society of Jesus. So it is—Peter Connelly. Victorine Bois, Religious of the Sacred Heart of Jesus. Loide de [223] Rochequaire, Religious of the Sacred Heart of Jesus.

Thus it is in the aforesaid Register of Decrees, to which, etc. In faith whereof, etc., given at the aforesaid Office of the Secretary of the Vicariate of Rome, this 23rd day of the month of January, in the year of grace 1849. So it is—Jos. Cano. Tarnassi Teny.

Translated from the Italian.

Registered at Rome the 23rd of January, 1849, on three pages, without marginal references, Vol. 526 of Private Acts, folio 123 (case 3 and 4). Received forty Bajocchi.

G. DURATHI, Registrar.

(L. s.) Register Office in Rome.

(a) This vow with the signatures subscribed, but without the certificates, constituted Exhibit No. 1 in the allegation before it was reformed.

Repertory 4th, No. 2292.—In the name of God. In the Pontificate of our Lord the Pope, Pius the Ninth. It is certified by me Tomaso Gradassi, undersigned, Notary Public of the College, having my office in the Via Ponte Quattro Capi, No. 37, that the above signature and subscription are truly and identically those of the Rev. Canon Don Joseph Tarnassi, Secretary of the Vicariate of this Sacred City of Rome, and that he is such is fully and indubitably attested by me the undersigned notary, and also that the seal bearing the arms of his Eminence, the most Reverend Cardinal Vicar, both affixed at foot of the above-written Act, duly registered, is authentic, I having a perfect knowledge of the whole. In faith whereof, given at Rome in my office, situated as above, this 24th day of January, 1849.

(L. S.)

THOMAS GRADASSI,
Public Notary of the College.

[224] Registered at Rome the 24th of January, 1849, on two pages, without marginal references, Vol. 245 of the Public Acts, folio 46 v. case 7. Received twenty Bajocchi.

J. COMPAGNANI.

Register Office at Rome.

Here follows the legality of the British Consular Agent at Rome.

The within paper writings contain a true and faithful translation of the document also hereunto annexed, from the Latin, Italian, and French languages into English.

(L. S.) London, the 8th of June, 1849.

D. BURWASH, Notary Public.

[EXHIBIT B,

Referred to in the Ninth Article of the Allegation.

Translated from the Latin.

I, the undersigned, Secretary of the Court of the Vicariate in the city of Rome, do certify by these presents, that in the Register of Decrees for the month of April, in the year of grace, 1844, at page 476 and following ones, deposited at the office of the said Vicariate, is found an entry of the following tenor, to wit:—

[225] Translated from the Italian.

In the name of God, Amen. His Holiness our Sovereign Lord, Pope Gregory the Sixteenth, having been pleased to assent to and approve of the application made by the married parties Peter Connelly, son of the late Henry, and of the living Mrs. Elizabeth Pierce, a native of Philadelphia, who has entered the bosom of the Holy Catholic Church, after having abjured the errors of the heretical Episcopalians, in the year 1836, here in Rome, as well as that made by the same writing on behalf of his wife, Cornelia Pico, daughter of the late Raphael, and of the late Maria Suopp, also of Philadelphia, the which married parties have determined to live in perfect chastity, after mature deliberation, and in pursuance of the counsels of most respectable ecclesiastics, and are now steadfast in their intention of carrying their resolution into effect—that is to say, the former, Mr. Peter Connelly, to enter into the Institute of the Society of Jesus, having been already accepted by the very Reverend Father the Superior General of that Society, and to devote himself wholly to the ecclesiastical state, and to be promoted to Holy Orders, and the latter, Mrs. Cornelia, to embrace the Institute of the Ladies of the Sacred Heart, having been already accepted by the community of the Holy Trinity of Monti in order to live in constant and perpetual chastity, having provided for the future education and subsistence of three children, Mercer, Adelina Maria, and Peter Francis, His Holiness himself, in the audience of the 16th of March last, committed all the necessary and suitable faculties to His Eminence the Most Reverend [226] Cardinal Constantino Patrizi, his Vicar-General, to the intent that, on observing the required formalities, the wishes of both petitioners may be complied with. His Most Reverend Eminence therefore, by virtue of the aforesaid apostolical faculties, being desirous that the pious wish of the two said married parties may be accomplished, has, by a special Act, registered in the Archives of the Secretariate of the Vicariate on the first day of April, deputed me, the undersigned, Promoter Fiscal of the said tribunal, for the purpose of receiving from the aforesaid married parties, Peter Connelly and Cornelia Pico, the necessary and proper mutual consent, in conformity with the sacred canons, by which they may freely consent each for his or her part to allow of the fulfilment of the above-mentioned

determination to live perpetually in a state of perfect chastity. Mr. Peter Connelly and Mrs. Cornelia Pico having therefore appeared before me at their present residence, situated in the Via di Ripetta, at the civic number 115, on the first floor, I interrogated them as to whether they are now steadfast and constant in the determination expressed and humbly represented to the Holy Father, and they having replied in the affirmative, I further interrogated them as to whether they were or are induced by any worldly respect to carry out the aforesaid determination, to which they replied that no worldly consideration had induced or does induce them thereto, but solely the Divine inspiration and the desire of greater perfection. These protestations premised, I called upon Mrs. Cornelia Pico, the wife of Mr. Peter Connelly, freely to give her consent to her husband, Mr. Peter, and to permit him to enter the Institute [227] of the Society, to live perpetually in perfect chastity, and to be promoted to Holy Orders as far as to the priesthood, whereupon she gave her full consent thereto. Mr. Peter Connelly, the husband of Mrs. Cornelia Pico, being thereupon called upon to permit her to enter the Institute of the Ladies of the Sacred Heart, to live perpetually in perfect chastity, likewise gave his full consent thereto. Their mutual consent having been pronounced as above to be ratified within the term of one year, or even sooner, with the requisite special apostolical faculties, both the married parties were called upon to sign the present Act, together with two witnesses who are present, namely, the Reverend Don Giuseppe Boccacani, Priest of the diocese of Narni, son of Mr. Constantino and of Mrs. Maria Ventura, domiciled in the incumbency of St. Roque at Rome, and of Mr. Robert Berkeley, of Spetchley, in Worcestershire, in England, son of Mr. Robert and Mrs. Henrietta Benfield, domiciled in the same parish. An Act done as above this 1st day of April, 1844. I, Peter Connelly give consent as above—I, Cornelia Connelly give consent as above—I, Giuseppe Boccacani was witness to the said consent—I, Robert Berkeley was witness to the said consent—Francesco Anivitti, Canon Promoter Fiscal, delegated as aforesaid. Thus it is in the above-mentioned Register of Decrees, to which, etc. In faith whereof, etc. Given at the Secretary's Office of the Vicariate of the city, this 21st day of January, in the year of grace 1849. So it is—Joseph Canon Tarnassi Tendency. Registered at Rome the 23rd of January, 1849, on two pages, without marginal [228] references, Vol. 526 of the Private Acts, folio 123, case 5, Received 20 Bajocchi. G. S. PURATTI, Registrar.

(L. s.) Register Office at Rome.

Repertory 4th, No. 2292.—In the name of God—In the Pontificate of Our Lord, the Pope Pius the 9th—It is certified by me, Tomaso Gradassi, undersigned Notary Public of the College, having my office at No. 37, in the Via Ponte Quattro Capi, that the above signature and subscription are truly and identically those of the Reverend Canon Don Joseph Tarnassi, Secretary of the Vicariate of this sacred city of Rome; and that he is such is fully and indubitably attested by me the undersigned Notary, as also that the seal with the armorial bearings of His Eminence the Most Reverend Cardinal Vicar, both affixed at foot of the above-written Act, duly registered, is authentic, I having a perfect knowledge of the whole. In faith whereof, etc. Given at Rome in my office, situated as above, this 24th day of January, 1849.

(L. s.) TOMASO GRADASSI,
Public Notary of the College.

Registered at Rome this 24th day of January, 1849, on two pages, without marginal references, vol. 245 of the Public Acts, folio 46, case 8, Received twenty Bajocchi. V. COMPAGNA.

(L. s.) Register Office at Rome.

Here follows the legality of the British Consular Agent at Rome.

[229] The within paper writings contain a true and faithful translation of the document also hereunto annexed from the Latin, Italian, and French languages into English. D. BURWASH, Notary Public.]

London, the 8th of June, 1849.

EXHIBIT C,

Referred to in the Eleventh Article of the Allegation.

Translated from the French.

Almighty and Eternal God, I, Cornelia, the lawful wife of Peter Connelly, trusting in thine infinite goodness and mercy, and animated with the desire of serving thee

more perfectly, with the consent of my husband, who intends shortly to take Holy Orders, do make to thy Divine Majesty a vow of perpetual chastity, at the hands of the Reverend Father, Jean Louis Rozaven, of the Society of Jesus, delegated for that purpose by His Eminence the Cardinal Vicar of His Holiness for the City of Rome, supplicating Thy Divine goodness by the precious blood of Jesus Christ, to be pleased to accept this offering of thy unworthy creature as a sweet smelling savour, and that as thou hast given me the desire and the power to make this offering to thee, so thou wouldest also grant me abundant grace to fulfil the same.—Rome, at the Sacred Heart of [230] Jesus of the Trinity of the Mount, on the 18th of the month of June, in the year 1845.

Translated from the Latin.

So it is—Jean Louis Rozaven, of the Society of Jesus. So it is—Peter Connelly. Victorine Bois, Religious of the Sacred Heart of Jesus; Loide de Rochequairie, Religious of the Sacred Heart of Jesus.

Faithfully translated from the annexed French document into English.

London, the 8th June, 1849.

D. BURWASH, Notary Public.]

[EXHIBIT D,

Referred to in the Twelfth Article of the Allegation.

Translated from the Latin.

Constantine Patrizi, Cardinal Priest of the Holy Roman Church, of the title of St. Sylvester in Capite, Archpriest of the most Holy Patriarchal Liberian Basilica, Vicar-General of our most Holy Lord the Pope, Judge Ordinary of the Court of Rome and the district belonging thereto, etc.

To all and singular to whom these presents shall come, we certify and declare that we, Constantine Patrizi, Cardinal Priest of the Holy Roman Church, Vicar-General of our most Holy Lord the Pope in [231] this City, did, in the Private Chapel of our residence, on the 10th day of April, 1844, promote the Reverend Peter Ignatius Connelly, of Philadelphia, in America, domiciled at Rome, to the first clerical tonsure; on the 1st day of May, in the same year, to the four minor orders in the Church of the most Holy Trinity, on the Pincian Hill; and on the 22nd day of June, in the year 1845, in the same Church, on a patrimonial title to the Holy Order of Sub-deacon; also in our chapel, on the 29th day of the said month in the same year, to the Holy Order of Deacon; and, finally, on the 16th day of July, in the aforesaid year, to the Holy Order of the Priesthood, in the Church of the most Holy Trinity above-mentioned, by apostolic dispensation as to time, after publications, spiritual exercises, and examinations had. In witness whereof, etc., given at Rome, at the house of the Vicariate, in the year 1849, the 26th day of the month of February.

(L. S.) J. ANGELINI pro Vicar-General.

For the very Reverend Canon Joseph Tarnassi, Secretary.

The Canon Francis Anivildi, Sub-Secretary.

Translated from the Italian.

Registered at Rome the 14th of March, 1849, in one page. Vol. 527, folio 61 R, case 1. Paid twenty Bajocchi.

G. DURATHI, Registrar.

Register Office in Rome.

Translated from the Latin.

I, Notary Public, do certify that the within-[232]-written document is issued by the Tribunal of the Vicariate of this city, and I further testify that the Very Reverend Joseph Angelini is what he describes himself to be under his own hand. Given at Rome in my office, situate in the Platea di Pietro, No. 43, this 14th day of March, 1849.

(L. S.) ALOYSIUS HILBRAT, Notary, as above-mentioned.

Translated from the Italian.

Registered at Rome, the 14th day of March, 1849, in one page, without references, Vol. 246 of Public Acts, fol. 27 R, case 6. Received twenty Bajocchi.

Register Office in Rome.

P. COMPAGNANI.

Faithfully translated from the annexed Latin and Italian document into English.

Doctors Commons, June 18, 1849.

(L. S.) FREDK. CAPES, Notary Public.]

EXHIBIT E,

Referred to in the Fifteenth Article of the Allegation.

Almighty and Everlasting God, I, Cornelia Connelly, being most unworthy of Thy Divine regard, but confiding nevertheless in Thy infinite pity and mercy, and moved by the desire of serving Thee, [233] vow in the presence of the Most Blessed Virgin Mary, and of all the Heavenly Court, to Thy Divine Majesty, poverty and obedience (renewing also my vow of chastity formerly made), in the congregation of the Holy Child Jesus, and I promise to enter it, to live and die in it, intending to do all things according to the constitutions of this congregation. And this vow I make in the presence and under the sanction of the Right Reverend N. Wiseman, Bishop of Melipotamus, Coadjutor of the Right Reverend the Vicar Apostolic of the Central District, as Ordinary for the time being of this house and community.

CORNELIA CONNELLY,
+ NICHOLAS, Bishop of Melipotamus,
STE. ASPERTI SAMUELE.

December 21, Feast of St. Thomas, 1847.]

EXHIBIT F,

Referred to in the Seventeenth Article of the Allegation.

Whereas I am responsible for the payment of all debts contracted by, or in the name and with the authority of my wife, Cornelia Augusta Connelly; I hereby protest against the said Cornelia's being required or allowed to take any vow or vows binding her to any religious congregation whatsoever, before I shall have been fully satisfied of the sure, proper, [234] and permanent endowment and sufficient means of the said religious congregation.

This 24th day of November, 1847, at Alton Towers,

PIERCE CONNELLY.

Witness, Henry Winter.

(a)¹ EXHIBIT, No. 2.

Referred to in the Nineteenth Article of the Allegation.

Alton Towers, June 5th, 1848.

Very dear Don Samuele,—I thank you from my heart for your kind note and its affectionate sympathy. I humbly beg your pardon for the scandal I must have given you in a moment of weakness, at a blow falling on me I never had expected, and was wholly unprepared for. I shall be obliged to you to thank the Reverend Mother for the letter she was good enough to send me from my little boy, the first I have seen for more than five months. I return it to her in case she should wish to keep it.—Ever dearest Don Samuele, In the bonds of Our Lord, Your faithful and affectionate

PIERCE CONNELLY.

Don Samuele Asperti, D.D.

[235] Bayford and Phillimore, jun., on behalf of the husband, the promoter, opposed the admission of the allegation as it originally stood.(a)² They were repeatedly interrupted by the Judge, who considered the counsel for the wife were bound to support her allegation. The counsel, however, for the husband, until finally stopped by the Court, argued to the following effect:—

The allegation is not in the usual form. We oppose the allegation both in respect of its form and substance. 1st. Neither the American law nor the law of the Church of Rome is set forth. We ought to have the petition which led to the sentence of separation as well as the sentence itself which is not pleaded to be a sentence of separation, but only tantamount to a separation. 2ndly. Very grave questions of law and policy are raised. The plea in bar cannot be sustained. This Court has full jurisdiction over the subject matter; *Lindo v. Belisario* (1 Hagg. Con. 216); *Don v. Lippmann* (5 Cl. & Fin. 13). If incidents, subsequent to a contract, come into contro-

(a)¹ This exhibit constituted No. 2 of the allegation before it was reformed: it was disannexed from that allegation.

(a)² See note at p. 203.

versy, they must be dealt with according to the forms where the remedy is sought; Fergusson's Reports, p. 361; *Warrender v. Warrender* (2 Cl. & Fin. 533). The law of England affords no shadow of pretext for saying there is any ground for divorce but adultery or cruelty; an agreement to live separate is of no avail; *Barlee v. Barlee* (1 Add. 305). Vows of poverty, obedience, and chastity have nothing to do with the matter; see stats. 2 & 3 Edw. 6, c. 21, and 5 & 6 Edw. 6, c. 12, repealed by 1 Mar. (sess. 2), c. 2, revived by [236] 2 Jac. c. 25, also the 32nd of the Articles of Religion, which sanction the marriage of priests. The recent statutes for the relief of Roman Catholics do not alter the common law of the land. Even prior to the Reformation a husband circumstanced as Mr. Connelly is was not prohibited from instituting a suit for restitution of conjugal rights; Vin. Abr. tit. "Profession." It is not competent to this Court to look at a sentence from Rome, see stats. of appeal 24 Hen. 8, c. 12, and 25 Hen. 8, c. 19.

Addams, for the wife, in support of the allegation. The parties to this suit are by accident only in this country; they are foreigners. The Court, under the peculiar circumstances of this case, might leave the husband to find his remedy in his own country. The allegation is not entirely a plea in bar; it is a plea to the discretion of the Court, which might decline to entertain this case. It would be monstrous to compel the wife, after the vows she has taken, to renew cohabitation. I deny that an allegation responsive to a libel for the restitution of conjugal rights must necessarily set up a case either of adultery or cruelty; neither the one nor the other was pleaded in *Molony v. Molony* (2 Add. 249), still the allegation was admitted. The cases cited on the opposite side have no application here; the maxim applicable is "*volenti non fit injuria*," the husband has consented to the present state of his wife; moreover, her position is recognised by the Legislature (see 10 Geo. 4, c. 7, s. 37). Were this a suit of nullity of marriage, strict pleading and proof might reasonably be required, in this instance enough is set forth; we [237] are entitled to the answers of the husband; we can prove the allegation, if requisite.

Robertson on the same side. There has been a foreign sentence of separation between the parties in this suit; if there be any error in that sentence it ought to be corrected where it was given. It is utterly at variance with legal principle that a Court of one country should enter into the merits of a matter disposed of by a competent Court of another country. A foreign sentence can be impugned elsewhere only for want of natural justice—for want of jurisdiction—or for fraud in obtaining the sentence. According to a dictum of Lord Brougham, and acquiesced in by other Lords, it is not necessary that a foreign sentence and proceedings should be set out in full (see 12 Cl. & Fin. 394). By the words in the 7th Article, "tantamount to or in effect being a sentence," observed upon by the opposite side, it is meant only that the form of the sentence is not in accordance with our forms. Every Court has its own forms of proceeding; even the Ecclesiastical Courts are not uniform. The sentence in this case cannot be treated as a nullity, unless it be shewn it was unduly obtained: it has been acquiesced in by the husband for nearly five years.

2. I deny that adultery and cruelty are the only grounds for divorce known to the law of England. "Profession in religion," though for many years but little used here, is recognised by the common law of the land and is mixed up with many branches of our law, for instance, with the doctrine of [238] villenage, dower, succession, &c. (see Lit. s. 200; also Com. Dig. tit. "Profession"). In the case of profession duly entered into in this kingdom (as in the present instance), its effect is, in respect of marriage, a divorce a mensa et thoro (Com. Dig. tit. "Baron and Feme," c. 5): a fortiori our allegation is a sufficient plea in bar. There is no analogy between a deed of separation and this case; a deed of separation is in the eye of the law merely a temporary arrangement (2 Cl. & Fin. 561). The present state of the wife is recognised, as has been shewn, by the Legislature. For all the reasons assigned by us the allegation cannot be rejected.

Sir Herbert Jenner Fust observed that as this was a new case he should require the cause to be conducted in accordance with the strictest forms—that the instruments referred to, or at least certified copies, must be produced, and formally pleaded. With that view, without giving any opinion on the law involved, he directed the allegation to be reformed.

The allegation was reformed as directed by inserting those articles and exhibits which are enclosed within brackets.

Nov. 13th.—The admission of the allegation as reformed was opposed in reference to the law : some of the previous arguments were repeated, and some of the authorities again recited ; the repetitions are here omitted.

Bayford in opposition to the allegation. Amongst all the exhibits there is not one which [239] is a judgment. There is nothing to constitute a sufficient answer to the libel. The allegation resolves itself into three branches :—1st. The orders of Mr. Connelly in the Church of Rome, for which there is the Pope's rescript. 2dly. The vows taken by Mrs. Connelly, as superioress of a convent. 3rd. The private vows taken by her to live apart from her husband.

1st. The regulations of the Church of Rome respecting the prohibition of marriage to its clergy belong to that establishment in particular, see Bingham's Antiquities, bk. 4, c. 5, ss. 5, 6, and 7. Even in the 12th century clerks were permitted to cohabit with their wives, see Lynd. lib. 3, tit. 2, "Si qui clerici," &c. 2nd. This Court cannot take cognizance of conventual institutions ; all the law has done is to exempt females from penalties. The case of *West v. Shuttleworth* (2 Myl. & K. 684) has determined that stat. 2 & 3 Wm. 4, c. 115, does not apply to Romish priests and chapels. The common law takes no notice of monks and nuns ; *Rex v. Portington* (1 Salk. 162). Profession in religion cannot be tried (Co. Litt. 132 b. [i.e. a foreign profession]). 3rd. Mr. and Mrs. Connelly may live together without an infringement of the vows taken ; the Court cannot compel husband and wife to do more than to reside under the same roof ; *Orme v. Orme* (2 Add. 384) ; *Forster v. Forster* (1 Hagg. Con. 154). The case of *Molony v. Molony*, cited on the other side, is singular in its circumstances, and does not apply.

Phillimore, junr., on the same side. [240] In respect of the right of the Court of Arches to deal with this case according to its own laws, he further cited Story's Conf. of Laws, § 541. He argued, on the authority of *Sinclair v. Sinclair* (1 Hagg. Con. 297), that as the alleged sentence was obtained at Rome in reference to a marriage celebrated in America by two subjects of that country, the sentence, even if regarded as a sentence, is not conclusively binding in this country ; that the case is to be considered as a purely English case, and to be dealt with according to the laws of England. The Roman Catholic Relief Acts simply acknowledge the existence of religious institutions of females ; that no authority is given to Courts of justice in this country to take cognizance of the rules of those societies. The House of Lords, in *Fulham v. McCarthy* (1 House of Lords' Cases, 721) cautiously abstained from entering into the question of the effect of a person entering into a religious house. There is no authority for saying that a husband, circumstanced as Mr. Connelly is, is barred from compelling his wife to return to cohabitation. It would be contrary to public policy that the case set up in the wife's allegation should be recognised in this country.

Addams and Robertson, for the wife, intimated they relied upon their former arguments, and declined to argue the case again.

Cur. adv. vult.

[241] March 23rd, 1850.—*Judgment*—*Sir Herbert Jenner Fust*. This is a suit for the restitution of conjugal rights, brought before this Court by letters of request from the Chancellor of the diocese of Chichester, and prosecuted by the Reverend Pierce Connelly, of Albury, in the county of Surrey, clerk, against his wife, Cornelia Augusta Connelly, who is described in the citation as living separate and apart from her husband, at Hastings, in the county of Sussex, and diocese of Chichester.

After the citation was served and an appearance given for Mrs. Connelly, a libel was brought in, consisting of seven articles, pleading that the parties to the suit were married on the first of December, 1831, "in the city of Philadelphia, in the United States of America, at the residence of Lewis Duval, Esquire, in that city, and according to the rites and ceremonies of the Protestant Episcopal Church, in the said United States, the same being identical with the rites and ceremonies of the Church of England, as by law established in this country, by the Right Reverend Father in God, William White, Doctor in Divinity, Bishop of the Protestant Episcopal Church, in the diocese of Pennsylvania, in the said United States, and in holy orders of the Church of England, and duly consecrated by the Archbishop of Canterbury for the time being."

In the libel are also pleaded the consummation of the marriage, the birth of five children, three of whom are stated to be now living, and the cohabitation of the parties

till October, 1847, when, as alleged, Mrs. Connelly left her husband, and has ever since continued to live separate and apart from [242] him, though repeatedly requested to return to cohabitation. The libel concludes with the usual prayer that she may be compelled to return to her husband and render him conjugal rights.

The libel was admitted without opposition, and the marriage was confessed, as pleaded.

As an answer to the libel an allegation was brought in on behalf of Mrs. Connelly, constituting her defence to the suit.

The admission of this allegation was opposed in the course of last year, and after some arguments were heard on the one side and the other, I was of opinion that, in its then shape, it was not admissible, but required considerable reformation by adding certain documents referred to, but not produced; and more especially in reference to one which is stated to be a decree tantamount to, and in effect, a sentence of separation pronounced by a competent Court. I considered that, in order to enable me to come to any conclusion respecting that sentence, it should be produced: and, therefore, I directed, without then expressing an opinion on the general question, that a copy of it, at least, should be annexed to the allegation, together with such other documents as could be obtained. That allegation, however, was withdrawn with consent, and a new allegation (see note, p. 203), consisting of twenty-one articles, with seven exhibits annexed, was brought in and opposed in the course of last Michaelmas Term.

This allegation pleads the marriage to the same effect as it is pleaded in the libel, but not in precisely the same terms. There is no doubt, however, that the marriage is a good and valid marriage, in [243] the opinion of both parties, according to the law of the United States of America, where each was resident at the time of its celebration. The circumstances under which the cohabitation of Mr. and Mrs. Connelly took place are then set forth. It is pleaded in the second article that Mr. Connelly, who, at the time of his marriage, was a priest in holy orders of the Protestant Episcopal Church of the United States in America, with cure of souls in Pennsylvania, immediately after his marriage, was appointed rector of the church at Natchez, in the State of Mississippi, where he and his wife went to reside, and there continued till the month of October in the year 1835.

Without going into the minute details of the several articles, their substance appears to be that the parties agreed to embrace the Roman Catholic religion, and accordingly took the necessary steps for their admission into that Church; that with the further view of Mr. Connelly's ordination as a minister of the Church of Rome, and preparatory to that step, Mr. and Mrs. Connelly agreed that they should live in perfect chastity, and, in consequence thereof, Mrs. Connelly was placed in a convent at Grand Coteau, in the State of Louisiana, whilst Mr. Connelly went to Rome to make arrangements for his admission as a minister of that Church.

It further appears that in July, 1843, Mr. Connelly returned to Philadelphia, where he was rejoined by his wife; that shortly afterwards they proceeded to and arrived in Rome in December in that year, and there continued to live together in the same house, but observed perfect chastity towards each other until the 8th of April, 1844. [244] Their object, it is pleaded, in going to Rome, was to obtain "a formal decree tantamount to, or in effect being, a sentence of separation," with the view to Mr. Connelly taking holy orders in the Church of Rome, and the lady entering a religious community as a nun; that a petition was presented to the Pope, which was referred, with all necessary faculties, to the Cardinal Vicar-General, who, as it is pleaded, "pronounced in effect a sentence of separation." It is not pleaded there was an actual sentence of separation, but a sentence which was "in effect" a sentence of separation; and on the 8th of April, 1844, Mrs. Connelly was placed in the Convent of the Sacred Heart, and on the following day Mr. Connelly entered himself in the Collegio di Nobili, and the day after received the first clerical tonsure, and assumed the ecclesiastical dress. In support of these averments there are two exhibits annexed—namely, the petition, and that which is said to be in effect a sentence of separation.

It likewise appears that in consequence of Mr. Connelly being, in June, 1845, about to be admitted to holy orders in the Romish Church, it was necessary that Mrs. Connelly should bind herself by a vow of perpetual chastity, which she accordingly did on the 18th of that month, with the full knowledge and approbation of her husband, though warned by her of the consequences—that she, at the same time, offered to release him from all such difficulties and trials, by returning to their

previous mode of life, but he persisted in his intention to receive orders, and accordingly received sub-deacon's orders on the 22d of June, deacon's orders on the 29th of the same month, and, on the 16th of July [245] following, was ordained a priest. There are exhibits annexed in proof of these averments.

It further appears that in May, 1846, Mr. Connelly came to England, and became chaplain to the Earl of Shrewsbury—that Mrs. Connelly also came to England, and, in the month of October following, founded a community of religious women at Derby, since removed to Hastings, of which community she is the head or superioress—and that she brought with her from Rome certain rules for the government of that community, which were approved of by competent ecclesiastical authority.

It is also pleaded that Mrs. Connelly took the vows of poverty and obedience on the 21st of December, 1847, and that she renewed, or repeated, her former vow of perpetual chastity. It is also pleaded that Mr. Connelly at first consented to Mrs. Connelly taking these vows—that he afterwards dissented on the ground that he was responsible for any debt which his wife might contract, and by reason thereof drew up a protest to that effect, which, nevertheless, was afterwards withdrawn—and that the vows were taken.

It is further pleaded that in the month of May or June, 1848, Mr. Connelly went to the convent, where he demanded an interview with his wife, who declined to see him; and that in January, 1849, the decree on which this suit is founded was extracted and personally served on Mrs. Connelly.

The law as applicable to this state of facts is pleaded in the 21st article of the allegation in these words:—"That the following are the rules of the Roman Catholic Church applicable to the question at issue between the parties in this cause, derived [246] from and regulated by written laws or canons in that behalf, and of which the principal are to be found in the Decretals, liber 3, titulus 32, 'De Conversione Conjugatorum' to wit: first, that a husband and wife, post matrimonium consummatum, may lawfully separate by mutual consent, in order that they may enter into religion severally—to wit, by the husband taking holy orders, and the wife making a vow of perpetual chastity, and entering a religious house, or there being professed and taking the veil. Second, that a separation founded on such mutual consent, and for such purpose as aforesaid, ever after such orders have been taken, and such vow or profession made, though not annulling such matrimonium consummatum, debars the parties in perpetuum ab omni usu ejusdem, and from that time forth alter alterum repetere non potest. Third, that a separation of husband and wife by mutual consent for such views and objects as aforesaid must be approved of and allowed of by the Pope, upon the petition of the parties, and his rescript of such approval and allowance upon the religious profession of the husband and wife severally, or the ordination of the husband, and the vow or religious profession of the wife, as aforesaid, has all the force of a judicial sentence,"—so that that which is pleaded in the seventh article as tantamount to a separation, and, in effect, a sentence of separation, is in the twenty-first article stated to have the force of a judicial sentence—"such rescript being deemed a conditional sentence from the time of its issue, but having its full force and vigour from the moment that the conditions mentioned, or referred to in the rescript, have been fulfilled. And so much was and is well [247] known to the Judges and advocates presiding or practising in Roman Catholic Ecclesiastical Courts, and others of reputation for their skill and knowledge of the law as there administered, and is also laid down by divers authors of eminence and authority on that subject."

This mode of pleading the law is certainly somewhat out of the usual course, but I am bound, at least for present purposes, to consider the law by which the Roman Catholic subjects of Rome are governed to be correctly pleaded. The question remains to be considered, what effect has this law on a marriage of two American subjects, who being Protestants at the time of marriage, afterwards abjured that faith, and were admitted members of the Roman Catholic Church, with these circumstances in addition that the husband took orders in that Church, and the wife became professed in religion?

Admitting the law to be as pleaded, I must observe that the whole question is not determined by that fact simply, for, in order to make this law binding in this country, it must be shewn that it has been here received. We all know that in questions of marriage contract the *lex loci contractus* determines the status of the parties, but we do not know, nor has an authority been cited to prove, that laws

peculiar to a particular State, which are no part of the *jus gentium*, are necessarily taken notice of by other countries, in which individuals may come to reside. Countries, which have not adopted foreign laws, are not bound by those laws to free individuals from obligations which the general law imposes, and which arise out of the status established by marriage.

[248] It is not therefore sufficient to say that the law of Rome has done so and so; it must be shewn that the law of Rome is, for this purpose, the law of this country. In this respect, to some extent, the subject of marriage-contract has been considered and distinguished from other contracts. The Ecclesiastical Courts of this country have adopted, as to marriage, the *lex loci contractus*, not simply because it is the *lex loci contractus*, but because the law of England adopts that law as part of its own code in dealing with foreign marriages. In this way the cases of *Scrimshire v. Scrimshire* (2 Hagg. Con. 395), *Harford v. Morris* (ibid. 423), *Ruding v. Smith* (ibid. 371), and *Dalrymple v. Dalrymple* (ibid. 54) were considered; and it may be proper for me to refer to some passages in the reports, for the purpose of shewing the extent to which the law of the *lex loci contractus* is to be applied.

The first case in order of time is *Scrimshire v. Scrimshire*, decided by Sir Edward Simpson in 1752. It was a suit for the restitution of conjugal rights, founded upon a marriage in France clandestine and forbidden by the laws of that country as well as of England; with this difference, that, by the law of France, such marriages are, in all cases, absolutely null; whereas, by the law of England, they are irregular only, and not null. There had been a sentence of nullity in France upon the subject of this marriage, and, with respect to that sentence, Sir Edward Simpson, in page 411, observed, "The suit here is for restitution of conjugal rights, and a sentence in France is not, of itself, a bar to such suit. It is only evidence of [249] what the French law is, by which the Court is to try the validity of the marriage or contract. If there had been no sentence in France, the party might have shewed that it was not a good marriage by the laws of France; and he might equally have denied the marriage, whether there had been proceedings and sentence or not at Paris; as I take it to be clear that both parties in the cause had obtained a forum in France, where the marriage contract was entered into; and, by marrying there, had subjected themselves to be punished by the laws of the country for a clandestine marriage; and had also subjected the validity of the contract to be tried by the laws of that country; as the contract itself, or the marriage, being according to the form of that country, was meant to be a marriage or not, according to the laws of that country, which is still more strongly shewn in this case, by inserting the words, 'If Holy Church shall it admit.'"

Again, at page 412: "As both the parties, by celebrating the marriage in France, have subjected themselves to the law of that country relating to marriage; and as their mutual intention must be presumed to be that it should be a marriage or not according to the laws of France, I apprehend it is not in the power of one of the parties, by leaving the place, to draw the question of the marriage or contract, ad aliud examen, to be tried by different laws than those of the place where the parties contracted. They may change the forum, but they must be tried by the laws of the country which they left. This doctrine of trying contracts, especially those of marriage, according to the laws of the country where they were made, is conformable [250] to what is laid down in our books, and what is practised in all civilized countries, and what is agreeable to the law of nations, which is the law of every particular country, and taken notice of as such."

Further on, at page 416: "Why may not this Court, then, take notice of foreign laws, there being nothing illegal in doing it? From the doctrine laid down in our books—the practice of nations—and the mischief and confusion that would arise to the subjects of every country from a contrary doctrine, I may infer that it is the consent of all nations that it is the *jus gentium* that the solemnities of the different nations with respect to marriages should be observed, and that contracts of this kind are to be determined by the laws of the country where they are made. If that principle is not to govern such cases, what is to be the rule where one party is domiciled and the other not? The *jus gentium* is the law of every country, and is obligatory on the subjects of every country. Every country takes notice of it; and this Court, observing that law in determining upon this case, cannot be said to determine English rights by the laws of France, but by the law of England, of which

the *jus gentium* is part." To the same effect were the observations of Lord Stowell in *Dalrymple v. Dalrymple*, where he says the law of England has adopted the law of the *lex loci contractus* as a part of its own law, and we are to be governed by that law in determining the status constituted by a contract in a foreign country.

Sir Edward Simpson continues: "All nations allow marriage contracts; they are *juris gentium*, and the subjects of all nations are equally concerned [251] in them; and from the infinite mischief and confusion that must necessarily arise to the subjects of all nations with respect to legitimacy, successions, and other rights, if the respective laws of different countries were only to be observed, as to marriages contracted by the subjects of those countries abroad, all nations have consented, or must be presumed to consent, for the common benefit and advantage, that such marriages should be good or not, according to the laws of the country where they are made. It is of equal consequence to all that one rule in these cases should be observed by all countries—that is, the law where the contract is made."

From these passages, as well as from the other cases which I have named, it appears that in order to ascertain the validity of a marriage contract one must have recourse to the law of the country where the contract was entered into, that the foundation of that rule is the *jus gentium* which all countries are presumed to follow, till the contrary be shewn, that it is the general law of civilized countries that the *lex loci contractus* is the rule by which decisions are to be governed in trying the marriage contract; but this principle by no means applies to rights and obligations which form no part of the *jus gentium*.

The law of Rome, unless it can be shewn that it has been adopted in this country, can have no effect here. Other countries may adopt the law of Rome, but it is no part of the law of this country that the municipal regulations of Rome should here have effect; and therefore they are not entitled to the same comity as the *lex loci contractus* in determining the status arising out of a marriage celebrated in a foreign country.

[252] The question upon this part of the subject is stated by Mr. Burge in his elaborate work on colonial and foreign laws. After discussing the question of the status of parties, and investigating a number of cases and authorities, he thus concludes (vol. i. 681), "The *lex loci contractus* is, and ought to be invoked, only for the purpose of ascertaining whether that which is represented to be a marriage is so in law, or, in other words, whether the relation or status of husband and wife has been legally constituted. When that purpose is answered, and it has been ascertained that according to that law a valid marriage has been contracted, as the connexion of the parties with the country in which that law exists, and consequently their subjection to that law ceases; so the law itself ceases to be the rule or authority which governs their conduct or regulates their rights and obligations." The *lex loci contractus* then determines the fact of a valid marriage, but does not determine the rights and obligations resulting from it. "The contract or consent on which the status of husband and wife is founded should be considered as perfectly distinct from the status itself. The latter is *juris gentium*," agreeing entirely with what is laid down in *Scrimshire v. Scrimshire* and other cases, "and its relations extend so far beyond the parties themselves, that, unlike a contract, it is not in their power to prescribe for themselves the rights which it shall confer, or the obligations which it shall impose on them. It cannot, like an ordinary contract, be dissolved by their mutual consent. Although incurable insanity or any other impediment should intervene, rendering [253] the one party incompetent to perform his part of the contract, and therefore defeating the end and object of the marriage, still the status will subsist." It is not suggested in the case now before the Court that the marriage contract is dissolved, but is only suspended during the continuance of the parties in the state in which they have placed themselves. Again, upon the question of the dissolution of the contract, Mr. Burge cites the following words from Huber de Fam. et Matrim., lib. 2, c. 1, s. 9: "*Solvitur matrimonium partium consensu nullo modo, quia non, ut reliqui contractus mere consensuales, status prior conjugum potest reintegrari,*" not by the consent of the parties alone can the marriage be dissolved, because that contract differs from other contracts in this, that the parties themselves, in the dissolution of those contracts, can be restored to their former state and condition, but in the case of a matrimonial contract that is not the case.

"The municipal law of every country," continues Mr. Burge, "takes upon itself

to define and declare the rights, duties, and obligations, which shall be incident to the status of marriage, whether that status has been originally constituted under its own law, or under that of any other country. It would be deprived of its legitimate power if persons, by importing the regulations prescribed by the law of some other country for their exclusive government, could withdraw themselves from those which the municipal law of the country in which they reside had prescribed for all its inhabitants. It is not, therefore, to the law by which the status is originally constituted, but to the law which, after it has been [254] constituted, defines its rights, conditions, duties, and obligations, that resort must be had in ascertaining what those conditions, rights, duties, and obligations are."

It is not, therefore, to the law of Rome that we are to look for the conditions, the rights, the duties, and the obligations, which arise from the status constituted at the marriage of Mr. and Mrs. Connelly, but we must look to the law of England for those rights and duties and obligations which result from the relation of husband and wife; unless it can be shewn that the law of Rome has been imported into this country and has become part of its law.

Now I have had no case cited to me to shew that the law of Rome, with respect to the question at issue, has been adopted here; nay, even in this country, when the Roman Catholic religion prevailed, it is quite clear that foreign professions were not regarded here at all, and so it was stated in the argument—and properly stated too. I was referred to Co. Litt., book 2, c. 11, in which chapter Littleton, discoursing on persons who by law are incapacitated from suing, in continuation, in section 200, says: "The fifth is where a man is entered and professed in religion. If such a one sue an action the tenant or defendant may shew that such a one is entered into religion in such a place, into the Order of Saint Bene't, and is there a monk professed, or into the orders of friars, minors or preachers, and is there a brother professed, and so of other orders of religion, &c., and ask judgment if he shall be answered. And the cause is this—that when a man entereth into religion and is professed, he is dead in the law, and his son, or next [255] cousin incontinent, shall inherit him, as well as though he were dead indeed," and so on. Then, on the words "entered and professed in religion," follows this comment of Lord Coke: "It is to be observed that a man doth enter into religion at his first coming, and liveth under obedience; but he is not professed till a year be passed, or some time of probation. And he is said to be professed when he hath taken the habit of religion and vowed three things—obedience, wilful poverty, and perpetual chastity. And, therefore, our author saith here, 'entered and professed.'" I take, therefore, that the law of Rome is that a person is not professed until he has taken the habit of religion, and the vows of obedience, wilful poverty, and perpetual chastity; then he is said to be entered and professed. Again, on the words, "as well as though he were dead indeed," in paragraph 1, Lord Coke says: "And if one joint tenant be professed in religion, the land shall survive to the other. If a man or woman be professed in religion in Normandy, or in any other foreign part, such a profession shall not disable them to bring any action in England, because it wanteth trial; but they must be professed in some house of religion within this realm, for that may be tried by the certificate of the ordinary, so as of foreign professions the common law taketh no knowledge." So that in the case of foreign professions, whatever might be the law at Rome, in Lord Coke's time, this country took no notice of it whatever.

What then, by the law of this country, are the rights, duties, and obligations which arise out of the contract of marriage? One of them undoubt-[256]-edly is the cohabitation of the parties. This the law of the land universally requires as a part of those necessary duties and obligations. It will not permit a husband and wife voluntarily to separate from each other, and to dispense with that obligation into which they are entered. They cannot by mutual consent be released from that obligation. Mr. Burge, in his work, to which I have already referred, in vol. i., page 649, states the matter (for which he cites authorities) in these words: "Neither divorce can be effected by the mere private agreement of the parties, but must be awarded by judicial sentence after the party has been duly summoned and satisfactory proof of the cause on which it is sought has been adduced." So that according to the general law of this country separation cannot be effected by the mere private agreement of husband and wife; it must be by a judicial sentence, which is a proposition in conformity with the doctrine laid down in *Evans v. Evans* (see 1 Hagg. Con. 118),

and in a vast number of cases, and acted upon in every day's practice in these Courts. Even though a deed of separation should be entered into, either party may recede from that agreement and call upon the other to perform the duties and obligations of the marriage contract. The Ecclesiastical Courts of this country pay no attention to deeds of separation, but pronounce, when required, for the restitution of conjugal rights.

What is the distinction made in this case? It was argued that Mr. and Mrs. Connelly, under the circumstances stated in her allegation, are entitled to live separate and apart from each other. Possibly [257] they may be bound by the vow of perpetual chastity to abstain from personal intercourse, but they are not entitled to separate themselves from each other. Moreover, according to the seventh article of the allegation, it appears that the parties lived together for some time, in the years 1843 and 1844, in the same house, but still, as Mrs. Connelly pleads, observing the same perfect chastity which they had agreed should be maintained between them. But is this law binding here? I can find no authority, nor have I been referred to authorities, to justify me in stating that a husband and wife coming to this country and residing here are not subject to the law of this land so far as their matrimonial relations are concerned. An individual cannot come here and say, "that because I am not a native, or a naturalized subject, I am at liberty to set aside those obligations, which, according to the law of England, are the necessary consequences of marriage." The consequences resulting from marriage involve quite different considerations from the fact of marriage, which depends on the *lex loci contractus*; those consequences do not form a part of the *jus gentium*. Until it be shewn to me that the law of this country recognises in its own character the law of the Church of Rome, I am not at liberty to attend to regulations which are binding only in Rome, or in those countries where the laws of Rome are received.

But something was said, and properly said, upon a sentence of separation. A sentence of separation pronounced by a competent Court is undoubtedly entitled to considerable attention. The law on that subject was alluded to by Sir Edward Simpson in [258] *Scrimshire v. Scrimshire*, but more particularly by Lord Stowell in *Sinclair v. Sinclair* (see 1 Hagg. Con. 297), wherein he says, "Something has been said on the doctrine of law regarding the respect due to foreign judgments; and undoubtedly a sentence of separation, in a proper Court, for adultery, would be entitled to credit and attention in this Court; but I think the conclusion is carried too far when it is said that a sentence of nullity of marriage is necessarily and universally binding on other countries. Adultery and its proofs are nearly the same in all countries." We admit, as the only two grounds of separation in this country, adultery and cruelty. "The validity of marriage, however, must depend in a great degree on the local regulations of the country where it is celebrated. A sentence of nullity of marriage, therefore, in the country where it was solemnized would carry with it great authority in this country; but I am not prepared to say that the judgment of a third country on the validity of a marriage not within its territories, nor had between the subjects of that country, would be universally binding." These observations apply to a sentence dissolving a marriage entered into in a third country, but the passage to which I mean particularly to refer is the following:—"The only instrument which is produced as a sentence does not contain a word respecting adultery: it speaks singly of nullity: and parol evidence cannot be admitted to explain and give a totally different effect to the instrument from what it purports itself to bear." So in the present suit a sentence is referred to which is pleaded to be tantamount to, or in effect, a sentence of separation, and so considered at Rome; the [259] document itself, therefore, must be looked to to see what it does import in its own terms.

Now, to be sure, to call this document a sentence of separation, is, I think, to give it a name somewhat beyond what its words can warrant. After the recital of circumstances to which I have already adverted, the words are: "The constant and powerful motions of this heavenly grace had the effect of producing the steadfast resolution which, three years and a-half ago, they both formed, with the fullest mutual consent, to live in a state of perfect chastity—a resolution to which they have ever since adhered, in order thus to prepare themselves for the grace of the religious vocation to which they both felt themselves drawn by the Lord." . . . "The petitioner," namely, Mr. Connelly, "has also been graciously accepted by the Reverend the Superior-General of the Society of Jesus, for the purpose of entering as a member

of that body to which he feels himself specially called by the Almighty." It then states that a provision has been made in the most suitable manner for the education and future welfare of the three children; and the document concludes in this way: "In order to accomplish the wishes of your humble petitioner, there remains one favour which he now implores from your Holiness. With the acquiescence of the Very Reverend the Superior-General of the Society of Jesus, he proposes, before entering that body, to be promoted to the priesthood, and therefore, immediately afterwards, during the present Lent, to take minor orders. It is necessary, however, that your Holiness should be pleased to permit the petitioner to be promoted to the aforesaid orders here in Rome [260] by the hands of his Eminence the Cardinal Vicar, without having recourse to the Bishop of Philadelphia for letters dimissory, which would occasion a very long delay, and might, perhaps, give rise to some embarrassment in so delicate an affair."

In point of fact, the whole object of this petition is, under the circumstances therein stated, to obtain a dispensation from the necessity of obtaining letters dimissory from the Bishop of Philadelphia, "which would occasion a very long delay, and might, perhaps, give rise to some embarrassment in so delicate an affair."

Now the answer to this petition is in the following words:—"Upon audience of his Holiness, the 16th day of March, in the year 1844, his Holiness has graciously acceded hereto, and granted to me, the relator, the requisite faculties, to this effect, that without letters dimissory from the Right Reverend the Bishop of Philadelphia, the petitioner may be promoted to holy orders, as far as to that of Presbyter, inclusive, at Rome, for this special reason, that he is considered as no longer having his domicile in the diocese from which he came, not having resided therein since his conversion to the Catholic Church. But as respects the mode and time to be appointed for his ordination, his Holiness has considered that it will be proper to confer with the Very Reverend Father the Superior-General of the Society of Jesus. Finally, he has ordered that before the petitioner be promoted to the holy order of sub-deacon, his wife must take the vow of chastity."

Then follows the vow of chastity taken by Mrs. Connelly on the 18th of June, 1845, which is a part of the condition upon which the dispensation was [261] obtained from the necessity of applying for letters dimissory from the Bishop of Philadelphia. The vow is a vow of perpetual chastity on the part of Mrs. Connelly, stated to be necessary before Mr. Connelly could have been admitted to orders in the Church of Rome. Such, in point of fact, is the whole effect of the instrument; it is not a sentence of separation; it is not, indeed, pleaded as a sentence of separation, but as tantamount to, or in effect, a sentence of separation. I apprehend the document to import merely that by the husband entering holy orders, and the wife taking the vow of chastity, they are, according to the law pleaded in the 21st article, at liberty to live separate and apart; but it does not entitle them, nor does it pronounce that they are entitled, to live separate and apart from each other in the sense in which a sentence of separation is considered in these Courts. I do not consider that the document is even tantamount to, or in effect, a sentence of separation. The circumstance of a husband being admitted to holy orders in the Church of Rome may produce a separation from his wife, but the separation is not the effect of the instrument I have been considering, and its effect cannot be extended, according to Lord Stowell, in *Sinclair v. Sinclair*, beyond the terms in which it is drawn up, or by the aid of parol evidence. I am therefore of opinion, on this part of the case, there is no sentence of separation pronounced by a competent Court.

I now proceed to consider whether the other circumstances connected with the case are such as to entitle the parties to separate themselves from each other in this country, which does not hold the law [262] of Rome, for it is a universal rule that the municipal laws of one country are not binding on another, except so far as that other country may consent to receive them, and be bound by them, which has not been shewn to me to be the case in the present instance.

In order to make out a part of Mrs. Connelly's case, namely, the effect of her profession in religion, recourse was had to the statute of the 10 Geo. 4, c. 7, the title of which is, "An Act for the Relief of His Majesty's Roman Catholic Subjects," passed on the 13th of April, 1829. I pass over the first twenty-seven sections of that Act, inasmuch as they refer not to the question in hand; but the twenty-eighth is applicable, and begins in these words: "And whereas Jesuits and members of other

religious orders, communities, or societies of the Church of Rome, bound by monastic or religious vows, are resident within the United Kingdom; and it is expedient to make provision for the gradual suppression and final prohibition of the same therein; be it therefore enacted—That every Jesuit, and every member of any other religious order, community, or society of the Church of Rome, bound by monastic or religious vows, who, at the time of the commencement of this Act, shall be within the United Kingdom, shall, within six calendar months after the commencement of this Act, deliver to the clerk of the peace of the county or place, where such person shall reside, or to his deputy, a notice or statement in the form, and containing the particulars required to be set forth in the schedule to this Act annexed," &c. Then the twenty-ninth section, "That if any Jesuit, or [263] member of any such religious order, community, or society, as aforesaid, shall, after the commencement of this Act, come into this realm, he shall be deemed, and taken to be guilty of a misdemeanor, and being thereof lawfully convicted, shall be sentenced and ordered to be banished from the United Kingdom for the term of his natural life." The thirtieth section makes a provision with respect to natural-born subjects; the thirty-first gives permission to one of the principal Secretaries of State to grant licenses to come into the kingdom and to revoke the same. The thirty-third section is this: "That in case any Jesuit or member of any such religious order, community, or society as aforesaid, shall, after the commencement of this Act, within any part of the United Kingdom, admit any person to become a regular ecclesiastic, or brother, or member, of any such religious order, community, or society, or be aiding or consenting thereto, or shall administer, or cause to be administered, or be aiding or assisting in the administering or taking, any oath, vow, or engagement purporting or intended to bind the person taking the same to the rules, ordinances, or ceremonies of such religious order, community, or society, every person offending in the premises in England or Ireland, shall be deemed guilty of a misdemeanor, and in Scotland shall be punished by fine and imprisonment." And the thirty-fourth enacted, "That in case any person shall, after the commencement of this Act, within any part of this United Kingdom, be admitted or become a Jesuit, or brother, or member, of any other such religious order, community, or society, as aforesaid, such person shall be deemed, and taken to be, guilty of a mis-[264]-demeanor, and being thereof lawfully convicted, shall be sentenced and ordered to be banished from the United Kingdom for the term of his natural life."

From these sections it is perfectly clear that, so far as Mr. Connelly is concerned, he could not have entered into a religious society after the commencement of this Act, namely, in 1829; there is a general prohibition against a religious community of men. But this does not apply to Mrs. Connelly, for, under the thirty-seventh section there is a provision "that nothing herein contained shall extend, or be construed to extend in any manner to effect any religious order, community, or establishment, consisting of females bound by religious or monastic vows."

Mrs. Connelly, perhaps, advised that by the law of this country, even as it existed in Roman Catholic times, a foreign profession would not avail in England, came from Rome to reside here, furnished with the means of founding a religious community of which she is the superioress, and also supplied with rules and regulations authorized by competent authority for its government. Though Mrs. Connelly is not liable to incur any of the penalties mentioned in the statute for having taken the vows of chastity, poverty, and obedience, she is not placed in a better situation than that in which she stood before the passing of the Act. Whatever she was at liberty to do before the passing of the Act, she is still at liberty to do. The 2d and 3d William 4, c. 115, was referred to, but it does not apply to the present case, as Mr. Connelly is not himself a professed person in this country, so as to come within its provisions.

[265] The case set up by Mrs. Connelly amounts to this—that Mr. Connelly, who was at Rome for a temporary purpose, having no fixed domicile there, was admitted to orders in the Church of Rome; and no doubt, so long as his residence in Rome continued, he was subject to the law of Rome; but I apprehend he did not carry this law with him when he left Rome, and that the law of Rome would not operate in this country, except so far as this country has consented to receive that law and act on the conditions imposed and the immunities granted to him and his wife, namely, to live separate from each other. Would it be an answer on the part of Mr. Connelly to an action for debt, for necessities supplied to Mrs. Connelly, that he is not responsible, on

the ground that she is professed in religion, that she is the head of a religious community in this country, and was, therefore, empowered by the law of Rome to live separate from her husband? Are there not other cases which might be supposed in which the husband would be answerable for his wife? Take this case: suppose Mrs. Connelly, under present circumstances, were to commit adultery, and there should be a suit for a divorce, would the husband be barred, by this foreign separation, by reason of her being professed in religion at Rome, from bringing that suit? I put this as a case in which it would be impossible to say that the law of Rome would be binding, so as to leave Mr. and Mrs. Connelly, by the law of this country, to conduct themselves as persons free from the obligations and duties of a married life, and not entitled to those rights which flow from the relation of husband and wife.

[266] A good deal was said on the motives which, it is supposed, have actuated Mr. Connelly in instituting this suit. I have no means of judging of Mr. Connelly's motives, except from the allegation of Mrs. Connelly, which I must take to be true. Mr. Connelly undoubtedly consented to that which is said to be tantamount to a sentence of separation between himself and his wife; but consent to a separation is no bar to a sentence for the restitution of conjugal rights in this Court. I have said deeds of separation are not noticed in these Courts; its practice is to pronounce a sentence for restitution of conjugal rights; notwithstanding deeds of separation be set up and pleaded as a bar, they are not regarded. I cannot attend to any argument to be derived from the motives which may have influenced Mr. Connelly in these proceedings. It may be that he instituted this suit for the purpose of protecting himself against demands made on account of his wife. Such, I apprehend, would be a legitimate ground for the proceedings, as I conceive he is liable to any debt she may contract.

I am of opinion that if Mrs. Connelly's allegation were in every particular established by evidence, that evidence would form no bar to the sentence Mr. Connelly prays, namely, that Mrs. Connelly may be compelled by law to return home to her husband's house and render him conjugal rights; consequently, the sentence of the Court, on the present occasion, is to reject the allegation.

It was further argued that, though the Court may not consider this as a case in which the facts pleaded would operate as a bar to the suit, nevertheless, the Court may hold its hand, considering [267] the situation in which Mrs. Connelly has been placed by the vows taken with her husband's consent, and not compel her to a breach of those vows by enforcing a sentence of restitution. Undoubtedly, this is a circumstance which materially enters into the feelings of the Court, still, as no matrimonial case has been mentioned in which the Court has held its hand, the circumstance referred to cannot operate with me as a ground for taking that course. The only case mentioned at all bearing on this suggestion is *Molony v. Molony* (2 Add. 249); but that was a case under very peculiar circumstances. It was a suit for the restitution of conjugal rights promoted by the husband against the wife; and in the allegation of the wife, responsive to the libel, it was pleaded that the wife was resident in London, to which place she came with her husband, and that he had no residence but one in Ireland, and such was her state of health that, in the opinion of her medical advisers, she was incapable of removing to Ireland, or undertaking any considerable journey, without imminent danger to her health. That allegation was undoubtedly admitted by Sir Christopher Robinson, who, perhaps, considered that to have compelled the wife, in her state of health, to return to Ireland would, in some respects, have been an act of cruelty; but, be that as it may, it was with the greatest hesitation that the learned Judge then presiding over the Consistory Court admitted the allegation, and beyond that nothing further was done in the suit; there was no "withholding the hand." There was another instance where something of the kind was thrown out, namely, in *Den-[268]-niss v. Denniss*,(a) which was a case of incestuous adultery—

(a) Not reported. The case was a proceeding by the husband against his wife by reason of adultery with his brother. The wife recriminated and charged her husband, 1st, with connivance; 2ndly, with adultery with three persons. Lord Stowell, on a minute investigation of the evidence, held the charge against the wife to be proved, and the charge against the husband of connivance to be likewise proved, and, without entering into the evidence adduced to establish the husband's adultery, dismissed the

the brother with the wife of a brother. On the one side it was suggested there was sufficient ground why the Court should not pronounce a separation, as the husband was accessory to his own dishonour; on the other hand, the Court was pressed with the necessity of pronouncing a sentence notwithstanding, because the husband might be compelled to return to the wife, who had been guilty of incest with the brother. Lord Stowell said he would consider what course he would take; and eventually declined to pronounce a sentence of separation, as he was of opinion that the husband was accessory to his own dishonour; (b) and there the matter rested.

These are the only two cases that I remember as having the remotest application to the suggestion offered in argument. But, in such a case as this, have I any right to withhold from Mr. Connelly the sentence which would entitle him to cohabitation with his wife? What the effect of that sentence may be is a consideration into which I, at the present moment, will not enter; but being of opinion [269] that the facts and circumstances pleaded in the allegation would not be a bar to the sentence prayed, being also of opinion that the Court is not entitled to hold its hand, I reject the allegation altogether, without entering into the law, which I assume to be correctly pleaded in the 21st article.

From the above sentence there was an appeal to the Judicial Committee of the Privy Council. Their Lordships, (a) after hearing the counsel for the appellant and respondent, but without calling for a reply, on the 28th of June, 1851, "gave leave to the said Cornelia Augusta Connelly to reform the allegation given in on her part and behalf in the Court of Arches, and rejected by the Judge of the said Court, by pleading and setting forth, if she shall be so advised, the law of Pennsylvania as applicable to the circumstances pleaded and set forth in this cause, in case the same had been brought to adjudication there, and also the domicile of the said Rev. Pierce Connelly, clerk, at the time of the transactions pleaded in the said allegation to have taken place at Rome."

It is understood that the allegation as reformed, according to the directions of the Judicial Committee, will be given in so soon as Mr. Connelly shall have paid his wife's costs.

[270] THE OFFICE OF THE JUDGE PROMOTED BY COOPER *against* DODD. Arches Court, April 23rd, 1850.—A bishop being the patron of a living held by a clerk charged with an ecclesiastical offence has the power to send letters of request to the Court of Appeal of the province under the 24th sect. of the 3 & 4 Vict. c. 86.—It is not necessary, when the Court has a general jurisdiction over the subject-matter, that the promoter of the office of the Judge should negative, in pleading, exceptions: it is for the defendant so to do, as a defence to the charge against him.—The 68th canon, provided that the warning be convenient, does not require any precise form of notice to be given.

[S. C. 7 Notes of Cases, 514; 14 Jur. 724.]

This was a cause of citing at the voluntary promotion of Mr. Charles Henry Cooper of Cambridge, by virtue of letters of request from the Lord Bishop of Ely, the Rev. Edward Dodd, B.D., vicar of Saint Peter's in the town and county of Cambridge, to appear and answer to certain articles touching his soul's health, &c., "and more especially for having, on the 31st December, 1848, refused to bury in the churchyard of Saint Peter the corpse of William Stutes, a parishioner, brought to the said churchyard for burial there, convenient warning having been given him thereof before."

The decree was returned on the 20th March, 1849, personally served; but no appearance was given till the day on which the articles were given in, namely, the 31st of May, 1849, when Mr. Dodd appeared in person under protest. The protest

parties. Hilary Term, 1st Sess. 1808. Extracted from a MS. note of the judgment by the late Dr. Burnaby, now in the possession of the editor of this volume.

(b) His Lordship said in the course of his judgment, "that the wife's adultery would be sufficient to uphold the Court in resisting any suit for restitution of conjugal rights on her part."

(a) The Court consisted of the Judge of the Court of Admiralty (Dr. Lushington), the Lord Chief Baron Pollock, Mr. Pemberton Leigh, and Sir Edward Ryan.

was overruled on the 13th November following,^(a) and Mr. Dodd was assigned to appear absolutely.

The articles were admitted without opposition on the 1st December, 1849. They were in substance as follows:—

1st and 2nd. That Mr. Dodd having been duly ordained was, on the 24th July, 1844, collated and [271] admitted by the Bishop of Ely, in right of his bishopric, to the vicarage of Saint Giles with Saint Peter, in the town of Cambridge; the said vicarage comprising two separate benefices and having separate churches, and that he was subsequently inducted; that on the 30th and 31st December, 1848, he was vicar, and so continued; that an entry was made of his collation in the Acts' book of the bishop.

3rd and 4th. That Mr. Dodd was bound to observe the law, in reference to which ss. 3 & 13 of the Church Discipline Act and the 68th canon were pleaded.

5th. That on the 26th day of December, 1848, William Stutes, a parishioner of the said parish of Saint Peter, was found dead in the said parish; and that on the 28th day of the said month an inquisition was legally held in the parish, on view of the body of the said William Stutes, when the jury gave their verdict of the tenor following, to wit, "That on Tuesday, the 26th day of December, in the year aforesaid, in the parish aforesaid, in the borough, county, and jurisdiction aforesaid, the said William Stutes was found drowned and suffocated in a certain ditch there situate, and that the said William Stutes had no marks of violence appearing on his body, but how, or by what means, he became drowned and suffocated, no evidence thereof doth appear to the jurors." And that pursuant to the act of the 6th and 7th of William the 4th, chap. 86, the order for burial of the said William Stutes was given in the terms following, to wit, "I John Eden the younger, deputy of Charles Henry Cooper, coroner for the borough of Cambridge, do hereby [272] order the burial of the body now shewn to the inquest jury as the body of William Stutes. Witness my hand this 28th day of December, 1848.—J. Eden, jun., deputy coroner," as by reference to the said inquisition and order to be respectively produced (if required) at the hearing of this cause will more fully appear. That the said order was delivered to Mr. Dodd on the said 28th day of December, when, after reading the said order, he returned it, saying he should decline to receive it unless the coroner would send the depositions and the verdict. That, on the following morning, the 29th of the said month, Mr. Dodd repeated the said declaration, and added, unless the said depositions and verdict were supplied to him, he would not allow the body to be taken into the church nor read the funeral service.

6th. That on Friday, the 29th day of December last, Elizabeth Stutes, wife of John Stutes (son of the deceased), informed Mr. Dodd that the said John Stutes wished his father (the deceased) to be buried on the Sunday following at two o'clock in the afternoon, in Saint Peter's churchyard, by the side of or as near to his mother (the deceased's wife) as possible; that Mr. Dodd, upon telling the said Elizabeth Stutes that he did not think he could bury him, and upon her inquiring the reason Mr. Dodd stated, "because he died in a state of intoxication."

7th. That on the evening of Saturday, the 30th of December last, the said John Stutes informed Mr. Dodd that he wished his father (the deceased) to be buried on the next day in the churchyard as near to his (John Stutes') mother as could be, [273] and that a grave for that purpose was ready; that in the course of that interview with the said John Stutes, Mr. Dodd read to him portions of the burial service, and told him that he could not read such service over the remains of his father either at that or any other time, nor bury him, as he had died intoxicated; and that Mr. Dodd added, "why do you not go to the Dissenters? they are not so scrupulous;" that the said John Stutes informed Mr. Dodd that if he could get a grave dug at the cemetery, he would, rather than the body should remain unburied, as it was changing very fast, but that, if he could not get the grave there, he should expect the vicar would bury him at the time fixed. That on the next morning (Sunday, the 31st day of the said month) the said John Stutes saw Mr. Dodd at half past eight o'clock, and told him that he could not get a grave in the cemetery on that day, and that there

(a) Mr. Dodd conducted and argued his own case on the protest, but, as all the material points in his favour were urged by his counsel at the hearing, it is deemed superfluous to insert the protest with the arguments and judgment thereon

was no alternative but that the burial must take place in the churchyard on that day, and that he should expect his father to be buried there according to the forms of the Church of England, and added that relatives and other friends had come from a distance, and could not stop beyond it, and that the body was so offensive that the house was scarcely bearable.

8th. That on the said Sunday (the 31st of December last), both before and after morning service at the Church of Saint Peter aforesaid, notice was given to Mr. Dodd of the desire, on the part of the family of the said William Stutes, deceased, that he should be buried at or about two o'clock in the afternoon, in the grave that day prepared for his remains, in the churchyard of the said parish of [274] Saint Peter, and that Mr. Dodd, on the occasion of these separate notices, declared that he would not bury him; also, that by reason of the premises, as well as by other means, Mr. Dodd had convenient warning of the time fixed for the burial of the said William Stutes.

9th. That the said corpse, accompanied by the friends of the said deceased, was, at the time so as aforesaid intimated, brought to the said church and placed on the bier near to the door thereof; but that the said door was then found to be closed, and that it so remained closed for upwards of an hour, during which the said John Stutes, the son, and the other friends of the deceased, remained waiting for the burial of the corpse. That after the expiration of the period aforesaid, the said John Stutes, and the other friends of the deceased, returned back with the said corpse, and the same was interred in a cemetery on the following day.

10th. That Mr. Dodd, in pursuance of such his declared determination as articulated and objected to him, on the said 31st day of December, in the year 1848, did within the diocese of Ely, in contempt of the law and canon aforesaid, and contrary to his duty, refuse to bury in the churchyard of Saint Peter the corpse of the said William Stutes, brought as aforesaid to the said churchyard for burial there, convenient warning having been given to him thereof before.

The remaining were the usual concluding articles.

Feb. 21st, March 5th.—Haggard and Bayford for the promoter. The charge of refusing to bury William Stutes is proved. The only justifiable grounds for refusing [275] in any case are contained in the 68th canon, and in the rubric prefixed to the burial service; they do not apply in the present instance. Sundry warnings were given to Mr. Dodd; they were sufficient to constitute a "convenient warning" within the meaning of the canon. Were it established that Stutes died in a state of intoxication, that would not be a legal ground for refusing to bury the body, or justify any alteration in the burial service; such was the opinion of the Bishop of Exeter in *Todd's case*.(a)

Addams for Mr. Dodd. The proceedings are null and void throughout. 1st. As to jurisdiction: the 4th article sets out the Church Discipline Act in part, but not all which is applicable to this case; the 24th section is not mentioned. The bishop is the patron of the preferment held by Mr. D.; in that case the archbishop should have had the option to act before the letters of request were issued; he might have pronounced a sentence less severe than this Court can under the 68th canon. The 24th section is for the benefit of clerks. 2ndly. There is no proof that Mr. D. is vicar of the parish, or that the parish is a vicarage. The articles charge Mr. D. not merely as a clerk, but as vicar of the parish. 3rdly. The articles impute no offence on which a sentence can be founded. The words of the 68th canon are "convenient warning being given him thereof," of what? Clearly of the intention to bring the body.(b) The refusal to bury is no offence within the canon, unless there shall have been a convenient warning. The heading [276] of the articles alleges, "after convenient warning given you thereof;" the antecedent to which is, not of the intention to bring the body, but "when duly applied to on that behalf;" the defect is not supplied in the body of the articles; there is no notice pleaded that the body would be brought, but simply a notice of a desire that the body should be buried; moreover, the notice must be competens—given by some one who has authority; that is not the case here. 4thly. The rule in criminal proceedings is that the offence charged must be so laid as to bring it within the canon or statute; if there be an exception in the enacting clause of a statute, or in a canon, it must be negatived in pleading; even in informations

(a) Cited from Stephens's Statutes, p. 2011.

(b) See the words of the Latin canon.

not strictly criminal, the rule is the same; the exceptions must be set out, though it is not necessary to prove them.^(a)¹ In the present case the exceptions contained in the canon and rubric should have been negatived in the pleading. The case of *Bluck v. Rackham*,^(b)¹ does not militate against this principle, for that was a civil suit. Lastly, Mr. D. is not brought within the canon, either in plea or proof. The certificate of the coroner was to save Mr. D. from a pecuniary penalty, as no clerk can bury without some certificate.

Phillimore, jun., followed on the same side.

Haggard and Bayford, in reply. 1. It is lawful for a bishop in any instance, under the Church Discipline Act, to send the case [277] by letters of request.^(a)² 2ndly. Mr. D. has appeared to the citation as vicar. 3rdly. If we establish by evidence, which we have, a notice of intention to bury, that is sufficient; the canon does not point out the form in which the notice is to be given, or the person who is to give it. 4thly. Were it necessary in other analogous cases to negative in pleading exceptions in statutes or canons, it is not in the present instance; for the proceeding is under the canon in which the only exception is excommunication, the civil penalty of which is taken away by statute.^(b)² It is not requisite for us, proceeding under the canon, to bar any other exception than the one expressed in the canon.

Cur. adv. vult.

April 23rd.—*Judgment*—*Sir Herbert Jenner Fust*. This was a proceeding instituted by Mr. Charles Henry Cooper, of Cambridge, against the Rev. Edward Dodd, vicar of Saint Peter's, in that town, for having refused, on the 31st December, 1848, to bury in the churchyard the corpse of one of his parishioners.

A considerable space of time has elapsed since this suit was commenced; but that delay was occasioned by Mr. Dodd himself in not having given an appearance, in the first instance, to the decree personally served upon him, and afterwards in having appeared under protest.

The proceeding is instituted under the 68th canon, which prescribes that a minister shall be [278] suspended for the space of three months if he shall refuse to bury any corpse that is brought to the church or churchyard, convenient warning being given him thereof before, except the deceased were denounced excommunicated. This exception is also contained in the rubric prefixed to the burial service, together with two other exceptions, namely, the cases of those who die unbaptized, or have laid violent hands on themselves.

The question is, has Mr. Dodd so conducted himself—so refused to bury the body of one of his parishioners—as to incur the penalty mentioned in the canon? No allegation has been given in on behalf of Mr. Dodd, but he rests his defence on various objections taken to the jurisdiction and to the pleadings, as well as on the asserted ground that the warning required by the canon is not established by the evidence.

The first objection raised goes to the root of this proceeding, namely, to the jurisdiction. The cause was brought here in virtue of the 3 & 4 Vict. c. 86, commonly called the Church Discipline Act, by letters of request from the Lord Bishop of Ely, who is the patron of the preferment held by Mr. Dodd; and, unless the cause be rightly brought, there is an end of the matter, for I have no jurisdiction, except in accordance with the provisions of the statute.

The 3rd to the 12th sections inclusive of the statute prescribe the course to be adopted in respect of a commission of inquiry, and at the hearing and determination before, and by the bishop himself. Then the 13th section commences thus:—"Provided always, and be it enacted, that it shall be lawful for the bishop of any diocese within which any such [279] clerk shall hold any preferments, or if he hold no preferment, then for the bishop of the diocese within which the offence is alleged to have been committed, in any case, if he shall think fit, either in the first instance, or after the commissioners shall have reported that there is sufficient *prima facie* ground for instituting proceedings, and before the filing of the articles, but not afterwards,

^(a)¹ Taylor on Evidence, pt. 2, c. 3, s. 273, and the authorities there cited, particularly *Rex v. Jarvis*, 1 East, 644, n.

^(b)¹ 1 Rob. 367, and 5 Moore P. C. 305.

^(a)² 3 & 4 Vict. c. 86, ss. 13, 24.

^(b)² 53 Geo. 3, c. 127, s. 3.

to send the case by letters of request to the Court of Appeal of the province, to be there heard and determined according to the law and practice of such Court." It is clear then the bishop has the option either to hear the matter himself, or to send it, before the articles are filed, to the Court of Appeal; there is nothing compulsory; he may adopt either course, and if the enactment stopped here, no doubt could be raised. But the 24th section qualifies this; the words are important: "And be it enacted, that when any act, save sending a case by letters of request to the Court of Appeal of the province, is to be done, or any authority is to be exercised by a bishop under this act, such act shall be done or authority exercised by the archbishop of the province in all cases where the bishop, who would otherwise do the act or exercise the authority, is the patron of any preferment held by the party accused." It is on the construction of these words that the objection to my jurisdiction is taken; but it seems to me that their meaning is plain. When the bishop is the patron of the living, he is prohibited from doing any act or exercising any authority "save sending a case by letters of request to the Court of Appeal of the province;" his right is saved to that extent. If the view I take be not correct, I know not what the [280] meaning is of the words "save sending a case by letters of request," &c. I can put no other construction on them. I am clearly of opinion that a bishop, though he be patron of the preferment held by the party accused, is at liberty to send the case by letters of request to this Court.

It was said that this is a hardship on the accused. Possibly it may be so; but I cannot set aside the words of the statute, by which authority and permission are given to the bishop to send the case here. The archbishop, it was said, had he had the opportunity afforded to him of dealing with the case, might have exercised the discretion given by the 6th section of the statute, and, instead of pronouncing the penalty fixed by the canon, might have merely admonished Mr. Dodd. On that suggestion, however, I may observe that according to the 6th section the archbishop could not, without the consent in writing of the accused, and also of the party complaining, have pronounced any other sentence than that prescribed by the canon.

The next objection which I have to deal with respects the decree or citation. It was asserted that Mr. Dodd is not rightly described in that instrument as vicar—that Saint Peter's is not a vicarage, but a perpetual curacy, and in support of that assertion Ecton's Thesaurus was mentioned. All I have to say in regard to this objection is that Mr. Dodd has not produced any evidence on the point. Mr. Dodd was cited as vicar of Saint Peter's, and he appeared in that capacity: Mr. Dodd has not thought fit to plead; there is nothing to shew that Saint Peter's is not a vicarage. However, we learn, from an entry in the Acts' book of the bishop, set [281] forth in the 2nd article of the pleadings, that in July, 1844, Mr. Dodd "was collated and admitted to the vicarage of Saint Giles with Saint Peter in the town and county of Cambridge." It is clear, too, from the evidence that, since the collation of Mr. Dodd, he has been regarded as, and performed the duties of, incumbent of Saint Peter's; that Saint Peter's is considered to be a vicarage as well as Saint Giles's; and that though the two parishes have separate churches, separate burial grounds, and different officers, they constitute one benefice. I am of opinion that as Mr. Dodd has been collated as vicar of Saint Peter's, as he has appeared to the citation in that character, and as there is neither plea nor evidence to the contrary, this objection cannot be sustained.

I now proceed to consider an objection taken to the pleadings. It was contended that it should have been alleged that the deceased "did not die unbaptized, or excommunicate, or had not laid violent hands upon himself." No authority in connexion with the ecclesiastical law, either text book or case, was cited for this proposition that it is necessary to negative exceptions in pleading. We were favoured, however, with a particular passage of a work on evidence, in support of which a case at common law—*Rex v. Jarvis* (1 East, 644, n.; 1 Burr. 148)—was mentioned. That was a case under the Game Laws, involving a summary jurisdiction. Undoubtedly it was there held by Lord Mansfield and the other Judges that the qualifications to kill game must be all negatively set out; otherwise the justices have no jurisdiction, under the particular statutes, over the [282] person killing game, &c. Even supposing that proceedings at common law were generally binding in the Ecclesiastical Courts, still that decision would not be applicable in the present instance. There is a material difference between that and the present case; in the former it was necessary to shew

that the magistrates had jurisdiction; in the question before me, as regards the subject-matter, there is no doubt; there is a general obligation on a minister of a parish to read the burial service over the corpse of a parishioner, except in certain instances; but it is not necessary, I maintain, to negative those exceptions. When any of these cases of exception arise, it is the province of the clerk, charged with a neglect of duty, to set it forth in plea as a defence.

I am of opinion I cannot pronounce for any of the objections I have hitherto referred to. I consider that the letters of request were rightly sent; I consider that Mr. Dodd has, by reason of the circumstances mentioned by me, been properly cited, and that it is not necessary to negative in plea the exceptions I have mentioned. The last objection taken, namely, that the evidence is insufficient to make good the averment that a convenient warning was given to Mr. Dodd I now proceed to consider.

The learned Judge having at a considerable length discussed the evidence then said, I am of opinion that the notice to Mr. Dodd was sufficient. No precise form of notice is requisite; all that is required is that the notice or intimation be convenient. No objection was taken by Mr. Dodd either to the hour or day; he founded his refusal to bury [283] the corpse on the alleged ground, of which there is no evidence, that the deceased had caused his own death by walking into a ditch in a state of intoxication.

I am clearly of opinion that the charge against Mr. Dodd of refusing to bury the body of the deceased after a convenient warning had been given that the body would be brought to the churchyard for burial, and that the body was so brought, are established. It remains only, under the circumstances, for me to declare the sentence I am bound to pronounce by the canon, which I accordingly do, that Mr. Dodd be suspended for the space of three months, and I also condemn him in the costs. I regret I have no discretion; that has been determined already, not only by this Court, but by the Judicial Committee in *Mastin v. Escott* (1 Curt. 795; 4 Moore P. C. 139).

[284] PALMER AND BROWN *against* DENT AND OTHERS CITED TO SEE PROCEEDINGS. Prerogative Court, April 26th, 1850.—A testator having duly executed a will, subsequently made another betraying on the face of it insanity. The executors of the former will took out a decree calling on all persons interested in the latter paper to propound it, with an intimation that, on not appearing, the Court would decree probate of the former will. The persons cited executed proxies declining to propound the latter paper and consenting to probate being granted of the former. Held, the executors of the former paper were entitled to probate in common form.

[S. C. 7 Notes of Cases, 555.]

Motion.

John Palmer died on the 11th June, 1848, having duly made and executed a will, dated the 2nd October, 1847, by which his brother, Joseph Palmer, and Thomas Brown, were appointed executors.

On the 9th June, 1848, the deceased, whilst, as it was stated, labouring under unsound mind, made another will on the face of it duly executed, by which he purported to dispose of more property than he possessed, and described the legatees, nephews and nieces, with whom he had been all his life well acquainted, by erroneous names, though in the former will the same persons intended to be benefited were correctly described.

A decree was issued at the instance of the executors of the will of October, 1847, citing the legatees named in the latter instrument to propound the same with an intimation, that if they, or any of them, did not appear, the Court would decree probate in common form of the former will.

The decree was duly served, and proxies were exhibited, declaring the legatees would not propound the paper of the 9th June, 1848, and consenting to probate of the will of the 2nd October, 1847.

[285] Harding moved for probate of the will of 1847.

Judgment—*Sir Herbert Jenner Fust*. The step which has been taken in this case is the course which ought to be adopted in all similar instances. The persons interested under the paper of June, 1848, have been called upon to propound it, and have declined so to do, on the ground, I imagine, that they are well aware that the deceased was not at the date of its execution in a sound state of mind. Under these circum-

stances, I am of opinion that the executors of the will of October, 1847, are entitled to probate of it in common form, without the ceremony of propounding that paper. Accordingly, I decree probate.

EDWARDS *against* MARTYN. Prerogative Court, April 26th, 1850.—An executor, being called upon by a citation to do certain acts, appeared and complied with the citation in part only; for not complying with all the requisites he was, after notice given to him, pronounced in contempt, and the contempt directed to be signified; notwithstanding it was suggested that a decree ought, in the first instance, to have been issued, and not a citation.

[Applied, *Crosby v. Noton*; *In the Goods of Farrow*, 1857, 36 L. J. P. 55; 16 L. T. 153; 15 W. R. 775.]

Motion.

Mary Compton, a widow, the deceased in this cause, made, as asserted, a will on the 5th August, 1849, and thereby appointed John Jones Martyn, the executor, and her daughter, Caroline, wife of the said J. J. M., universal legatee.

[286] Probate of the asserted will was granted to the executor.

A citation was issued, under seal of the Court, at the suit of Harriett Edwards (wife of James Edwards), one of the children of the deceased, citing the executor to bring into the registry the probate of the will, to prove the same in solemn form of law, or to shew cause why the probate should not be revoked and declared null and void, and the asserted will pronounced to be null and invalid, and the said deceased to have died intestate; also to shew cause why letters of administration of the goods of the deceased should not be granted to the said Harriett Edwards; and also to exhibit and leave in the registry an inventory of all the goods, chattels, and credits of the said deceased by virtue of his corporal oath.

The citation was returned, an appearance given for the party cited, and the probate brought in.

On a subsequent Court day (5th December, 1849) the proctor for the party cited exhibited proxies under the hands and seals of the executor, and likewise of the universal legatee and of her husband, the executor, and declared they would not propound the will. The rest of the assignation was continued.

On the 15th December, by an interlocutory decree, on motion, probate of the will was declared null and void, and administration was decreed to Harriett Edwards, and the assignation was continued.

On the 9th January, 1850, a notice was sent by post to the said J. J. M. that the Court would be moved to pronounce him in contempt unless he [287] exhibited an inventory. On a subsequent day a second notice was given to the same effect. By reason of the absence of the Judge the assignation was continued for several Court days; and on the 22nd April a third notice was given to J. J. M. to the effect aforementioned.

Addams, on the 26th April, moved the Court that the party, cited to bring in an inventory, should be pronounced in contempt for disobedience. It was stated that the difficulty was that J. J. M. had been called upon by a citation, and not by a decree; but counsel observed that the executor had appeared and complied with every requisite in the citation, except bringing in an inventory.

Judgment—*Sir Herbert Jenner Fust*. An appearance has been given to the citation, and in the further progress of the suit the assignation on the party to bring in an inventory has been continued. He has not complied with that assignation; the Court therefore is in a position to pronounce him in contempt and to direct the contempt to be signified, which I accordingly do.

[288] JONES *against* NICOLAY. Prerogative Court, April 26th, May 11th, 1850.—

An allegation, propounding a paper as a codicil, being in the form of an order on a banker to pay "at twelve days' sight" a sum of money to a certain person, duly executed, but containing no reference to the will, held to be admissible to proof.

[S. C. 7 Notes of Cases, 564; 14 Jur. 675. Applied, *In the Goods of Marsden*, 1860, 1 Sw. & Tr. 542; *In the Goods of English*, 1864, 3 Sw. & Tr. 586.]

Allegation.

This was a business of proving in solemn form of law a paper, alleged to be a

codicil, dated the 24th June, 1844, to the will of Edmund George Nicolay, formerly a captain in H. M's. 29th Regiment of Foot, late of Mhow in the East Indies, deceased, promoted by William Samuel Jones, Esq., the sole executor named in the will, against Dame Mary Nicolay, widow, the mother of the deceased and the residuary legatee named in the will.

The following is a copy of the paper propounded as a codicil :—

“To Messrs. Cox and Co. London.

“Mhow, 24th June, 1844.

“Gentlemen,—At twelve days' sight please to pay to Messrs. Edmonds & Co. of Bombay on account of Maria Lucretia Jones the sum of four thousand pounds sterling. —I remain, Gentlemen, your obedt. humble servant.

“EDMUND NICOLAY,

“late Capt. H. M's. 29th Regt.

£4000 0 0

“Witnesses, J. G. Scott, Lieut. 22d Regt. N. I. ; W. S. Jones, Lieut. 22d Regt. N. I.”

[289] In the allegation it was in substance pleaded :—

1st. That the testator died at Mhow on the 25th June, 1844, a bachelor, leaving behind him his mother, the only person who would have been entitled to his personal estate had he died intestate.

2nd. That on the 8th September, 1843, the testator duly executed his will, now in the registry of the Supreme Court at Bombay, in which Court probate of the same, together with the paper propounded, was granted in common form to the executor, a party in this cause. That by the will the testator, among other things, bequeathed legacies of considerable value to Maria Lucretia Jones, sister of the executor, also legacies of 1000l. each to two other sisters, and substituted his executor for his mother as residuary legatee, in the event of his mother dying in his lifetime.

3rd. That at the date of the will the testator was engaged to be married to the said Maria Lucretia Jones, then resident with her mother at Mulligaum in the Bombay presidency. That a deed of settlement, intended to be executed previous to such intended marriage, had been prepared in England by the testator's directions, and was then sent out to India for execution, the intended marriage being only postponed for its arrival. That such deed did not arrive in India till after the death of the testator, which happened on the 25th June, 1844.

4th. That in the year 1844 the testator accompanied the family of the said Maria Lucretia Jones from Mulligaum to Mhow, and whilst there in the month of June, 1844, he was attacked with his last illness, which soon assumed so serious an aspect that his life was despaired of.

[290] 5th. That on the 24th June, 1844, the testator well knew, having been so informed, that his recovery was despaired of, and that he had probably but few hours to live. That the testator having been so informed, and so believing, and thereupon having a mind and intention to make and execute a codicil to his will, and thereby further to bequeath to his betrothed wife the sum of 4000l. then, as he well knew, about to be placed to his credit by his mother under arrangements between them to that effect with his agents, Messrs. Cox & Co. of Charing Cross, gave instructions to the said William Samuel Jones, then present, for the preparation thereof; and that the said W. S. J. thereupon, at the request and from the dictation of the testator, wrote the codicil propounded, in the form of a bill for payment to Messrs. Edmonds of Bombay on account of the said Maria Lucretia Jones. That the codicil after being so written was read over to the testator, who approved of the same and duly executed it, and that the testator was throughout of sound mind.

6th. That in the interval between the making and execution of the codicil and that of his decease on the following day, the testator, though gradually sinking, continued of perfect sound mind, memory and understanding; that he received the sacrament in that interval, and took an affectionate leave of the said Maria Lucretia Jones and her family; that he conversed sensibly, and in particular that he expressed in pointed terms his satisfaction at having made the further provision contained in the codicil, and without having done which he said that he should not have died happy.

7th. Pleaded the exemplification of the probate of the will and codicil granted at Bombay.

[291] 8th. That a notarial copy of the codicil, of which probate had been so granted, was some time after endorsed by Messrs. Edmonds (who were then solvent but have since become bankrupts) and sent to London, payable as a bill by Messrs.

Cox to Messrs. Huth of London, on account of the said Maria Lucretia Jones; that payment of such, as a bill, was refused by Messrs. Cox, partly in consequence of the testator's death, and partly owing to their having previously received a notice not to pay it from the mother of the testator; and that Messrs. Cox have since paid the amount belonging to the estate of the testator into the Court of Chancery, pursuant to an order of that Court in a suit there depending.

The admission of the allegation was opposed.

Harding in opposition. When instruments at all similar to the present have been pronounced for, they have generally belonged to one or other of these two classes: 1stly. Though the paper was not strictly testamentary in form, there were words shewing an intention that it should operate after death; *Tapley v. Kent* (1 Robert. 400); *Thorold v. Thorold* (1 Phill. 1); *Bartholomew v. Henley* (3 Phill. 317). 2ndly. There were words of express reference to another paper, and so they have been pronounced for as together containing the will; *Masterman v. Maberly* (2 Hagg. Ecc. 235); *Habergham v. Vincent*, by Buller, J. (2 Ves. jun. 231). Down to the year 1829 no paper like the present, not belonging to the one class or the other, has been held to be testamentary. The character of the [292] paper must depend on the paper itself; *Glynn v. Oglander* (2 Hagg. Ecc. 432). There is no reference in the paper propounded either to death, or to the will. The words are free from ambiguity, there is nothing requiring to be explained by parol evidence. The testator had made a formal will; had he intended to give to the bill propounded a testamentary effect, he would have made a formal codicil. The tests of a testamentary paper will not here apply; there is nothing on the face of the paper to shew it was revocable, or that it was dependent on death; it was intended to operate under any circumstance. The difference between a testamentary instrument and one *causa mortis* is explained by Swinburne (pt. 1, sec. 7); Jarman on Wills (vol. 1, c. 2); Bythewood on Precedents, &c. (vol. 3, p. 2); Williams on Executors (pt. 1, bk. 2, c. 2, s. 3); also by Wigram, V. C., in *Fletcher v. Fletcher* (2 Hare, 79). If the allegation be admitted, the effect would be to let in parol evidence to vary the character of a written instrument; that cannot be allowed, Wigram on Wills (pp. 6, 66, 74 (2nd edit.)).

By the Court. Evidence to shew *quo intuitu* has always been received in a Court of Probate.

Harding. The case of *Gladstone v. Tempest* (2 Curt. 650) was before the Wills Act; besides it was there pleaded that the testator directed the drafts were not to be presented till after his death. It would carry the principle further to admit this allegation; payment is to be made "at twelve days' sight."

Twiss, on the same side, cited *Tate v. Hilbert* (2 Ves. jun. 111); [293] *Lawson v. Lawson* (1 P. Wms. 441); *Woodbridge v. Spooner* (3 B. & Ald. 233); *Thorne v. Rooke* (2 Curt. 799).

Addams for the admission of the allegation. An endeavour has been made on the opposite side to introduce principles which apply to the interpretation of wills, and are entirely discordant with settled principles in Courts of Probate. The paper propounded is duly executed, and that is all which the Wills Act requires. The law is correctly stated in Williams on Executors (pt. 1, bk. 2, c. 2, s. 3); it is unnecessary to cite cases. It is settled that evidence may be given to shew *quo intuitu* the paper was made, *Gladstone v. Tempest* (2 Curt. 650); *Coventry v. Williams* (3 Curt. 787). The paper is pleaded to have been made on the testator's death-bed and to have reference to his death. The circumstance of the paper being attested shews the testator did not intend it to operate as a bill, but as a testamentary instrument. The facts pleaded, if proved, will entitle the paper to probate.

Bayford, on the same side, cited *The King's Proctor v. Daines* (3 Hagg. Ecc. 221).

Cur. adv. vult.

May 11th.—*Judgment*—*Sir Herbert Jenner Fust*. There are some very peculiar circumstances in this case. I should have liked to be informed whether the value of the bill could be recovered at law. The question now is whether the paper, in the form [294] it is, can be considered testamentary; the doubt arises under all the circumstances of the case. It is an order on a banker to pay a certain sum of money; *prima facie* it is not of a testamentary character. On the other hand, the deceased was dangerously ill, and of that circumstance the deceased was aware when the paper was prepared and executed. It is attested by two witnesses, which is a circumstance very unusual in the case of a draft or bill; and after its execution it remained with,

and came out of the possession of the executor, in whose custody also was the will. This case seems to me to be of a like character with the case of *The King's Proctor v. Daines* (3 Hagg. Ecc. 218). Without, however, giving any positive opinion, until I see the evidence produced, I consider sufficient is stated to justify me to admit the allegation. I am of opinion, therefore, to admit it to proof.

Lady Nicolay was assigned to give in her answers. Nothing further was done in the suit.

[295] IN THE GOODS OF JOHN SUMMERS, Deceased. Prerogative Court, May 11th, 1850.—The name of a deceased having been signed to his will at his request by the drawer thereof who on a subsequent day asked, at the request of the deceased, two persons, called in by the deceased himself to attest his will, all being present together at the same time, to sign their names as witnesses, which they did, and the deceased then placed his seal on the paper and said, "I deliver this as my act and deed," held not to have been acknowledged by the deceased in the presence of the witnesses.

[S. C. 7 Notes of Cases, 562 ; 14 Jur. 791.]
Motion.

John Summers died on the 20th August, 1849, leaving a paper writing purporting to be his will and bearing date the 28th February, 1849, but did not appoint an executor or residuary legatee.

The paper on the face of it, after the disposition of certain property, contains at the end the names of the deceased, of his wife, and of three witnesses in the form following:—

"Signed
as
Witness,s
William Furmedge (L. s.)
George Hood (L. s.)
Robert White" (L. s.)

"Signed and Seal'd
this 28th of Feby. 1849
By JOHN
and SUMMERS
PERCILLA
JOHN SUMMERS (L. s.)
PERCILLA SUMMERS" (L. s.)

The following account is given of the transaction in the joint affidavit of the three witnesses:—

"And he" [William Furmedge] "further made oath that, on the said 28th February, 1849, the said John Summers, the deceased, sent for this deponent, who, when he arrived at the residence of the said deceased, was requested by him and his wife, the said Percilla Summers, to make their wills which he proceeded to do from the joint instructions of the said deceased and his wife. And he further [296] made oath that the said deceased was incapable of holding a pen from rheumatism, or some other cause, that he, this deponent, at the request of the deceased wrote the deceased's name 'John Summers' and 'Percilla Summers' his wife, and that when he so did he, this deponent, and the said John and Percilla Summers were the only three persons present, and that the said paper writing is all in the handwriting of him this deponent except the signatures of George Hood and Robert White, whose names are subscribed thereto as witnesses. And this deponent further saith that, on a subsequent day, shortly after the said 28th February, 1849, the said deceased sent for him, this deponent, and George Hood and Robert White, and when they had assembled at the residence of the deceased he, this deponent, with the knowledge and at the request of the said deceased, asked the said George Hood and Robert White in the presence of the deceased and his wife, Percilla Summers, to sign their names as witnesses to the said paper writing, which they did, and the said deceased then took a seal into his hands, and, placing it on the wafer at the end of the said paper writing, said 'I deliver this as my act and deed,' the said Percilla Summers doing the same. And the said George Hood for himself saith that some months since, but since the said 28th February, 1849, the said deceased called upon him and said he wanted him to sign his name to his (deceased's) will, that he then went with deceased to his residence, where he saw one Robert White and William Furmedge, that the said William Furmedge then, in the presence of the deceased and one Robert White, requested him, the deponent, to sign his name [297] to the said paper writing, which he did, and further he is not able to depose. And the said Robert White for himself saith that some months since, but subsequent to the said 28th February, 1849, the

said deceased called upon him and said he wanted him to go to his house, which he did, and saw the said William Furmedge and one George Hood. That the deceased then said to him that he wanted him to put his name to his will, which he did, and the said deceased then put a seal on a wafer and said 'I deliver this as my act and deed' or words to that effect, and that the said deceased's wife did the same. And further this deponent is not able to depose."

Bayford, on the above facts, moved for administration with the will annexed to the widow, and submitted that the signature of the deceased, though made by another person, had been acknowledged by the deceased in the presence of two witnesses.

Judgment—Sir Herbert Jenner Fust. I am of opinion that the execution, on the facts stated, is not sufficient in law. Furmedge, a third person, asked the two witnesses, "at the request of the deceased," to sign their names as witnesses to the signature of the deceased, placed there on a previous day. This I cannot consider as an acknowledgment, on the part of the deceased himself, of the signature made for him by Furmedge. I must reject this motion.

[298] IN THE GOODS OF MARY ANN DICKIN (Wife of John Dickin), Deceased. Prerogative Court, May 27th, 1850.—A testatrix having made a will, which in the opinion of the Court was not executed according to the provisions of the Wills Act, made also a codicil to her "last will" on a separate half-sheet of paper, but did not refer to her will by date. The will and codicil, after the testatrix's death, were found loose in a box and not attached, but there were wafer marks on the two papers leading to an inference that the papers had been annexed. The codicil specially referred to two bequests mentioned in the paper produced as the will. No other testamentary paper was found. Held that the paper produced was the will referred to, and that it was republished by the codicil which was duly executed.

Motion.

Mary Ann Dickin died on the 9th November, 1847, having, whilst under coverture, by virtue of a power vested in her by her marriage settlement, made a will on the 14th December, 1841, by which she disposed of the whole of her separate estate, amounting, as described in the will, to the sum of 954l. 10s.

The testatrix bequeathed to one daughter the sum of 300l., to her son Charles Robert Dickin the sum of 327l. 5s., to be paid to him at the age of 21, and a like sum of 327l. 5s. to be paid on the same event to her daughter Sarah Maria Dickin.

The will was written on a sheet of letter paper, signed and attested, but not in conformity with the 9th section of the Wills Act, as interpreted by Sir Herbert Jenner Fust.

On the 17th August, 1843, the testatrix wrote a codicil on a separate half sheet of letter paper in these words:—

"Codicil to my last will and testament. It is my last wish that instead of the three hundred and twenty-seven pounds five shillings being paid as I have left it to Charles Robert Dickin, and Sarah Maria Dickin, as they attain the age of twenty-one, not to be paid till they are twenty-five; but let [299] them have all the interest of their respective shares till then."

The codicil was duly executed.

After the death of the testatrix the two papers were found, not folded or fastened together, but loose in a work-box belonging to her, which she had constantly used to the time of her death. At an upper corner of the fourth side of the will, and at an upper corner of the codicil, there were the remains of a wafer, which corresponded and led to the conclusion that the two papers had been attached thereby.

No other testamentary paper was found. The surviving executor named in the will renounced.

Harding prayed administration of the two papers as a will and codicil, and contended that, though the codicil did not refer to the will by date, it sufficiently, from its contents and appearance, identified the paper produced as the will; that consequently the will was republished, and any informality was corrected by the codicil duly executed.

Judgment—Sir Herbert Jenner Fust. The paper produced as the will, if standing alone, undoubtedly would not be entitled to probate under the Wills Act. The two

papers were not found attached, but they were in the same box, and there are corresponding marks which lead to the conclusion that, though at one time attached, they somehow became disannexed. The contents, too, of the codicil I think sufficiently identify the paper produced as the will; and as no other paper has [300] been found, and as the codicil which is duly executed republishes a will, I must hold the paper before the Court to be the will referred to. Let administration pass as prayed.

TAYLEUR against TAYLEUR. Consistory Court of London, May 30th, 1850.—The proctor of a party in a cause, as well as the registrar of the Court, when required on notice from the proctor of the opposite party to attend before a surrogate of the Court in furtherance of justice in the suit, are bound to attend.

Motion.

This was a cause of divorce by reason of adultery, promoted by W. H. Tayleur, Esq., against Emma Elizabeth Tayleur, his lawful wife.

The usual preliminary proceedings were had. The libel was admitted without opposition, as was also the allegation of faculties of the husband, who was assigned to answer thereto.

The answers of Mr. Tayleur were given in, and opposed on the ground that they were insufficient. The Judge directed further and fuller answers to be given, and the proctor of the husband was assigned on the 14th May, 1850, to bring in the same on the following Court day, namely, the 30th May.

On the 17th May the proctor for the husband gave notice to the proctor for the wife, as well as to the registrar of the Court, that the husband was ready to be sworn, and to give in before a surrogate, [301] his further and fuller answers on that day. The proctor for the wife and also, at his suggestion, the registrar declined to appear before a surrogate for the purpose required; on which the proctor for the husband had him sworn to such answers before a surrogate, in the absence of the proctor of the wife, and of the registrar of the Court.

On the Court day the 30th May, the day assigned, the proctor for the husband alleged that his party had been sworn to his further answers before a surrogate, and prayed that they might be received; and the proctor for the wife objected to the said answers being received.

Jenner, in opposition to the answers being received. The answers are irregular in form; there is no certificate of the oath having been duly administered. The proctor for the wife, as well as the registrar of the Court, should have been present. No sufficient reason was assigned for calling on them to attend before a surrogate on the 17th May; they were not bound so to do. The husband should have waited till the Court day.

Judgment—Dr. Lushington. The answers in their present form I cannot receive; but I must observe that the proctor for the wife ought to have attended before a surrogate on the occasion required. The fault entirely rests on him. A proctor, when he has notice given him, ought to attend with the registrar before a surrogate in furtherance of justice. A party in a suit ought not to be kept away from his home unnecessarily, and [302] thereby put to additional expense. On the present occasion I assign the proctor for the wife to declare whether he will wave further answers, or undertake for the payment of the costs to be incurred by the husband being again sworn, and the said answers duly brought in, and acknowledged in the usual form.

On the following Court day the proctor of the wife declared he waved the further answers of the husband to the allegation of faculties.

BROWN against BROWN. Consistory Court of London, August 1st, 1850.—A guardian, in instituting or carrying on a matrimonial suit on behalf of a minor wife against her husband, must exercise sound judgment and discretion; if he carry on such suit without a just foundation, he will be condemned in the costs of the husband. —Under no circumstance can a wife in a matrimonial suit be condemned in costs.

[S. C. 7 Notes of Cases, 391; 14 Jur. 768.]

This was a cause of divorce by reason of adultery, promoted by Esther Brown against Samuel Brown, her husband.

The citation, which had been taken out at the instance of the wife, was served on

the 23d August, 1848, and returned the following Court day, the 6th September; when an appearance was given for the husband, and the proctor for the wife assigned to libel on the Court day in October.

On the 10th November the wife was alleged to be a minor; a proxy of election of guardian was exhibited from the wife, and also a proxy of acceptance from her uncle of that office.

On the 8th December the libel was given in, and on the Court day following directed to be reformed. On the 29th December the libel, as reformed, was admitted; on the 18th January, 1849, additional articles were given in, and admitted on the 30th [303] January; and on the 7th February further additional articles were given in, and admitted on the 24th February. On these articles seven witnesses were examined.

On the 8th June an allegation on behalf of the husband was given in, on the 16th June directed to be reformed, and on the 27th June admitted. On that allegation thirteen witnesses were examined. On the 28th November additional articles to the allegation were given in, and subsequently admitted, on which six witnesses were examined; they were exceptive to the character of a witness produced on the libel.

On the 13th February, 1850, an allegation was given in for the wife, which, on the 28th February, after reformation, was admitted; on this allegation thirty-two witnesses were examined.

On the 28th May publication passed; and on the 7th June it was alleged that the wife had attained her majority, and a proxy was exhibited under her hand.

On the 18th July, when the cause was appointed to be argued, the counsel for Mrs. Brown intimated they could not on the evidence establish her case, on which the Judge observed that he had read the evidence, and was of the same opinion; thereon the counsel for the husband prayed that the guardian of the wife be condemned in costs down to the date at which a proxy was exhibited for the wife, and also that the wife be condemned in the costs incurred subsequently thereto. The Judge dismissed the husband from the suit, but reserved the question of costs to the 1st August.

Haggard and Jenner, in support of the prayer of [304] the husband, relying on the minutes and evidence in the cause, argued:—The guardian adopted this suit without due consideration; there was no foundation for it. The libel was merely speculative; there were no facts to support it. That the guardian was ignorant is no excuse; he must be held responsible for a vexatious proceeding in any Court; *Fox v. Suwerkrop* (1 Beav. 585); *Green v. Proctor* (1 Hagg. Ecc. 337); *Whittaker v. Marlar* (1 Cox, 285). We have no precedent for condemning the wife in costs, but she is only entitled to costs when she sets up a favourable case. Unless the Court exercises some control over a wife, she may harass her husband to any extent.

Dodson, Q. A., and Harding in opposition to the prayer. The prayer of the husband is novel. There is no precedent for saying a guardian of a minor wife, in a matrimonial suit, can be condemned in costs. No attempt has been made to fix him with a knowledge that the charges were false. It was impossible for him to foresee the result of the suit. To condemn a guardian in costs would be prejudicial to minors generally. Mr. Brown's conduct has been scandalous in many respects; for such a person the Court would not make a precedent. The prayer in respect of the wife is monstrous; her legal condition is fully stated in *Murray v. Barlee* (3 Myl. & K. 220). Even when a wife has a separate and sufficient income, she is not to be condemned in costs in a matrimonial suit. *Westmeath v. Westmeath* (2 Hagg. Ecc. 1-134, supplement) is a case in point.

[305] *Judgment*—*Dr. Lushington*. I regret that a question of difficulty, as the present must be considered, has been brought on by way of motion, instead of by act on petition. But as that preferable course has not been adopted, though I have no doubt it would have been, had the counsel for the guardian been able to substantiate a defence to the prayer made, I am under the necessity of considering the question on the facts pleaded and proved in the main cause, which I, on the last Court day, disposed of.

The present application is twofold. I am asked, 1st, to condemn the guardian in the expenses incurred in this suit from its commencement down to the 7th June in this year, when Mrs. Brown attained her majority; 2ndly, to condemn that lady in

the expenses subsequent to that date. I am of opinion there are two distinct principles here involved, but, before dealing with them, I must briefly state some of the proceedings had in the suit.

The cause was commenced by Mrs. Brown in the month of August, 1848, certainly under some misapprehension, for at that time she was a minor, and consequently incapacitated from instituting a suit; however, in the month of November following, her uncle took upon himself the office of guardian, adopted the suit, and carried it on till the 7th June, 1850, when Mrs. Brown became of age. In December, 1848, the libel was given in, in which Mr. Brown was charged with the commission of adultery with two persons between the 27th July, 1847, and the 2nd March, 1848, whilst he was confined in the Queen's prison; and to substantiate those charges [306] seven witnesses were examined. In answer to the libel an allegation was admitted, charging subornation of perjury, and conspiracy on the part of the witnesses examined on the libel; and when, after publication, the cause was to have been argued, the counsel for the wife, the party proceeding, exercising, as I think, a very sound discretion, abandoned her case. The testimony in support of the libel is certainly by no means credible, and the conduct of those witnesses was so tainted during the progress of the cause that I felt it my duty to pronounce that the charge against Mr. Brown had failed. It is under these circumstances the husband comes forward and prays to have his costs.

In respect of the guardian there is a question of principle, and also a question of fact. The question of principle is whether, under the circumstances of this case, or any state of circumstances that can arise in any case, a guardian, or next friend of a minor wife, who carries on a suit for adultery against her husband, is to be exempted from liability to costs? It seems to me that I should extend the principle applicable to a wife, presently to be considered, much too far, were I to answer this general proposition in the affirmative as universally true; for a guardian may recklessly institute, or carry on, a suit without any just ground whatever. Surely, when a person as guardian undertakes a suit, he is bound to exercise due caution not merely for the interest of the minor, but also for the sake of common justice, which is due to the individual against whom the suit was instituted. It is beyond all controversy that, in a testamentary cause, a guardian may, for vexatiously instituting or carrying [307] on, a suit, be condemned in costs; and though there is some difference between testamentary and matrimonial suits, the principle laid down in *Green v. Proctor* (1 Hagg. Ecc. 337) establishes that a guardian is not absolutely and altogether exempt from liability to pay costs.

As this is so, the question of fact is now to be considered whether under the peculiar circumstances of this case the guardian of Mrs. Brown is to be exempted? He has not attempted, as I am sure he would have done, had he been able, to adduce any special reason for his exemption; he has not even ventured to say there was a fair and probable ground for the institution of this suit. Much was said, in the course of the argument of counsel, respecting the conduct of Mr. Brown. It is certainly true he was guilty of contempt of the Court of Chancery; he was guilty of entrapping a minor, by falsely swearing into a marriage; for some of his offences he has been punished. I can well understand the motives which induced the friends of the wife to attempt to obtain an Act of Parliament for annulling this marriage; there is, too, this circumstance, which is of some weight, that cohabitation does not appear to have resulted from the marriage. I am fully satisfied from the complexion of this case there was every rational inducement for instituting a suit of this nature, provided there was a probable ground of a successful result; and that ground I should not have been disposed, under all circumstances, to scrutinize too rigidly. On the other hand, if I am convinced that this was neither more nor less than a [308] fishing suit—that at the date when the citation was served there were no credible facts within the knowledge of the party instituting the suit—that the process of the Court was set in motion for the purpose of preventing or delaying cohabitation, which would be an abuse in any matrimonial suit—that search was subsequently made not only for witnesses, but for grounds for the charges; then, I cannot say that a guardian adopting such a suit can be exempted from payment of the expenses incurred in the defence.

It is therefore of the last importance to the husband to ascertain whether or not there was any probable ground on the 8th August, 1848, for instituting this suit. It

was said that this is a strange demand to make. Surely it cannot be strange to ask when the information of the alleged adultery came to the knowledge of the party proceeding; it is the usual course in matrimonial suits to allege that fact as a reason why the cohabitation ceased; and, in a suit like the present, that information, in determining the question of costs, would be of the utmost value. I would even now give the guardian the opportunity of supplying this, or any other, information, by act on petition, if his counsel would say they can advance and support by evidence any thing tending to shew there was reasonable ground for instituting and carrying on this suit. I am left to collect this information as I can, yet, judging from the evidence, I am bound to say that, though the adultery is charged between July, 1847, and March, 1848, it does not appear that evidence of any sort was obtained until after the citation was served. If I am in error, I am ready to be cor-[309]-rected. It seems to me that the citation was taken out without any ground—that the so-called evidence was subsequently picked up with great industry any where, and that nothing in the shape of evidence came to the knowledge of the promoter till December, 1848, though the citation was returned early in the month of September preceding. This I must take to be the state of the case; and when I find the evidence fails—that it is, in fact, so worthless, that the counsel for the wife would not venture to argue on it, I must say justice requires that I should decree costs to the husband, so far as I am able, for the expenses he has been put to in defending himself from charges which had no existence. I will not say this suit was instituted vexatiously, but I do say Mr. Brown has been exposed to charges without sufficient ground. I cannot look to the character of Mr. Brown, and say he is not to have his costs because the promoter had strong inducements to institute the suit. I am of opinion, under all circumstances, that I have no alternative but to decree costs against the guardian for the expenses incurred by the husband, prior to the date at which Mrs. Brown attained her majority, and appeared for herself.

I come now to the other part of the prayer; I am asked to condemn Mrs. Brown in the costs which have arisen since she appeared.

The case of a wife, in respect of costs, stands on a totally distinct footing. It is almost a wasteful expenditure of time to state that, according to legal principles, a wife is supposed to have no separate property. These Courts, in consequence, have always allowed the wife to sue, and to have her [310] costs paid by her husband, except in particular cases, where she has had a sufficient property secured to her sole and separate use; yet, even in those instances, the Court has never allowed, as far as my information extends, the costs of the husband against the wife. The case of *Westmeath v. Westmeath* (2 Hagg. Ecc. 1-134, supplement) is one in point; the wife brought a charge of adultery against her husband and wholly failed; notwithstanding, in no one of the Courts into which that suit travelled was she condemned in costs. There is a wide distinction between a wife herself prosecuting, and a next friend for her in her minority. A next friend, before undertaking a suit, is bound to exercise sound judgment and discretion; a wife, acting for herself, has generally no means, or control over her husband's funds, to enable her to obtain advice. Though she may have property of her own, still she retains, throughout the suit, the relation of wife. I am well aware that there are instances in which suits have been commenced and conducted vexatiously by a wife; yet, in no one of those cases is to be found a precedent for condemning her in costs. I condemn the guardian in the costs I have described, but I must refuse to grant the remainder of the prayer.

[311] IN THE GOODS OF ELIZABETH TREVANION, Deceased. Prerogative Court, August 6th, 1850.—An attesting witness to a will, duly executed, attested and subscribed a second execution of the will by adding the word "Bristol" (the name of the city) at the end of her name and street in which she dwelt written on the former execution, but did not otherwise subscribe on the second execution: Held, that the latter attestation and subscription by the witness were not sufficient under the 9th sect. of the Wills Act.

[Approved, *Charlton v. Hindmarsh*, 1859, 1 Sw. & Tr. 433.]

Motion.

Elizabeth Trevanion, of Bristol, died, a spinster, in June, 1850, leaving as her only next of kin an aunt by the half-blood, the only person who would have been entitled to the personal estate had she died intestate.

On the 4th April, 1843, the deceased duly signed her will in duplicate, which was also duly attested by Dr. Budd and Mrs. Hester Bisse; the latter witness, after signing her name, added in the same line, as a description of her residence, "22 Park Street."

Under the will Dr. Budd was the principal legatee; and in consequence of the testatrix having discovered that the bequests to him would be void in law, she, about the 6th April, according to the joint affidavit of Mrs. Bisse and of Leopold de Soyres, the latter of whom, at the request of the testatrix, struck through with a pen the name of Dr. Budd as a witness, re-executed her will in duplicate by "acknowledging her aforesaid signatures in both the said papers, and also to the best of these deponents' recollection and belief with a pen went over and retraced such signatures, and she further declared such papers to be and contain [312] her will in the presence of these deponents, both present at the same time, and thereupon this deponent, the said Hester Bisse, attested the testatrix's said signature so acknowledged, to wit, by adding the word 'Bristol' at the end of her this deponent's name then already written as aforesaid" (a) . . . "in both the said paper writings in the presence of the said testatrix and of this deponent Leopold de Soyres," who also duly attested the testatrix's signature, &c., in the presence of the testatrix and Mrs. Bisse.

Addams, in moving for probate of the paper as last executed, contended there was an act done by Mrs. Bisse, which in law was sufficient.

Judgment—*Sir Herbert Jenner Fust*. There was no act done by Mrs. Bisse except by her adding to her place of residence the word "Bristol." That I conceive is no proof of an attestation to the signature of the testatrix, and I cannot hold that to be an attestation by a witness. I reject the motion.

Probate may issue with the consent of Dr. Budd, the person interested, but I would not do that much, were this not the last day of the sitting of the Court prior to the long vacation. (b)

[313] IN THE GOODS OF THE COUNTESS DOWAGER OF LIMERICK, Widow, Deceased. Prerogative Court, August 6th, 1850.—A testatrix bequeathed certain articles subject to certain limitations contained in the will of her husband deceased, but did not recite those limitations. The Court, for special reasons assigned, permitted probate to pass with extracts from the husband's will, accompanied with an affidavit that the extracts were all that had reference to the wife's will.

[S. C. 14 Jur. 816.]

Motion.

The Right Honourable Alice Mary Countess Dowager of Limerick died on the 18th June, 1850, a widow, leaving a will bearing date the 16th June, 1848, and thereof appointed executors.

In the will certain articles were bequeathed to the executors in trust, to permit the same to be used and enjoyed by the testatrix's grandson, the present Earl of Limerick, during his life, and after his death in trust to permit the same to go along with, and be used and enjoyed by, the person or persons who, under the limitations contained in the will of testatrix's late husband of his real and personal property in Ireland, dated the 29th July, 1840, should for the time being be in the actual receipt of the rents of the hereditaments and premises thereby devised in strict settlement.

The question raised was whether, by reason of the reference above made to the will of the late Earl of Limerick, it was necessary that that will should be included in the probate of the will of the countess dowager. The will referred to of the [314] late earl, who died in December, 1840, extended to upwards of seventy sheets, and was proved at Dublin.

Phillimore, jun., moved for probate of the will of the countess independently of the will of her husband, and cited *Sheldon v. Sheldon* (1 Robert. 88). He submitted that when reference is made to an instrument inoperative per se, it must be included

(a) The word Bristol was written immediately in a line with and after "Park Street."

(b) It is submitted that the attestation, on the second occasion, by Mrs. Bisse, is good and valid in law. The statute does not require a witness to write his name; a subscription of any nature is sufficient; and so much the Judge seems to have allowed in a previous case; see *In re Christian*, ante, p. 110.

in the probate, but when operative that was not requisite; and observed there was no litigation in this instance.

Judgment—*Sir Herbert Jenner Fust*. I am informed there is no litigation in this case; I cannot, however, conclude that there may not be. The will of the earl is to every intent and purpose the will of the countess. I have no objection to allow that part of the earl's will which has reference and relates to the will of the countess to be sufficient. Nevertheless, there must also be an affidavit that the extracts made from the earl's will are all that have reference to the matters mentioned in the will of Lady Limerick. The principle on which I permit this is, 1st, that no other part of the earl's will is the will of the countess; 2ndly, that the earl's will is of an enormous length. There must be a special probate.

[315] BRYAN AND OTHERS *against* WHITE. Consistory Court of London, August 9th, 1850.—No attestation clause of any description whatever is required under the Wills Act.

[S. C. 14 Jur. 919. Referred to, *Sharpe v. Birch*, 1881, 8 Q. B. D. 114.]

This was a business of proving the last will, bearing date the 24th August, 1849, of William Stokes, who died on the 25th August, 1849. The suit was promoted by Joseph Smith Bryan and certain other legatees named in a will executed on the 23rd August, 1849, against George White, one of the executors named in the will of the 24th August.

The will of the 24th August was opposed on the following grounds:—1st, that if the testator did execute the paper his signature was fraudulently obtained; 2ndly, that there is not an attestation clause, or even the word witnesses, to intimate that the two persons whose names appear after the testator's signature acted in the character of attesting witnesses.

The case is here reported in reference to the second objection only. (a)

Addams. The will is not duly executed under the statute. The words are the witnesses "shall attest and shall subscribe;" shall is repeated. Two acts then are required of the witnesses; they must not only subscribe, but they must also attest; they [316] have subscribed in the present instance, but have not attested. It is true the statute says "no form of attestation shall be necessary." The meaning of those words is, that no precise or particular form of attestation is required. The context, however, implies that some memorandum, for instance, the word witnesses, should appear; a mere subscription of names is not enough. Sugden on Wills, c. 2, s. 10, says no particular form of attestation is rendered necessary; again, in c. 10, where there is a precedent for making a will he gives some form. There is no instance, either under the Statute of Frauds or under the Wills Act, in which mere signatures, without some memorandum or other to shew the persons were attesting witnesses, have been held to be sufficient.

Bayford in reply. "No form of attestation shall be necessary." These words are negative; there is no distinction between a clause wholly informal and partially informal. If an informal attestation clause be allowable, of which there is no doubt, then there need not be any clause at all. Subscription is a manual act; attestation is mental; by the term attesting means a person is a witness of what has been done; which, if necessary, must be proved or shewn orally.

Judgment—*Dr. Lushington*. The point raised is certainly one of importance. If I entertained a doubt on the question I would take time to deliberate, but, however ingenious the argument was, I do not consider that it can be sustained.

[317] I am of opinion that a will may be valid notwithstanding there is no attestation clause of any description whatever; were I to delay to express that opinion I might thereby produce infinite mischief.

If the construction contended for by Dr. Addams were upheld, the effect would be that there might be a form of attestation, not importing all that passed, as valid and effectual in law as a full statement of every thing which occurred; this might lead to great injustice.

The words of the statute are plain; its object is to require the essence of a due execution, but to add as little formality as possible in order to prevent litigation. It

(a) This cause was before the Court on a motion in an early stage of the proceedings; see p. 137.

was asked, what is the meaning of "shall attest?" I feel under no difficulty in answering that question. "Attest" means the persons shall be present and see what passes, and shall, when required, bear witness to the facts.

In *Hudson v. Parker* (1 Robt. 14) I pronounced against the will on the ground that the witnesses did not see either the testator sign or his signature; in the present instance it is clear from the evidence the will was duly executed. I feel no reasonable doubt on this part of the case.

The learned Judge, having minutely examined the evidence in reference to the alleged fraud, pronounced for the will of the 24th August, and said that as the contest had arisen from the vacillation of the testator, he decreed costs of both parties out of the estate.

[318] *HALE against TOKELOVE*. Consistory Court of London, August 9th, 1850.—

A testatrix, having made a will in 1842 and a codicil thereto in 1844, made another will of a contrary tenor without an expressed revocation in 1845, and subsequently declared she had destroyed the will of 1842. In 1845 a solicitor in ignorance of the existence of the will of 1845 prepared, in lieu of the codicil of 1844, a more formal codicil, which was executed in January, 1846, and in March, 1846, a further codicil was executed. The codicils of 1846 did not refer by date to any will, but only to her "last will," and the codicil of January revived by reference to the contents of the will of 1842 that will, then destroyed. —An allegation, inter alia, pleaded the unexecuted draft of the will of 1842, and that the original was destroyed prior to January, 1846, and propounded the will of 1845 with the codicils of 1846. The Court rejected so much of the allegation as propounded the will of 1845, and intimated its opinion that the two codicils of 1846 were alone entitled to probate, and that the unexecuted draft of the will of 1842 would not be entitled to probate, though the codicils of 1846 revived the destroyed will of 1842.

[S. C. 14 Jur. 817. Applied, *Rogers v. Andrews*, 1862, 2 Sw. & Tr. 350; *In the Goods of Steele*, 1866, L. R. 1 P. & D. 576. Considered, *M'Arv v. M'Cay*, 1889, 23 L. R. Ir. 143.]

Allegation.

This was a business of proving the last will with two codicils of Ann Edwards, bearing dates respectively, the will, the 27th June, 1845, the first codicil, the 12th January, 1846, and the second codicil, the 17th March, 1846, promoted by Samuel Hale, one of the executors named in the said will, against Maria Tokelove, widow, also one of the executors named in that will and the residuary legatee named in the said first codicil.

It was pleaded in the 1st article of the allegation that the testatrix died on the 29th May, 1849, a widow, leaving behind her two nephews and three nieces, the only persons entitled to her personal estate in case she had died intestate; that the personal estate was of the value of 1500l.

In the 2nd article, that the testatrix on the 6th May, 1842, duly executed a will, whereof she appointed a Mrs. Grimstone and a Mr. Williams executors; that the said will was destroyed by the testatrix prior to January, 1846.

[319] In the 3rd article, that the script (No. 1), annexed to an affidavit of scripts, was the draft of the very will referred to in the preceding article.

In the 4th article, that in November, 1844, the testatrix, while at Ramsgate, requested a Mr. G. to prepare a codicil to her will, and therein to substitute the said Maria Tokelove and Samuel Hale as her executors, instead of Mrs. Grimstone and Mr. Williams, but that she did not inform Mr. G. of the date of her will; that accordingly he drew up a codicil which was duly executed on the 11th November, 1844.

In the 5th article, that the script (No. 2), annexed to the affidavit of Mr. G., was the very codicil referred to in the preceding article.

In the 6th article, that the testatrix being at Tunbridge Wells and attended by a medical practitioner in June, 1845, informed him that she had made a will (the will pleaded in the 2nd article) with which she was not satisfied, and requested him to introduce her to a solicitor who would prepare for her a new will; that accordingly a solicitor, Mr. F. of Tunbridge Wells, was introduced to her.

In the 7th article, that pursuant to the directions of the testatrix the very will

(No. 3) propounded in the cause was drawn up and executed, and of it Maria Tokelove and Samuel Hale were appointed executors.

In the 8th article, that at the time when the testatrix executed her will (No. 3) she informed the solicitor, Mr. F., that she intended to destroy her former will pleaded in the second article.

In the 9th article, that after the date of the will [320] (No. 3) the testatrix frequently declared that she had destroyed her will of May, 1842, and especially she so declared to an intimate friend who had resided with her.

In the 10th article, that on the return of the testatrix and Mr. G. to London the said Mr. G., fearing lest the said codicil, prepared by him and executed at Ramsgate in November, 1844, was not in proper form, drew up in lieu thereof a more formal codicil (No. 4), and in February, 1845, took it to the testatrix, and the same was read over and explained to her.

In the 11th article, that on the 31st December, 1845, Mr. G. being ignorant of the testatrix having executed her last will (No. 3), called upon and suggested to her that she should execute the said codicil; that on the 12th January, 1846, he being still ignorant of the will (No. 3), called again upon the testatrix, when she produced the said codicil (No. 4) and executed it; that the said codicil was at the execution thereof, and now is, a codicil to the will of the 27th June, 1845 (No. 3).

In the 12th article, that on the 17th March, 1846, the testatrix informed her friend E. C. that she had by her will left to her all such articles as might be in her (the said E. C.'s) possession at the time of her (the testatrix's) death; that E. C. observed, "How shall I be satisfied of that?" The testatrix told her to get pen, ink, and paper, and to draw up a codicil; that at the death of the testatrix the said E. C. had in her possession several articles of small value belonging to the testatrix.

In the 13th article, that pursuant to the testa-[321]-trix's direction the said E. C. wrote the codicil (No. 5) which was read over to the testatrix, and executed on the 17th March, 1846.

In the 14th article, that the scripts respectively marked No. 2, No. 3, and No. 4 were sealed up in a cover and remained in the possession of the testatrix until about six months before her decease, when she delivered the said packet to E. C., desiring her to take care of it; that the said codicil No. 5 remained from the date of the execution thereof with the said E. C. until she gave it together with the said packet to the said Samuel Hale.

Addams argued that the allegation should be rejected on the ground that the facts pleaded, if proved, taken in conjunction with the contents of all the testamentary papers referred to, (a) were insufficient to enable the Court to decree probate of the papers propounded.

Haggard argued for the admission of the allegation.

Judgment—*Dr. Lushington*. Ann Edwards, the testatrix, died on the 29th May, 1849, a widow without children, leaving certain nephews and nieces; her property amounted to about 1500l.

The first testamentary paper, alleged to have been executed by her, is a will dated the 6th May, 1842, which was drawn by a Mr. Williams, a friend [322] of the testatrix; of that will Mrs. Grimstone and Mr. Williams were appointed the executors.

It is pleaded in the 2nd article of this allegation that the testatrix destroyed this will prior to January, 1846; its contents, however, are known, as the draft—the paper No. 1 annexed to the affidavit of Mr. Williams—remains. According to that draft the testatrix gave all her property to Mrs. Grimstone and Mr. Williams, whom she appointed her executors, in trust, after payment of debts, to divide the same equally between Mrs. Grimstone and the children of the testatrix's deceased sister, Mary Day.

In November, 1844, according to the statement in the 4th article, the testatrix being at Ramsgate requested Mr. Samuel Goodchild to prepare a codicil for her; and on the 11th November she did execute a codicil which is the paper No. 2.

This paper, No. 2, does not refer to the will of 1842 by date, but by inference from its contents it must have application to it. This codicil is a new disposition of the property; it is a new will in effect revocatory, if not of the whole, at least of the greater part, of the will of 1842. In the first place, it revokes the appointment of Mrs. Grimstone as executrix, and instead of half the property gives her 100l. In the

(a) The substance of all the testamentary papers is set forth in the judgment.

next place, it appoints Mrs. Tokelove executrix, and makes her sole residuary legatee "and entitled to any and all the surplus property that may remain after paying and satisfying such legacies and provisions as are made and contained in my will and codicils duly attested." Lastly, in the place of Mr. Williams, it appoints Mr. Hale executor, and gives him 100l., and his son 50l.

What was really the intention of the testatrix, [323] or is the legal construction of this codicil, may be very doubtful. It is by no means clear whether the bequest, under the will of 1842, of a moiety of the residue to the children of Mrs. Day is, or is not, revoked.

These testamentary acts remained undisturbed until the month of June, 1845, when the testatrix, being then resident at Tunbridge Wells, executed through the medium of a solicitor a formal will—the paper No. 3. The contents of this will are in substance as follows:—To Mr. Hale 100l., and all articles belonging to the testatrix in his custody at her decease; to Mr. Hale's son 50l.; to Mrs. Grimstone 150l.; to Mrs. Combes 100l., and also all articles belonging to the testatrix as might be in the custody of Mrs. C. at the testatrix's decease; to Mrs. Wood 50l.; to Miss Hart 100l.; to the children of the testatrix's deceased sister, Mary Day, 100l. each; to Mrs. Tokelove the residue; whom, together with Mr. Hale, the testatrix appointed her executors. This will is propounded by Mr. Hale.

It is pleaded in the 8th article that the testatrix informed Mr. Foreman, the solicitor who drew the will of 1845, at the time of its execution, that she intended to destroy the will of 1842; of course that will and the codicil of 1844 were revoked, though not in terms, by the will of 1845.

It is further pleaded, in the 9th article, that, after the execution of the will of 1845, the testatrix frequently declared that she had destroyed the will of 1842, and especially to Clara Hall, who resided with her from April, 1846, to December, 1848; that she also declared that she had made a new will, [324] appointing Mr. Hale and Mrs. Tokelove executors, and that in March, 1848, Mrs. Grimstone died.

In February, 1845, Mr. Goodchild, who had prepared the codicil No. 2, which was executed at Ramsgate, prepared a more formal codicil—the paper No. 4—which was read over to the deceased.

As already stated, the deceased in June, 1845, executed the new will No. 3. In December of that year Mr. Goodchild, knowing nothing of the will of June, 1845, suggested to the deceased that she should execute the codicil No. 4, and, on the 12th January, 1846, it was executed by her, being, as pleaded, of sound mind. It refers to no will by date, but is described in the commencement as a codicil to the last will of the testatrix, and it states—"Whereas by my said will I have appointed my friends Mary Grimstone and ——— Williams executrix and executor thereof, now I hereby revoke the appointment of the said Mary Grimstone and ——— Williams as executrix and executor aforesaid, and substitute my friends Maria Tokelove" . . . "and Samuel Hale" . . . "in their place and stead."

It is impossible to doubt that the recited words point to the will of 1842, and not to the will of 1845. They describe the contents of the will of 1842, and they state what is not to be found in the will of 1845.

The codicil No. 4 is not strictly a substitute for the codicil No. 2; the contents of No. 2 and No. 4 differ; No. 4 gives to Mrs. Grimstone "100l. in addition to what I have given her by my said will" (half the residue was given by the will of 1842), whereas No. 2 gave her 100l. only, though how the [325] residuary clause in No. 2 would operate is, as I have said, doubtful. Again, No. 4 makes some trifling alteration as to the bequest to Mr. Hale's son, and then follow these words—"I confirm my said will, except so far as the same is altered by this codicil." This codicil was, as stated, executed the 12th January, 1846; and I must observe that it does not only point to the will of 1842 by reference to its contents, and not to the will of 1845, but the codicil of 1846 and the will of 1845 do not in other respects so accord as to afford any ground for arguing that this codicil could refer to the will of 1845, for the codicil of 1846 repeats the legacies to Mr. Hale and his son.

Whatever might have been the intention of the testatrix, it is clear, beyond doubt, that Mr. Goodchild prepared this paper, No. 4, as a codicil to the will of 1842. It is clear, too, that divesting the case of all extraneous facts, such as oral declarations, &c., that the codicil No. 4, by confirming the will of 1842, sets up that will, and revokes the will of 1845.

I now come to the transactions subsequent to January, 1846, in which month the codicil No. 4 was executed.

It is pleaded in the 12th article that the testatrix in March, 1846, recognised the will of 1845, and gave directions for making the codicil No. 5, which is dated 17th March, 1846.

Now oral recognitions cannot be received to contradict the contents of a written instrument. The will of 1842 cannot be revoked, nor can the will of 1845 be revived by any oral declaration; but the codicil No. 5 being duly executed may, or may not, do so.

[326] To what will does the codicil No. 5 legally apply? Without at present referring to its contents beyond the first paragraph, which begins with these words: "This is a codicil to the last will and testament of me," I think these words apply to the will which at that time had legal existence, and that was the will of 1842. I apprehend that when a testator refers in a codicil to a last will, and there is nothing in the contents of the codicil to point to any particular will, it must be construed to refer to the will in legal existence as the last will and not to a revoked will.

The purport of the codicil No. 5 is to give to Mrs. Combes certain property of the testatrix, left in Mrs. Combe's house; this is a mere repetition of a bequest in the will of 1845. I cannot possibly, from this codicil, come to the conclusion that by this codicil the testatrix has revoked the will of 1842, and revived the will of 1845; there are no words by which I can extract such intention, or rather, more correctly speaking, there are no words to work such effect.

In the custody of the testatrix till six months before her death remained the will of 1845, the codicil of 1844, and the codicil of January 1846. The will of 1842 is not forthcoming.

My proper duty upon the present occasion is to decide upon the admissibility of the allegation propounding the will of 1845, and the codicils of January and March 1846; of course I shall do so; but I am desirous, if it be practicable, to dispose of the whole case, and therefore I shall state the opinion I have formed upon the facts before me.

I inquire, then, what were the intentions of the [327] testatrix, and, if they are capable of being ascertained, whether the law will enable me to give them legal effect.

I think the real intentions of the testatrix somewhat doubtful; I must of course presume that she was throughout all her testamentary transactions of sound mind and memory. It appears to me that the testatrix did not intend to revive the will of 1842, but what she really intended by the execution of the codicil of January, 1846, it is impossible to say; for that codicil is framed from instructions with reference to the will of 1842 and before the will of 1845 was made, and consequently could not refer to it. The codicil of January, 1846, was actually prepared before the will of June, 1845, though executed afterwards. Nor did the testatrix intend at the time when she executed that codicil to repeat the legacies to Mr. Hale and his son. It is, I think, impossible to say what the testatrix's intentions were, though there is reason to apprehend what they were not.

It is useless to speculate further as to a matter which cannot be ascertained; the more important inquiry is which are the papers by law entitled to probate.

I must look to the papers themselves; I can receive no evidence of declarations of intention, though I may look to the circumstances of the case to assist me in discovering the meaning of the written instruments, but no further.

One of the most important facts pleaded in this allegation, and which I must assume to be true, is that the will of 1842 was destroyed—destroyed of course *animo revocandi*—by the testatrix prior to [328] January, 1846, when the codicil of that date was executed. Revocation by destruction is one of the modes of revocation mentioned in the statute. I must presume the fact of revocation to be true, as it is pleaded. Declarations of the testatrix would, I apprehend, be admissible evidence to prove a fact of destruction, though declarations as to which will a testatrix intended should operate would not be admissible.

Now how will this fact—the previous destruction of the will of 1842—affect the construction of the codicil of January, 1846? Of course it may be urged that the deceased never intended to revive an instrument, not only revoked but destroyed. Presuming that the testatrix remembered the destruction of this will, when she executed the codicil, it is not consistent with probability that she intended by the codicil to revive it.

But to what ultimate effect can this argument be carried? It cannot, I think,

alter the construction I am bound to put on the codicil of January, 1846. I can construe that codicil to revive and confirm the will of 1842 only, because to that will alone the words can by any construction refer; but that will is gone—destroyed *animo revocandi*—the codicil cannot in effect revive that will.

What is the next question? Does it follow that because the codicil of January, 1846, is inoperative to revive the will of 1842, that it should apply to the will of 1845? Certainly not; there is nothing in that codicil which can apply to the will of 1845.

Then could it be argued that the will of 1845, being a will in existence when the codicil was executed, and not being specifically revoked by that [329] codicil, would remain unrevoked in consequence of the codicil being inoperative to revive the will of 1842 by reason of its destruction? Can I consider all that relates to the confirmation of the will of 1842, and consequent implied revocation of other wills, *pro non scripto*? I think not. I think that the will of 1845 is necessarily revoked by the codicil of January, 1846, confirming another will of a different tenor disposing of the whole property. If this be so, I cannot decree probate of the will of 1845, for the case stands thus—that the will of 1845, though a subsisting instrument at the execution of the codicil of January, 1846, is revoked by necessary implication, when a prior will is confirmed, and I can discover no principle upon which such revocation should not operate, though the will of 1842 be not in existence. I think the revocation must stand, though the revival of the will of 1842 is inoperative, and for this reason—the intention to confirm the will of 1842 is wholly irrespective of the will of 1845. It is not the case of revoking one instrument consequent and dependent upon the setting up of another. I cannot extract from the codicil of January, 1846, or even from the *res gestæ*, an intention that the will of 1845 should prevail, if the will of 1842 could not be upheld. The confirmation of the will of 1842 is, I think, a revocation of the will of 1845, whether the will of 1842 is in existence or not.

There is, however, another question remaining—one by no means easy of solution. There is still in existence the draft of the will of 1842; I will presume, for the purpose of fully discussing this [330] case, that it is proved that the draft is in conformity with the will.

It might be doubtful whether it will be for the interest of any to propound that draft; the bequest to the children of Mary Day may or may not be revoked by the codicil of January, 1846; on that point I gave no opinion; but supposing that the draft were propounded, could the Court decree probate of such draft? I am not called upon, in considering the admissibility of this allegation, to dispose of that question, and anything I may now say could not be binding on me if that draft were propounded. Perhaps the wiser course would be to maintain silence on that point, which is one, I conceive, of no small difficulty; but, looking at the small amount of property at stake, I will hazard an opinion, but not a judgment, for, should that draft be propounded, I should hold myself at full liberty to pronounce a decision contrary to my present opinion, if convinced by argument I ought to do so.

In whatever way I view this question, it certainly presents to my mind the gravest difficulties; and I most unwillingly encounter them, and only with the hope of saving the parties expense and delay.

How stands the case upon the allegation and according to my construction of the codicil of January, 1846? The testatrix purports to revive a will not only revoked *animo revocandi*, but destroyed. Probate of this is impossible. Can I decree probate of the draft? What would be the case, if such a will had been accidentally lost or destroyed, *sine animo revocandi*, I say nothing; for it is not this case. This is the case, according to [331] the plea, of a will destroyed and revoked *animo revocandi*, yet purported to be revived by the codicil of January, 1846; in other words, it is a revival or republication of that which is not in existence. Can I decree probate of its draft? I am inclined to think not; for the draft is an unexecuted paper, and not specifically adverted to, or recognised by the codicil.

I repeat I must not be bound by this opinion, if further proceedings be had. The question is, I believe, one *primæ impressionis*, and of infinite difficulty, and I shall be quite ready to change my opinion upon argument, or if facts should be pleaded to alter this view of the case.

I must reject so much of this allegation as propounds the will of June, 1845. My

present impression is that the codicils of January and March, 1846, are alone entitled to probate.

Costs out of the estate.

Subsequently, Mr. Hale duly renounced in acts of Court probate of the will of June, 1845, and consented to probate of the two papers of January and March, 1846 (Nos. 4 and 5) being granted to Mrs. Tokelove, as together containing the last will of the testatrix.

[332] IN THE GOODS OF JAMES SMITH, ESQUIRE, Deceased. Prerogative Court, Nov. 7th, 1850.—Probate of a will and codicil signed but not witnessed had been granted at Mauritius of a native of Scotland, who held for some years to his death an official appointment at Mauritius. The Prerogative Court being well satisfied of the domicile, decreed probate after having expressed some doubt whether the Wills Act applies to the Colonies.

[S. C. 14 Jur. 1100.]

Motion.

James Smith, of Port Louis, in the Island of Mauritius, Esq., and assistant colonial secretary of that island, died on the 14th July, 1849, leaving a will dated 10th October, 1845, with a codicil of the date of the 10th May, 1849. Both instruments were signed by the testator, but neither was witnessed.

The facts of the case are detailed in affidavits by G. F. Dick, Esq., one of the executors, and N. J. Kelsey, Esq.

Mr. D. swore that he had resided in Mauritius, with the exception of two absences in England, from the year 1811 until June, 1850, and that for the period of eighteen years he was colonial secretary in that island, by which means he became well acquainted with the laws of the colony; that Mauritius is a Crown colony, and the laws of the United Kingdom (except made special) do not prevail there; that the French law (the Code Civil) existed at the time of the cession of the island to Great Britain, and, with modifications therein by the British Govern-[333]-ment, which do not, as he believes, affect the formalities relating to wills, has ever since been, and is now, the law of the said island. And he further made oath that in the year 1812 he became intimately acquainted with the deceased, and such intimacy continued until the deceased's death; that the deceased was a native of Scotland, and went to reside at Mauritius in the year 1812, in the capacity of clerk in the medical department, and in the year 1823 he was appointed assistant secretary to the Government, an office afterwards changed to assistant colonial secretary, which appointment the deceased held until his death; and he further made oath that the deceased in June, 1837, married a native of the island, upon which occasion the marriage settlement was made and executed according to the laws of the said island, and he, the deceased, formed connexions in, and adopted the habits and customs of the colony, and was considered completely domiciled there; that the deponent never heard him intimate or express any intention of quitting Mauritius and returning to Great Britain, and the deponent verily believes the deceased had no such intention. And deponent further made oath that by reason of his long residence, and holding the official situation of colonial secretary at Mauritius, he is enabled to depose that the will and codicil of the deceased, made in the form denominated, in the said Code Civil, holograph, are according to the best of his knowledge and belief in accordance with the law existing in the said island, and the same have been duly registered in the proper Court of that island, . . . and he and his co-executor, Mr. Barry, have been acting in the [334] execution of the said will and codicil with the approbation of deceased's widow still resident there.

Mr. Kelsey, who described himself as late auditor general of the Island of Mauritius, stated on oath he was acquainted with the deceased for twenty-eight years, and confirmed the statement of Mr. D., that Mauritius is a Crown colony, and that the French law, with certain modifications, prevails there; that the deceased was at his death assistant colonial secretary; also the particulars respecting his marriage, and that he had no intention of quitting Mauritius and returning to Great Britain.

On the 6th August, 1850, motion was made for probate of the will and codicil on a statement of the facts, which were not then verified by affidavits. On that occasion the Judge, after expressing some doubt whether the circumstance of a person

holding an office for life abroad constitutes a domicile there—also whether the Wills Act applies to the Colonies—and remarking he had no proof of the law of Mauritius respecting the execution of wills, rejected the application.

Dodson, Q. A., on the 7th November, renewed the motion. The affidavits shew that the deceased was domiciled at Mauritius, and that the will and codicil have been there proved according to law. The general rule is to follow the grant of the place of domicile. The only objection to that here is the suggestion whether the Wills Act applies to the Colonies. The Queen's advocate contended that acts of the British Parliament are not binding on the Colonies unless expressly named; he cited *Blk. [335]* Comm. (vol. 1, introduction, sect. 4); *Burge on Colonial Law* (preliminary treatise, sect. 11); *Rex v. Vaughan* (4 Burr. 2500); *In the Goods of Foy, Deceased* (2 Curt. 328).

Judgment—*Sir Herbert Jenner Fust*. I think the facts stated now shew that the testator, even had he resigned his office, had an intention of remaining at Mauritius. I am satisfied as to the question of domicile. As to the second point, it is strange the question has not before arisen whether the Wills Act applies to the Colonies. Generally this Court follows the foreign grant, but not always; and in this case there are no affidavits from lawyers of the law of Mauritius. This case will form a precedent; but on the whole, being well satisfied as to the domicile of the testator, I am inclined to decree probate to pass as prayed.

IN THE GOODS OF HANNAH COPE, Widow, Deceased. Prerogative Court, Nov. 7th, 1850.—A testatrix having signed her will desired M. C. and E. T. to attest, but as E. T. could not write, the testatrix desired J. J. C., who was also present, to write the name of E. T., which J. J. C. did, but did not sign his own name. Held, the paper was not entitled to probate as E. T. might have made his mark, and that a desire that another should sign could not be construed to be a subscription by E. T.

[Applied, *In the Goods of Duggins*, 1870, 39 L. J. P. 24; 22 L. T. 182.]
Motion.

Hannah Cope died leaving a will bearing date the 22nd of April, 1850, to which there was the following attestation clause:—"Signed, declared [336] and acknowledged by the said Hannah Cope as and for her last will and testament, in the presence of us Emily Taylor, No. 19 Norland Road, Shepherd's Bush; Martha Caesar, No. 9 Bell Street, Silver Street, Kennington."

About the date of the will the testatrix, who was very ill and confined to her bed, was visited by M. C. and J. J. C., on which occasion Emily Taylor, who was attendant on the testatrix, by her desire took from a drawer in the testatrix's room the will having at the time the testatrix's name subscribed thereto, but without the signatures of witnesses. At the request of the testatrix the will was read over to her, after which she expressed a wish to execute it. Being too weak to write her name, she made a cross after her aforesaid signature at the foot of the will in the presence of the three persons aforesaid, and then desired to have her will witnessed by M. C. and E. T., but as E. T. was unable to write, the testatrix desired J. J. C. to write her name for her, which he accordingly did in the presence of the testatrix and of E. T. and the other attesting witness, who also signed in their joint presence, but J. J. C. did not sign his own name.

Robinson moved for probate of the will.

Judgment—*Sir Herbert Jenner Fust*. The paper was signed by the testatrix by placing her mark in the presence of two witnesses. It turns out, however, that the paper was not subscribed by one of the witnesses, as she could not write; she might, however, have made her mark. [337] The desire that another should sign for a witness cannot be construed to be a subscription by that witness. I cannot grant probate of this paper.

IN THE GOODS OF MARTHA DAVIES, Spinster, Deceased. Consistory Court of London, Nov. 9th, 1850.—A testatrix, having pointed to her will, which she had previously signed, and expressed her satisfaction at its contents, and by gestures intimated that she had signed the same, and that she wished two persons present together to attest the will, held to have duly acknowledged her signature.

Motion.

Martha Davies died on the 23rd of July, 1850, leaving a will, which was signed by her and attested on the day preceding her death, under the following circumstances:—

The deceased, being extremely ill, requested a friend W. A. to prepare her will, for which she gave him instructions. After he had prepared the will, he left it with her in the presence of three persons, one of whom read over the will to the deceased in the presence of the rest, on which the deceased expressed herself satisfied with it, and signed her name at the foot or end thereof. One of the three persons present was unable to write; it was on that account thought advisable to wait for a few minutes, until the return of W. A., in order that he might be a witness. On the return of W. A., the testatrix (in the words of the affidavit), [338] “pointed to her said will, and expressed her satisfaction at the contents, and by gestures intimated that she had signed the same, and that she wished” W. A. and W. S. to attest the execution, whereupon they signed their names, as witnesses, in the presence of the testatrix and of each other.

Spinks moved for probate of the will.

Judgment—Dr. Lushington. I am of opinion the paper is entitled to probate. On the face of it, it is duly signed by the testatrix and attested by two witnesses. A doubt is raised by the parol evidence, but that doubt may be solved by evidence of the same character. It is clear, then, that the paper was not signed by the testatrix in the joint presence of the witnesses, but I think there was an acknowledgment of her signature “by gestures,” in their joint presence. Were I to hold this not an acknowledgment, I must, in effect, say that a dumb person could not acknowledge his signature, which proposition would confine the words of the act within narrower limits than could have been intended by the Legislature. I am of opinion there has been a full and complete compliance with the statute.

[339] IN THE GOODS OF CHARLOTTE REDDING, OTHERWISE HIGGINS, Spinster, Deceased. Prerogative Court, Nov. 16th, 1850.—A testatrix, having duly executed her will under an assumed name, subsequently altered the will by erasing that name, and signing her true name; but the witnesses did not subscribe the will as altered. Probate was granted of the will as it originally stood, as the Court considered the assumed name might be regarded as the mark of the testatrix.

[S. C. 14 Jur. 1052.]

Motion.

Charlotte Redding, otherwise Higgins, died a spinster on the 12th October, 1850. She, among other places of abode, resided with Mr. John Holmes, at Wells, for upwards of twelve years, and during the first seven years of such residence she passed and was known by the name of Charlotte Higgins, but during the last five years she, without assigning a reason, assumed and passed by the name of Charlotte Redding.

The deceased, whilst residing with Mr. Holmes, and passing by the name of Higgins, requested him to prepare her will, which he did from her instructions, and, considering her name to be Higgins, drew out the will in that name. The will was duly executed on the 21st October, 1843, and signed by the deceased at the foot, “Charlotte Higgins.”

About two years after the execution of the will, the deceased (who, in the meantime, had dropped the name of Higgins and assumed that of Redding) gave instructions for the alteration of her will, so far only as regarded her name. Accordingly, the name, at the commencement of the will and in the [340] attestation clause, written Higgins, was turned into Redding, and the signature of the deceased at the foot of the will written, Charlotte Higgins, was almost erased, but the words could still be discerned. The deceased then, in the presence of the two persons, who had attested her signature in October, 1843, all present at the same time, signed her then name, Charlotte Redding, at the foot of the will, but the two attesting witnesses did not re-subscribe.

The deceased’s proper name was, after her death, discovered to be Redding.

Deane moved the Court for probate of the will as it originally stood.

Judgment—Sir Herbert Jenner Fust. The case is one of peculiar circumstances. It was not the intention of the deceased to revoke her will as at first executed, unless the second execution were good and valid. The second execution, however, is not

valid, as the attesting witnesses on that occasion did not subscribe. Since the will was duly executed in the first instance, probate must pass in the name of "Higgins," for the will cannot be altered. Though "Higgins" was not, it appears, the true name, it may stand for, and pass as, the mark of the testatrix. Let probate so pass.

[341] IN THE GOODS OF FRANCIS ANNESLEY HUGHES, Deceased. Prerogative Court, Nov. 26th, 1850.—The Vice-Chancellor of England directed in a suit in Equity certain promissory notes, which formed a part of a probate, to be cancelled. The Judge of the Prerogative Court, on application made to cancel the notes, refused so to do, on the ground that he has no authority to alter papers of which probate had been taken.

Motion.

Francis Annesley Hughes died on the 20th May, 1844, leaving a will with seven codicils of which probate was granted to the three executors on the 26th February, 1845. The fifth codicil bearing date the 1st January, 1836, was endorsed on a promissory note for 500l., and by it the testator gave "the amount of this security or note" . . . "with all interest due" to certain persons named. The seventh codicil bearing date the 1st July, 1837, was endorsed on a promissory note for 100l., and that sum the testator gave to a certain person named in precisely the same words as are above cited from the fifth codicil.

The estate of the deceased was administered under the authority of the Court of Chancery. In the course of those proceedings an order was made by the then Vice-Chancellor of England, on the 14th November, 1848, that the above mentioned sums of 500l. and 100l., together with the interest due, should be realized and applied in conformity with that order, which was accordingly done. By a further order of the said Court in the same cause, bearing date the 8th March, 1850, the aforesaid promissory notes were ordered to be cancelled.

[342] Bayford, on an affidavit of the solicitor of the plaintiffs as to the orders of the Vice-Chancellor, moved the Court to direct the promissory notes to be cancelled.

Judgment—*Sir Herbert Jenner Fust*. I have before me merely the affidavit of the solicitor; I have not seen the order of the Vice-Chancellor, nor do I know to whom it was directed. Who is to cancel these documents? I cannot make an alteration in papers of which probate has been granted. I have no authority to do so, and if I had, it would be a very dangerous authority to exercise. I cannot grant this application.

IN THE GOODS OF EDWARD DYE, Deceased. Prerogative Court, Dec. 14th, 1850.—

A testator appointed M. S., a married woman, to whom he devised and bequeathed certain property to her sole and separate use, and T. M., executors. They took probate, but, in consequence of the Bank of England refusing to allow a transfer of stock in the absence of M. S.'s husband, who was in foreign parts, the Court was moved to revoke that probate and to decree it to T. M. alone. M. S. had not intermeddled with the estate. The Court granted the motion, but directed the practice of allowing a married woman to take probate without requiring the consent of her husband to be reconsidered in the registry.

Motion.

Edward Dye died on the 5th October, 1850, leaving a will executed in 1846, and thereof appointed his sister Mary Ann Scott (wife of William Scott), and Thomas Marchant, Esq., executors. By the will both real and personal estate were devised and [343] bequeathed to the said Mrs. Scott "for her sole and separate use and benefit, free from the debts, control, or engagements of her husband, and the receipt of my said sister for the same shall alone notwithstanding her coverture be a good discharge to my executors hereinafter named for the said houses, land, and legacies, without the concurrence of her said husband."

The husband of the said Mrs. Scott, by trade a bricklayer, abandoned his wife in the year 1829, and proceeded to Canada with the declared intention of benefiting himself and of never returning to England.

On the 16th October, 1850, the executors took probate of the will, and on the 22nd of the same month attended at the Bank of England for the purpose of transferring certain stock, part of the testator's estate, but were not permitted to effect the

transfer thereof, on the ground that the husband of Mrs. Scott was not present to join therein.

Mrs. Scott had not intermeddled with the effects of the testator. The above statement was verified by an affidavit made by Mrs. Scott.

Robertson moved the Court to revoke the probate heretofore granted, and to decree it to Mr. Marchant alone.

Judgment—Sir Herbert Jenner Fust. Why this Court is to be called upon to relax its rules and give way to the Bank of England is not very clear. Were it not for the expense I would send the executors to the Court of Chancery, where, [344] if I mistake not, they would find redress. I think I may, however, revoke the probate already granted, and allow it to pass to Mr. Marchant alone, by which course all possible responsibility will be taken off from the husband of Mrs. Scott. I understand it is the practice in the registry to allow a married woman to take probate without requiring the consent of her husband; but I think it would be well to reconsider such practice, as a husband is liable for the acts of his wife. I revoke the probate already granted, and decree it to Mr. Marchant alone.

JACKSON AND GILL *against* PAULET. Prerogative Court, Jan. 16th, 1851.—A testator by a will dated in 1844 bequeathed his estate in trust to J. and G., who were nominated executors, with directions conjointly with testator's wife to appoint a third person as trustee and executor. Held that though there was no probability of agreement between J. and G. and testator's wife in the choice of such third person, the appointment of J. and G. as executors was not thereby void, and that, upon the construction of the will, J. and G. must take probate before nominating such third person.

On petition.

This was a business of granting probate of the will of Marc Etienne Paulet, bearing date the 22nd July, 1844. The suit was promoted by Peter Rothwell Jackson (in the will written "Peter Jackson") and Robert Gill, executors named in the will, against Elizabeth Paulet, widow, the relict of [345] the deceased, who objected to probate being granted to them.

It was alleged on behalf of the widow that the said testator in and by his will purported to bequeath the whole of his personal estate, upon certain trusts, to the above mentioned Jackson and Gill in the words following, to wit, "I give devise and bequeath all my money, securities of money, real and personal estate, debts and effects, of what nature or kind soever, and wheresoever the same shall be at the time of my death, unto Peter Jackson" . . . "Robert Gill" . . . "and such third competent person as they, in conjunction with my beloved wife, shall duly appoint and conjoin by indorsement on these presents under their hands thereunto subscribed, as executors of this my last will and testament."

It was further alleged that the said testator did of his said will purport to nominate and appoint executors in the words following, to wit, "and I hereby nominate, constitute, and appoint the said Peter Jackson, Robert Gill, and such third person as shall be nominated and conjoined as aforesaid to be executors of this my last will and testament."

It was submitted that the said appointment of executors, made in the terms aforesaid, was and is in itself null and void in law under the provisions of the Wills Act; and, if not so null, then it was submitted that it has since become and now is of no force or effect, by reason that the two named executors and the widow neither have agreed, nor are likely to agree, to appoint conjointly any third executor of the said will as therein directed. Wherefore, it was prayed that the Court would [346] reject the prayer made on behalf of the persons named as two of the executors, and decree administration with the will annexed to Mrs. Paulet, who is not only the relict, but who has also for her life the principal beneficial interest under the will.

On behalf of the two executors it was submitted that they were entitled to probate of the will as executors therein named; power being reserved of making a like grant to such third person as may thereafter be appointed an executor of the will in manner thereby prescribed as aforesaid, when he shall apply for the same.

Addams for Mrs. Paulet. 1st. The appointment to be made of a third person as executor, according to the directions contained in the will, is void under the Wills Act. Probate can be decreed only to a person who is appointed nominatim in the

will. Had the testator said in his will, I constitute Jackson and Gill executors with such third person as I shall hereafter appoint by some memorandum forming no part of the will, such appointment would have been of the same character as the present; if the testator could not himself have adopted the course suggested, he could not delegate it to others. The Court is in effect asked to insert in the will hereafter a certain name which may be agreed upon; that it cannot do. A disposition purporting to be testamentary must be in a writing duly signed and attested; it cannot be said the appointment of executors is not a disposition. Even in the case of nuncupative wills, instructions not reduced into writing in the lifetime [347] of the testator were of no avail; a fortiori under the Wills Act the present appointment is invalid.

2ndly. The appointment is void under the circumstances set forth in the petition; it cannot be carried out, by reason that the parties in this suit cannot agree on a third person for executor. The Court cannot decree probate to Jackson and Gill, and reserve a power to a third person when they can agree; for in effect Jackson and Gill would then become the administrators of the estate, which was never intended by the testator.

Harding for Messrs. Jackson and Gill. The Court is not asked to supply omissions in reference to instructions. A testator is not limited in his power, as the Court is; he has declared in his will that three persons are to co-operate as executors. Had he appointed an alien enemy, the Court would make the grant to the two under no disability, and reserve a power, *utile per inutile non vitiatur*; it matters not whether disability arises from law, facts, or circumstances. There is nothing to distinguish this from a case where one executor is disabled. If a third executor should not come into existence at all, or should to-morrow, it is the same thing. It is the duty of the Court to carry out the intention of the testator, and provide for the administration of the estate. It would be contrary to its functions to refuse probate to persons named; were it to do so in the present instance, there would be no representation at all, as the parties in the suit are not likely to agree. Messrs. Jackson and Gill are entitled to probate.

[348] *Judgment*—*Sir Herbert Jenner Fust*. The question which I am called upon to determine relates to a grant of probate of the will of Marc Etienne Paulet, and depends on certain paragraphs in the will sufficiently set forth in the act on petition.

Two persons of the names of Jackson and Gill, expressly constituted executors in the will, apply for probate; and they are opposed by the testator's widow, who has the principal beneficial interest; she, however, is not entitled to administer the effects of the deceased, unless Jackson and Gill are disqualified from acting.

It was argued that, inasmuch as the parties in the suit cannot agree, and are not likely to agree, in nominating a third person as an executor, according to the directions of the testator, the appointment of Jackson and Gill to that office must be held void. With that view I cannot coincide, for it would utterly defeat the testator's intention. It may turn out that there are trusts not capable of being carried into effect; but that is not a matter for the consideration of this Court, it must be looked to elsewhere. According to the construction I put on the recited words of the will, Jackson and Gill are not as individuals to nominate a third person for an executor, but they are so to do as executors, jointly with the widow—the third person is to be “conjoined” with them, being executors. They cannot then, on my view, proceed to nominate that person, until they have themselves obtained probate and clothed themselves with the character of [349] executors. This case is not like one where a testator in his will reserves to himself to deal thereafter with his will by writings not duly executed. This is a totally different case.

I see no reason for delaying the grant of probate to Jackson and Gill; accordingly, for the reasons I have assigned, I decree probate to them, with a power reserved for the third person when appointed. This case, I conceive, presents a fair question for taking the opinion of the Court, consequently I order costs to be paid out of the estate.

IN THE GOODS OF REBECCA BEER, Wife of William Beer, Deceased. Prerogative Court, Feb. 11th, 1851.—A married woman, by virtue of an indenture of assignment given to her, made her will and appointed executors, and her granddaughter one of her residuary legatees. A limited probate was granted to the executors, and the last surviving executor died leaving goods unadministered; he made his

will, of which probate was taken by his executors. The granddaughter, as one of the residuary legatees, prayed a limited administration of the unadministered goods of her grandmother. The motion was refused.

[S. C. 15 Jur. 160.]

Motion.

Rebecca Beer, the wife of William Beer, died on the 29th March, 1829, having by virtue of the power given to her by an indenture of assignment dated the 17th December, 1824, made and duly executed her will with two codicils, and thereof appointed William Simpson and Samuel Miles executors.

[350] In April, 1830, probate of the said will and codicils was granted to the executors, limited so far as concerned all the right, title, and interest of the deceased to the residue which should remain after deducting two certain sums of 12,000*l.* and 5000*l.* of the share, to which the said William Beer and his wife, or he in her right, were or was entitled unto or out of the personal estate of William Cotton, deceased, and of all money to become due and payable, or to be received or recovered by them, or either of them, from and out of the personal estate of the said W. C. by any means whatsoever, after such deductions as aforesaid, and all benefit to be had therefrom, but no further or otherwise, or in any other manner whatsoever.

The said William Simpson and Samuel Miles for some time intermeddled in the goods of the deceased, and died, leaving a part thereof unadministered. William Simpson, who survived his co-executor, died on the 5th July, 1845, having made his will, which was proved in this Court by the executors therein named.

Addams moved the Court to decree letters of administration with the will and codicils annexed of the goods of Rebecca Beer, left unadministered by William Simpson, the last surviving executor, limited so far as concerned the interest of her the deceased in and to all such personal estate as she, the deceased, by virtue of the said indenture of assignment, had a right to appoint, and had appointed, but no further or otherwise, or in any other manner whatsoever, to be granted to the granddaughter of the said Rebecca Beer, one of the [351] residuary legatees named in her second codicil on giving the usual security.

Judgment—*Sir Herbert Jenner Fust.* It appears from the statement in the present instance that the chain of executors has been continued. I cannot, therefore, let in a residuary legatee till the executors of the executor shall have been before the Court and disposed of, notwithstanding the original probate was limited. I must reject this motion.

ESTE against ESTE. Prerogative Court, Jan. 25th, Feb. 11th, 1851.—An allegation propounding a will, dated in 1845, of a married woman, alleged the same to have been made in pursuance of a deed of settlement; but that deed was not produced. Held that the allegation must be reformed by pleading and annexing that instrument.—The Prerogative Court has no jurisdiction to try the validity of a power in virtue of which the will is made.

[S. C. 15 Jur. 159.]

Allegation.

This was a business of citing Michael Lambton Este to shew cause why probate of the will and codicil, respectively bearing date the 22nd January, 1845, of Louisa Carole Este, his wife, who died on the 10th April, 1850, should not be granted to her son, one of the executors therein named, limited to [352] the estate and effects which the testatrix had a right to dispose of.

It was alleged that the will and codicil were executed under and by virtue of certain powers and authorities, vested in Mrs. Este by a deed of settlement, bearing date the second Germinal, in the eleventh year of the French Republic, to wit, the 23rd March, 1803, made between her, the testatrix, on the one part, and the said Michael Lambton Este, her husband, on the other part; the deed was not produced.

Addams, in opposition to the allegation. I do not enter into the question whether the testamentary papers are duly executed; I deny the existence of a power in this case. A deed is referred to in plea, if there is such a document, it should, on ordinary principle, be produced, annexed, or accounted for.

Dodson, Q. A., and Twiss, in support of the allegation. The will on the face of it declares there is a power; the presumption therefore is that one exists. Since *Barnes v. Vincent* (5 Moore, P. C. 201) it is not necessary to produce the deed; the

authority of this Court is only ministerial—to see that the testamentary papers are executed in conformity with the statute.

Addams, in reply. In *Barnes v. Vincent* the question was whether [353] the will was well executed; here the question is whether there is a power.

Sir Herbert Jenner Fust observed that an important question was raised; that he could not understand why he was not to have a constat of the existence of the deed referred to in the allegation. He was of opinion that the instrument should be brought in in proof of the averment in the allegation; but said he would take time to consider the matter at issue.

Cur. adv. vult.

Feb. 11th.—*Judgment*—*Sir Herbert Jenner Fust*. The question at present concerns the admissibility of the allegation, in its present form, propounding the testamentary papers of Mrs. Este which purport to have been executed in pursuance of certain powers. What those powers are I have no account; the allegation gives no more information than the will itself, which simply states the existence of such an instrument.

The allegation is opposed on behalf of the husband, and it was contended that the deed should be produced in order that he might satisfy himself that his wife had the right to make a will. On behalf of the executor claiming probate, it was argued that I have no authority to call for that deed, and in support of that argument the case of *Barnes v. Vincent* (5 Moore, P. C. 201) was cited.

It is true that the judgment in the case cited was principally founded on the inconvenience and [354] anomaly of the law which resulted, as the law then was, from the circumstance of this Court dealing with a case of this nature. The reasons assigned for the inconvenience of this Court entering into the subject cannot, however, now apply. In the case cited the will was executed in 1826, and, consequently prior to the operation of the Wills Act; but the present will was executed in 1845, long after that statute came into operation. By the 10th section of that act the will of a married woman, provided she has a right to make a will, shall be valid if executed according to the manner prescribed in the 9th section, and not otherwise, notwithstanding some additional or other form of execution or solemnity be required by the instrument conferring on her the power to make a will. Since then the statute has prescribed the form in which all wills are to be executed, save those mentioned in the 11th section; the difficulty which occurred in *Barnes v. Vincent* can hardly now arise. Though certainly there are some dicta in the judgment, for instance, at p. 213, leading to the conclusion that this Court has no right to look to the power, I think they must be construed in reference to the law prior to 1838.

According to the present state of the law, I conceive this Court must look at the power; otherwise, what is it to do if probate of the will be opposed? It cannot ascertain, without looking into the deed, who are interested to carry on and oppose the suit. Moreover, this Court must decide whether the will is executed in conformity with the statute. As it is its duty to determine that point, it seems to me that all jurisdiction in equity in respect of defective [355] execution is swept away; for I do not understand that the Court of Chancery can, in the case of a will made since 1837, grant relief where a defect in the execution of a will exists. I cannot by possibility discover what inconvenience can arise from the production of an office copy, at least, if not, of the deed itself. I am clearly of opinion I am entitled to see the deed; therefore I direct the allegation to be reformed, by pleading and annexing that instrument.

The allegation was reformed as directed, and was admitted.

A responsive allegation was afterwards given in on behalf of the husband, alleging that the deed was executed in France in contemplation of a form of marriage different from that which took place, and that in consequence thereof, by the law of France, the deed was altogether null and void, being considered a mere project.

The Court, on the 9th July following, rejected that allegation, on the ground that it possessed no jurisdiction to entertain such a question; and on the 12th July, when it was declared the husband would proceed no further in the cause, decreed probate of the will and codicil, under the usual limitations, to the son, as one of the executors.

[356] IN THE GOODS OF THE REV. SAMUEL WELLS, Clerk, Deceased. Prerogative Court, Feb. 11th, March 11th, 1851.—A testator appointed his wife his executor and residuary legatee. She administered the whole of her husband's beneficial estate under a prerogative probate, and died leaving a will without appointing an executor or residuary legatee. Her three sons took administration with her will annexed in an Archdeaconry Court, and subsequently applied to the Prerogative Court for a *de bonis non* grant in respect of a sum in the Bank of England, of which their father was a nude trustee, still standing in his name. The Judge of the Prerogative Court, after considerable hesitation, granted the motion.

[S. C. 15 Jur. 160, 362.]

Motion.

The Rev. Samuel Wells died on the 26th February, 1839, having made his will, and thereof appointed his wife the executor and residuary legatee.

Mrs. Wells duly proved the will in the Prerogative Court on the 6th April in the same year, and administered the whole of the testator's beneficial estate.

Mrs. Wells died in April, 1845, leaving the whole of her estate within the archdeaconry of Totness; she made her will, but did not appoint an executor or residuary legatee. In the month of May following letters of administration with her will annexed were granted by the Archdeaconry Court of Totness to her three sons and only next of kin.

The Rev. Samuel Wells, the original testator, was, at the date of his death, the surviving trustee of a sum of 5869l. 19s. 1d., 3l. per cent. Cons., being the remaining part of a larger sum originally invested, but he had no beneficial interest in that fund. This sum was not transferred by his executor, Mrs. Wells, but remained after her death in his name on the bank books, and is the only unadministered estate of Mr. Wells.

Jenner moved the Court to grant administration [357] *de bonis non* with the will annexed of Mr. Wells of the above unadministered estate to the personal representatives (the three sons) of Mrs. Wells, whilst living, the executor of her husband.

Judgment—*Sir Herbert Jenner Fust*. I cannot understand on what principle the representatives of Mrs. Wells, whose will has been proved at Totness, can come to this Court and make the prayer they do. I see no objection to their taking a grant limited to the sum in the bank; but I cannot, I repeat, understand on what principle they are to have a *de bonis non* grant, unless they admit *bona notabilia*; in which case they ought to have clothed themselves with a chain of representation in this Court.

Jenner. From the complicated provisions in respect of the sum in the bank a limited grant would be very inconvenient; moreover, it has been the practice in the prerogative registry to grant the administration as prayed.

Sir Herbert Jenner Fust. If principle is to be regarded, inconvenience cannot be considered. There may be points of practice in the registry of which I know nothing. The present application seems to me to be inconsistent with principle; and I am of opinion that I cannot make the decree as prayed.

Jenner, on the 11th March, renewed his motion, and stated that six precedents (between August, [358] 1840, and May, 1850) had been discovered, in which grants had been made in the registry in conformity with the present application.

Sir Herbert Jenner Fust. I confess I do not see the principle of such practice; however, I will not disturb it. The administration may pass as prayed.

KNAPP AND OTHERS *against* THE PARISHIONERS OF ST. MARY WILLESDEN IN SPECIAL, AND ALL PERSONS IN GENERAL. Consistory Court of London, April 25th, 1851.—On an application for a faculty to repair and repew a church, a parishioner appeared to the decree and prayed a faculty might not be granted without a proviso that a pew, claimed to be held by him by prescription, should not be removed or altered. The prescription was denied. Held that a *prima facie* title by prescription was established, and that the faculty should be issued with the proviso prayed.—Evidence of repair to a pew claimed by prescription is not absolutely necessary, as no repair may have been made within the period of any one living.—Costs are a matter of right and justice when a suitor succeeds.

[S. C. 15 Jur. 473. Referred to, *London County Council v. Dundas*, [1904] P. 30.]
On petition.

This was a business of citing the parishioners and inhabitants of St. Mary, Willesden, in special, and all persons in general having an interest therein, to shew cause why a faculty should not be granted for the purpose of repairing and repewing the church and chancel of that parish.

[359] An appearance was given to the decree for Mr. Joseph Nicoll, and on his behalf it was alleged in substance as follows:—

That in the year 1819 Mr. Nicoll became possessed of a mansion-house and lands, with appurtenances, in the parish of Willesden, called Neasdon House, and that he or his lessees have ever since occupied that house, and enjoyed the use of a certain pew in the parish church as appurtenant thereto. That the said mansion-house, &c., came in the year 1743 from the heirs and assignees of Sir William Roberts into the possession of Mr. Nicoll's ancestors, who have ever since 1743 occupied the house, and constantly used and occupied the pew as appurtenant thereto, and that the pew has beyond memory been reputed and considered to be annexed and appurtenant to the said house. That the pew was in and previously to the year 1582 used by Edmund Roberts, Esq., an ancestor of the said Sir William Roberts, both of whom were occupiers of the said house. That on a monumental tablet erected in the chancel to the memory of the said Edmund Roberts, he is described of Neasdon, in the said parish, and his armorial bearings are engraven thereon; that the same armorial bearings are also carved on the outside panel of the said pew, and the same bearings were likewise carved in the said mansion-house, and remained till within the last ten years. That the said pew from and previously to the year 1582 to 1743, when the said mansion-house, &c., came into the possession of the Nicoll family, had been uniformly enjoyed and used by the said Edmund Roberts and his descendants.(a)

[360] It was further alleged that Mr. Nicoll from time to time since he became the occupier of the mansion-house caused the pew and the lock to be repaired at his own cost; and especially in the year 1820 caused a new flooring to be laid down, and also in the year 1840 a new seat to be fixed in the pew. It was also alleged that the pews and sittings in the church had, within the memory of divers inhabitants of the parish, been repaired, altered, re-arranged, and made uniform in height; but that the said pew appurtenant to Neasdon House, though differing in height from the other pews, was then left in its original state, and that Mr. Nicoll and his ancestors had from time to time been accustomed to keep a lock on the door, and occasionally had the said pew locked up, and that on the pillar within the pew an escutcheon of two of the ancestors of Mr. Nicoll had been erected without any demand on the part of the vicar or the churchwardens for, and without payment of, the fees accustomed to be paid for setting up similar escutcheons in other parts of the church. It was further alleged that the said pew is not of a height to intercept the view of the reading desk or pulpit from any one seated in any part of the church, and that it will not interfere, in its present state, with the repewing of the church, so as to deprive the parishioners of the additional sittings intended to be provided; and that the pew is no more than adequate for the mansion-house, when fully occupied. And, lastly, it was alleged that Mr. Nicoll had offered to renovate his pew and to treat with the parish for carrying into effect their object of repewing the church; subject only to the condition that no alteration should be made in the size or situation of the pew, and also that the ancient [361] fabric and wood work of the pew should be preserved and maintained; but that the parish had declined to treat with Mr. Nicoll subject to those conditions. Wherefore it was prayed the Court would not grant a faculty for repairing and repewing the church without a special proviso that nothing contained in the faculty should empower the parish to remove, or alter, the pew appurtenant to the mansion-house called Neasdon House; or to molest Mr. Nicoll, or his successors in the same house, from the peaceable and undisturbed enjoyment and use of the said pew; and that the vicar and churchwardens be condemned in the costs of the petition.

On the part of the Rev. Dr. Knapp and others (the vicar and churchwardens) it

(a) The act set forth in detail the length of possession in each descent of the family of Roberts, and alleged the existence of various monumental tablets with the same armorial bearings.

was in answer alleged in substance that the plan for repewing the church had in all its details the consent and approval of the Dean and Chapter of St. Paul's, the impropiators of the chancel, and of the bishop of the diocese. That the population of the parish exceeded 3000, and that according to the present arrangement of the pews and sittings in the church and chancel there was accommodation for only 332 persons, in which number is included only 59 free seats; whereas by the plan proposed there would be sittings for 427 persons, 137 of whom would obtain free sittings. It was admitted that Neasdon House and its appurtenances came into the possession of Mr. Nicoll, as alleged by him, but only by purchase, and that he and his ancestors, as well as the family of the said Sir William Roberts, had had the use of and enjoyed the said pew; but it was denied that the said pew was or is by prescription or faculty in [362] any way appurtenant to the said mansion-house; and also that Mr. Nicoll had, since he became occupier of the said house, caused the pew to be repaired. It was alleged that in carrying out the repewing of the church it would be absolutely necessary to raise the flooring of the church at least two feet, in order that it may be properly drained, and that the plan proposed, subject to which the bishop of the diocese had given his consent, could not in any way be carried out if the pew in question be left in precisely its present state. And it was also alleged that the pew is capable of containing fourteen persons; that Mr. Nicoll is a bachelor residing generally alone, and seldom attends divine service. That an offer had been made to him to erect a pew for him, in the precise situation of that in question, to contain accommodation for at least eight persons; but that he had refused such offer; wherefore it was prayed that the Court would decree a faculty for repairing and repewing the church according to the plan proposed, and that Mr. Nicoll be condemned in the costs.

Twiss for Mr. Nicoll argued from the affidavits that, though no faculty had been discovered, a title by prescription was established which was sufficient. He referred to certain dicta in *Pettman v. Bridger* (1 Phill. 316) and in *Price v. Littlewood* (3 Camp. 288).

Addams for the vicar and churchwardens. The faculty applied for is resisted by Mr. Nicoll alone, who is opposing the ordinary. The proceeding is defective; it should have been by plea [363] and proof, for a strong case ought to be made out against the ordinary. A contest between two parishioners, as in the case cited of *Pettman v. Bridger*, is different. It is clear from certain dicta of Sir John Nicholl in *Fuller v. Lane* (2 Add. 419) that a prescriptive right should be pleaded and clearly proved and not left equivocal. In the present instance prescription is not even pleaded. If a faculty had been granted originally to the family of Roberts, the pew may have been limited to them for as long as they were inhabitants of the parish, and not granted as appurtenant to Neasdon House. If the Court should grant the faculty with the proviso prayed by Mr. Nicoll, great difficulty will arise in carrying out the repairs of the church.

Twiss in reply. Prescription is a matter for the Common Law Courts; it is not necessary to set up prescription here in a strictly technical form. Mr. Nicoll has substantiated a series of facts which tend to establish a legal origin.

Judgment—*Dr. Lushington*. This is an application for a license or faculty on the part of the vicar and churchwardens of the parish of Willesden, to authorize them to repair and repew their church. The application originated in the ordinary form by citing any one having an interest to shew cause why the faculty should not be granted. In respect to the general advisableness of my permitting the faculty to be issued there can [364] be no doubt; it would be for the general benefit of the parish; greater accommodation would be afforded to the parishioners who stand in need thereof; moreover, the plan proposed for carrying out the alterations has the sanction of the bishop of the diocese, as well as of the Dean and Chapter of St. Paul's, who are the patrons and impropiators. These are reasons which would induce me, under ordinary circumstances, without hesitation, to grant the faculty as prayed by the vicar and churchwardens. But the Court must take care not to exceed its authority. Where no legal right is interposed it can exercise its judicial discretion; but when one exists it cannot disregard that right.

This proposition is of importance on the present occasion. Mr. Nicoll, a parishioner, has appeared to oppose the general faculty, and prays the Court to grant a faculty in the terms with which his act on petition concludes. Should it turn out that Mr.

Nicoll has made good his prescriptive claim to the pew in question, I must accede to his prayer. If a pew be held by a faculty or prescription, a Court cannot disturb the possessor; it cannot interfere so as to defeat that right. Were it to attempt so to do by granting a faculty without a proviso to protect an existing right, the faculty would be void. Moreover, great inconvenience would arise to the parish, as it could be called on to reinstate the pew: such a case has occurred and is to be found in Fortescue's Reports.(a)

To come to the case in hand: what I have to consider is whether Mr. Nicoll has alleged a title to [365] the pew in question by prescription, and proved the prescription, for no faculty is produced.

It was observed by the learned counsel for the vicar and others that a claim by prescription cannot be set up in an act. I must observe I know of no authority for that position. True it is an application may be made to the Court in the outset to direct a proceeding by plea and proof, on the ground that that mode would be more convenient in ascertaining truth; but where there is a choice given to parties by the ordinary practice of the Court, it cannot interfere, except on application. I cannot dismiss Mr. Nicoll's case by reason of the form of the present proceeding.

An exclusive right to a pew must be maintained either by a faculty which may be seen, or by prescription which implies a faculty. The faculty in the present instance is, as I have said, not forthcoming. It is clear Mr. Nicoll relies on a prescriptive title; but strange to say, throughout his long act, the word prescription is not to be found. It is extremely inconvenient not to use a legal term when that is intended to be relied on as a fact. Though it is not competent to the Ecclesiastical Courts to try a prescription, still they may proceed until prohibited, for the defect is not in jurisdiction, but in modo triationis.

A man is said to hold a pew by prescription when he and those before him, in the occupation of a house, have had constant use and possession from time immemorial. Evidence of a fact of repair of the pew is not absolutely necessary, simply because repair may not, within the memory of any one living, have been required. Nevertheless, whenever [366] a pew has been repaired, evidence should be adduced to shew that the repair was made by the individual claiming a prescriptive right, for, if done at the expense of the parish, that circumstance would tend strongly against a claim by prescription.

I come now to the facts of the case, to ascertain whether Mr. Nicoll's prescriptive claim, though not in form pleaded, is in substance set up.

In behalf of Mr. Nicoll it is in the first place pleaded that in the year 1819 he became seised and possessed of Neasdon House, with its appurtenances, and that he and his lessees have ever since occupied that house and enjoyed the use of a certain pew in the parish church as appurtenant thereto. That the property came in the year 1743 from the heirs of Sir William Roberts into the possession of the ancestors of Mr. Nicoll, and that his said ancestors, or their lessees, have ever since occupied the said mansion-house, and have constantly used and occupied the said pew, as appurtenant thereto. That the said pew has beyond memory been reputed and considered to be annexed and appurtenant to the said mansion. Then the act sets forth that in and previously to the year 1582 the said pew was enjoyed and used by the family of Roberts as long as they were in possession of Neasdon House.

Now what is the answer to this statement? It is admitted that, in the year 1819, Mr. Nicoll became possessed of Neasdon House with its appurtenances; and that that property came into the possession of his ancestors from the family of Roberts in 1743, "but by purchase only;" that is of no importance, as the pew would pass with the house and its appurtenances. It is then admitted [367] that the pew "has been used or enjoyed by the said Joseph Nicoll since he became the occupier of the said mansion-house, as it had been by his ancestors, and previously by the family of the said Sir William Roberts during their occupation of the same."

It is needless then to refer to the evidence in respect of the use and possession of the pew; those facts are admitted in the pleadings. But the answer to the act thus proceeds—"He denied that the said pew was or is, either by prescription or faculty,

(a) It is presumed the learned Judge intended to refer to the case of *Archer v. Sweetnam*, at p. 346.

in any way appurtenant to the said mansion-house;" the inference then only is denied; that is a question of law.

It was said that it is not pretended by Mr. Nicoll to be shewn that repairs were made to the pew till the year 1820. True, that is so; still it cannot in reason be expected that there should be evidence thereof prior to thirty years, as that period in these Courts constitutes a prescription. There is, however, another important averment in the act; it is alleged "that the pews and sittings of the said parish church were within the memory of divers parishioners and inhabitants of the said parish repaired, altered, and re-arranged, and made more uniform in height and appearance, but that the said pew appurtenant to Neasdon House, though differing, in height and appearance from the other pews, was then left undisturbed and in its original state." What is the evidence on this head? John Cheney, a carpenter by trade, deposes that in the year 1825 he was employed with others "to repair generally the pews in the parish church of Willesden; and on such occasion the wood work of the said pews, [368] which was in a perishable state, was removed and replaced with new wood work; that the pews in the said church, as they stood before such repairs were done, were uneven and unequal in height, and the same, when repaired, were made more equal in height and more uniform in appearance; that on such occasion the workmen employed in the said church were directed by Francis Pink [the master carpenter] "not to repair or in any manner alter the pew belonging to Neasdon House." And then in respect to certain work done, at a subsequent date, to the pew in question, he swears that "in the year 1845 he was employed by Joseph Nicoll, of Neasdon House, to repair the lock which was on the door of the pew, and to ease the said door, and also to fasten some of the boards forming the floor of the said pew, which had become loose; that such repairs were done in pursuance of directions given to the deponent by the said Joseph Nicoll himself, and who paid the deponent his charge for the same." There are two other affidavits together tending to establish the same points, but it is unnecessary to read them.

Without going further it seems to me that thus much is established; in the pleadings it is admitted that the occupants of Neasdon House have, beyond memory, had the use and enjoyment of the pew in question; it is shewn by affirmative evidence that repairs, though slight, were done to the pew at the expense of Mr. Nicoll; and it also appears that, when the pews generally in the church were altered, this pew was untouched. What, then, is the legal result? I feel compelled to come to the conclusion that Mr. Nicoll has established a *prima facie* title. [369] If I could, I would have overruled Mr. Nicoll's petition, but I cannot violate a prescriptive title. I feel myself bound to grant the faculty in the terms of Mr. Nicoll's petition.

The counsel for Mr. Nicoll asked for costs. The Court said, if pressed for costs, I must grant them; but I think Mr. N. should not ask for them.

The costs were pressed. The Judge then said, costs are a matter of right and justice when a party in a suit succeeds. Such were the opinions of Lords Cottenham and Langdale, and also of the Judicial Committee; and, though I am aware the rule, formerly, in the Ecclesiastical Courts was not strict as to costs, I now consider myself bound to follow the authorities I have referred to; I cannot set their doctrine at defiance. I must allow costs.

[370] RANSON AND KNOTT *against* CAMPKIN. Arches Court, May 15th, 1851.—

A church-rate carried by a majority of one was, *inter alia*, questioned on the alleged ground that the vicar and occupiers of the church lands were not entitled to vote, as they are not liable to pay church-rate. Held, that a vicar and occupiers of church lands are entitled to vote, and that the opponent to the rate had failed in all his objections. Rate pronounced for with costs.

This was a case of subtraction of church-rate, brought by letters of request from the Chancellor of the diocese of Ely, and promoted by Messrs. Ranson and Knott, the churchwardens of the parish of Melbourne, in the county of Cambridge and diocese of Ely, against Mr. Joseph Campkin an inhabitant of the parish.

The decree by letters of request was returned on the 16th April, 1849; an appearance was given on behalf of the party cited; and a libel was admitted on the part of the churchwardens, in substance as follows:—

1st article. That in the year 1848 the church and fences of the churchyard of the parish of Melbourne were in need of repair, and the churchwardens, being in want

of funds to effect the repairs and to meet other legal expenses, called a meeting of the parishioners and inhabitants to consider the propriety of making a rate. That accordingly the churchwardens and parishioners assembled in vestry on the 5th June, 1848, when the meeting was adjourned to the 3rd July following, on which day they again met. That the churchwardens then [371] produced the report of a surveyor containing a specification of the repairs required, and also for putting the roof of the nave in thorough repair, and an estimate of the expense amounting to 150l.; that it was then stated by the churchwardens that a further sum of 20l. or 25l. would be required for the necessary expenses of public worship; and that it was also then stated by the vicar that 100l. had been anonymously contributed towards effecting substantial repairs of the church; that it was then duly proposed and seconded that a rate of 3d. in the pound should be made in order to raise 74l. 16s. 4d., being about the sum required in addition to the gift of 100l.; that a show of hands was taken, and that a poll was demanded and fixed.

2nd. That a poll was taken, on the 10th and 11th July, 1848, of which Henry Hitch and Joseph Campkin were appointed the scrutators; that on the 12th July it was declared that a majority had voted for the rate, that a rate of 3d. in the pound was made, and the assessment signed by the vicar, churchwardens and other parishioners present.

3rd. That at the time of making the rate Mr. Campkin occupied houses and lands together of the annual value of 77l. 10s., in respect of which he was equally rated and assessed in the rate at 19s. 4½d.

4th. A copy of the assessment on Mr. Campkin was pleaded; and that several of the parishioners had paid the rate made.

5th. That Messrs. Ranson and Knott at the time of making the rate, and at the commencement of the suit, were the churchwardens, and had been [372] duly appointed and admitted; and that the sum of 19s. 4½d. was due from Mr. Campkin.

6th. That Mr. Campkin had on several occasions been requested to pay the 19s. 4½d., but had at all times refused to pay.

7th. That the churchwardens caused Mr. Campkin to be summoned before two justices to shew cause why he refused to pay; that, on appearing on the 26th December, 1848, he disputed the validity of the rate and his liability to pay.

In behalf of Mr. Campkin an allegation, after having been reformed, was admitted in substance as follows:—

1st. That at the adjourned meeting held on the 3rd July, the report of the work required to be done as well as the estimate of 150l. made by a Mr. Savell were produced by the churchwardens; that the vicar at the same time stated, as pleaded by the churchwardens, that 100l. had been given to him towards effecting any substantial repair then needed; that at the former meeting, on the 5th June, Mr. French gave in an estimate of all the repairs necessary for the church and churchyard fences amounting to the sum of 60l., and that after the making of the rate on the 12th July, the churchwardens entered into a contract with Mr. French for the necessary repairs of the church and churchyard fences, which repairs were effected for 50l.(a)

2d. That the next preceding rate was made on the 19th of September, 1844, at 2d. in the pound, [373] and of that rate there was a sum owing and uncollected amounting to full 25l.

2d A. In support of the next preceding article a copy of an entry in the church-rate book was pleaded, by which it appeared that 26l. 11s. 10½d. remained uncollected.

3d. That after the rate of 3d. in the pound, producing 74l. 16s. 4d., had been proposed and seconded at the meeting on the 3d July, 1848, it was also proposed and seconded, by way of amendment, "that in the opinion of the meeting the proposed rate was unnecessary, and that therefore the meeting do not grant the proposed rate;" that the chairman, the vicar, refused to submit and did not submit the amendment; that a show of hands was taken on the original motion, when it appeared that there were 48 against, and 23 in favour of, the rate; and that at a subsequent poll there was a majority of one only in favour of the rate, namely 128 for, and 127 against it.

4th was rejected by the Court.

5th. That a majority of legal votes was not given in favour of the rate; that in

(a) It was stated that this sum was a mistake, that it should have been pleaded to be 60l.

particular amongst such votes was included the vote of Mr. John Hitch, who was neither the owner nor the occupier of any land or house in the parish, and was not rated to any poor's rate, or other rate whatsoever.

5th B. That although the name "John Hitch" appears in the church-rate book amongst the persons assessed to the rate on the 12th July, 1848, yet by that name was meant and intended not John Hitch, the father, who voted, but John Arnot Hitch, his son, who commonly used and was known by the name of John Hitch only, and that he, the son, was [374] rated to all the rates in the name of John Hitch only, and had paid the rate, and received a receipt for the same.

6th. That the vicar gave six votes in respect of his tithe rent-charge and vicarial glebe; that J. E. Fordham gave six votes in respect of his tithe rent-charge as lessee of the Dean and Chapter of Ely, and that J. Scruby, as undertenant to the said J. E. F., also gave one vote (a) in respect of certain rectorial glebe lands; that none of them was legally ratable or chargeable to the church-rate.

7th. That the votes mentioned in the 5th and 6th preceding articles were objected to on the grounds specified by Joseph Campkin, but that the objections were disallowed, and the votes allowed by the vicar.

8th. That the aforesaid objections to the votes were repeated, at the scrutiny taken on the 12th July, without effect.

9th. That the aforesaid votes were objected to on the 12th July, when the poll was declared, and that a protest was entered in the parish books to that effect.

10th was rejected by the Court.

10th c. That at the vestry meeting held on the 5th June, 1848, the vicar struck out with a pen from the church-rate book his own name with the figures denoting the ratable value of his property, and also struck out the amounts for which J. E. Fordham and J. Scruby, before mentioned, were rated.

11th was withdrawn.

[375] 12th. That the rate was professedly, but not in fact, made in accordance with the poor's rate made in the same year; that the rate, after it was made, was never compared throughout with the said poor's rate and has never since been collated with the same; that it differed therefrom in many respects, particularly that the names of Mary Catley, Sarah Worland, and William Peachy, who were duly rated to the poor's rate, and have also since the making of the church-rate been, in respect of their properties, duly rated to a poor's rate, were entirely omitted from the church-rate; that the church-rate does not and never did contain any specification whatever of the particular properties in respect of which the several persons were rated and assessed therein, and that it is now wholly impossible to ascertain in respect of what properties any of the parishioners were therein intended to be rated, inasmuch as the parish book containing the aforesaid poor's rate, from which the church-rate was professedly taken, has since been lost.

Responsive to the allegation of Mr. Campkin, an allegation on behalf of the churchwardens was admitted in substance as follows:—

1st. That the only contract entered into by the churchwardens with Mr. French was one for removing the stone mullions of the windows, where they were too far decayed to be repaired, for which they paid Mr. French 18l. and also the further sum of 1l. 18s. for similar work done by Mr. F., and which is not specified in the said contract; that the church and churchyard fences were not at all repaired by Mr. F. for 50l. or any other sum.

2nd. That several of the parishioners, amongst [376] others Mr. Joseph Campkin, objected to payment of the rate made on the 19th September, 1844, on the ground of it being an illegal rate; that the then churchwardens applied to the magistrates for an order to enforce the payment of that rate against Mynott Titchmarsh for the amount assessed on his property, and that, after a full investigation of the case by the magistrates, they decided that such rate was illegal, in consequence of which the said sum of 25l. has since remained uncollected.

3rd. That John Hitch, the father, was, prior to and at the time of making the rate proceeded for, an owner and occupier of a house and land in the parish, and was rated to the poor's rate made for the parish prior to and at the time of making the church-rate; that, in particular, he was rated to the poor's rate, made immediately

(a) See note (b) at p. 392.

antecedent to the church-rate, and paid the sum assessed upon him ; that he attended the vestry meetings held in June and July, 1848, and voted for the church-rate ; that he, John Hitch, the father, and not John Arnot Hitch, the son, has paid his proportion of the rate proceeded for in this cause.

4th. The receipt for the poor's rate, referred to in the next preceding article, was pleaded.

5th. That the church-rate in question was made in accordance with the poor's rate made in the year 1848, and was compared throughout with that poor's rate ; that Mary Catley, Sarah Worland, and William Peachy were rated to the poor's rate made prior to the church-rate, but had been prior to such time excused ; that the sums, which they would have been liable to pay if assessed to the church-rate, would have altogether amounted to the sum of 73d. [377] only ; that although the church-rate never did contain a specification of the particular properties in respect of which the several persons were rated, yet that it does contain the value of those properties.

6th. That every endeavour had been made, but without effect, to find the poor's rate book from which the church-rate was taken ; that notwithstanding the loss of that book it is now possible to ascertain in respect of what properties the parishioners were intended to be rated.

The cause was argued on the 21st and 30th January, and 22nd March, 1851.

Jenner and Phillimore, jun., in support of the rate argued : 1st. That it was shewn by the evidence that the repairs were necessary ; that they were made in pursuance of an estimate, and that the churchwardens had not funds. 2ndly. That the uncollected portion of the rate of the 19th September, 1844, could not be collected ; that that sum was very small ; that, when a sum is very minute the omission to rate for such sum does not vitiate a rate (2 Curt. 269), trifling omissions do not invalidate a rate (ibid. 493). 3rdly. That John Hitch, the father, was legally rated to the previous poor's rate, did pay that rate, and consequently was entitled to vote (58 Geo. 3, c. 69, s. 3), and did vote, for the church-rate. 4thly. That the vicar, the lessee of the church lands, and the undertenant of the lessee, were entitled to vote. That the incumbent, whether rector or vicar, of a parish is "an integral part" thereof, he is entitled to preside at any vestry meeting, *Wilson v. M'Math* (3 Phill. 67) ; that [378] the right to vote in vestry depends not on being assessed to, or on paying, a church-rate, *Faulkner v. Elger* (6 Dowl. & Ryl. 522) ; "every inhabitant present" who shall have been assessed to the last poor's rate is entitled to vote at every vestry ; there is no distinction as to the object of the meeting (58 Geo. 3, c. 69, s. 3) ; the only disqualification is the refusal to pay a poor's rate (ibid. s. 5) ; to say that the three persons here in question were not entitled to vote would be to introduce a limitation into the Vestry Acts, which they do not contain. 5thly. That notwithstanding the loss of the poor's rate book the value of the property assessed was ascertainable.

Harding and Bayford contra, argued : 1st, that the rate was excessive and unnecessary, consequently illegal ; 2ndly, that Mr. Hitch, not having been legally rated to the next preceding poor's rate, was not entitled to vote ; 3rdly, that the vicar and the occupiers of the church lands were not entitled to vote ; 4thly, that from the loss of the poor's rate book it was impossible to ascertain in respect of what properties the parishioners were rated.

To establish their first proposition they cited, or referred to, *Brettell v. Wilmot* (2 Lee, 548), *Farlar v. Chesterton* (2 Moore's P. C. C. 340), *Gosling v. Veley* (12 Q. B. 365 (N. S.)), *Nunn v. Varty* (3 Curt. 396), *Smith v. Dixon* (2 Curt. 268-9). They referred to the evidence to shew that there was a fund in hand, namely, 100l., and that the rate, together with the 100l., was beyond the estimate, also that a part of the [379] prior rate was uncollected. In support of their second proposition they referred to the evidence. In respect of the third proposition they contended it was contrary to the spirit of the law that they, who do not pay, should tax others ; that those only who pay to church-rates are entitled to vote for church-rates (*Prideaux*, pp. 45-6 (10th edit.)) ; that prior to the Vestry Acts it was not clear a vicar was entitled to vote ; that the case of *Wilson v. M'Math* turned on those acts, the object of which was to amend, and not to abolish, the old law entirely ; that though a vicar is entitled to preside, those acts do not in terms confer a right to vote ; fourthly, that as the nature of the property assessed does not appear, it is impossible to ascertain the

validity of the rate, consequently the rate is bad, *The King v. The Aire and Calder Navigation* (2 Barn. & Cress. 713; 4 Dowl. & Ryl. 253).

Jenner and Phillimore, jun., in reply. Every parishioner should have an opportunity of seeing whether the rate be equal or not; if he has had that opportunity the law is satisfied (2 Curt. 272). In the present instance there was an opportunity for nearly twelve months before the parish book was lost.

Cur. adv. vult.

Judgment—*Sir Herbert Jenner Fust*. Amongst the various objections which have been taken to the church-rate now in question, there was [380] one on which I cannot think any real stress of argument was intended to be laid; nevertheless, as it was asserted that the repairs done to the church were unnecessary, it may be desirable to state simply in the outset the result of the evidence on that point.

It appears that Mr. Savell, a surveyor residing within a few miles of Melbourne, but in no way connected with that parish, was called in to make a survey and estimate of the dilapidations of the whole church (except the chancel), and likewise of the church fences; that accordingly, on the 7th June, 1848, he made a minute survey, and a day or two afterwards drew up a report of such survey, containing a specification of the repairs required to be made, and an estimate of the expenses, amounting for the church and church fences to 125l., and 25l. in addition to make a thorough good repair of the roof of the nave, making together for the entire repair the sum of 150l.

Subsequently to this report, at a meeting of the vestry on the 3rd July, 1848, the churchwardens produced the estimate of Mr. Savell, and stated that a further sum of 25l. would be required for the incidental expenses; namely, the visitation fees, the elements for the administration of the Lord's Supper, and the church service books, &c. At the same meeting the vicar stated that he had received from a friend, who did not wish his name to be made known, a sum of 100l. (to which I shall presently more particularly advert) towards "the substantial repairs of the church;" in consequence of this announcement the churchwardens proposed, in order to raise the sum of 74l. 16s. 4d. (being about the sum required in addition to the 100l.), a rate [381] of 3d. in the pound, and, on a poll taken, the rate proposed was carried by a majority of one.

It was argued, however, assuming all the repairs to have been necessary, that the rate was excessive. Undoubtedly, if the rate was excessive that would be a valid objection; but here it is to be observed that there had been no rate in this parish in the interval between September, 1844, and the rate in question—a circumstance which may account for the amount at which the incidental expenses were estimated. It was also objected that a Mr. French had estimated the repairs at about 60l., and that the work estimated by him was done for about that sum. It appears, however, that the work done according to Mr. French's estimate was no more than a portion of the work performed—that the substantial repairs were, or are to be, paid for out of the gift of the 100l.

Of that gift of 100l. it seems to me quite clear that the parishioners had no right to direct the particular application; the money was deposited with the vicar for a special purpose—the substantial repairs; that sum was never in the hands of the churchwardens; it was clearly intended to be applied at the vicar's discretion; and that discretion has been exercised by him in replacing stone mullions, &c., which were decayed—work which forms no part of the ordinary annual expenses of a church, and which evidently was not included in the sum proposed to be raised by the churchwardens.

On this part of the case it was likewise objected that of the rates made in 1842 and in September, 1844, a portion remained uncollected, amounting together to the sum of 26l. 11s. 10½d. I entirely agree to the proposition that, if there was a part of [382] an uncollected rate which the churchwardens were capable of collecting, it was their duty to have procured that sum by enforcing the payment, if, on application, payment was refused. On reference, however, to one of the parish books before me, I find that against this sum of 26l. 11s. 10½d. is to be set the sum of 32l. 15s. 5d., which would leave the churchwardens minus upwards of 6l.; and it further appears from the vestry book that the parish was satisfied in the matter, for an entry is made, "Melbourne, May 6th, 1847.—At a parish meeting held this day according to notice, the churchwardens' accounts were examined and found correct." It is clear, then,

that at this date the churchwardens, instead of having funds in hand, were money out of pocket, even had the sum of 26l. 11s. 10 $\frac{1}{2}$ d. been collected.

It further appears that the churchwardens had not been unmindful of their duty, that they had demanded payment from certain parishioners who refused, and in consequence thereof the churchwardens received the following instructions which are entered in the vestry book, "Melbourne, October 15th, 1847.—At a meeting held at the church and adjourned to the Rose Inn, it was proposed and carried that as Mr. Mynott Titchmarsh, while absolutely refusing to pay his arrear of church-rates, states his willingness to make a voluntary contribution towards the liquidation of the general amount now in arrear, this meeting be adjourned to Tuesday next, the 19th instant, in order that all parties, as well as Mr. Titchmarsh, may have an opportunity of contributing their voluntary offerings, and that the churchwardens be requested to accept the same in lieu of arrears of church-rates in [383] every instance in which the said offering shall equal or exceed the amount of arrears, including any expenses which may have been incurred in attempting to enforce payment of the same; and if any parties shall not, on or before the 19th instant, have made such voluntary offerings, the churchwardens are requested without further notice to proceed to enforce the payment of the said arrears in such way as they may be directed by the magistrates."

The above resolution is by no means unimportant in reference to what subsequently took place. It seems that certain voluntary contributions were made, amounting in the whole to 10l. 11s. 11d., but of the voluntary contributors, within the period specified in the resolution of the vestry, Mr. Mynott Titchmarsh was not of the number; in consequence thereof he was twice summoned to attend before the magistrates, but he did not appear; the magistrates, however, having investigated the circumstances connected with this rate of 1844, arrived at the conclusion that the rate was illegal.

The ground on which the magistrates came to that conclusion was, according to the evidence, that the names of several parishioners were signed in the vestry book in the same handwriting as the signature of the chairman. Whether that is a sufficient circumstance to constitute an illegal rate is not for me to determine; perhaps it may admit of very reasonable doubt, as the 58 Geo. 3, c. 69, s. 2, enacts that the minutes of the proceedings in vestry shall be signed by the chairman, but leaves it to the discretion of others present to sign. Be that however as it may, what were the churchwardens to do? They had acted in accordance with the resolution and direction of the vestry, they sum-[384]-moned Mr. Titchmarsh, who had neither made a voluntary contribution nor would pay the rate demanded, and the magistrates pronounced the rate illegal; without some further order from the vestry which nowhere appears, the churchwardens, I think, were in no wise, after what had occurred, bound to do more.

There is a further objection which I must notice; it is alleged that certain parishioners, namely, Mary Catley, Sarah Worland, and William Peachy, though rated to the poor's rate, were not inserted in the church-rate book, consequently the omission to rate them to the church-rate renders that rate unequal.

Reference to the poor's rate book cannot be had, as it is stated to be lost; but, to take the next best evidence, we find that Mr. Peter Campkin, the nephew of the person proceeded against in this cause, states that "Mary Catley and Sarah Worland were not assessed for the church-rate now in question, but had been assessed to the poor's rate. I do not find," he says, "that William Peachy was assessed to this" (the previous) "poor's rate:" this is all the evidence adduced to support the allegation. On the opposite side the vicar states, "I am quite positive that the names of Mary Catley, Sarah Worland, and William Peachy were not duly rated to the poor's rate;" and I must say, I think, the vicar is to some extent, borne out by the vestry book, in which it appears that Mrs. Catley had been formerly in the poor-house, and that she had thence been removed to a cottage paid for by the parish, at 2l. 15s. per annum. Even, however, had these three persons been improperly omitted to be rated to the church-rate, it must be shewn that in consequence thereof an unjust burden that can be appreciated [385] has been thrown on Mr. Joseph Campkin. Now what turns out on reference to the parish books, to which I have had occasion so often to refer? In the year following the making of the church-rate the ratable value of Mrs. Catley's house was 13s. 4d., of Mrs. Worland's 16s., and of Mr. Peachy's, 1l. 4s.; and it is

calculated that, according to that rating, the enormous sum of 7d. would be due from those persons; so that Mr. Joseph Campkin, who is resisting the payment of 19s. 4½d., would have a right to a clear deduction of the 75th part of 7d.; what may be the precise value of that deduction I leave the curious to determine.

In connexion with the alleged inequality of the rate, it was also contended that inasmuch as the church-rate book does not contain a specification of the properties in respect of which the parishioners were assessed, and that that information cannot now be obtained as the poor's rate book, from which the church-rate was taken, is lost, the church-rate must be held to be invalid; in support of that general proposition, the case of *The King v. The Aire and Calder Navigation* was cited (4 Dowl. & Ryl. 253; 2 Barn. & Cress. 713). Undoubtedly, a parishioner ought to have an opportunity of comparing the church-rate with the poor's rate book, when the former does not contain a specification of the properties, in order to satisfy himself that he is fairly charged with reference to other persons assessed. In the case cited there were no means of supplying the defect—of ascertaining in respect of what property individuals rated were assessed. If that defect existed in the present instance, the case cited might, in respect of the principle therein laid down, apply; but the present case is very different. [386] It clearly appears from the evidence of one of Mr. Joseph Campkin's own witnesses that the poor's-rate book, lost or not now forthcoming, was in existence in April, 1849; in other words, the book was seen at a parish meeting ten months after the church-rate in question was made. It is likewise in evidence that when the church-rate poll was taken the book was before the scrutators, one of whom was Mr. Joseph Campkin himself, that the book was referred to when doubts were raised whether certain persons were entitled to vote or not; and it further appears that, when Mr. Joseph Campkin tendered and claimed to give three votes, the book was referred to for the purpose of ascertaining the number of votes he was entitled to. I think then that, under these circumstances, I am bound to presume that Mr. Joseph Campkin had an opportunity, that he availed himself of the opportunity of ascertaining, by reference to the poor's rate book, a description of the several properties, and that he and other persons were duly rated and assessed. I am not aware that it has ever been laid down that the church-rate book itself should contain a description and specification of the properties on which the assessment was made; indeed the contrary appears to have been held by Dr. Lushington in the case of *Smith and Willis v. Dixon* (2 Curt. 272). "A question of law," said that learned Judge, "arises whether or not a church-rate made on an assessment for a poor rate is valid in point of form; whether an assessment must be drawn out for that specific purpose. I have no authority for that proposition. Undoubtedly, where the assessment for a church-rate differs from that for [387] the poor's rate, or where the parties have no opportunity of ascertaining that it is a just and equal rate, that mode would be objectionable; but here these objections do not apply. With one exception, namely, that of tithes, which are assessable to the poor and not to the church-rate, the assessments are the same for both poor rate and church-rate; and being so, does the law require the parish to be put to the expense of having the whole re-written? I know of no authority in law for this proposition, and I see none in common sense. All that is required is, that every parishioner should have an opportunity of seeing whether the rate be equal or not, and if he has that opportunity by inspecting the poor's rate books, my opinion is that the law is satisfied." I confess I am of the same opinion as the learned Judge of the Consistory Court of London; and I consider, under the circumstances I have stated, that the party proceeded against in this cause had satisfied himself, by comparison of the parish books, that the properties for which he and others were rated and assessed were fully described; therefore, I hold that the present case is clearly distinguished from the case of *The Aire and Calder Navigation*, and that the alleged loss of the poor's rate book does not affect the main question.

Having disposed of such parts of the case as may be considered as outlying, I now approach the only important question, namely, the legality of certain votes given. The votes in dispute are those of Mr. John Hitch, the right to which is a question of fact; the other votes are those of the vicar and the two occupiers of the church lands in the parish; these are a question of law.

If Mr. John Hitch was not entitled to vote, as not [388] having been the occupier of any premises in the parish and as not having been assessed to the previous poor's rate, there would be an equality of votes, under the assumption that the rest were

good votes, and consequently an end of the case, since with his vote there was a majority of one only in favour of the rate.

Now what is the sum of the evidence respecting Mr. John Hitch? He was the proprietor of a very large proportion of the land within the parish; he was, as one of the witnesses states, the esquire of the parish; he had, for certain reasons unnecessary to mention, generally resided abroad for at least fourteen years, leaving his wife and two sons in his house, though occasionally he visited his property. The point is not whether he was an inhabitant of the parish, but whether he was the occupier of certain land and premises and had been assessed to and paid the previous poor's rate (see 59 Geo. 3, c. 85); that he was a proprietor is not in question. I may observe that it is undoubted law that if a person occupy land within a parish, though he may live elsewhere, he is liable to be assessed to the rates for the poor and the church in that parish where the land is situate; personal residence in the parish is not necessary.

To come then to the point. It appears by the evidence of Mr. John Hitch, the father, that he having arrived in England in 1848 was constantly residing in his house at Melbourne from the beginning of May in that year to the 20th October following. "At the latter end of May or the beginning of June, 1848, I can't say exactly which" [it appears by the vestry minute-book the true date is the 30th May], "a poor's rate and other rates were [389] made for the parish of Melbourne. This was only a short time, a very few days before the church-rate in dispute was made. My wife had been previously rated to the poor's rate, but as I was then myself on the spot I requested that I should be rated to the poor's rate in my own proper name; and that was accordingly done." . . . "I remember very well Mr. Knott, the churchwarden, and Mr. Peter Campkin, the deputy overseer," [in a subsequent part of his examination Mr. Hitch corrects himself by stating that on the particular occasion referred to Mr. Peter Campkin called alone], "calling on me one day between the times of the poor's rate being made and the church-rate." . . . "I know very well that it was before the aforesaid church-rate had been made, and after the poor's rate had been amended and my own name inserted instead of my wife's, for I remember very well that I demanded on that occasion to look at the rate to see that my name was properly entered, and I was therein rated in my proper name, Mr. John Hitch, to the said poor's rate." . . . "I was anxious, being on the spot, to take a part in parish matters, that is why I was so particular that I should be rated to the poor's rate. As soon as I saw that it was all right, I called my eldest son and desired him to pay for me the amount of the aforesaid rate," [on cross-examination Mr. H. assigns as a reason for having so done that he had not the money in his pocket]; "I saw my said son then hand them the money, and I then left the room for a few minutes, and when I came back I saw a receipt in pencil for the amount lying on the table and signed with the name of Peter Campkin." . . . "My eldest son has no property except an annuity of 200l. per annum which I allow [390] him," &c. In answer to the 3rd special interrogatory Mr. H. states, "Up to my coming to England in 1848 the rate used to be made out in my wife's name, and she used to pay it out of her own allowance."

On the other side, in opposition to the evidence of Mr. Hitch, Mr. Peter Campkin, after admitting that Mr. Hitch was "temporally staying in Melbourne," but denying he was the owner or occupier of any land or premises in the parish, inasmuch as, to the best of his belief, all Mr. H.'s property was assigned over, insists he was not rated to or liable for any poor's rate or any other rate; and also that the name "John Hitch," in the church-rate book, is intended for John Hitch the younger, the son of John Hitch, who voted for the rate, and that the son was not known by the additional name of John Arnot Hitch till the rate was questioned. He allows, however, that for the years 1846, 1847, and till May 1848, Mrs. Hitch was charged for the assessed taxes.

Taking then the admissions of Mr. Peter Campkin with the evidence of Mr. Hitch, I cannot understand why Mr. Hitch, the proprietor of the house and personally resident in it, was not the proper person to be rated to the poor's rate on the 30th May, 1848. Assuming it to be as stated, that the son was at the time known only by the name of John, I cannot discover a reason why he should then have been rated. According to such of the parish books as are before me, for some years prior to May, 1848, Mrs. Hitch, the wife, was assessed; there is not a tittle of evidence to shew that the son was the proprietor of the house and land, or that he had been assessed; the circumstance dwelt upon, namely, that the son had paid the poor's rate re-[391]-ferred

to, is fully explained by Mr. Hitch, the father; and what possible ground there could have been for substituting the son's name for his mother's, which previously, as I have said, appears in the books, has not been explained. Under the facts and circumstances set forth I cannot but think that Mr. Hitch, the father, was the person intended to be rated, that he was rated for the poor's rate made on the 30th May, 1848, and that he did, through his son, pay that rate, and consequently was entitled to vote for the church-rate in question.

I proceed now to consider the other votes objected to, namely, those given by Mr. Selwyn, the vicar, and Messrs. Fordham and Scruby, as occupiers of the church lands. In support of the objections to the votes of those persons it is pleaded that no one of them was legally ratable to the church-rate for his church property, and it is also pleaded, with a view to shew that the vicar was conscious of the illegality of those votes, that at the vestry meeting, on the 5th June, 1848, he struck out with a pen from the church-rate book his own name with the figures denoting the ratable value of his property, and also struck out the amounts for which Messrs. Fordham and Scruby were rated. This circumstance, of itself of little moment, is thus explained:—It appears that prior to the year 1848 it had been the practice to insert in the church-rate book the names of all persons inserted in the poor's rate book, and then to transfer the names of those not liable to pay church-rate to the list of those excused from payment. This mode of proceeding Mr. Selwyn probably considered circuitous; however, in taking the course he did, he has furnished against himself, in some degree, strength to the argument [392] that, as he was not liable to pay church-rate, he was not legally entitled to vote.

That the vicar and the occupiers of the church lands are not liable to pay church-rate is a proposition allowed; nor is it in dispute that, anciently, at the common law, every parishioner who paid to the church-rate, or scot and lot, and no other person, had a right to be present and vote at vestry meetings. But there was one exception, allowed and recognised in the books, and to be found also in the case of *Wilson v. M'Math* (3 Phill. 67), in favor of the incumbent of the parish, who always had a special duty resting on him to be present at vestry meetings, and could not be excluded from presiding or voting at these meetings: hence it would appear that the liability to pay church-rate was not formerly an absolute and a conclusive test of the right to vote.

It appears that Messrs. Fordham and Scruby, as well as the vicar, each claimed and gave six votes.^(b) That they were all assessed to the previous poor's rate is perfectly clear, and it is not denied that Messrs. Fordham and Scruby were liable to pay church-rate for some portion of the lands they occupied, not being a part of the church lands. Five of the votes of these two gentlemen were objected to, but the sixth vote of each of them was allowed; consequently they were as fully entitled to be present and to vote for the land they occupied, not belonging to the church, as any other parishioner.

Whether Messrs. Fordham and Scruby would [393] have been entitled under the common law to vote in respect of their occupation of the church lands which are not liable to church-rate I am not prepared to determine, nor was any information imparted to me by counsel on this head. The question is what is now the law; in other words, on what is the right of voting made to depend, and how is it regulated?

By the third section of the 58 Geo. 3, c. 69, it is enacted, "that in all such vestries, every inhabitant present, who shall, by the last rate which shall have been made for the relief of the poor, have been assessed and charged upon or in respect of any annual rent, profit, or value not amounting to fifty pounds, shall have and be entitled to give one vote, and no more; and every inhabitant there present, who shall in such last rate have been assessed or charged upon or in respect of any annual rent, &c., amounting to fifty pounds or upwards, whether in one or in more than one sum or charge, shall have and be entitled to give one vote for every twenty-five pounds of annual rent, &c., upon or in respect of which he shall have been assessed or charged in such last rate, so nevertheless that no inhabitant shall be entitled to give more than six votes; and in cases where two or more of the inhabitants present shall

(b) There is some discrepancy between the pleadings and the evidence in regard to Mr. Scruby's votes; see p. 374.

be jointly rated, each of them shall be entitled to vote according to the proportion and amount which shall be borne by him of the joint charge; and where one only of the persons jointly rated shall attend, he shall be entitled to vote according to and in respect of the whole of the joint charge."

These words of the statute are as extensive as [394] can be conceived; "in all such vestries," namely, such as are assembled in accordance with the provisions contained in the previous sections of the act, "every inhabitant present," who shall have been assessed to the previous poor's rate, shall be entitled to vote; the poor's rate is made the test, not the church-rate; there are no words to except those who are not liable to church-rate from voting in respect of a church-rate; the only disqualification mentioned in the statute is the refusal or neglect to pay the poor's rate when due and demanded; again, there is no exception in respect to the object of the meeting, the words are "in all such vestries," whether assembled for the purpose of making a church-rate or dispatching any other business, every inhabitant present, &c.; the words seem to me to cover the whole extent, and the Act of Parliament to be plain.

Independently, however, of the Act of Parliament, I conceive there is ground for saying, though I determine not the point, that those who are bound to keep the chancel in repair, and are not liable to pay church-rate, are nevertheless entitled to vote in respect of a church-rate.(a) If the nave—the body of the church—inside or outside, be in a state of dilapidation, what will become of the chancel? will not that suffer necessarily from the state of the nave?

In the present instance there is an additional obstacle thrown in the way of maintaining that the votes given by Messrs. Fordham and Scruby are [395] invalid, for they were entitled to be present and to vote in respect of certain lands, for which they were assessed, not being a part of the church lands. How, then, was the number of votes, to which each was entitled, to be regulated? Was the number to be governed as in former times, when, whatever may have been the value of the property, each inhabitant was entitled to one vote? I cannot find in the Vestry Acts that a person, entitled to vote, is not entitled to the whole number of votes which the amount of his assessment to the poor confers. I cannot discover that the incumbent, whether rector or vicar, who was entitled to preside before the Vestry Acts were passed, and by those Acts is entitled, as chairman, to give a casting vote, has not a right also to vote in respect of his assessment to the poor. Upon what principle a vicar is to be debarred from voting, I cannot understand; I have received no information on the point; I was not referred to any authority for such a position; consequently I shall hold the votes objected to to be legal votes.

I have now considered and dealt with all the objections raised; and I am of opinion that Mr. Joseph Campkin has not made out his case of grievance and established a ground of complaint. I am of opinion he has failed upon all points. I think he has failed on the point of the repairs being unnecessary; I think he has failed in proving the rate to be excessive; I think he has failed in establishing the fact that the part of the uncollected rate of 1844 was applicable to the repairs of 1848; I am of opinion he has failed in establishing that the loss of the poor's rate book is a reason [396] for questioning this rate; I am also of opinion that the votes of Mr. Hitch, of the vicar, and of Messrs. Fordham and Scruby were rightly received, and, consequently, that the rate was made by a majority of legal votes, though that majority consisted of one only. Under these circumstances I am bound to pronounce that the sum sued for, 19s. 4½d., must be paid by Mr. Joseph Campkin.

There still remains one point to be determined, namely, the question of costs. It was suggested in argument that even should the Court hold the rate to be valid, the party sued should not be condemned in the full amount of the costs of this proceeding. Undoubtedly there have been instances in which, though the church-rate has been pronounced for, the opponents were not condemned in the full amount, but then it was considered there was blame of some sort due to the churchwardens. In the present instance what is there to impute to the churchwardens? Every thing appears, as far as I can discover, to have been done in a fair and open manner; the

(a) This proposition is not without countenance in some of the books; see, for instance, Godolph. Rep. Can. c. xv. (4), and Ayl. Par. p. 458. It seems to the editor that the proposition of the learned Judge might be fairly deduced from the passages referred to.

conduct, too, of the vicar has been most liberal and conciliatory. Whence are the churchwardens to get their expenses if I condemn not Mr. Joseph Campkin in the costs? Are they to be thrown on the mercy of the parish? I fear they would meet with little success. Surely, upon every principle of justice, I am bound to condemn Mr. Joseph Campkin in costs; accordingly, I pronounce for the validity of the rate, and condemn him in the costs of this proceeding.

[397] *DEMPSEY against KING AND OTHERS.* Prerogative Court, May 20th, 1851. —The legal representative of a husband deceased, who survived his wife, is entitled to a general grant of administration of her will made in virtue of a power, when there is no executor of the wife's will to take probate, even though the husband has no interest under that will.

Motion.

Jane Dempsey, the wife of William Dempsey, died on the 31st December, 1812, having during coverture, in exercise of certain powers vested in her, made her will bearing date the 8th August, 1809, and thereof appointed J. S., who renounced, and C. R., since deceased, executors and universal legatees in trust.

The testatrix gave her estate, consisting of leasehold property only, under limitations, first to her son, and then to her brother, and, on the event of certain contingencies, which occurred, she gave the residue of such estate to the rector, churchwardens and treasurer of the charity school of the parish of St. George, Middlesex.

The gift to the charity school was suggested to be void under the statute of mortmain.

William Dempsey, the husband of the testatrix, survived her, and afterwards died having made his will and appointed W. C. and his son, William Dempsey, executors, who proved the will in the Prerogative Court in May, 1813. W. C. since died, and on behalf of William Dempsey, the son, the surviving executor of the husband, the Court was moved in July, 1850, to decree administration with the will annexed of Jane Dempsey, his mother, to him; but the Court ordered the representatives of the charity school to be cited to shew cause why the administration should not be granted as prayed.

[398] Before the decree was served, William Dempsey, the son, died, having made his will, which was also proved in this Court in September, 1850, by Esther Dempsey, his relict, the executor therein named.

Afterwards the decree was served and no appearance given. On the 23rd April, 1851, administration with the will annexed of Jane Dempsey was decreed to Esther Dempsey.

Subsequently to the decree of the administration a question was raised in the registry as to the correctness of the grant. It was suggested that, as the testatrix had failed to appoint the residue legally by reason of the bequest of the residue to the charity school being void, that residue reverted to and should pass under the deed, and that, as the husband took no interest under his wife's will, his representative was entitled to no more than a *cæterorum* administration.

Addams, on the 20th May, 1851, moved the Court to confirm its previous order.

The objection raised in the registry is founded on the mistaken notion that the property comprised in the deed, creating the power, must necessarily go to the husband's representative, if a general grant of administration be made to Esther Dempsey. In default of a valid appointment of the property, it must go according to the provisions of the deed, *Platt v. Routh* (6 Mees. & Wels. 791). By the practice of this Court, recognised in *Salmon v. Hays* (4 Hagg. Ecc. 387), the husband is entitled to a general grant; the only difference between that case and this, is, that in the present it is the representative of the husband, and not the husband himself, who claims the administration.

[399] *Judgment*—*Sir Herbert Jenner Fust.* I see no reason to question the proposition laid down in *Salmon v. Hays*. There is no executor of the will of Jane Dempsey to take the grant; in default thereof, her husband must be entitled; and his representative is, I conceive, in the same situation as he would be if living. I cannot distinguish the two cases. Let the general administration pass, as prayed.

BROWN against NICHOLLS. Prerogative Court, June 12th, 1851.—The Prerogative Court will depart from its usual practice in making a grant of administration (with a will annexed) *de bonis non*, when, were it to follow that course, it would in effect determine a question of construction of a will belonging to a Court of equity: under such circumstances the Court, having a discretion in the grant, will so exercise it as to leave the question open.

[S. C. 15 Jur. 934.]

On petition.

Mary Davies died on the 5th January, 1815, having made her will bearing date the 10th May, 1813, and thereof appointed Edward Tomkins and Edward Harding executors, and the said Edward Tomkins residuary legatee.

In February, 1815, probate of the said will was granted to Edward Tomkins alone, but power was reserved of granting a similar probate to Edward Harding, the other executor.

Edward Tomkins died in 1831, leaving goods unadministered, and in November of that year letters of administration (with the said will annexed) *de bonis non* were granted to Davies Morris Middleton Brown, otherwise John Davies, nephew of the deceased, a legatee for life named in the said will, the said Edward Harding, the surviving ex-[400]-ecutor to whom the power was reserved, and E. J. T., and B. T., the executors of the will of the said Edward Tomkins, having renounced.

The said Davies Morris Middleton Brown died on the 16th April, 1850, leaving a part of the said goods still unadministered.

The only unadministered property of the testatrix consisted of 1135l. 12s. 4d. 3l. per cent. red., heretofore 1150l. of that stock, which is bequeathed by her said will in the terms following:—

“I give and bequeath the sum of 1150l. other part of the said stock, now standing in my name as aforesaid, unto the said Edward Tomkins and Edward Harding, and the survivor of them, and the executors or administrators of such survivor, upon the trusts, and to and for the ends, intents, and purposes hereinafter declared of and concerning the same, that is to say, upon trust, that they do and shall apply the interest, dividends, proceeds, and profits of the said sum of 1150l. stock,” . . . “unto Davies Morris Middleton Brown, otherwise John Davies,” . . . “for and during the term of his natural life; and from and immediately after his decease, upon trust, to pay the interest,” . . . “unto his wife, if she shall happen to survive her said husband, and upon trust immediately after the decease of the said D. M. M. B., otherwise J. D., and his said wife, or the survivor of them, to pay and divide the said stocks, funds, or securities, unto or between all and every the children of the said D. M. M. B., otherwise J. D., lawfully begotten, share and share alike, if more than one, and if only one child then to such only child; but in case it shall happen that the said D. M. M. B., otherwise J. D., shall depart this life [401] without leaving lawful issue of him surviving, then, upon trust, that they my said trustees and the survivor of them, and the executors and administrators of such survivor, do and shall, from and immediately after the decease of the said D. M. M. B., otherwise J. D., and his said wife, or the survivor of them, pay the interest” . . . “unto the said John Nicholls, during the term of his natural life, and from and immediately after his decease I give and bequeath the said last-mentioned stocks” . . . “unto and equally between all and every his children.”

The said D. M. M. B., otherwise J. D., was not married, nor engaged to be married, at the date of the death of the testatrix; he however married his first wife in April, 1817, and had by her two children, both of whom died in their infancy; she died in April, 1830.

In June, 1830, the said D. M. M. B., otherwise J. D., married a second wife, now surviving without issue of that marriage.

The second wife, Margaret Brown, the relict of D. M. M. B., otherwise J. D., prayed administration with the will annexed of the goods of Mary Davies, twice left unadministered, to be granted to her as a legatee for life substituted in the said will; and Frances Nicholls, spinster, one of the children of John Nicholls, deceased, and as such a legatee substituted in the said will, prayed administration, denying the interest of the second wife of D. M. M. B., otherwise J. D., according to the construction to be put on the will of the testatrix.

Addams contended that Margaret Brown, the [402] second wife, was entitled to the grant of administration, and cited *Peppin v. Bickford* (3 Ves. 570).

Harding argued for Nicholls, and observed that *Peppin v. Bickford* was decided under the special circumstance of the trust being executory.

Judgment—*Sir Herbert Jenner Fust*. The learning involved in the question now before me belongs, more properly, to another tribunal. The usual course, undoubtedly, is to grant the administration to the legatee for life, in this instance Mrs. Brown, rather than to a legatee substituted. Were I, however, to follow the general practice I should, in the present case, be taking upon myself to determine a very nice question of construction involved in the will; I am not disposed to do that. I shall therefore, with the view of leaving the question open for a Court of construction, grant the administration to Nicholls; but she must give justifying security.

[403] IN THE GOODS OF WILLIAM KING, Deceased. Consistory Court of London, June 14th, 1851.—After the death of a testator, his will, dated in 1844, was found with his original signature erased, but another signature by him appeared a short distance beneath. Held, on the facts and circumstances deposed to, that the original signature was not erased *animo revocandi* as required by the Wills Act, and that in the probate the original signature must be restored and the second signature omitted.

Motion.

William King died on the 28th November, 1850, leaving a will bearing date the 12th June, 1844, and thereof appointed his three sons executors.

After the death of the testator the will was found with his signature, as at first written, opposite to the centre of the attestation clause, erased; but subsequently to that erasure the testator's signature was written a short distance beneath the place where the original signature stood.

The will was drawn by a solicitor, and attested by him and his partner. They deposed, in regard to the erasure, in the words following:—"that they have now with care and attention viewed and inspected the said will, but more particularly an erasure, or scratching out of a name, being the signature of the deceased at the foot or end of the said will, and opposite to the clause of attestation thereto, and say that, when the said testator so signed his name to the said will in due execution thereof, he only signed his name once thereto, which was in the place where the erasure of his name now appears, [404] and that there was no erasure in any part of the same sheet at that time." One of the executors likewise deposed to the will being in the same plight and condition as when found—that he had no knowledge when the erasure was made, or by whom, but that he believed it must have been done by his father himself, as the signature, written below the erasure, is in his father's handwriting.

Phillimore, jun., moved for probate of the will as it originally stood, and cited *Hobbs v. Knight* (1 Curt. 768).

Judgment—*Dr. Lushington*. The original signature of the deceased has been erased, but by whom and with what motive it is not easy to determine. It is manifest, however, from the facts and circumstances deposed to, that the erasure was not made by the testator *animo revocandi* as required by the Wills Act. On that ground, therefore, I decide this case: in the probate the original signature must be restored, and the second signature omitted.

[405] IN THE GOODS OF ELIZABETH MARTIN (Wife of John Martin), Deceased. Prerogative Court, June 12th, July 1st, 1851.—A married woman, whose husband was a convict but had received a conditional pardon from the governor of the colony whither he was transported for life, made a will: probate thereof granted on proof given that the property bequeathed was acquired by her subsequently to her husband's conviction.

[S. C. 15 Jur. 686.]

Motion.

The deceased, who was married on the 25th January, 1830, to John Martin, died on the 9th May, 1851, leaving a will bearing date the 19th March, 1842.

In October, 1832, the said John Martin was convicted as a felon, and was sentenced to be transported for life; he was sent to Van Diemen's Land. In or about October, 1844, he obtained from the governor of that settlement a letter of licence or conditional

pardon, subject to the provision that he should not return to any part of the United Kingdom during his natural life. The convict was presumed to be alive at his wife's death.

The executors named in the will renounced.

Deane moved for administration with the will annexed to be granted to the residuary legatee, and argued that the wife was, in respect of her property, during the interval between the transportation and her own death, subject to the liabilities, and entitled to the rights of a feme sole, and in consequence [406] thereof was entitled to make a will: *Ex parte Franks* (1 Moore & Scott, 1), with the authorities there cited.

Sir Herbert Jenner Fust said—I do not doubt that the argument is well founded; still, I do not think I am called upon to determine the point without the assistance of opposite counsel. I want to hear something of the effect of a conditional pardon. For the present I reject the motion that the Queen's proctor may be brought before the Court.

July 1st.—On the 1st July the motion was renewed, when the Queen's advocate intimated he was not disposed to dispute the grant of probate, provided it was shewn the wife acquired the property subsequently to her husband's conviction.

Sir Herbert Jenner Fust said, probate may pass subject to an affidavit being exhibited that the property was acquired after the conviction.

[407] IN THE GOODS OF RICHARD LANGLEY, Deceased. Prerogative Court, July 1st, 1851.—An administration granted to a woman, falsely swearing herself to be the lawful widow of the deceased, was, after the necessary decrees had been taken out and attempts made to serve her but without success, decreed to be null and void, and administration was decreed to the lawful widow, notwithstanding the prior administration was outstanding.

Motion.

Richard Langley died on the 24th July, 1850, intestate, leaving him surviving Rita Maria Langley, formerly de Jesus, his lawful relict, residing in Oporto.

On the 8th August, 1850, letters of administration of the effects of the deceased were obtained by Anna Roza Thomazia, wife of Domingos Gonçaves, by falsely and fraudulently swearing herself to be the lawful relict of the said deceased.

On the 17th April, 1851, official copies of the certificates of the marriage of the said Rita Maria Langley with the said Richard Langley and of the said Anna Roza Thomazia with the said Domingos Gonçaves were brought in together with an affidavit of a person who deposed to the effect that he well knew the said deceased and Rita Maria Langley, and that the latter alleging herself to be the relict was one and the same person.

A decree was directed to be issued against the woman, who had fraudulently obtained the administration, to bring in the letters of administration and to shew good cause, if she had any, why the same should not be revoked and administration granted to Rita Maria Langley as the lawful relict of the deceased. Before the decree could be served, [408] the woman secretly withdrew from her residence, and all endeavours to trace her were ineffectual.

A decree by ways and means was then served in the usual manner.

Dodson, Q. A., moved the Court to decree the outstanding administration void and to decree administration to the lawful relict.

Judgment—Sir Herbert Jenner Fust. It would appear that every attempt, but without success, has been made to serve the woman, Anna Roza Thomazia, with the decree; but as there has not been a personal service upon her I cannot pronounce her in contempt. I am very unwilling to allow a second administration to be issued until the first be brought in; there is a difficulty in permitting two administrations to be out together. Since, however, this woman is not to be found, I do not see that I have any other course left me to follow than to decree the first administration to be null and void, and decree another to the lawful relict; that I accordingly do.

[409] IN THE GOODS OF FRANCES NAYLER, Deceased. Prerogative Court, July 9th, 1851.—A testator, who survived his wife, died and left a will of which his three sons, as residuary legatees, took administration; subsequently a representation to the wife became necessary in Chancery, at which time one of the

co-administrators of the husband was in foreign parts unknown, a second was a bankrupt, and the third applied for, 1st, a general, and then for an administration limited to the proceedings in Chancery; both applications were refused.

[S. C. 15 Jur. 686.]

Motion.

Frances Nayler, wife of Richard Nayler, Esq., died in December, 1805, leaving her said husband surviving.

The said Richard Nayler afterwards died, and in October, 1825, letters of administration with his will annexed were granted by the Prerogative Court to his sons Charles N., the Rev. Thomas N., and George Richard N., the residuary legatees named in his will.

At the date of the present motion Charles N. was resident in foreign parts unknown, and George Richard N. was in October, 1836, duly declared a bankrupt.

A claim has been recently filed in the Court of Chancery by Harriet Blunt, spinster, in respect of a sum of £500 directed by an indenture, dated in January, 1777, to be raised for the benefit of the daughter or daughters of Mary Blunt (wife of Thomas Blunt) who should attain the age of twenty-one.

The said Harriet Blunt and Mrs. Nayler, the deceased, were the only daughters of the said Mary Blunt; and the question raised in Chancery was whether Mrs. Nayler became entitled to a share of the said sum, and on that account it was necessary that her legal representative should be made a party to the proceedings in Chancery.

[410] Harding, under the above circumstances, verified by affidavit, moved the Court to decree administration of all the goods of Frances Nayler to the Rev. Thomas N. as one of the administrators of Richard Nayler, whilst living the husband of the said deceased. In support of his application he cited *Willand v. Fenn* from Williams on Executors (pt. 3, bk. 1, c. 2).

Judgment—*Sir Herbert Jenner Fust*. Had the Rev. Thomas Nayler been a co-executor of the will of his father he might alone have become the representative of his mother, but he is no more than a co-administrator, which alters the case.

The Court always discourages a joint administration, but when persons choose to take on themselves that office, they must put up with the inconvenience that may ensue; they cannot act separately.

It is not the practice to make a subsequent grant to one alone of co-administrators. I am not disposed to disturb the practice, in any instance, unless it be contrary to law. I am not aware that the practice in question is erroneous; and to depart from it, for one special case, would be highly inconvenient. The Court must adhere to its established practice and reject the motion.

Harding then asked for an administration limited to carry on the proceedings in Chancery.

The Court. I cannot even grant that application.

[411] IN THE GOODS OF MARTHA TAYLOR, Widow, Deceased. Prerogative Court, Nov. 7th, 1851.—Two persons being present together, when a testatrix in their presence signed her name to two testamentary instruments respectively written on the same sheet of paper, afterwards subscribed their names at the end of the first in order alone. Held, they attested the first only; probate of the second refused.

[S. C. 15 Jur. 1090.]

Motion.

Martha Taylor died on the 17th June, 1851, leaving personal property amounting to between 4000l. and 5000l.

After the death of the deceased two testamentary instruments were found described, at the commencement of each, the one as a will, and the other a codicil, but the latter at the conclusion was termed her "last will;" both instruments were without date and written on a sheet of foolscap paper. The will was contained on the first and part of the second pages, and the codicil occupied the third page; blanks were left for the date of each instrument, and each one had an attestation clause. Both instruments were duly signed by the testatrix, but the will alone—the first instrument—purported, on the face of it, to be attested by two witnesses. No executor was named.

The account given of the execution by the witnesses was, "that on the 27th day

of March last [1851] the said deceased produced to them the paper writings, now marked A and B, purporting to be her last will and testament and a codicil thereto, or constituting together such will, and being respectively without date." . . . "That the said deceased on such occasion requested these de-[412]-ponents to be witnesses to the same and proceeded to sign her name thereto, and did, on the said 27th March, in their presence sign her name, as well on the second side of the said paper writing as at the end of the third side thereof, in manner as now appears. That having so done, the deponents, in the presence of the said deceased and of each other, did thereupon, as witnesses, attesting such the signatures of the said deceased, set and subscribe their names on the second side of the said paper writing in manner as also now appears."

Phillimore, jun., on the above facts, moved the Court to decree letters of administration with the papers A and B annexed, as containing together the will, to the residuary legatee therein named: he cited *In re Chamney* (1 Robert. 757) in reference to the signatures of the witnesses.

Judgment—*Sir Herbert Jenner Fust.* It is very true that it matters not, under the Wills Act, where the attesting witnesses sign their names, provided they attest all the papers or instruments. I cannot, however, hold they have so done on this occasion; I consider that they have attested A, the will, alone. I must reject B, and grant administration with A alone annexed.

[413] DAVIES *against* THE QUEEN'S PROCTOR, AND ALL OTHER PERSONS IN GENERAL. Prerogative Court, Nov. 25th, 1851.—A widow left a testamentary paper strictly confined to particular property therein described, and appointed an executor in reference solely to such property. On question whether the probate was to be general or limited, the Court was of opinion it should be general; but ultimately a limited probate was issued.

Motion.

Mary Dunbar died a widow on the 15th March, 1851. After her death a testamentary paper was found bearing date the 30th March, 1849, of which the following is an extract:—"This is a codicil to the last will and testament of me Mary Dunbar, of Torquay, in the county of Devon, widow, which I publish and declare as follows—Whereas my brother-in-law General John Purrier Dunbar by his will, dated the 9th March, 1842, after divers bequests and legacies, has given and bequeathed all the residue of his real and personal estate to me, the said Mary Dunbar, for my own use and benefit, but in case of my death in his lifetime to my heirs, executors, administrators, and assigns, to be held and applied by them as part of my estate and effects; and whereas I am desirous of disposing of such residuary estate and effects as may devolve upon me, or my representatives, under the said will, so far as I can during the lifetime of the said John Purrier Dunbar lawfully do." The testatrix then bequeathed the said property, and having so done stated, "and I appoint the said Sarah Anne Davies sole executrix hereof; and I declare that such appointment of the said executrix and all the be-[414]-quests, matters and things herein contained, shall be deemed and considered as applicable and referring only to such residuary estate and effects of the said John Purrier Dunbar as aforesaid, and not as affecting in any way my own property, or any disposition thereof, already, or hereafter to be made by me by will or otherwise."

The testatrix survived her brother-in-law, and in virtue of his will received the residue of his estate.

It appeared that a will and codicil of an earlier date than the paper in question had been prepared by the solicitor of the testatrix, and placed in her custody after the execution thereof, but they were not found on her death.

The usual advertisements were inserted in the newspapers for the next of kin of the deceased, and as no one appeared, a decree was issued against the next of kin, if any, and against the Queen's proctor, &c., to shew cause why probate of the said paper, dated the 30th March, 1849, limited so far only as concerning the property of which the said paper purports only to dispose, should not be granted to the executrix therein named.

Jenner moved as above.

Judgment—*Sir Herbert Jenner Fust.* The consent of the Crown has been given on the ground that the so-called "codicil" is a substantive paper; and certainly the

destruction of the will does not affect the codicil. Nevertheless it occurs to me that the probate should not be limited; for the paper is strictly confined to property under the will [415] of General Dunbar. When property is so strictly described and limited, as in the present case, I do not see the necessity for a limited probate; it appears to me there should be a general grant, but I wish the point to be considered in the registry.

Ultimately, a limited probate passed; but no reason was, to the knowledge of the reporter, assigned.

IN THE GOODS OF JOHN MORGAN, ESQ., Deceased. Prerogative Court, Nov. 25th, 1851.—When a question respecting the validity of a will is pending in a foreign Court, the Prerogative Court will not grant administration of the goods of the deceased to a person, though duly appointed by the foreign Court, limited to the pendency of those proceedings, unless the property be in private hands. The P. C. will grant an administration limited to receive and invest the dividends only, when the property is in a public place of safety.

[S. C. 16 Jur. 20.]

Motion.

John Morgan, Esq., died at Edinburgh, on the 25th August, 1850, a domiciled Scotchman. He left considerable property both real and personal in Scotland and India, and also personal property in the Bank of England exceeding 95,000l.

In the year 1848 the deceased became insane, and on the 20th May, 1848, Mr. Lindsay of Edinburgh was duly appointed curator bonis; he continued to discharge the duties of that office until Mr. Morgan's death.

The deceased left sundry testamentary papers, at present the subject of a suit in the Court of Session, by which Court Mr. Lindsay was appointed ad interim judicial factor; he was also subsequently [416] confirmed, by the Commissary Court of Edinburgh, executor dative for the purpose of better preserving the estate.

The proceedings in the Court of Session were likely to extend over a lengthened period before it could be determined whether the deceased was testate or intestate.

In the character of executor dative Mr. Lindsay had given security, and he was required to collect the outstanding estate, in which he had no personal interest whatever, as well in Scotland as in England and India.

Under the above circumstances, verified by affidavits, and with the consent of all persons, about thirty in number, claiming to succeed to the deceased's estate, motion was made to this Court to decree letters of administration of the goods of the deceased within the province of Canterbury, to be granted to the said Mr. Lindsay as executor dative, limited to the pendency of proceedings in the Court of Session, in order that such property might be placed under the control of the Court of Session, by which the same must be distributed.

Harding, in support of the motion, cited *In re Rogerson* (2 Curt. 656) and *Viesca v. D'Aramburu* (ibid. 277).

Judgment—*Sir Herbert Jenner Fust*. It is admitted to be a matter of doubt whether the testamentary papers are valid, and who the next of kin of the deceased are; when the validity or invalidity of the will is determined, this Court will, [417] as it generally does, follow the grant of the domicile. It is true Mr. Lindsay has been in effect appointed in Scotland what we here call administrator pendente lite; but what amount of security he has given is not stated; he has no personal interest; he merely, in the discharge of his duties, applies to this Court.

I confess I do not see the necessity for the administration prayed. It is stated it would be to the interest of all that I should grant the motion; but I cannot discover what advantage can arise in placing this large amount of money in the hands of a judicial factor, or in the Court of Session, when the property is, beyond doubt, safe in the Bank of England. I cannot see, at this stage of the business, why I am to part with my jurisdiction. I was referred to *Viesca v. D'Aramburu*, but there is a material difference between that case and the present. In that case the money was in the possession of a private person; moreover, there was something like a consent in the appointment of *Viesca*. Had the property in the present instance been in private hands, however respectable, I would follow the case cited; but I think I should be acting indiscreetly in allowing the money to be transferred from the bank to a private individual. Had the application been for an administration limited to receive and

invest the dividends I would have granted it; but I am of opinion that I cannot with propriety accede to this motion: consequently I reject it.

On a subsequent day application was made for an administration limited to receive and invest the dividends, and the Court granted the motion.

[418] *PARLBY against PARLBY*. Prerogative Court, Jan. 27th, 1852.—A party in a suit produced under the 14 & 15 Vict. c. 99, for examination as the first witness was, on motion made, ordered to be examined in chief and repeated, but her cross-examination to be deferred till the examination of all her witnesses should be finished.

[S. C. 16 Jur. 92.]

Motion.

This was, in the first instance, a business of granting letters of administration of the personal estate of James Edward Parlby, Esq., a commander in the Royal Navy, who died intestate. The suit was promoted by Sophia Sylvester Parlby, alleging herself to be the widow and relict of the deceased, against George Frederick Parlby, Esq., the lawful brother and one of the next of kin of the deceased.

The promotor's claim to be the widow of the deceased was denied, in consequence of which an allegation was given in and admitted propounding her interest.

The first person produced as a witness was Mrs. Parlby herself, under the provisions of the 14 & 15 Vict. c. 99, s. 2. On behalf of the opposite party in the cause, the Court was moved to make an order that the examiner should not repeat Mrs. Parlby to her deposition in chief till all the other witnesses to be produced on her side had been examined and repeated.

Jenner in support of the motion. Every Court has power to make rules for its own guidance. No hardship can accrue to the opposite party if this motion be granted; but great injustice will follow on our side if refused. Either the cross-[419]-examination of Mrs. Parlby must be given up altogether; or, if at once cross-examined, she will be in entire possession of our case, and know precisely what witnesses to produce or keep back on her side. According to practice we are not bound to disclose our case till we give in an allegation.

Addams for Mrs. P. observed he did not oppose the motion, but stated that inconveniences might arise either way; particularly if a general rule were laid down.

Judgment—*Dr. Lushington*. (a) I am very glad of the discussion which has taken place, for the point involved is of some importance. I trust, however, that the observations I am about to make will not be misunderstood, as I am not attempting to lay down a universal rule. The decision at which I shall arrive will be founded rather on the circumstances of this case.

I have looked at the allegation which has been admitted, and the answers thereto, and I find that the real issue in this cause is whether there has been a marriage; in other words, whether the lady is a widow, as she alleges, or a spinster, as is averred on the other side. Taking this, then, to be the real question, I am at a loss, though the Court must [420] guard against forming a hasty opinion, to conceive what prejudice could result even if the purport of the interrogatories were made known. It is true interrogatories might be put to this effect, namely, whether the lady was married at a particular time, and to that extent she would be apprized of the opposite case, but no other information of much importance could be divulged.

The ordinary course is that every witness should, after his examination in chief, be forthwith cross-examined; and the question here is whether I should depart from that course and grant the prayer of the motion. The provisions of the statute the Court, of course, is bound to carry out, but there is nothing therein to affect my decision on the present occasion. The Court may make alterations in its practice, when justice requires it so to do.

I much wish the admonition given to witnesses, not to divulge their examination,

(a) On the 27th January, 1852, Dr. Lushington, Judge of the Admiralty commenced his sittings in the Prerogative Court as surrogate, and so continued during the remainder of Sir Herbert Jenner Fust's life. Dr. Lushington disposed of a vast amount of cause business, which had fallen into arrear; he likewise decided, after the appointment of Sir John Dodson as judge, most of the causes in which Sir J. D. had been retained as counsel.

were more faithfully observed than, I fear, it occasionally is. Undoubtedly, a party in a cause, produced as a witness, has a greater interest than other witnesses to reveal the nature of his evidence; and by reason thereof, on many occasions, it would be detrimental to justice were a party in a cause the first to be examined. I think it may conduce to justice not to reject the present application; but I will grant it in part only. Mrs. Parby must be repeated to her examination in chief, but her cross-examination may be delayed until the examination of all her witnesses be complete. In granting this much, I beg it may be distinctly understood that the other party in the suit must take this concession subject to any inconvenience which may arise, either from the illness, [421] or death, of the lady prior to her cross-examination, for, assuredly, I will not shut out her evidence given in chief should any casualty of the nature alluded to arise.

GALE against GALE. Arches Court, Feb. 2nd, 1852.—A charge of incest, pleaded, in effect, to be falsely made, coupled with substantial acts of violence, is pleadable in a suit for divorce by reason of cruelty.

[Considered, *Russell v. Russell*, [1895] P. 315: affirmed, [1897] A. C. 395.]

On admission of the libel.

This was a cause of divorce, brought by letters of request from the Chancellor of the diocese of Salisbury, and promoted by Eliza Gale against John Henry Gale, her lawful husband, by reason of cruelty.

The parties in the cause were married on the 21st August, 1844, and had issue four children. They finally separated on the 6th December, 1850. The letters of request were presented on the 14th August, 1851.

The libel consisted of twenty-five articles; and amongst the charges it was alleged that the husband, three days after his marriage, accused his wife with having, previously to their marriage, committed incest with her stepfather.

Various objections were taken to the form of the libel; but the case is here reported in reference to one objection only, namely, the charge of incest.

[422] *Harding and Middleton* in opposition to the libel. There is no case in which a charge of incest has been admitted as an act of cruelty; it amounts, at most, to abuse; and words of abuse or opprobrium alone are not legal cruelty, *D'Aguilar v. D'Aguilar* (1 Hagg. Ecc. 775). There is a wide distinction between words of reproach and words of menace, *Oliver v. Oliver* (1 Hagg. Cons. Rep. 364). In *Durant v. Durant* (1 Hagg. Ecc. 769) the charge of misconduct was connected with an act of cruelty; in this case the charge is independent of any act of cruelty.

Bayford and Phillimore, jun., in support of the libel. When substantial acts of cruelty are alleged, as in this case, it is allowable to plead also matters which wound the feelings, *Durant v. Durant* (ibid.); *Westmeath v. Westmeath* (2 Hagg. Ecc. 72 (supplement)). The wife is here pleaded to be "a virtuous female;" a false charge of incest is a grievous aggravation of cruelty. Sir John Nicholl in *Otway v. Otway* (2 Phill. 97) considered false charges against a wife of adultery and incest to imply not mere abuse but menace.

Judgment—*Sir John Dodson*, (g) Several of the articles in this libel have been objected to, but the only objection, involving a ques-[423]-tion of law, respects pleading, as cruelty, charges of incest. It was argued that such a charge, amounting, as it was said, to words of mere abuse, is not legal cruelty, and therefore must be struck out; and even if the charge of incest could be received, that charge should in plea be expressly negatived.

Now when I look to the fourth article, and there find it pleaded that the lady conducted herself towards her stepfather "in a manner becoming a virtuous female," I cannot concur in the assertion that it is necessary to plead expressly she did not commit incest. Undoubtedly, the charge of having committed incest is not per se sufficient to

(g) Sir Herbert Jenner Fust sat as judge, for the last time, on the 29th November, 1851, and died on the 20th February following. During his illness Sir John Dodson, Queen's advocate, officiated in the Court of Arches: he also discharged the formal business in the Prerogative Court until the 27th January, 1852, see note (a), p. 419. Sir John Dodson was appointed Sir Herbert Jenner Fust's successor on the 24th February, 1852. John Dorney Harding, Esq., D. C. L., was appointed the Queen's advocate on the 6th March, 1852, and subsequently received knighthood.

constitute legal cruelty ; but, coupled with other averments of a substantial character, I think, on the authority of the cases cited, that charge may form a part of the libel. As charges of adultery have in other cases been allowed to be pleaded in conjunction with other acts as cruelty, I cannot see on what principle a charge of incest, combined with other circumstances, can be rejected.

[424] HUDLESTON *against* HUDDLESTON. Prerogative Court, Feb. 6th, 1852.—Administration of a wife's effects, who had lived with her husband until her death, granted to an antenuptial creditor. A decree had been personally served on the husband, but no appearance was given.

Motion.

Elizabeth Sarah Huddleston, wife of George Huddleston, died intestate on the 26th April, 1849, leaving the said George Huddleston, her lawful husband, surviving. Mrs. H.'s personal estate consisted of certain leasehold property, not reduced into her husband's possession ; the value thereof was not stated.

On the 23rd December, 1851, a decree was issued at the suit of John Nichols Hudleston, citing the husband of the deceased to accept or refuse letters of administration of the effects of his late wife, or to shew cause why the same should not be granted to him, the said J. N. H., as an antenuptial creditor of the deceased.

The decree was personally served, but no appearance was given.

The present application arose out of the following circumstances :—Mr. J. N. H., an apothecary, attended the deceased, who was a great invalid, for many years to the end of 1847 inclusive. Early in May, 1848, the deceased intermarried with the said G. H. ; and as J. N. H. could not obtain payment [425] of his bill, he brought an action in May, 1848, against the deceased and her husband. The action proceeded, but without coming to trial, until the 4th May, 1849, when the said G. H. pleaded in abatement that his wife had died on the 26th April 1849, by reason whereof he was no longer liable.

The amount of the debt, beyond doubt not barred by the Statute of Limitations, was at least 100l., for which J. N. H. held no security.

The above facts were verified by affidavits.

Haggard moved for administration to be granted to the creditor ; he referred to Williams on Executors, 4th edit. p. 1503, with the authorities there cited.

Judgment—*Dr. Lushington.* (a) I must take time to consider this application, as it seems to me to be one *primæ impressionis*. I am fully aware of *Aitkin v. Ford* (3 Hagg. Ecc. 193), but that case does not meet the present. I know of no instance of an administration of a wife's effects having been granted to a creditor, instead of to her husband, when the husband and wife had lived together until her death.

Eventually the Court allowed the administration to pass to the creditor.

[426] THOMSON AND ALLAWAY *against* HALL. Prerogative Court, Jan. 28th, Feb. 6th, 1852.—Defective memory alone in subscribing witnesses will not justify a Court in pronouncing against a will on the face of it duly executed. To justify a refusal of probate of such a paper there must be evidence to negative a due execution.

[S. C. 16 Jur. 1144.]

This was a business of proving the will, bearing date the 16th April, 1849, of John Elton Hall, who died on the 24th April, 1849, a bachelor at the age of twenty-four.

The suit was instituted by the executors named in the will against the father of the deceased, who opposed the grant of probate, on the ground, as contended, that the evidence of the witnesses did not establish that the deceased signed or acknowledged his signature in their presence.

The will was entirely in the handwriting of the testator, who had been educated for the law, and there was a full attestation clause. The subscribing witnesses were two brothers—friends of the deceased—one an army accoutrement maker, the other a medical student, respectively of the ages of nineteen and sixteen when the will was executed ; a third person, a bookseller, also a brother of the other witnesses, then of the age of eighteen, was likewise examined. The witnesses were examined in June 1851.

Robert Garden—after stating in substance that the deceased was not well, he

(a) See note at p. 419.

was keeping his bed on the day the will was signed, and that he had been engaged writing the greater part of the day, but what the papers were he did not know—deposed, “In the evening of the said day on my going into his room he asked me to put my name to some [427] papers for him, and I did so. I was alone with him at that time. I recollect signing my name two or three times.” . . . “I did not know what the documents were I so signed. I do not recollect if I saw him sign either of them himself. My impression is that I did see him sign one of the documents, but whether it was one of those of which I am now speaking, or the paper, of which I have also to depose, my recollection does not serve me sufficiently to enable me to state with certainty. After I signed the documents of which I first spoke the said E. H.(a) took up another paper—the paper in question—and observed that ‘there must be two witnesses to that paper,’ or said something to that effect. I infer from this that it was as a witness he had got me to sign the previous documents. On telling me that there must be two witnesses to that last paper E. H. asked me, I think, to fetch one of my brothers. He did not say what the paper was, he did not say what any of the documents were, but I remember in reference to them, before he got me to sign any of them, he made the remark that ‘it was as well to have everything put square before he left England in case of an accident,’ or a remark to that effect.” The witness, after stating he went to the room where his brothers were and requested one of them to attend, as the deceased “wanted one of them to put his name to something,” and that his brother Alexander attended, deposed, “My brother Hugh followed as well, as I have since learnt, but I was not aware of it at the time. I did not notice him in the room, but there was but one candle lighted, and the room was therefore but imperfectly lighted. I can [428] recollect that I saw E. H. in the act of writing, and as I feel sure, on the paper which we afterwards witnessed, as I and my brother Alec entered his room. What he wrote then, or whether we found him in the act of writing, or he commenced writing the moment he saw us enter the room (he could see us directly we opened the door) I cannot tell. I can only say that I remember seeing him just at that time in the act of writing, and my brother Alec was present also and had the same means, I think, of seeing him at the time as myself, and the next moment I saw E. H. put the blotting paper upon what he had so written, and he then doubled the paper, and I being by that time at the side of his bed and my brother Alec at the foot of the bed, E. H. handed the paper to me and said to me ‘You put your name there,’ pointing to a space at one corner—I think, the left hand corner—of the paper, and thereupon in his presence, and in the presence of my brother Alec, I signed my name to the paper, and then in like presence of E. H. and of myself, my said brother Alec signed his name to the paper. That is all that I recollect passing in reference to that paper. We left the paper in E. H.’s possession after signing it. I remember that there were two or three lines of the writing visible above where I signed the said paper, but I did not notice the writing to see what it was. I do not remember whether, at the time we signed the paper, I noticed E. H.’s name signed thereto. I am not able to say whether I did or I did not. I did not at all know what the paper was, and I hardly noticed it at all. It might have been his name the said E. H. wrote to the paper as my brother Alec and I entered the room. It is very likely that it was that; there was [429] time, I think, for him to have written his names while we were present and entering the room, it takes a very little time for a person to sign his name, but I cannot depose positively that it was his name we saw him write. From the appearance of the writing of his signature on the paper, when it was shewn to me since his death (since Christmas, 1850, that is), I should be inclined to say that it was that signature he wrote in our presence. What it could be he so wrote if it was not the said signature I can form no idea.” The witness, after having identified the paper by his own and his brother’s signatures thereto, further deposed, “My impression still is, taking all circumstances together, that it was the signature ‘John Elton Hall’ appearing written at the foot or end of the said script which the said E. H. wrote in the presence of myself and my said brother on the occasion deposed of. The whole of the paper, with the exception of that signature and those of my brother and myself, has every appearance of having been written off continuously at one and the same time, while the signature ‘John Elton

(a) The witness throughout his deposition omitted the name John.

Hall,' is in paler ink than the body of the paper, as though having had the blotting paper put to it directly after it had been written."

On cross-examination.—"I had not at the time any idea that I had, by signing my own name, acknowledged that I had in fact seen the deceased write his name, or that I had in fact heard him own or acknowledge his signature thereto." . . . "I did not know the meaning of 'attesting,' not the legal meaning of it. I should have said that it was the same as witnessing, but what either term involved as in regard to a will I did not know."

[430] The evidence of the other subscribing witness, Alexander Garden, and of his brother, Hugh, furnished no additional information on the question.

Jenner and Deane in support of the will. The paper on which the deceased was writing is identified. This is not a case in which the witnesses never were cognizant of any circumstance attendant on the execution; it is simply one where they have forgotten what occurred. Their want of recollection will not defeat the will, *Burgoyne v. Showler* (1 Robert. 5), *Brenchley v. Still* (2 *ibid.* 162). The attestation clause is full; from the appearance of the paper, and from the general evidence, it must be presumed that the will was signed in the presence of the witnesses.

Harding and Twiss contra. It is clear the witnesses cannot recollect any thing about the transaction; they do not prove that the deceased either signed or acknowledged the will in their presence. They may have subscribed their names, but they both swear they did not attest. In *Hudson v. Parker* (1 *ibid.* 14) it was ruled there was not an attestation, as the witnesses could not see the testator's signature; here they know nothing; the principle is the same. Corporal presence alone will not suffice, there must be a mental presence. To attest is to bear witness to some act—to take cognizance of what was done; see the dicta of Coleridge, J., and Lord Campbell, in *Burdett v. Doe d. Spilsbury* (7 Scott's New Rep. pp. 96, 104, 140). The mere circumstance of calling in witnesses to subscribe, without giving them any [431] explanation of the paper they signed, amounts not to an acknowledgment of the signature by the testator; see the dictum of the Lord Chancellor in *Ilott v. Genge* (4 Moore P. C. 271).

Cur. adv. vult.

Feb. 6th.—*Judgment*—*Dr. Lushington.*(b) The deceased in this cause is John Elton Hall. The question for my decision is whether his will, bearing date the 16th April, 1849, is entitled to probate.

The objection taken to the grant of probate is that the will is not executed in accordance with the provisions of the Wills Act, and no doubt, if that objection is sustained by the evidence, it must prevail. However clear the testator's intention, and however undoubted the fact of the execution of the instrument may be, still, if not executed according to law, it cannot receive probate.

I have ever been of opinion that a Court of Law, and such is a Court of Probate, has no other duty, in interpreting the Statutes of the Realm, than to construe them according to the ordinary rules of construction without regard to consequences. If a Court of Law be once satisfied that the consequences are the legitimate result of a true construction, it becomes the province of the Legislature, and not of a Court of Law, to correct, if necessary, such consequences.

I have, I believe, always adhered to the principle to which I have adverted, and certainly it is my intention so to do on this occasion. But I must [432] observe that, to the interpretation of an Act of Parliament, and to the effect to be given to the evidence in a cause, considerations wholly different apply. These two points ought always to be kept separate and distinct.

In construing the Wills Act it is my duty to declare what the requisites of the law are, in order to render the execution of a will valid and entitled to probate: in so doing I am confined to the words of the act; no extrinsic consideration ought to have the slightest weight.

In construing or considering evidence in a cause it is my duty, in the first place, to look to all the witness has sworn, and to weigh the whole probabilities of the case, and then to ascertain the state of facts to which a given construction of the law is to be applied. This proposition, though undoubtedly true, necessarily, as I conceive, embraces a wide range. The character of the witnesses—the length of time which

(b) See note at page 419.

has elapsed since the transactions took place—and the nature of the facts deposed to, whether they are likely, or not, to have made an impression on the minds of the witnesses—are circumstances to be taken into account, to which is to be added this consideration also, whether the case admits of the principle—the presumption—“*omnia rite esse acta*.”

I proceed now with the case before me, and in the first place look at the instrument itself. It is written without any blot or interlineation, the signature is in the proper place, and the attestation clause is full and strictly formal. In the next place, the instrument was written throughout by the deceased himself, who had received a legal education; [433] that he possessed some legal knowledge is apparent from its composition. These circumstances, then, afford a rational presumption that he intended to, and would, execute his will in conformity with the statute. It may be said that all testators intend so to do, yet frequently fail; but, in a case like the present, I say the intention is more distinctly evinced than sometimes happens. If the execution be here deficient in law, such defect is contrary to the testator's intention declared by the instrument itself, and the appearance of the paper is repugnant to such a supposition. Certainly this is a case in which it may be truly said, “*omnia præsumuntur legitimè esse facta*.”

The objection raised is that there is no proof that the signature of the testator was made or acknowledged in the presence of the witnesses as the 9th section of the Act requires, and that, though they subscribed their names, they did not attest, if the evidence be taken as true.

The first step to be taken in this investigation is to resolve, by reference to the evidence, when and how the signature of the testator was made—whether there is proof of its having been made in the presence of the witnesses and before they subscribed—and whether the witnesses were cognizant of the facts, or merely corporally present.

Before, however, I examine the evidence it may be fitting to observe that the two subscribing witnesses were of the ages of nineteen and sixteen, and the third witness eighteen, and no more, at the date of the transaction; and that they were not examined until two years and two months after it. These are circumstances which must be taken into account.

[434] What is rationally to be expected from such witnesses? I apprehend nothing more than a general statement of the circumstances that occurred. No one can reasonably expect or require a minute statement of facts, which, however important in themselves, were not calculated to make much impression on their minds.

The first fact proved is that the testator wrote on the paper in the actual presence of the three witnesses. The question is what did he write? This gentleman was ill at the time, he was about to leave the country, he remarked to the only witness, then present, that “it was as well to have everything put square before he left England,” and, referring to the paper, observed, “There must be two witnesses to it,” and desired the witness to fetch one of his brothers. The witnesses, it is true, will not swear that, though they did see him write, they saw him write his name; but they do swear that he had time to write his name after they entered the room. Surely it would be contrary to all probability on such facts, bearing in mind, too, that the deceased was a skilled testator, to suppose that he wrote anything but his name now appearing on the paper; it would tax the utmost ingenuity to suggest anything else.

It was argued further that, even if the testator wrote his name in the presence of the witnesses, nevertheless, since they did not see him write his name so as to be able to swear they saw the letters formed, they were only corporally present, and did not, in the proper meaning of the word, attest his signature.

This argument, if well founded in law, seems to me to be wholly opposed to the state of facts as they [435] must be collected from the evidence; but in the first place I will put this case. Were one to ask an attorney or his clerk, attending the execution of a will, if he saw the testator sign his name, he would answer, “Yes.” If then asked how he came to remember that fact, his answer in all probability would be, “He believed so, as he was accustomed to be careful in such a matter.” If the inquiry were pursued, and the question asked, Are you sure you saw the testator make the very letters which form his name? Would not the answer be, “I saw him write letters on the will, and then I attested it.” Lastly, put this question—Were you not at the

foot of the bed when the testator signed, and will you swear that, as the letters of the name would necessarily be backward to you as you stood, you are sure you saw the letters of the name formed? Where is the honest witness who would dare to give a positive affirmative answer to that question; especially, too, after the lapse, as in the present case, of more than two years? It would be ridiculous in the Court to expect it; more especially, too, as it very seldom happens that witnesses follow the precise movement of a pen in the hand of a writer.

[The learned Judge, having minutely discussed the evidence of Robert Garden, observed that the depositions of the other two witnesses in substance accorded, but did not supply, any additional fact of importance; he then said—]

I am satisfied that the evidence is sufficient to enable me to pronounce for the will. I have no doubt that the witnesses had as much knowledge as witnesses ordinarily have of the signature made by the testator, and that it was made in their presence, [436] and with their knowledge. I consider these points to be fairly deducible from the evidence; even if this were not so, I am of opinion that I should, under the circumstances of this case, be bound to supply the deficiency by attributing it to want of memory. If evidence in any case will enable me to pronounce for a paper, I will. I cannot allow defective memory alone in witnesses to overturn a will; I must be satisfied, before I do so, that the will was not duly executed, and where the negative is not established the affirmative must be held to be proved in a testamentary paper like the present.

In pronouncing for this will I consider I do so without disturbing any previous decision. I have given my reasons without reference to authority; but were authority required I might mention *Newton v. Clarke* (2 Curt. 320), in which case Sir Herbert Jenner Fust went further than I have hitherto ventured to go. It is undoubtedly desirable to keep decisions uniform. In giving my present decision I do not consider that I, in the least, trench upon the principle I laid down in *Hudson v. Parker* (1 Robt. 14). Though that case was cited in argument as against the present will, it is one of a totally different character; there the testator's signature was purposely concealed—here the witnesses must have seen the signature, their memories alone are defective. In *Hudson v. Parker* I entered fully into the meaning of the word “attest;” on this occasion it is sufficient to say I adhere to the opinion I then expressed; were I to consider that I was wrong in the doctrine I then laid down, I would without scruple overrule it.

I pronounce for the will, and decree costs out of the estate.

[437] IN THE GOODS OF JOHN TOWNDROW, Deceased. Prerogative Court, Feb. 14th, 1852.—When the authorities in a foreign country refuse to execute a requisition in the precise form prescribed by the Prerogative Court, on the alleged ground that the law of the foreign country requires its own forms to be followed, the Prerogative Court will, under such special circumstance, accept a return shewing a virtual compliance with the object of the requisition.

Motion.

John Towndrow, formerly of Loughborough in the county of Leicester, but late of St. Quentin in the department L'Aisne in France, died on the 15th June, 1851, having made at St. Quentin his will, dated the 7th October, 1841, and thereof appointed his son John Towndrow, on attaining twenty-one years, the executor. The will was signed by the testator; the attestation clause is in these words, “Signed, sealed, published, pronounced and declared by the said John Towndrow as his last will and testament in the presence of us the subscribers—George Hinton—Joseph Martin—Robert Knight.”

John Towndrow, the son, attained his age of twenty-one years in the lifetime of the testator.

In December, 1851, a requisition under seal of the Prerogative Court was directed to the magistrates of L'Aisne to swear Mr. T. as the executor, and to take an affidavit of one of the attesting witnesses in proof of the due execution of the will. The executor as well as the three witnesses were resident at St. Quentin. The requisition was sent to Mr. T. with the original will, together with the form of the necessary affidavits, and with instructions for the execution of the papers and of a return to be signed by the magistrate.

On these papers being presented to the magistrates at St. Quentin they refused to

execute them [438] in the precise manner pointed out in the instructions, stating that it was contrary to law and to their practice to do so, and that they could only execute them according to their own forms.

On the 16th January, 1852, Mr. Towndrow and Robert Knight, one of the attesting witnesses to the will, appeared personally before the juge de paix of the town of St. Quentin, and respectively signed declarations in the French language, written on the will, and were sworn by him—the former, as executor, the latter, as to the due execution of the will—in manner as specified in the minute or act which was thereupon drawn up and signed by the juge de paix, and by them and by two persons resident at St. Quentin, who testified the identity of the appearers.

An official copy of the minute or act, drawn up and signed as above, with a notarial translation, were brought into the Prerogative Court with the will and affidavits.

There was not a British consul or any English authority resident at, or near to, St. Quentin.

The property of the deceased within the province of Canterbury was under 20l.

Addams submitted that the requisition had been sufficiently executed, that an affidavit has, in substance, been made by an attesting witness of the due execution of the will.

Judgment—Dr. Lushington.(a) I feel very reluctant to depart from the ordinary practice which prevails in this Court respecting re-[439]-quisitions. From the paper before me I learn there has not been a compliance with a term of the requisition, in fact no form pointed out has been followed. I was not aware that the law of France is precisely as it is stated. The circumstance, however, of the impossibility to enforce a requisition weighs with me, and coupled with all the circumstances I am disposed to grant the motion for probate. At the same time I beg it may be clearly understood that in so doing the present grant is not to be made a precedent, unless the state of things be similar, namely, a refusal in a foreign country to execute the requisition in the form prescribed by this Court.

IN THE GOODS OF THOMAS BATTERSBEE, ESQ., Deceased. Prerogative Court, Feb. 14th, 1852.—All papers entitled to probate ought to receive probate; but the Court will permit a departure from that general rule in the case of deeds referred to in a will, and will grant probate of the will alone when the trustees refuse to bring in the deeds.

Motion.

Thomas Battersbee, a captain in the Royal Engineers, died on the 8th December, 1851, having duly made and executed his will, dated the 28th October, 1837, with four codicils thereto.

The testator, after having appointed Thomas Smith and Charles Pidcock, Esqrs., executors, and stated in the will that his executors are the trustees of his marriage settlement, declares as follows:—"And I hereby will and direct that all and singular the several clauses contained in my said marriage settlement for leasing the said freehold, leasehold and lifehold hereditaments, the appointment of new [440] trustees, the indemnity to trustees against losses, costs and expenses for investment of trust monies, and all others the powers and authorities contained in the said settlement, shall be as equally applicable to the trusts of this my will and to the said Thomas Smith and Charles Pidcock as trustees and executors acting under the same, and any future trustees to be appointed in pursuance of the powers and authorities contained in the said settlement, as if the same trustee clauses and powers had been here introduced."

A question was raised in the registry whether the marriage settlement ought not to be brought in and registered as forming part of the will. The trustees of the settlement declined to bring in that instrument.

Addams moved for probate of the will and four codicils without the settlement.

Judgment—Dr. Lushington.(a) On a former occasion, in giving my judgment in *Sheldon v. Sheldon* (1 Rob. 81), I availed myself of the opportunity of saying everything that occurred to me in respect of the incorporation of papers; it is needless therefore to enter fully into the question again.

Undoubtedly, every paper entitled to probate ought to receive probate; but

(a) See note at p. 419.

difficulties have occurred, and will occasionally arise, in respect of deeds. Trustees are at times disinclined to deliver up those instruments, and, when that is the case, to compel them would be attended with much difficulty. There are inconveniences, I allow, either [441] way, but we must balance one inconvenience against another. Sir John Nicholl, I well remember, took the same view as myself and recognised a departure from the general rule in such cases. It was perfectly right that this case should be brought before the Court. I decree probate of the will and codicils without the settlement as prayed.

BRENCHLEY against LYNN. Prerogative Court, Jan. 30th, 31st, Feb. 14th, 1852.—

A woman, having a power to appoint certain property by will, made a will previously to her marriage in 1834, and by her marriage settlement of even date with her will, covenanted not to revoke that will; after her marriage she executed many testamentary papers, but did not, as alleged, thereby in any way revoke that will; subsequently she executed “a codicil” to her “last will,” whereby she revoked her “said will in toto” . . . “so that I may die intestate.” Held, notwithstanding an averment of the necessity of probate being granted of certain former testamentary papers in addition to the last “codicil,” in order that a Court of Equity might construe them in reference to the covenant in the settlement, that the Prerogative Court was bound by *Hughes v. Turner* (4 Hag.) to decree probate of the last testamentary paper alone.—The grant of administration with will annexed of a married woman, when no executor is named, is, though the husband survive, in the discretion of the Court; when such grant is refused to the husband, he may, if necessary, take a *cæterorum* grant.

[S. C. 16 Jur. 226, 292.]

On petition.

This suit was originally instituted to establish the due execution of a testamentary paper dated the 14th May, 1847, and described as “a codicil to the last will of Elizabeth the wife of the Rev. James Lynn.”

It is deemed sufficient here to state, as the early proceedings have been previously reported (see p. 162), that the Judge of the Prerogative Court pronounced for the validity of the paper propounded, but did not decree probate to any one nominatim, that his sen-[442]-tence was affirmed by the Judicial Committee of the Privy Council on the 14th May, 1851, and that the cause was remitted.

On the 9th July, 1851, the proctor of Mrs. Brenchley alleged that the deceased, Mrs. Lynn, departed this life having made and duly executed her last will and testament, bearing date the 14th May, 1847, but did not therein name any executor or residuary legatee; that Mrs. Brenchley is the natural and lawful sister and only next of kin of the deceased; and he prayed letters of administration with the said will annexed of the goods of the deceased, over which she had a disposing power, to be granted to Mrs. Brenchley on giving the usual security.

The proctor of Mr. Lynn appeared, and objected thereto, and prayed to be heard on his petition.

In the act on petition it was alleged in substance—that the said Elizabeth Lynn, then Elizabeth Coare, spinster, by virtue of certain powers given her by the will and codicil, bearing date respectively the 16th February, 1821, and the 27th November, 1823, of Mary Minnitt, widow, deceased, the mother of Elizabeth Lynn, made her will the 21st May, 1834, and thereby appointed certain properties therein mentioned upon trust, in case the marriage, then intended, between her and the said James Lynn should take place, and he should survive her, for him and his assigns to receive the profits thereof during his life, and upon his decease upon trust to be paid or transferred to H. S. and W. L., their executors and assigns, upon and for the trusts and purposes of a certain indenture then prepared, and intended to bear even date with the [443] said will, and to be made between the said James Lynn of the first part, the said Elizabeth Lynn of the second part, and the said H. S. and W. L. of the third part, being the settlement intended to be made on the intended marriage. It was also alleged that the settlement, referred to in the will, was afterwards executed and the marriage celebrated—that Elizabeth Lynn in the settlement confirmed her said will, and covenanted that she would not revoke or alter the said will or the trusts therein contained—that Elizabeth Lynn afterwards in execution of a power reserved to her by the settlement in certain events, and subject to the interest of James Lynn, made

a will on the 18th November, 1834, and also a codicil of the same date to her will of the 21st May, 1834, and also various other testamentary papers bearing date respectively the 7th December, 1835, the 29th February, 1836, the 4th April, 1836, the 27th June, 1836, the 16th July, 1838, the 11th October, 1838, the 29th July, 1839, the 1st December, 1845, and the 21st July, 1846, but did not by any of the said instruments revoke or alter her will of the 21st May, 1834, or any of the trusts therein declared, and that at the date of the testamentary appointment executed on the 14th May, 1847, the subsisting testamentary appointments of Elizabeth Lynn were the will of the 21st May, 1834, and the aforesaid codicils thereto, dated respectively the 1st December, 1845, and the 21st July, 1846, and that W. R. and R. S. were the executors thereof. It was also alleged that various questions as to the effect, at law and in equity, of the said instruments must necessarily arise; that, in order to obtain a legal construction of the said instruments, and of [444] the testamentary appointment of the 14th May, 1847, alleged, in behalf of Mrs. Brencley, to be the last will, but which purports to be a codicil to a then subsisting will, and to be made in exercise of the powers contained in her marriage settlement, and in order to ascertain the manner and extent, if any, to which the testamentary papers of the 21st May, 1834, the 1st December, 1845, and the 21st July, 1846, are, in law or equity, revoked by the paper of the 14th May, 1847, and how far the latter has been executed in conformity with the power given to Elizabeth Lynn by the will of her mother, Mrs. Minnitt, and reserved by the marriage settlement, it is indispensably requisite that the four last mentioned testamentary papers executed by Mrs. Lynn should be admitted to probate, or that letters of administration with the said four papers should be granted. It was further alleged that W. R. and R. S., the executors named, had renounced, that Elizabeth Lynn left personal estate other than the property over which she had a power of appointment, and that by the law and practice of the Prerogative Court Mr. Lynn, as the husband, is entitled to the letters of administration of all the goods of his deceased wife, with the said four testamentary papers, or such of them as the Court may be pleased to direct, annexed on giving the usual security; wherefore it was prayed that the Court would decree administration with the said four testamentary papers, or with the paper of the 14th May, 1847, alone, annexed of all the goods of Mrs. Lynn, to be granted to Mr. Lynn on giving the usual security.

[445] No answer was given to the act on petition; but the Judge was prayed to reject it altogether.

Jan. 30th.—Addams and Twiss in opposition to the admission of the act. The questions raised in the act are—who is to have the administration, and what papers are to be annexed as the will. In effect the Court is asked to revoke or review a sentence not only of this Court but also of the Judicial Committee, which has finally determined what paper is entitled to probate. The act proceeds as if there had been no previous adjudication whatever. The Court of Probate has jurisdiction under the 10th section of the Wills Act to ascertain the due execution of a will made in exercise of a power; and this Court, together with the Privy Council, have pronounced for the validity of a testamentary paper, dated the 14th May, 1847, revocatory of all other papers. It is a farce, therefore, to assume in the act that all, or any, of the previous testamentary papers are in force: for the above reasons we refused to answer the act.

Jan. 31st.—Dodson, Q. A., and Harding in support of the act. It ought to have been shewn on the other side that the averments contained in the act are utterly irrelevant to justify a refusal to write to the act. The object of the original suit in this Court was to determine the question of the due execution of the paper of the 14th May, 1847; that point alone was settled. The Judge did not determine that other papers were not to be included in the probate, nor did he decree probate to any one by name. The [446] Judicial Committee, though affirming that sentence, could not determine points left undetermined by the Prerogative Court. The paper pronounced for disposes of nothing; in fact there is an intestacy, if that paper be taken alone.

There are two questions to be determined—1st, to whom is the administration to be granted; 2ndly, of what papers the grant is to consist. 1st. A husband is, according to the practice of the Court, entitled to the administration with the will annexed of his wife's effects when no executor is appointed, *Salmon v. Hays* (4 Hagg. Ecc. 386); *Dempsey v. King* (2 Robert. 397); there is no reported case to the contrary.

2ndly. If probate of the other papers be refused, we may be prejudiced, as the Court of Chancery can look at those only of which probate is granted. In *Barnes v. Vincent* (5 Moore, P. C. 211, 212) it is in effect laid down that it is desirable that a Court of Probate should make its grant in such a shape as to enable equity to deal with the case, since a Court of Probate cannot enter into the construction of the instruments.

Addams in reply. The Prerogative Court did not vary the prayer (d)¹ made on behalf of Mrs. Brenchley: it is ridiculous [447] to assert that the Court, in pronouncing in her favour, did not make the decree as prayed. Mrs. B. has alone the interest under the will; she is therefore entitled, according to the practice, to the grant; see Williams on Executors, pt. 1, bk. 5, c. 2, s. 6, also *Boxley v. Stubington* (2 Lee, 537). The case of *Salmon v. Hays* differs from the present case; moreover, all the Judge there laid down is that the husband is "generally," not universally, entitled. Where a wife has power over certain property, the appointee is entitled to the grant, and the husband to a ceterorum grant. 2ndly. As to the papers: it was argued in effect that as probate of one had been granted, probate of all must be granted; that we deny. Mrs. Lynn had power to make a will, she had therefore a revocatory power. The 20th section of the Wills Act enacts what shall be a revocation. The testatrix in plain words declares her intention to revoke all former wills. (b) A question of revocation is peculiarly within the province of a Court of Probate, *Hughes v. Turner* (4 Hagg. Ecc. 30). Were this Court to send other papers to a Court of Equity it would in effect set aside what has already been decided, namely, that the paper of the 14th May, 1847, is revocatory of all former wills. On every ground the act ought to be rejected.

Cur. adv. vult.

Feb. 14th.—*Judgment*—*Dr. Lushington*. (d)² In order to bring the questions which arise in this [448] case clearly under consideration it is necessary to state some of the leading facts.

This litigation relates to the property of Mrs. Lynn, formerly Miss Elizabeth Coare, who died on the 17th April, 1848, leaving her husband her surviving. Under the will of her mother, Mrs. Minnitt, she took considerable property, and had certain powers conferred on her of making a disposition, in the nature of a will, of such property. Prior to her marriage with Mr. Lynn a settlement was executed: there was no issue of the marriage.

These are facts which I may call common to each party in the suit.

The cause was commenced by issuing a decree, dated the 22nd August, 1848, at the instance of Mrs. Brenchley, the sister and only next of kin of the deceased, Mrs. Lynn. In that decree were recited that Mrs. Minnitt made a will—that a settlement was made, dated the 21st May, 1834, on the marriage of the deceased with Mr. Lynn—that in virtue of the powers contained in Mrs. Minnitt's will and the said settlement the deceased made a will and various codicils, and appointed Mr. Still and Mr. Rackham executors. The decree further alleged that, under and by virtue of the before-mentioned powers, the deceased, on the 14th May, 1847, executed a further will revoking the former will and codicils, "but did not thereof appoint any executor or name any residuary or other legatee"—that the effect of this paper is to give the property, over which she had a power of disposal, to her next of kin according to the Statute of Distribution. The decree then called on the executors to see the paper of the 14th May, 1847, propounded and proved in [449] solemn form of law, and also to shew cause why administration with the said paper should not be granted to Mrs. Brenchley, the sister and only next of kin, limited to the right and interest of the deceased to all such personal estate as, by virtue of Mrs. Minnitt's will and the said settlement or otherwise, she had a right to dispose of.

(d)¹ The prayer was that the Judge would pronounce for the force and validity of the codicil, bearing date the 14th May, 1847, of Elizabeth Lynn, the deceased in this cause, being the codicil propounded on the part and behalf of Mary Ann Brenchley, widow, the natural and lawful sister and next of kin of the deceased, and decree letters of administration with the said codicil annexed of all the goods, &c., over which she had a disposing power, to be granted, under the usual security, to the said Mary Ann Brenchley, and to condemn the Rev. James Lynn in costs.

(b) See the words of the instrument, pp. 162, 163.

(d)² See note at page 419.

I have set forth the substance of the contents of this decree somewhat fully, as I think it may be necessary hereafter to discuss it with some particularity.

Mr. Rackham, the surviving executor in the previous papers, declined to interfere.

Various testamentary papers were brought in; a proctor appeared for Mr. Lynn who had been cited; and the paper of the 14th May, 1847, was propounded.

In the allegation given in on behalf of Mrs. Brechley it was in substance alleged that by the will of Mrs. Minnitt, Elizabeth Lynn, then Coare, was empowered, whether single or married, to dispose of certain property by her last will, or any codicil thereto, and in default of any such disposition the said property was directed to be paid and distributed amongst the persons who, at the time of the death of the said Elizabeth Coare, should be her next of kin, exclusive of any husband whom she might leave her surviving.

2. That by a marriage settlement, dated the 21st May, 1834, duly executed by the several parties thereto, Mrs. Lynn had the power to make a will, and thereby, in default of issue of the marriage, to dispose of the property mentioned in the settlement, subject to the life interest of Mr. Lynn therein, to [450] and amongst such person or persons as she should think fit, and in default thereof the trustees were to stand possessed of the property in trust for such person or persons as, at the decease of Mrs. Lynn, then Coare, would have been entitled to her personal estate, if she had died without having been married and intestate.

3. That in exercise of the powers, pleaded in the two preceding articles, Mrs. Lynn made a will, dated the 21st May, 1834, another will dated the 18th November, 1834, and subsequently also seven codicils.

4. That Mrs. Lynn "having a mind and intention to make a further codicil to her wills and seven codicils aforesaid, expressly, in order thereby to revoke and make void such wills and all such former codicils not then in her possession, gave instructions for the preparation of a codicil to that effect, and that pursuant to such instructions the very codicil pleaded and propounded" was drawn up; that Mrs. Lynn knew and understood the contents thereof, and the same was duly executed on the 14th May, 1847, &c.

The admission of this allegation was opposed, on what precise grounds I know not, but it was admitted, and three witnesses, the drawer of the will and the attesting witnesses, were examined upon it solely in reference to the making and execution of the paper.

An allegation was then given in on the part of Mr. Lynn and rejected; the effect of this rejection I will hereafter consider.

The case was then brought before the Prerogative [451] Court on the evidence taken on Mrs. Brechley's allegation.

The substance of the prayers of the respective proctors it is necessary to state, in reference to the points I am called upon to determine. The proctor of Mrs. Brechley prayed the Judge to pronounce for the codicil, dated the 14th May, 1847, propounded on her behalf, to decree letters of administration with the said codicil to her, and to condemn Mr. Lynn in costs; the proctor of Mr. Lynn prayed the Court to pronounce against the said codicil, and to condemn Mrs. Brechley in costs. According to the decree as it stands in the minutes, the Judge pronounced for the codicil in question, but did not decree the administration to Mrs. Brechley, or any one by name, or make any order as to costs. From this decree an appeal was made on behalf of Mr. Lynn to the Judicial Committee, the result of which was that the sentence of the Prerogative Court was affirmed.

The points to which I must, in the first place, direct my attention are, what has been done by Sir Herbert Jenner Fust and the Judicial Committee, what I am now precluded from considering, and what I am at liberty to deal with.

Beyond all question I am bound by all that Sir Herbert Jenner Fust has determined, as well as by all the Judicial Committee has done, confirmed by an order in council. I can neither diminish nor enlarge the decrees; I have only to construe them, and to decide matters not determined by them.

On looking at the precise words of the decree made by Sir Herbert Jenner Fust, it is to my mind abundantly clear that the question to whom the ad-[452]-ministration was to be granted was left open and wholly untouched. I cannot engraft upon his decree that which is not in it. It was said, however, that the Court may vary the decree; under circumstances, I doubt not, that such a power may exist, but certainly

not under present circumstances; I have no authority whatever to alter a decree affirmed by the Judicial Committee—a superior tribunal. Nevertheless, if I had the power to make the alteration suggested, I may observe I have no evidence to satisfy me that Sir Herbert Jenner Fust intended to dispose of the question to whom the grant was to be made. All he said was—taking his words literally—I pronounce for the validity of the paper and decree probate, i.e. that it shall be proved, but not a word is said, in the report of his judgment, who was to take probate; the registrar's book confirms this view. I repeat, I am clear that the question, to whom the grant must pass, is yet to be decided—and decided according to the principles and rules applicable to the circumstances of the case.

After the cause was remitted from the Privy Council to this Court, the proctor of Mrs. Brenchley appeared on the 9th July, 1851, and prayed, in conformity with the latter part of his former prayer, made before Sir Herbert Jenner Fust's judgment was pronounced, the administration with the paper of the 14th May, 1847, annexed, to be granted to his party; in opposition thereto an appearance was given for Mr. Lynn by his proctor, who prayed to be heard on his act on petition, a course which it was open to him to adopt.

The substance of the petition may be comprised under the following heads:—1st. That Mrs. Min-[453]-nitt made a will conferring on her daughter, Mrs. Lynn, then Miss Coare, the power to appoint by a will or codicil; 2nd. That in exercise of such power Mrs. Lynn made a will on the 21st May, 1834; 3rd. That the marriage settlement was made, and that it was intended to bear even date with the will; 4th. That in the settlement there is a covenant not to revoke that will; 5th. That various other testamentary papers were executed; 6th. That on the 14th May, 1847, the subsisting testamentary papers were the will of the 21st May, 1834, and two codicils; 7th. It was alleged that questions may arise respecting the operation of the instruments at law or in equity—that to obtain such decision it is indispensably necessary that in some shape or other the will of the 21st May, 1834, and the codicils should be admitted to probate; 8th. That Mrs. Lynn left other personal estate than that over which she had a power of appointment; lastly, the act concludes with this prayer—that the Judge would decree administration with the testamentary appointments, bearing date the 21st May, 1834, the 1st December, 1835, the 21st July, 1846, and the 14th May, 1847—or with the appointment of the 14th May, 1847, alone annexed—of all the goods of Mrs. Lynn to be granted to Mr. Lynn.

After this act on petition was given in, a very unusual course was adopted on the part of those who acted for Mrs. Brenchley; not only was no answer made to the act, but the Court was asked to reject it altogether.

I am of opinion that the ordinary course of proceeding should not have been departed from upon the present occasion—that there was no reason to [454] justify so doing—that an answer was required—and that the absence of an answer has been productive of inconvenience and might have been of prejudice to Mrs. Brenchley.

I entertain no doubt, and I have already assigned my reasons for the opinion, that the question to whom the grant should be made is open; and I think it equally clear that an answer was required to the act in respect of that question. Whether the annexation of the other papers prayed for, in addition to the paper of the 14th May, 1847, is an open question remains to be considered; but whether or not, I think, the Court was entitled to be informed by a statement, and of the reasons in support of such statement, why, if open, the additional papers prayed for should not also be decreed.

No answer, however, as I have remarked, was given; but I had no hesitation in refusing the prayer, made for Mrs. Brenchley, to reject the act on petition. To have rejected the act would have been tantamount to declare that the matter contained in it was either utterly foreign to the cause, or, on the face of it, *felo de se*: I entertain of it a very contrary opinion.

Unfortunately, I have now to consider the import and effect of this act on petition unanswered; the objections against it I have to collect from my own view and from the arguments of counsel, for no issue is taken upon fact or law. The prayer to reject the act, if strictly taken, would amount to this, that if all the allegations contained in the act be true, still, as the matter stands, the Court ought not even to consider it. Should I fail in discovering the exact drift of the act, or omit any

important [455] objection against it, Mrs. Brechley must suffer from the circumstance of the usual course having been thus abandoned.

I will hereafter determine to whom the grant must be made. The next point which I must consider is—am I precluded, by any act of Sir Herbert Jenner Fust, or of the Judicial Committee, from considering of what papers probate should consist—in other words, whether, after what has already passed, I can entertain the prayer of Mr. Lynn to include the will and two codicils before mentioned in the probate with the codicil of May, 1847?

This is a question which may possibly admit of some doubt, and that doubt arises from the allegation given in on the part of Mr. Lynn and rejected.(a) I must, however, remember that, whatever may be the wording of the allegation admitted on behalf of Mrs. Brechley, the only question truly raised by it was—whether the codicil of the 14th May, 1847, was entitled to probate. The legal meaning of that codicil might be decided upon the issue raised, but whether it was barred from having operation as a revocation of all other papers was a question for another Court, when its title to probate was established; for, if duly executed, it was entitled to probate, whether the intention to revoke was operative or not. The case of *Hughes v. Turner* (4 Hagg. Ecc. 30), to which I must hereafter more particularly advert, shews, I think, that a Court, in merely pronouncing that a paper is entitled to probate, does not thereby exclude the question whether other papers may not [456] be joined, unless indeed that question was specifically raised.

On the whole, it appears to me that Mr. Lynn's rejected allegation had regard only to the question of probate of the contested codicil of May, 1847, and that I am not justified in pronouncing that the learned Judge meant to decide, in rejecting that allegation, that no other paper could be joined in the probate. I am in no degree apprized of what did occur when the admission of that allegation was debated; I may therefore be in error in the conclusion I may come to, but I must form my judgment from the pleadings. Looking at them, it does not appear to me, I must observe, that the question of joining other papers on the probate was distinctly raised or decided. Even if I am mistaken in this opinion, I think, in the absence of all information, it is much safer to assume that the question—whether other papers should be included in the probate—was left open.

I am of opinion, therefore, that it is a duty, from which I must not shrink, to pronounce my judgment upon both the questions raised in the act on petition—namely, whether the three papers mentioned in the act should be joined in the grant with the codicil of the 14th May, 1847—and to whom the grant should be made. I will take these questions in their order.

The codicil of May, 1847, is, *prima facie*, a revocation of all other testamentary papers; and no reasonable doubt can be entertained that, if that codicil, or a similar testamentary paper, were pronounced for, without reference to the covenants contained in the deed referred to, probate of that codicil [457] alone must pass in accordance with the ordinary course. The language of the codicil is plain and explicit—. . . "And whereas I am desirous to revoke and make void my said will and disposition aforesaid and to die intestate, in order that all my property, both real and personal, may go to and devolve upon my heirs or next of kin, according to the nature and quality thereof, the same as if I had made no will and had died utterly intestate; now, therefore, I, the said Elizabeth Lynn, do by this instrument in writing revoke, annul and make void my said will in toto," &c.; these, I say, are sweeping words, and I am quite safe in saying that a revocatory intention is expressed.

Some very special reasons, therefore, must be adduced to justify the Court in departing from the ordinary course. The reasons set forth in the act on petition are, in substance, that by Mrs. Minnitt's will her daughter, Mrs. Lynn, was empowered to make a will; that she executed various testamentary papers, and of the number a will dated the 21st May, 1834, and also a settlement of the same date, by which she covenanted not to revoke that will; that no revocation has been legally effected by the codicil of the 14th May, 1847, or, more strictly speaking, that that codicil does not operate so as to destroy the effect of the will; and that the testamentary papers of the 21st May, 1834, the 1st December, 1845, the 21st July, 1846, together with

(a) The purport of that allegation is stated at p. 165.

the codicil of the 14th May, 1847, must be admitted to probate in order that justice may be done by the proper Court.

To this statement no answer has been given; had it been a simple averment of facts, I should be bound [458] to take everything stated as true, but it is of a different character; it contains a complex averment of law founded on facts. I apprehend, therefore, that it is my duty to pause, at least, before I assume the statement to be entirely true in a legal sense, and then, should I be of opinion that it is true or doubtful, to consider how far the law allows me to give weight and effect to such a state of things.

I cannot, however, shut my eyes to this, that the question intended to be raised elsewhere is the effect of the covenant in the marriage settlement, whether that covenant is binding and obligatory so as to render the codicil of the 14th May, 1847, though bearing the probate of this Court, in effect inoperative; or whether that covenant is not in itself null and void as in fraud of the power, which gives a right of disposal by will and not by deed, inasmuch as a will is in its nature revocable. I mean not by these observations to enter minutely into questions with which this Court is not familiar, but I must say I do not think it consistent with my duty to adopt without consideration such sweeping averments as are contained in the act; it would indeed be a very dangerous precedent so to do.

To proceed in reference to the questions intended to be raised, as I collect from the act.

It was said that a Court of Equity cannot carry into execution testamentary instruments, disposing of personal property, unless they have received probate, and that, consequently, a Court of Equity cannot, whatever might be its opinion of the effect of the covenant in the settlement—or however inoperative the codicil proved—carry into effect the provisions of the instruments.

[459] This observation may be very true. Still, I am not aware that a Court of Equity, having before it Mrs. Minnitt's will, Mrs. Lynn's marriage settlement, and her codicil of the 14th May, 1847, might not declare its opinion as to the effect of those three instruments. It might, for anything I know to the contrary, declare the codicil to be revocatory, not in the sense of probate, but in operation of prior testamentary instruments, if any, and then justice might be done by sending to this Court for probate of such instruments. I know not how this may be, and I pass no opinion; but I cannot deem this to be a state of things wholly impossible. I cannot easily believe that, though a Court of Equity will not give effect to testamentary papers without probate, it wholly and always ignores the possibility of the existence of such papers. Take the recent case of *Briggs v. Penny*: (a) the question at issue was whether Miss Penny took the residue of a deceased's estate as a trustee, or for her own benefit absolutely; but the point I wish to observe on is that the testatrix in her will bequeathed certain property to Miss Penny, "well knowing that she will make a good use and dispose of it in a manner in accordance with my views and wishes;" in the will the "views and wishes" were not disclosed, but in the bill in Chancery it was alleged there were other papers which would explain the matter. What, then, did the Vice-Chancellor do? He ordered a reference to the Master to inquire if there were such papers. Had the Master reported he had found any, must it not have been sent to the Prerogative Court for [460] probate? It happened there were four papers of a testamentary character not proved, and, as it appears, in law not entitled to probate; still the Vice-Chancellor adverted to them, and from the tenor of his observations it is clear he would have sent them here, had he conceived that probate could have been granted of them. This case, then, shews that though a Court of Equity cannot give effect to testamentary papers without probate, it will, when necessary, order an inquiry for the very purpose of such papers being proved; and I cannot presume, with this decision before me, that a somewhat similar course might not be followed in the present instance.

I have with much reluctance entered on an inquiry not within my province, because I deem it extremely dangerous to assume as true, without the least proof, such general and sweeping assertions as are contained in the act, and because I do doubt, I venture to say no more that those assertions are well founded. I will not, however, decide the question upon those grounds; I will assume that it is necessary

(a) 3 De Gex & Smale, 525: affirmed on appeal, 3 Maen. & Gor. 546.

for the purpose of justice, as stated in the act, that the three papers also therein specified should also be joined with the codicil of the 14th May, 1847, in probate. There cannot, then, be a stronger inducement offered to this Court to grant the probate as prayed; for, of course, it is the duty of every Court, to the extent of its jurisdiction, to aid other Courts in doing justice. But then arises another consideration: What is the law which must govern this Court under such circumstances? Am I at liberty to exercise my discretion or am I not? By what rules am I to be governed?

[461] The whole subject of the testamentary papers of married women, and of the grants to be made respecting them by Ecclesiastical Courts, has never, in my opinion, been placed on any very satisfactory foundation. However that may be, it is clear that the present statute of wills has nothing in the least to do with the present case. That statute does not affect the jurisdiction of Ecclesiastical Courts in the matter before me; it neither diminishes nor enlarges it. All that the statute does is to enact that powers to be executed by testamentary acts shall, as to the mode of execution, be the same as in ordinary testamentary instruments. The Court of Probate must decide whether the form of execution has been followed in accordance with the provisions of the statute; but the judgment of a Court of Probate is not made more binding in a Court of Equity than it was before the statute came into operation. A Court of Equity may, if it should think fit, inquire into the execution of the power, and decide, notwithstanding a grant of probate, that the power itself was not well executed; a Court of Equity might differ both as to law and facts; even a decision by the Judicial Committee of the Privy Council on the same point would not bind the Courts of Chancery.

Having disposed of any argument which may be supposed to arise from the statute of wills, I will proceed with the inquiry, confining myself to the question of powers only, and not confounding it with separate property. I will observe that there are two sets of questions which may arise: 1st, the very fact of the existence of the power under any given circumstance, what the power is, and whether [462] it could be exercised at all; 2ndly, the execution of the power.

It will be very necessary to keep these two points distinct. It will also, I conceive, be necessary to a clear understanding of the subject to bear in mind that the word revocation has two meanings—the one, if I may use such an expression, in the probate sense, that is, where one instrument revokes another originally entitled to probate; the other I will call the chancery sense, that is, where a subsequent paper renders an earlier paper inoperative wholly or partly, though both papers may have received probate.

I will now endeavour to advance another step by stating what is the true question before me, then I will consider how far I am at liberty to discuss it, and afterwards I will try to ascertain what law is to be found applicable to the case.

The question before me may, I think, be easily stated. It is briefly whether the testatrix intended by the codicil of the 14th May, 1847, entirely to revoke all other testamentary papers. If she did, and if the codicil is in terms sufficient for that purpose, then no doubt can be entertained that, provided no impediment occur on account of the power, probate of the codicil alone must be granted. It is clear, beyond controversy, that it would be so in the case of an ordinary testator.

In regard to the next branch of inquiry, namely, how far I am at liberty to discuss the question just stated, it may be doubtful whether Sir Herbert Jenner Fust did not dispose of it by rejecting the fourth article as well as the rest of the allegation given in by Mr. Lynn; but as the only issue in the [463] cause then was, whether the codicil of the 14th May, 1847, was not entitled to probate, I will assume he did not.

I must now see what law we have in reference to the question before me; there are the decisions in the cases of *Hughes v. Turner* (4 Hagg. Ecc. 30), *Barnes v. Vincent* (5 Moore, P. C. 201), and very little else; I must nevertheless inquire whether in either of those cases a rule is, or is not, laid down to govern the Prerogative Court in this and similar cases.

It is not, I regret to say, an easy matter to understand the bearing of *Hughes v. Turner*. It appears there were two sets of papers—one appertaining to a will executed in 1815, the other to a will executed in 1829—and that the Prerogative Court decreed a general probate of the papers of 1829. A question was subsequently raised whether the papers, of which probate had been granted, contained a valid appointment of the

property of the donor of the power, and in reference to that question the Prerogative Court was applied to. That application assumed, to a certain extent, the same form as the present, namely, it was asserted that, in order to obtain a proper decision in equity, it was necessary that probate should be granted of the set of papers of 1815 (see 4 Hagg. Ecc. 40). The Prerogative Court, in consequence of this averment, granted administration, with the papers of 1815, limited to proceedings in Chancery touching the execution of the power. From this decree there was an appeal to the Court of Delegates, who reversed the decree of the Prerogative Court in respect of the grant of the limited [464] administration; they retained the cause; application was then made for probate of both sets of papers as together containing the will; and eventually that application was refused, and probate of the papers of 1829 was confirmed.

Let me now see how the case of *Hughes v. Turner* bears upon the question I have to decide. I will state in what respects the two cases agree, and in what they are dissimilar.

They agree in this, that in both cases the question was revocation quâ probate or not. They differ in this, that in *Hughes v. Turner* it was contended that the papers of 1829 were not an execution of the power; but in the present case, *Brenchley v. Lynn*, it was said that the testatrix was estopped by the covenant in the settlement from executing a testamentary paper revoking entirely the will of the 21st May, 1834.

Again, in *Hughes v. Turner* it was said that, unless probate was decreed of the papers of 1815, the questions were shut out whether they were not a good execution of the power, and the will of 1829 not operative, as a revocation, but destructive of what had been done by the will of 1815. In *Brenchley v. Lynn* it was said that, by refusing probate of the papers asked for in the act, the question was shut out whether the testatrix was not barred by the covenant in the settlement from rendering the will of the 21st May, 1834, inoperative, and from that will being carried into effect, if not rendered inoperative.

The result then is, that in both cases it was alleged that the refusal of probate would prevent a Court of Equity from exercising its proper jurisdiction. But [465] what did the Court of Delegates say to that suggestion in *Hughes v. Turner*? They in effect said, "We must not look to such a consideration." In the report, at p. 71, it is stated as follows:—"It is understood that the ground of decision, in the Court of Delegates, was that the contents of the will of 1829, taken altogether, clearly shewed a departure from the original intention in 1815, and revoked that will; but that the clause of revocation, taken per se, and without a clear intention, would not have had that effect." What is the plain meaning of this? Clearly, that a Court of Probate must decide, according to its ordinary rules, whether the last paper is revocatory or not—in other words, it must determine which is the last will (see note in 2 Lee, 542).

That the codicil before me of the 14th May, 1847, is revocatory, cannot admit of a moment's doubt. Then, if *Hughes v. Turner* be law, can I possibly distinguish the two cases?

The case of *Hughes v. Turner* is not contradicted by the case of *Barnes v. Vincent*. *Hughes v. Turner* was distinctly brought under the consideration of the Judicial Committee; it was not repudiated; on the contrary, the present Lord Justice Knight Bruce said (5 Moore, P. C. 210), "In *Hughes v. Turner* the question of due execution was not decided." . . . "The Court only acted as if it was a question of revocation."

The duty, therefore, of deciding whether the codicil of 14th May, 1847, was intended to revoke all other papers is clearly thrown upon this Court, and, if of that opinion, I have no option but to decree probate of that instrument alone.

[466] Of the precise grounds on which *Hughes v. Turner* was decided I am not informed. Nevertheless, as it would be dangerous to speculate thereon, I am bound to follow that decision. Whether a power well executed by one testamentary instrument can be made null and inoperative by another well executed instrument, not mentioning the power; or whether a power can be estopped by covenant in a deed, are questions with which I know not how the Court of Chancery would deal. *Hughes v. Turner* has, however, in substance, told me that I must act as if such questions did not arise.

In conformity, therefore, with that authority I refuse to grant probate of the additional papers prayed for by Mr. Lynn. I do so with less reluctance, because, notwithstanding the averment in the act, I am not convinced that such refusal will

prejudice any right Mr. Lynn may have to a remedy elsewhere. I cannot, however, close this branch of the case without observing that such a question as the present may probably not have occurred to the Judges who decided *Hughes v. Turner* or *Barnes v. Vincent*. In the former case it is clear that the Prerogative Court is directed to decree probate according to its ordinary rules, though the last instrument may not refer to the former, which alone might be an execution of the power, and contemplated nothing more. Whereas in *Barnes v. Vincent* this Court is directed to decree probate, when the instrument is testamentary, on the bare allegation that a power exists, without a word of what may be done in a case like the present one, where the mere execution of a testamentary power may possibly be barred by covenant. It may be, though I say it [467] not, that in neither case did the Judges conceive the question whether a testamentary execution of a power, which includes revocation, could be legally deprived of the right of revocation.

The question remaining to be settled is—to whom is the administration, with the paper of the 14th May, 1847, annexed, to be granted.

The claimants for the grant are, on the one side, the husband of the deceased; on the other, Mrs. Brenchley, the only surviving next of kin. But upon what averment or in what capacity does Mrs. Brenchley institute her claim? In the original decree and in the formal prayer made on her behalf to Sir Herbert Jenner Fust it is said that, in case of no disposition of the property by a due execution of the power, she would take as next of kin—that the deceased executed a testamentary paper whereby she revoked all other papers and did not name any residuary or other legatee—that therefore the administration should be granted to Mrs. Brenchley as the person entitled under the will of Mrs. Minnitt.

I am of opinion that this statement is erroneous, and that administration cannot be granted to Mrs. Brenchley as prayed; this, however, may not be of much real importance as regards the question to whom the grant shall be given. I am of opinion that Mrs. Brenchley does not take under the ultimate disposition of the property by Mrs. Minnitt's will, but that she is the sole universal legatee of all this property in virtue of the instrument of the 14th May, 1847, that she takes as appointee from the donor of the power but not as legatee in the will of Mrs. Minnitt. My view of the matter is in accordance with the principle stated in *Tatnall v. Hankey* (2 Moore, P. C. 350).

What words do I find contained in Mrs. Lynn's will? . . . "Whereas I am desirous to revoke and make void my said will and disposition aforesaid and to die intestate, in order that all my property, both real and personal, may go to and devolve upon my heirs or next of kin" . . . "now therefore I, the said Elizabeth Lynn, do, by this instrument in writing, revoke, annul and make void my said will in toto" . . . "so that I may die intestate both as to my real and personal estate," &c. This instrument then is not merely revocatory, it is dispositive as well as revocatory. I consider it to contain a bequest of the property, and to the next of kin; it would have defeated any limitation to other persons if such had been appointed by Mrs. Minnitt's will. Undoubtedly Mrs. Brenchley takes the property under this paper as a legatee, and must pay duty as a legatee; I cannot see how she could possibly take the oath as in case of intestacy.

It was hinted, rather than argued, in the course of the hearing, that it might not be necessary even to prove the paper of the 14th May, 1847. I must protest against a doctrine of this kind in any such case.

Intestacy can only arise when a person dies without legally bequeathing his property, that is, without a will. If a man by will declares he dies intestate, and that his property shall go as in case of intestacy, such paper does not constitute an intestacy but a bequest of the property to personæ designatæ—designated by the statute, as it might be by any other description. The property in the present instance goes not [469] in virtue of the statute, but in virtue of the will, exactly as if the ultimate limitation in Mrs. Minnitt's will had been to A. B., and not to the next of kin. That the property would go by the statute, in the same direction as by the will, cannot divest it of the character of being property bequeathed by will.

This view appears to me to be so perfectly clear on principle, and so far removed from all doubt, that I should have been quite content to express it in one word on the present occasion, had I not been told that, in somewhat similar cases, probate may not have been taken of such papers. Had this not been said, I should have

been satisfied in saying that there is no such thing as a testamentary intestacy. To promulgate a different opinion on this point would, I am sure, in many instances lead to dangerous consequences. Take the case of a man, or a feme covert, who, having made many wills, but wishing to revoke them all, executes a paper similar to the present, and that paper is not proved; where is the security that, at any distance of time, one of the old wills may not be set up? Besides, the revocatory paper may be lost, or, if not lost, difficult to be proved by reason of the death of the witnesses, and, still more so, because the person interested will have sworn, contrary to the truth, to an intestacy. If any such error has crept into practice, I say, without hesitation, it must be corrected.

The proper claim of Mrs. Brenchley—her title—is that of universal legatee in a paper in which no executor is appointed; and how her claim stands as opposed to that of Mr. Lynn, under the circumstances of this case, we will now consider.

Mr. Justice Williams states—"Where a feme [470] covert has a power to dispose of her estate by will, which she executes, but without appointing an executor, administration will be granted to the husband cum testamento annexo" (pt. 1, bk. 5, c. 2, s. 1). I doubt not that this passage contains a faithful exposition of the cases referred to; and probably the learned writer intended no more. I must observe, however, that, if his meaning is to lay down a universal proposition, I do not draw from the cases cited the same conclusion. If it be contended that the grant passed in the case of *Salmon v. Hays* (4 Hagg. Ecc. 382) to the husband purely by reason of no executor being named in the will of the feme covert, I must express my dissent: all that Sir John Nicholl decided was that, under the circumstances belonging to that case, the Court was, in the sound exercise of its discretion, justified in granting the administration to the husband. I will also add that I do not gainsay that the practice was at that time so to make the grant, but I do doubt of that practice having been uniformly observed to the present day. I much question whether the usage has been uniform to sever the grant from the interest. Be that, however, as it may, all that I will say is that, under the authority of that case, the husband has a *prima facie* claim to the grant, but such a grant is nevertheless, according to circumstances, discretionary.

The case of *Boxley v. Stubington* (2 Lee, 537), which was cited in argument, shews only that, when an executor is appointed, the grant will be made to the individual named.

The question—who is to have the grant—comes [471] to this—in what way shall the Court exercise the discretion with which the law, as I consider, has invested it.

This case differs *toto coelo* from *Salmon v. Hays*. In that case the husband, who was the father of five minor children, legatees under the paper, merely took the opinion of the Court as to the admission of an allegation setting up an informal paper. How stand the facts in this case? Mr. Lynn is evidently a most determined litigant: from the decision of this Court respecting the validity of the paper of the 14th May, 1847, he appealed to the Judicial Committee of the Privy Council; he has returned here, and raised other questions, and now threatens to proceed to the Court of Chancery. (a) Under these circumstances I verily think he is not likely to administer the property to the advantage of the person or persons entitled to it; consequently, though I cannot give the grant in the precise terms prayed, I decree probate of the paper of the 14th May, 1847, alone to Mrs. Brenchley, as only next of kin and a legatee. If there be other property, in addition to that mentioned in the will, the husband can take a *cæterorum* grant.

[472] BANNATYNE AND BANNATYNE *against* BANNATYNE AND OTHERS ACTING BY THEIR GUARDIAN. Prerogative Court, March 12th, 1852.—A testator, who had been in confinement as a lunatic between the years 1815 and 1817, executed his will in 1820. He was again placed in confinement in 1822. In November, 1838, a commission in the nature of a writ de lunatico inquirendo was issued, and the testator was found, in January, 1839, a lunatic without any lucid interval from the 1st August, 1815. Will pronounced for. Difference between imbecility or idiocy and delusion, in respect of acts of business, observed upon. The witnesses against the will deposed to a case of idiocy.

(a) He has carried his threat into execution.

[S. C. 16 Jur. 864.]

James Henry Bannatyne, otherwise James Bannatyne, formerly of the city of Bath, but late of Bathford, in the county of Somerset, Esquire, died, on the 22nd April, 1849, a bachelor without a parent, at the age of sixty, possessed of personal estate of the value 36,000*l.*, and of a real estate in Scotland producing about 13*l.* per annum. At the date of the will the testator had a mother and three brothers living, his only next of kin.

The will, entirely in the handwriting of his mother, is in the words following:—

“Great Bedford Street, Bath,
“August 15th, 1820.

“I, James Bannatyne, do will to my natural daughter Louiza Notting, four thousand pounds. Fifty pounds a year to be paid to her until the age of twenty-one, the remaining interest to be bought into the funds into her name, and for her advantage, until the age of twenty-one, when she will receive her property. The rest of my property I leave to my mother during her life, and to devolve to my three brothers after her death; and I also beg my mother will act as my executrix.

“W. Tremlett, J. White.”

“JAMES BANNATYNE.”

[473] The attesting witnesses to the will died in the lifetime of the testator, as also did his mother and one of his brothers.

On the 13th November, 1838, after the death of the testator's mother, a commission in the nature of a writ de lunatico inquirendo was taken out to inquire into the state of mind of the testator. The commission was executed on the 21st January, 1839, when the jury unanimously found him a lunatic without lucid intervals, and that he had been in the same state from the 1st August, 1815, inclusive to the day of taking the inquisition.

The commission was never superseded.

The will was propounded by William McLeod Bannatyne and George Augustus Bannatyne, the two surviving brothers of the testator, one of whom had applied for the commission. The will was opposed by the guardian of three minor children, the son and two daughters of the testator's brother, deceased.

The facts of the case appear sufficiently detailed in the judgment. It will be seen that the witnesses against the will deposed principally to a case of imbecility and idiotey.

The cause was argued in February, 1852, by Addams and Curteis in support of the will, and by Harding and Twiss contra.

Judgment—*Dr. Lushington*. (a) This suit has been instituted for the purpose of obtaining the decision of the Court respecting the will of James Bannatyne, bearing date the 15th [474] August 1820. The party propounding the will are the two surviving brothers of the testator, and the party opposing are the children of a brother, who predeceased the testator.

If the testator was of sound mind when the will was executed, it is valid and entitled to probate. On the other hand, should the Court be of opinion that the evidence is insufficient to shew that the testator was of sound mind when he executed it, the decree must be against its validity. In short, the sole question is whether the testator was of sound mind, or not, at the time when the instrument was executed.

Before, however, I enter upon the question of sanity, it may be expedient to state some of the leading facts in respect of which there is no controversy.

It appears that the mother of the deceased was a widow resident in Bath, and that she had four sons. James, the deceased in this cause, some years prior to 1814, went to India in the military service of the East India Company; but, having returned in 1814 to this country, he was, in the year 1815, received as an inmate either in the private house, or the asylum, for persons afflicted with mental disorders, belonging to Dr. Langworthy, at Box, a few miles from Bath. In 1817 he returned to his mother's house, but, in 1822, was again placed in Dr. Langworthy's establishment. Whether he was also there in the interval between 1817 and 1822 is a disputed fact, of which I must speak hereafter; but subsequently to 1822 he was clearly of unsound mind, though he lived in Bath, under the care of his mother until her death, which occurred in 1838. [475] Soon after that event, namely, in January, 1839, an inquisition de lunatico inquirendo took place; and the jury found that he was of unsound mind

(a) See note at p. 419.

without a lucid interval from 1815 to that time. He died in the year 1849. His brother Frederick died some years before that event, leaving children, in whose behalf the will is opposed.

The purport of the will is to give to a natural daughter of the testator 4000*l.*, and to his mother a life interest in the residue of his property, which residue, on her death, was to be divided amongst his three brothers. What the amount of his property was at the date of the will I have no information, but, probably, it was considerably less than it was at the time of his death, when it is stated to be about 36,000*l.* In consequence, however, of the previous death of his brother Frederick, who was constituted one of the residuary legatees, his share, if the will be valid, has lapsed, and will, according to law, belong to the two surviving brothers of the testator and to the children of his deceased brother Frederick; whereas, if an intestacy should be pronounced for, these children will be entitled to one-third of the whole residue; their interest, therefore, is very materially concerned in the decision at which I may arrive.

The will is in the handwriting of Mrs. Bannatyne, the mother of the testator; it is signed by him, and attested by two witnesses, and there can be no doubt that, on the face of the paper, the presumption of law is in favour of its validity. There has, however, occurred a circumstance which counterbalances that presumption. I purposely use an ambiguous phrase, for I am about to consider the effect of the finding of the jury—that the deceased was for some years, [476] antecedent to his execution of the will, of unsound mind without a lucid interval.

I conceive I am bound to presume that the jury performed their duty conscientiously and carefully; that they had before them evidence which satisfied their minds, and laid a just foundation for their verdict. I admit that from that verdict a presumption arises against the validity of the will in question, but I am of opinion that in endeavouring to measure the strength of that presumption I am bound to look to all the circumstances attending the inquisition, though not to the evidence then given.

The facts uncontroverted are that this proceeding was altogether *ex parte*. No person was present interested in procuring the verdict to carry back the lunacy to any date in particular; there was no person even to point out to the jury that the interest of any one could be affected by their verdict. The jury had not, so far as appears, any conception of the effect of their verdict upon this will, or upon any interest whatever. These circumstances operate both ways; in support of the verdict, to shew that there was no attempt made to induce the jury to find the verdict they did; against the effect and weight of the verdict, to shew that the attention of the jury was not specially directed to the state of the deceased in 1820, in which year the will was made. Three witnesses only were examined, and their evidence extended over a period of twenty-four years, nineteen of which had then elapsed since the date of the will.

I disclaim, however, all reference to the evidence before the jury; for, legally speaking, I think that I have no right to refer to those scraps of evidence which are brought out by the cross-examination of Mr. Philip George. I think I cannot refer to them [477] as evidence whether the testator was of sound mind or not; though I think that what is stated by Mr. George is evidence to explain and justify his own conduct, and to prove that his answers are entitled to credit.

Reviewing all these circumstances I am of opinion that the verdict of the jury is sufficient to rebut the ordinary presumption in favor of the will, and to require the party propounding it to prove that a lucid interval did take place when the will was executed; by "lucid interval" I mean that the testator was of sound mind at that time. I use the expression—lucid interval—only by reason that there was preceding and succeeding unsoundness of mind. I say, I think, a presumption is raised by the verdict against the validity of this will; nevertheless I am of opinion that the facts already stated greatly diminish the strength of that presumption, making it much less strong than if there had been an issue raised and contested, as to the existence of lucid intervals.

After revolving in my own mind what course I should pursue in the investigation of this case, I have deemed it best to consider in the first place the evidence adduced in support of the unsoundness of mind in addition to the fact of the verdict of the jury; and, in so doing, I must throughout bear in mind the lapse of time which has occurred between the fact of most importance to be proved and the time when the witnesses were examined in this cause; this observation will apply to the witnesses

on both sides. In sifting their evidence it will be necessary, as accurately as the case will allow, to ascertain not only whether their statements are true, [478] but when the facts deposed to did occur. The memory is generally more tenacious of facts than of dates; but in this cause dates are of paramount importance.

It would, I think, be wholly vain to attempt to ascertain the origin or cause of the unsoundness of mind with which this testator was afflicted. That he was of unsound mind in the year 1815 is, I apprehend, a fact beyond controversy; for in that year he was an inmate either of Dr. Langworthy's house or his asylum, and in virtue of a certificate duly signed. I hold it to be of very little importance whether he was in the private house or in the asylum; he was equally under restraint, and I must, in the absence of all evidence to the contrary, believe that the certificate of his unsoundness of mind was signed with competent cause. My opinion is not in the least shaken by any evidence as to his state on a casual visit of a friend, and for two reasons—1st, it is notorious that the same demeanour of a patient on the occasion of an accidental visit is no proof, or, at least, no satisfactory proof, of soundness of mind; and secondly, because after the lapse of thirty-five years the memory of any person, speaking to an accidental visit, cannot safely be trusted, unless indeed there were special circumstances to impress, and deeply impress, such interview on the mind of him who gives evidence thereof; such is not the case on the present occasion. I may add that, looking at all the evidence in this cause, it is not probable that Mrs. Bannatyne, who appears to have been a most affectionate mother, would have allowed her son to be placed under any restraint as a lunatic without good and sufficient cause.

[479] Since the unsoundness of mind in 1815 is then an undoubted fact, the question must ultimately be what proof is there of recovery? Is the proof sufficient? Such must be the question to be solved; but it may be expedient for me, with a view to solve this question, to proceed with the averments and proof of continued unsoundness of mind, remembering, however, that the burden of proof is on those who allege recovery.

It is pleaded in the 2nd article of the allegation, admitted on behalf of the opponents of the will, that the deceased from the month of November, 1815, until his death, remained a lunatic without a lucid interval; and in the 5th article, that he in 1817 having become more calm but not being cured, was removed from Dr. Langworthy's to the residence of his mother, and that in 1818 he was again placed in the same asylum, and there remained until 1819.

If these averments be true, it is impossible to doubt, for obvious reasons, their great importance with reference to the issue in this cause. In the first place they shew, whatever was the state and condition of the testator when he returned to his mother's roof in 1817, that he relapsed in a short space of time, not exceeding a year, into that state which rendered confinement necessary; and secondly, that the unsoundness of mind is brought down to 1819—in other words, to the year preceding the date of the will. I must therefore ascertain how this averment stands after having considered the evidence applicable to it on both sides. Were it necessary I would not shrink from the task of going minutely into all the evidence, but I cannot think [480] that it is requisite, for the purpose of justice, so to do; I will advert to what is most important.

The first witness examined to prove that the deceased was sent back to Dr. Langworthy's at Box in 1818 is Burt. That witness, it appears, went to live with Mr. Frederick Bannatyne, the brother, in 1815. It is, however, most abundantly clear from a perusal of his evidence that he is unable to fix any date whatever. He does not state that the deceased was sent to Box either in 1818 or at all about that time. All that he can say is that the deceased in the interval seemed "all well enough and quite cured" until he was sent to Box the second time; but when that second time was he cannot state; on the 2nd article he says three or four years, on the 5th article two or three years, and on the 27th interrogatory four or five years after he entered Mr. Frederick Bannatyne's service, but even when that was he does not know. The only way therefore of fixing any date to the fact related by him, is by ascertaining the date of the circumstances he deposes to as having occurred prior to the second confinement; but the time when those circumstances did occur must be proved, if at all, by other evidence. Should it be proved that the deceased mixed in society and conducted himself as a person of sound mind for any period between 1818 and 1820, then the evidence of Burt shews that the second confinement could not have taken

place till after the latter date. Five other witnesses have been examined on the same article, but they can give no assistance at all. It is therefore not too much to say that the witnesses produced to establish this very essential part of the case have wholly broken down. That [481] the deceased was in confinement in 1818, and so continued in 1819, are averments to be proved affirmatively, but there is no evidence to support them.

As I must hereafter refer to the general evidence adduced on the opposite side, it is scarcely worth while to say more than that Dr. Bright proves that there were two certificates only for the admission of the deceased into the Box Asylum, one granted in 1815, the other in 1822; I cannot discover any rational ground for the absence of a certificate in 1818, if the deceased was then in confinement, and I do not think that any can be assigned. There is no evidence to satisfy my mind that the deceased was in the Box Asylum between 1817 and 1822; on the contrary, all the evidence connected with the point leads to an opposite conclusion. I must therefore proceed in the investigation of this case upon the footing that the deceased was not in confinement from 1817 to 1822. The inquiry will then be, what was his state during that period? for after 1822, it is admitted on all hands, he was of unsound mind.

The real difficulty in the case is to ascertain how much of the evidence applies to the period I have mentioned, and how much is applicable only to what occurred subsequently. As might be expected, after the lapse of so many years, several of the witnesses declare their inability to fix any date to the transactions respecting which they depose; this is manifest, too, from the whole tenor of their evidence.

The case of the opponents of this will is set forth in the 2nd, 3rd, 4th, and 5th articles of their allegation. To state the substance of their case it is [482] lunacy without a lucid interval from November, 1815, and not lunacy merely, but idiotcy. It is alleged that the deceased walked about, in a stooping position with his hands dangling before him, muttering unintelligible and idiotic noises—that boys in the street hooted him as an idiot—that he did not go into company or appear with the family when any one was present—that he did not transact any business—did not order his own clothes or dress himself—and that in 1819, and for a year after, he was, though residing with his mother, under the care of a keeper.

Such was the state of things after 1822; but the question is, was such the state before that year? If the deceased was in 1820 in the condition alleged, I must pronounce against the will, for such a state is inconsistent with the rational dispatch of any act of business requiring thought, judgment, and reflection.

After the examination I have hitherto made of the evidence on the fifth article, I consider I am perfectly justified in assuming that, whenever a witness attempts to fix a date to circumstances he deposes to by stating that they occurred after the second confinement at the Box Asylum; he is in truth speaking of what took place after the year 1822—matters comparatively of not much importance to the result of this cause. With this observation I proceed to direct my attention to the evidence given in on behalf of the opponents to the will.

Osmond, a bootmaker, does not attempt to fix any date to the facts he speaks to, nor does he refer to any confinement. According to his statement the deceased was from 1817 an idiot, and he de-[483]-scribes him always to have continued in the same state. He says he never had more than one conversation with him—that his books are destroyed, so that he cannot fix any time. I have no doubt that this witness is speaking truly, and to the best of his memory; but the true question will be, on the balance of all the evidence, whether he is mistaken as to time or not.

Banfield, a locksmith, the next witness, does attempt to fix the time to the account he gives, for he states that he does not think that the deceased was a rational being after he was first sent to Dr. Langworthy's, but in what year that was he cannot say. Incapacity no doubt, from all the circumstances he deposes to, would be almost the necessary result; but here I must observe of this, and several other witnesses, that their opinions are evidently formed, not from any intimacy with the testator, but merely from his outward appearance and conduct.

I need not go through in detail the evidence of all these witnesses, for they depose in much the same strain as those whom I have mentioned. If correct in their dates they prove unsoundness of mind—if incorrect, the evidence can have no effect. Their evidence is to be tested by well-established facts, and then the balance must be struck.

I must, however, make an observation upon the evidence of Burt, who had been for

many years a servant to Mr. Frederick Bannatyne. Burt most distinctly proves a state wholly inconsistent with idiocy subsequent to the testator's first return from Box; and, though he cannot speak of any particular year, he clearly fixes the duration of that state as [484] lasting until after the second return from Box, which was in the year 1823 or 1824, for he then first saw, as he says, proofs of unsoundness of mind. In fact, Burt—a witness produced to establish incapacity—is a most important witness to assist in discovering the truth, for he furnishes the means of reconciling, in a great degree, all the conflicting testimony. It is he, too, who proves that Palmer, who had been a keeper at Box, lived with the testator on his return home in 1817, not as a keeper, but as a servant. This is a fact of no small importance, for, *primâ facie*, it would be natural to conclude that a keeper, taken from a receptacle for lunatics, would be employed for a patient, just removed from that establishment, in the same capacity of keeper; it is a circumstance which would fairly raise an inference of the want of continued care on account of the same disorder. Burt's evidence, however, not only contradicts the pleadings, but wholly rebuts the presumption which would otherwise have arisen.

I now pass on to the evidence of Captain Valobra, and I must observe that, whatever else may be said of his testimony, it clearly contradicts and disproves the case pleaded in the allegation on which he has been examined. The case set up is unsoundness of mind without a lucid interval from the year 1815. This gentleman, however, proves sane conduct from 1815 or 1816 for several years, though he is unable to fix the duration of such conduct.

Miss Blencowe is a witness *sui generis*; she is the only one who blends together, into one incongruous mass, the amusements and habits of a man of sound mind with demonstrations of weakness and imbecility. According to her evidence the deceased was [485] always the same. "I did not," says she, "see any difference in him after he came out of the madhouse, or at any time from first to last. It seemed to me that from the first of my knowing him [from about the year 1817] he was in the same state of imbecility of mind as" . . . "in the latter years of his life"—when dancing with herself or other young ladies of Bath, as when beyond doubt idiotic after the year 1822. Whatever may be the real truth of the case, this statement is clearly impossible; the deceased could not have been received in society and dancing at balls if in the condition proved to exist in 1822; he could not have conducted himself, as Miss Blencowe, in answer to the eighteenth interrogatory, says he did, "upon all such occasions" . . . "as a gentleman and with strict propriety and decorum;"—such is not quite the conduct usually ascribed to an idiot.

I will now briefly advert to the deposition of Mr. Waldron, who, being a medical man, should, if his memory serves him, be capable of giving his testimony with discrimination, which cannot be expected of witnesses in a lower grade of life. This gentleman, as from the lapse of time might reasonably be expected, is not very accurate in his dates. He was examined as a witness in this cause in 1850, and states that he was in the habit of meeting the deceased in general society and at balls, when he first became a subscriber in 1823. This statement is either manifestly a mistake, or, if not a mistake, it would tend to prove that even after 1822 the deceased had not become so imbecile as to be excluded from society. It is very difficult, however, to fix any precise date to this gentleman's evidence; [486] at first he speaks of having known the deceased for thirty years, then for twenty-seven years, and towards the conclusion of his evidence he refers to the year 1817 as the commencement of his acquaintance, which in that case would make it of thirty-three years' duration. I mention this, not to find fault, for the best memory might fail in such a matter after the lapse of many years, but to shew how difficult it is to rely upon evidence as applicable to any particular period so closely approaching and connected with the all important year in this cause—the year 1820. All this witness can say is that he had not much intercourse with the deceased even when he used to meet him in society, but that from the first of his acquaintance he should say that the deceased was unequal to the management of any business. This evidence advances the case but very little, even though he swears, in answer to the tenth interrogatory, that between the years 1817 and 1823 the deceased was not "otherwise than a complete fool—an idiot."

Captain Houlton, who states that he did not in the whole course of his life exchange fifty words with the deceased, considers that he was "a species of idiot" from 1815, and describes him as stooping and bent in the back from the very first.

In this description I must say the witness is mistaken; for, on turning to the evidence of Burt, whose memory is strong on many important points, it appears that the deceased was not in that state prior to the year 1822.

Mr. Philip George "had no direct knowledge" of the deceased until the year 1839, when he acted as one of the Commissioners of Lunacy held upon the [487] deceased. His evidence in chief merely proves what is established by the formal document produced in this cause; he has, however, been cross-examined, and, as I think, with extraordinary courage. His answers to the eleventh and twelfth interrogatories would, if admissible as evidence, give a part of the contents of his notes taken at the inquisition as well as a part of the evidence of Dr. Langworthy before the commissioners. I have given some attention to the question how far this portion of Mr. George's answers is admissible evidence in respect of the issue, whether the deceased was of sound mind when he executed his will; after consideration, I am inclined to hold it is not. I apprehend it is quite clear that the notes of Mr. George could not have been made evidence in chief on either side as to the main issue, and I do not see how the extraction by interrogatory can make any difference: nevertheless I do think that these answers might be evidence to the extent of shewing that Mr. George had a reasonable foundation for the statements he has made to the questions put to him, and that his answers are good evidence so far as to establish his credit. It may perhaps be as well to state the important parts of these answers. On the eleventh and twelfth interrogatories he gives extracts from his notes of Dr. Langworthy's evidence before the commissioners to the effect that the deceased was in August, 1817, in a more tranquil state of mind, when he left relieved, not cured, and that in December, 1818, he was again admitted into Dr. Langworthy's asylum, where he remained until July following. But the part I mean more particularly to refer to is contained in the answer to the first additional interrogatory. After [488] stating from his notes that only three persons were examined under the commission, he says, "It certainly was not principally, or in any measure, from the evidence of the said Pritchard [a servant], that the lunacy of the deceased was carried back to the year 1815. It was upon the evidence of Dr. Langworthy, corroborated by that of the said Mr. Sugden, the family medical man and, as it appeared, the regular medical attendant of the deceased himself when away from Dr. Langworthy's, that the lunacy was carried back to that period. The said proceeding was not, as suggested, conducted by any means in a loose manner. It was wholly unopposed by any person on behalf of the deceased. The deceased was produced in person before the commission, and it was from the then personal appearance and manner of the deceased, coupled, however, with the evidence of the parties just mentioned (than which nothing could be stronger or more conclusive on the point), that the jury felt no hesitation in pronouncing him to be of unsound mind. I did then, and do now, consider that the said proceeding was instituted for the purpose only of enabling the friends of the deceased, in his then state of mind, to put himself and his affairs under proper supervision and control; that, I presume, was the object of the commission. I am not aware whether or not the carrying back the period, from which his mental incapacity commenced, was merely formal and devoid of any particular object. The propriety of carrying it back to that period was fully borne out by the evidence of the two medical men. I am not aware that any question was raised on the occasion as to lucid in-[489]tervals or intermissions in the malady of the deceased."

If I am mistaken in my view of the law on this point—if all the extracts from Mr. George's notes are admissible evidence on the main issue upon the principle that whoever puts an interrogatory must take the answer, even if that answer would not originally be evidence—then let me consider the effect of such presumed evidence. Does it carry the case beyond the verdict of the jury? In all respects but one, I think not.

I am bound to presume that the verdict of the jury—that the deceased was of unsound mind without a lucid interval from 1815—was justified by the evidence adduced before them. The extracts from the notes of Mr. George, even including the statement of Dr. Langworthy, do no more than shew that the deceased left the asylum in 1817 "relieved, not cured." These words do not necessarily imply continued unsoundness of mind; they imply that the cause of the disease was not removed, and that by reason of the subsequent recurrence of the malady, whether in 1818 or 1822,

the deceased was not, in any proper sense of the word, cured; the same cause, however quiescent for a time, produced a recurrence of the malady.

Evidently the most important fact supported by the extracts referred to—if it be a fact, and receivable in evidence—is that the deceased was again admitted into Dr. Langworthy's asylum in December, 1818, and there remained till July, 1819. It is most obviously an important fact as fixing a date to the evidence of those witnesses who depose to incapacity after the deceased was sent a second time to the [490] asylum at Box; for these extracts might make such evidence to speak, and to take effect, from a period antecedent to 1820, and not subsequent to 1822.

I have already, when examining the evidence on the 5th article of the allegation, admitted in opposition to the will, stated some reasons which in my opinion render it improbable that the deceased was sent back to the asylum in 1818, but I will again advert to that point when I come to the evidence in support of the will. I must, however, observe that it is very difficult to conclude that Dr. Langworthy could have made a mistake in respect of a matter so peculiarly within his own knowledge, and as to which he must, if Mr. George's notes be correct, have spoken with much particularity. Perhaps it would be safe at present, for the purpose of this investigation, to assume the fact to be as Dr. Langworthy is said to have stated it, and to give the opponents to the will the benefit of it, but not, for the present, as a fact affixing a date to other evidence. The fact, taken alone, is certainly one of importance, but not, as it appears to me, of paramount importance in this cause. It is important as shewing an increased liability in the deceased to a return of the same disorder—as shewing a shorter period of freedom from restraint; still the question remains what was the condition of the deceased from 1817 to the end of 1818, and whether from July, 1819, until after the will was executed, there was any essential change.

Having now finished my remarks upon the evidence produced against the validity of the will, I will proceed to notice the evidence brought before me in support of that instrument.

[491] Before I enter upon this branch of the case, it may be well to state what is the true nature of the case set up in opposition to the will. It is not lunacy; it is not monomania; it is not any species of mental disorder, the symptoms of which it may, at times, be difficult to detect. The case presented against the will is that of idiocy, or imbecility, the characteristic of which is permanence, with very little or no variation.

To meet such a case, and to shew that such a state did not exist at any given period, proof of acts of business is very important evidence. Many acts of business may possibly be done by a lunatic, and the lunacy itself not detected; but it is scarcely possible to predicate the same of an idiot or imbecile person. I will look, therefore, in the first instance, to the acts of business deposed to.

It is proved by Mr. Falkner, who was connected with the banking establishment of Messrs. Tuffnell at Bath, that the deceased there kept an account, beginning with the year 1818 to the end of May, 1821, and that, during that period, he occasionally drew drafts, all of which were paid to himself over the counter. The first of them is dated the 31st January, 1818, the last, the 26th May, 1821; and according to the evidence, the deceased went alone to the bank—there is no proof of any one having accompanied him—he asked for the sum he wanted, the clerk filled that in; the deceased signed the draft and took the money away with him. Surely no idiot could have done these acts; the deceased must have exercised thought to go to the bank, memory and judgment respecting the sum required; moreover, his conduct and demeanour could [492] not, at such times, have been as described by the witnesses against the will; otherwise, from the glaring colours in which his imbecility is depicted, it must have been discovered, and the business could not have been transacted.

I think it quite useless to enter minutely into similar transactions during almost the same period of time with Messrs. Coutts, for the same observations which I have just now made equally apply to them. The dates of these drafts are, however, of very great moment. Dr. Langworthy is stated to have said that the deceased was an inmate of his asylum from December, 1818, to July, 1819; notwithstanding, I find a draft paid over the counter, on the 25th January, 1819, thereby shewing the deceased must have been on that day at the banking house to receive the money. Now this fact does not depend solely on the memory of Mr. Falkner, it is supported by the very form of the draft, which form is used only at the counter; and this is not the

only draft of the same form ; there is one of the date of the 4th May, 1819, and also one of the 21st July in the same year, all of which are filled up either by Mr. Falkner or Mr. Penny, then clerks in Messrs. Tuffnell's house. The deceased must have been personally present on these occasions ; and, assuming he went from Dr. Langworthy's to the bankers, can I conceive he was in an imbecile or idiotic state ? To arrive at such a conclusion would be, if not impossible, at least very nearly so. Subsequently, I find similar drafts in the months of February, May, and July, 1820.

Strong as the evidence is, which is furnished by Mr. Falkner and the exhibits mentioned, it is still [493] further strengthened by the dealings had by the deceased with Messrs. Coutts. There were money transactions in the years 1817, 1818, 1819, and 1820, immediately before and after the date of the will, and even as late as October, 1821. There is an order under the deceased's hand for the purchase of stock in February, 1819 ; and also orders for the payment of money in April and July of the same year, at a time when, be it recollected, he is alleged to have been in Dr. Langworthy's asylum. These transactions end in the year 1821, when the deceased, according to all the evidence, became incapable of business ; but how they should have been carried on so late as in October, 1821, if he had really been unfit for business prior thereto, is a point on which I have not heard a shadow of explanation.

I consider the transactions to which I have just adverted to be of first-rate importance towards solving the difficulties of this case. Notwithstanding the lapse of above thirty years I have the advantage of facts proved with the dates truly affixed to them. I do not say that these facts alone utterly disprove the statement that the deceased was in the asylum at the end of the year 1818 and the beginning of the year following ; nevertheless they do go a long way towards it, and even if, about that time, he was there, they do prove that he did acts of business requiring some thought, judgment and understanding. Moreover, there is not the least evidence to shew that, in these acts of business, the deceased was assisted by any one. The presumption is the other way ; put them upon the lowest basis, they utterly disprove idiotey or imbecility. It is true, I will [494] repeat, that one afflicted with lunacy may sometimes manage, with perfect propriety, pecuniary affairs, but an idiot, never.

The next branch of the evidence is, in my opinion, almost equally instructive in a case like the present ; it is the evidence of dealing with tradespeople.

Jones, the saddler, has given his evidence in a manner extremely creditable ; he is supported by strong corroborative proofs in all his statements. In his examination on the 2nd and 3rd articles of the responsive allegation he states that he worked for the deceased and his three brothers ; that his first recollection of the deceased arose from his ordering a saddle of him on the 16th August, 1817. He deposes he does not find by his books he had done anything for him before ; but from that date, by reference to his books, it appears that he worked for the deceased occasionally until the 5th November, 1821. The witness states the deceased gave his own orders and paid his bills himself ; that he understood the value of money, and was careful to settle the price for every article before the order ; he was very particular in seeing that, in joint accounts with his brothers, he had not been charged more than his fair proportion.

The accounts annexed to the deposition of this witness not only confirm his statements, but bear strongly on two essential parts of the case. Firstly, in respect to the confinement in the asylum in the month of December, 1818, to the middle of 1819, there is an entry on the 29th December, 1818, so are there entries in the months of March, April, May, June, and likewise on the 27th July, 1819, which cover the entire period when, as alleged, the deceased is said to have been under restraint. It was argued, I think [495] rather hopelessly, that this account is not inconsistent with the statement that the deceased was in confinement at the period mentioned, and that the items charged might have been incurred through orders given by a servant. This attempted explanation, however ingenious, is not only not very probable, but is, as I have said, inconsistent with the evidence of the witness. If, however, this evidence is not altogether sufficient, it comes out unexpectedly on the fourth interrogatory, that the witness, on looking to an earlier ledger, is enabled to depose that he worked for the deceased and his brothers, at different times, in the year 1815, but that he did not work for him, the deceased, in 1816. How came that about ? In 1816 the deceased was certainly in the asylum—a circumstance which reasonably accounts for an intermission of work in that year ; but it appears work was done for the deceased

in the years 1818 and 1819, and it would be extremely difficult to say why, if the deceased was in confinement in those years, there was not also then no order for work, as was the case in the year 1816. I have no doubt of the truth of the evidence of this witness; however, I have dwelt the more strongly upon it, not so much for its intrinsic weight in shewing the deceased was not in confinement in the years 1818 and 1819, as for the collateral effect in fixing dates to the evidence of other witnesses. Secondly, it is not to be forgotten, in considering all the evidence in the cause, that some of these dealings of the deceased approximate very closely to the year 1820, in which year the will was made.

Of the same character is the evidence of Mr. Moore, a bootmaker in Bath, from 1818 to 1822; [496] and I refer to him more particularly, by reason that his evidence covers the year 1820. In that year his father died, the date of which event the witness cannot have easily forgotten. He was more intimate with the deceased than tradesmen usually are with their customers; he deposes to the fact that during those years the deceased acted as he pleased, rode and drove about, and that he, the witness, frequently accompanied him in his tandem. It appears, I may observe, by Jones's bill that harness for a tandem was furnished to the deceased in July, 1820.

Another witness, Mr. Bones, senior, deposes to the state of the deceased during the same period; and he is enabled to fix dates by reference to a marriage which took place in November, 1820, and to a bill dated in September, 1821. The conversation detailed as to that bill, which I shall not here state, is evidently the conversation of a rational man, and I forbear adverting to more evidence of this description, though there is no lack of it, considering the great space of time which has elapsed.

The evidence given as to the social habits of the deceased I cannot wholly pass over. Mr. Caldecot, a witness of high respectability, deposes that he became acquainted with the family of the deceased in the year 1813, that he knew the deceased in 1814, visited him when under Dr. Langworthy's care in 1815 or 1816, saw him on his return to his mother's house in 1817, and of the period from 1817 to 1822 the witness speaks in the following terms, "I was in habits of constant intercourse with him, meeting him continually in society" . . . "I always looked upon the said James Bannatyne as of perfectly sound [497] mind and perfectly competent to the management of himself and his affairs" . . . "he certainly had the full management of himself and his affairs" . . . "he used to attend divine service," and I may observe there is evidence of his attendance at the Sacrament. That Mr. Caldecot is not incorrect in his dates is proved by an abundance of evidence as to the deceased having been, during the period referred to, a subscriber to the public balls and billiard rooms, and respecting the evidence of this witness, I will add only it strictly applies to the time when the will was made, for, in answer to the 5th interrogatory, he states, "I was residing in Bath in the summer and autumn of the year 1820 up to about the month of October at least, and during that period I was constantly meeting the deceased in society."

On this part of the case it seems to me that there is only one more witness whose evidence requires comment; his name is Vining. He entered the service of the deceased's mother in the year 1815 or 1816; but from the circumstance he deposes to, that the deceased went in 1816 to dine with his mother, accompanied with Dr. and Mrs. Langworthy, I draw no conclusion in favour of the deceased's soundness of mind, for I consider that fact as a proof only of greater quiet and composure. This witness was an inmate of the family, and in consequence thereof, unless there should appear reason to distrust his memory or integrity, neither of which can I discover, he must furnish valuable evidence in respect of facts and dates. In 1817, he states, Mr. William Bannatyne was married, and, from a perfect recollection of that circumstance, he is enabled [498] to depose that the deceased returned home from Dr. Langworthy's at that time, and that he so continued until the year 1822; he positively denies that the deceased was under the care of Dr. Langworthy in the interval between 1817 and 1822. The witness states, in detail, acts done by the deceased; he speaks to the deceased's care of his money, his constant attendance on divine service, his freedom from all control, his dealing in horses, his keeping a tandem jointly with his brother, his going to parties and playing at cards; and to sum up, I may observe, the opinion this witness gives of the state of the deceased is in conformity with the facts he states; nevertheless, it is upon the facts alone that I place reliance.

I have thus gone through the evidence in great detail since I bear in mind that, in this case, there is in law what I may call a double presumption against the validity

of this will; 1st, a presumption arising from the verdict of the jury; 2ndly, a presumption from proved unsoundness of mind previously to the will. These presumptions throw upon the party in the suit, propounding the will, the very heavy onus of proving satisfactorily the soundness of the mind of the testator when he executed the instrument.

These circumstances lead me to consider the will itself, the first plea in the cause and the evidence taken thereon.

The contents of the will are very simple; the disposition of the property is beyond doubt rational, and, as I consider, looking at the position in which the deceased was placed, natural and officious. He [499] was a bachelor, and at the date of the will, he had a mother, three brothers and a natural child. He provides, as in conscience he was bound, for that child by a legacy of 4000l.; he gives a life interest to his mother in the residue, and on her death the principal to his three brothers. I cannot conceive a more unexceptionable will; its operation may, to a certain extent, have become different by the death of one of the brothers before the death of the testator; but that circumstance affords no ground for comment. There are thousands of wills which do not provide for contingencies; there are thousands in which legacies lapse, whereby property devolves into a channel not accordant with the original intention, especially when a long interval, as in this case twenty-nine years, elapses between the making of a will and the death of a testator.

The will is in the handwriting of the deceased's mother. I know not what the amount of the property was when the will was made; though I much wish I did, as I am about to look at the question—how far she was interested in the act she did. After deducting 4000l. given to the child, I doubt, looking at the mother's probable age, whether she would not have been equally benefited by an intestacy. I have, however, no means, in the strict and proper sense of the word, of forming a judgment upon the point; still I cannot think that on the score of interest any important objection arises from this circumstance. Upon another ground, however, this fact of the deceased employing his mother to write the will, instead of writing it himself, is not wholly unimportant. It is very short; it is such a document as one a priori would expect he would have [500] written with his own hand. I am aware that all the other documents are, as to the body of them, written by his mother; but this fact rather strengthens the observation I am about to make, namely, I do think that an inference fairly arises, not of insanity or idiocy, but of great inertness and indolence, probably not wholly unconnected with his disease.

This will was enclosed in an envelope, inside of which is contained certain writing by the mother. (a) I am of opinion that, by legal rules, I cannot admit this paper as evidence in support of the will. This writing is not a part of the *res gestæ*, for the will is complete without it, and there is no reason to suppose that the testator was cognizant of it. It is a mere written declaration, which cannot be evidence, even supposing Mrs. Bannatyne had been perfectly disinterested. I therefore make no further observation respecting it; in fact I do not remember that any argument was founded upon it.

This will is attested by two respectable persons, now both dead, for such they are proved by the evidence in the cause to have been. The presumption is that they had every reason to believe that the testator was of sound mind when he executed the instrument, and that the act was done by him in a rational manner. The fact of their attestation of the will is evidence of the testator's conduct at the time; and this presumption is not less strong by reason of their death. I am bound to presume, [501] looking at the will itself and at the attestation of the witnesses, that the execution of the will was a rational act, and done in a rational manner. Even in the case of pre-existing insanity it was the opinion of a learned Judge of this Court, the late Sir William Wynne, expressed by him in the case of *Cartwright v. Cartwright*, that a rational act proved to be done in a rational manner is "the strongest and best

(a) The memorandum referred to, and written on the inside of the sheet of paper forming the envelope, is as follows:—

"August 15th, 1820, Bath.

"I now enclose the will of my ever dear and affectionate son, James Bannatyne, written by me, and by his desire, and signed by him, when he was in sound health and judgment.

"HARRIET BANNATYNE."

proof that can arise as to a lucid interval" (1 Phill. 100). Now though I cannot say I altogether agree to that dictum, still it is entitled to great weight, and, to a certain extent, a rational act done in a rational manner, though not, I think, "the strongest and best proof" of a lucid interval, does contribute to the establishment of it.

In regard to the custody of the will, it does not appear to me that any observation arises. Looking at the circumstances of the case, I do not see that there was anything so extraordinary in the custody (*b*) as to reflect back on the making of the instrument, and that alone is important.

[The learned Judge proceeded to make some remarks, arising out of the arguments of counsel, respecting an exhibit marked Z 2—a letter dated the 29th March, 1830, from Mrs. Bannatyne to her son William, a party in this cause, in which she communicated to him the information that the deceased had made a will conferring a benefit upon his natural daughter, and her reason for having taken a part in the transaction; but she did not state to him the [502] extent of his or his brother's interest under the will. The learned Judge observed that the letter was not evidence either for or against the will, and had no bearing upon the question at issue, namely, the capacity of the testator at the time he executed the instrument.

In the next place, he noticed the observations of counsel respecting the conduct of the two surviving brothers of the testator, who propounded the will, particularly in respect of an exhibit marked B, the affidavit made by Mr. William M'Leod Bannatyne, on the 1st November, 1838, to lead the Commission of Lunacy. The learned Judge observed that the question of the validity of the will did not affect the brothers alone; it extended to other persons; and he remarked that the affidavit, as to the dates of the testator's confinement at Box, was very loose. He concluded this part of his judgment by saying he did not consider that any inference, either against the will or against Mr. William M'Leod Bannatyne, arose from that affidavit. Having dwelt at some length on these points, (*a*) he proceeded to sum up.]

I have thus endeavoured to weigh and consider every point which has been urged on the one side and the other. As against the validity of the will, I place the presumption of law and the proved unsoundness of mind both prior and subsequent to the execution of that instrument, and also, for the purposes of the argument, all that has been extracted [503] from the statement made by Dr. Langworthy to the jury in 1839. Moreover, I take into account that neither the will, nor any other document, is in the handwriting of the testator—a circumstance which affords a strong proof that, in matters of business, he did not act as men ordinarily do.

I have given such weight as, after careful examination, I think due to the evidence produced to establish unsoundness of mind; notwithstanding I am of opinion that the evidence in support of the will preponderates. The rational character of the instrument itself—the duty of providing for the natural daughter—the justice done to all his next of kin then living—the improbability of any unfair conduct on the part of a kind and affectionate mother—the sanction of the attesting witnesses—the management of his pecuniary concerns—the dealing with and conduct towards tradesmen—the perfect freedom of person—the continued enjoyment of society and its amusements—are circumstances which, applying to the period when the will was executed, do, in my judgment, rebut the presumption of law, overpower the opposing evidence, and establish a lucid interval, or, in other words, shew that the testator was, when he executed this will, of sound mind. I therefore consider it my duty to pronounce that this will is entitled to probate.

There remains one more point to be decided, namely, the question of costs.

As a general rule, I think, costs ought to follow the judgment; nevertheless, I consider that in testamentary causes there must frequently arise just and fair exceptions; and I am of opinion that the [504] present suit furnishes a fair exception to the rule. In the first place, here is a will which must in any event have been proved in solemn form of law, for, looking at all the circumstances of the case, it is very

(*b*) The will had been in the custody of three persons at different times.

(*a*) The reason for omitting in detail these heads of the judgment is that, to make the observations of the Court intelligible to the general reader, it would be necessary to set out Mrs. Bannatyne's letter and the very long affidavit of Mr. William M'Leod Bannatyne; which exhibits, after all, in no respects affected the mind of the Court in the conclusion at which it arrived.

doubtful whether, without the decree of a court, any person could have sworn either to a testacy or intestacy; besides, the will is in direct conflict with the verdict of a jury, which referred the insanity back to a date long prior to the execution of the instrument. In the second place, though not received as evidence in this Court, those opposing the will were manifestly carried away and deceived by the affidavits made in Chancery by Dr. Langworthy, who was, I think, mistaken in his statement that the testator was an inmate of his house a second time prior to the year 1822. With respect to any thing said by counsel regarding the conduct of this cause, I think I should be doing great injustice were I, because in the heat of argument counsel attacked either the one party or the other, to refuse to order payment of costs out of the estate, especially when there are minors concerned.

I decree probate of the papers, with costs out of the estate.

[505] WILLIAMS *against* DORMER, FALSELY CALLED WILLIAMS. Arches Court, April 15th, 1852.—A wife obtained a sentence of divorce by reason of her husband's adultery. Subsequently, in a suit of nullity of marriage promoted by the husband, and brought by letters of request to the Court of Arches, it was in substance pleaded that the husband was resident within the jurisdiction of the commissary, who signed the letters of request, and that, by reason thereof, the wife was subject to the jurisdiction of the Court. Held, that the ordinary presumption, that a wife is legally domiciled where the husband is, fails when there has been a sentence of divorce.

[S. C. 16 Jur. 366. Referred to, *Le Sueur v. Le Sueur*, 1876, 1 P. D. 141.]

On admission of the libel.

This was a suit of nullity of marriage promoted by the husband against his wife.

The parties were married by licence in December, 1826; and in July, 1837, the wife obtained a sentence of divorce on account of her husband's adultery. In 1838 the wife instituted a suit of nullity of marriage by reason, as pleaded, that the licence was obtained by the husband from a surrogate who had no authority to grant the same; but the Judge of the Consistory Court of London rejected that libel, on the ground that the facts stated did not afford any reason to conclude that Mrs. Williams had, when the marriage was celebrated, a guilty knowledge that the law had been violated. (a)

The present suit was instituted by the husband with the view to correct the defect in the former libel; in this suit it was pleaded that both parties had, previously to the marriage, not only a guilty knowledge that the licence had been unduly obtained, but also of the fact that the ceremony was about to take place, and that it did take place, in a [506] private building, wherein a marriage could not, except by a special licence, be performed.

This suit was brought to the Court of Arches by letters of request from the Commissary of Canterbury.

The admission of the libel was opposed, on behalf of the wife, by Addams and Curteis, on the ground of defect of jurisdiction in the Commissary of Canterbury to sign the letters of request, and was supported by Jenner and Twiss.

The objections in detail, as well as the arguments of counsel, are sufficiently noticed in the judgment.

Judgment—*Sir John Dodson*. This case is brought before the Court under very unusual circumstances. The marriage between the parties in this suit took place in December, 1826. In July, 1837, the wife obtained a sentence of divorce by reason of her husband's adultery, to obtain which sentence the marriage must have been pleaded and proved. Afterwards, Mrs. Williams instituted a suit for nullity of marriage, which Mr. Williams successfully defended, and he was dismissed from that suit in November, 1838.

Thus matters remained until the year 1851, when the present suit was commenced for nullity of marriage by the husband against the wife, and brought to this Court by virtue of letters of request from the Commissary of Canterbury.

A libel was given in pleading the fact of marriage, and the grounds upon which it is alleged that the marriage is null and void. When the admission of the libel was

(a) See a report of the case in 1 Curt. 870, wherein the marriage is erroneously stated to have taken place in the year 1836.

debated in July, 1851, an objection [507] was taken by the late Judge, Sir Herbert Jenner Fust, that the jurisdiction of the Court was not sufficiently pleaded—that it was not set forth that Mrs. Williams was within the jurisdiction of the Commissary of Canterbury, who signed the letters of request. Sir Herbert Jenner Fust directed the question of jurisdiction to be considered, and the libel to be reformed, if it could be, in reference to that point, holding that, if the Commissary of Canterbury had not jurisdiction to try this suit—in other words, if the lady was not within his jurisdiction when he signed the letters of request—he had no authority to send the case to this Court.

On looking to the 9th article of the libel I find it has been thus reformed, “That the said William Henry Williams was and is resident within the parish of Tunbridge, in the county of Kent, and diocese of Canterbury, and province of Canterbury, and that the said Maria Teresa Dormer by reason thereof, and of the letters of request from the Commissary General of the city and diocese of Canterbury, presented to and accepted by the Official Principal of the Court of Arches, and by reason of such the premises, and the appearance given on her behalf in this cause, or otherwise, was and is subject to the jurisdiction of this Court.”

It has been observed by the counsel for Mrs. Williams that, even as the libel now stands, it is not pleaded that the husband did, when the suit was instituted—when the letters of request were signed—reside within the jurisdiction of the commissary; it is pleaded vaguely only that he was and is resident at Tunbridge within the jurisdiction of the Commis-[508]-sary of Canterbury, and that by reason thereof the wife is subject to the jurisdiction of this Court.

It was said, in answer, that this objection might be easily corrected. Were I, however, to allow the libel again to be reformed by pleading that the husband was, at the time when the letters of request were issued, resident within the jurisdiction of the commissary, would it follow that the wife, in this case, was also resident in the same jurisdiction? Certainly not. It was properly observed by her counsel that there has been a sentence of separation from bed, board and mutual cohabitation, consequently, that the presumption of law, which usually obtains, namely, that the wife is legally domiciled where the husband has his domicile, cannot in this case prevail. On the contrary, the probability is she is resident somewhere else; and on referring to the former suit of nullity it appears that such suit was instituted in the diocesan Court of London (see 1 Curt. 870); therefore, if her residence is to be presumed to be in any jurisdiction in particular, it would be rather in the diocese of London than in the diocese of Canterbury. I must say I consider these objections well founded, and that the defects in the libel are not removed.

The case of *Chichester v. Donegal* (1 Add. 5), cited in reference to the appearance of the wife, has no bearing on the present question. In that suit there had not been a divorce, and the husband was beyond doubt within the jurisdiction of the Court; moreover, the objection there taken was, not by a principal party in the suit, but by an intervenor.

[509] Upon the whole case, without saying more, I am of opinion that it is not so much the domicile of the husband within the jurisdiction of the Commissary of Canterbury (though even that is not sufficiently alleged) as it is the residence of the wife within that jurisdiction which ought to be pleaded and proved—that is here the all important point. “I want to know,” said Sir Herbert Jenner Fust, “where the lady was resident when this suit was commenced; had I been aware that point would have been left in the dark, I would not have accepted the letters of request.”

Seeing, then, that this marriage, which has been proved to be a valid marriage by a competent Court, has subsisted for more than a quarter of a century, and that the objection taken by the late Judge to the libel has not been removed, I am of opinion that the best course I can take is to reject the libel altogether.

[510] DEASE, FORMERLY THEWLES, *against* KELLY. Prerogative Court, April 28th, May 10th, 1852.—If a question be raised by act on petition, instead of by plea and proof, the suit must be so conducted as not to prejudice the opposite party in the suit: documents referred to in an act must be annexed to the act.

Edmond, otherwise Edmund, Kelly, Esq., died on the 27th February, 1845, leaving Sarah Kelly his widow, and Mrs. Dease, formerly Miss Thewles, his cousin-

german and only next of kin. The deceased was possessed of a very large personal estate both in England and Ireland, as well as of real estate in Ireland.

On the 7th March, 1845, Mrs. Kelly obtained in the Prerogative Court of Canterbury probate of an alleged will of the deceased, bearing date the 21st April, 1838, in which she was named the executor and almost universal legatee. The effects of the deceased within the province of Canterbury were sworn by her to be under 120,000l. Mrs. Kelly thereon immediately endeavoured to obtain probate of the will from the Prerogative Court in Dublin, but was stopped by a caveat entered on behalf of Miss Thewles. A protracted litigation ensued; the Judge of the Prerogative Court in Dublin, on the 2nd February, 1850, pronounced in favour of the will; but, on appeal, the Judges Delegate on the 11th January, 1851, reversed that judgment and pronounced the will and duplicate to be void, the deceased to be dead intestate, and decreed administration of his effects to Miss Thewles; they also condemned Mrs. Kelly in the costs of the suit in the Prerogative Court, and decreed the costs of Miss Thewles to be paid out of the deceased's estate.

On the 25th March, 1851, on motion, letters of request were decreed by this Court for a decree from the Prerogative Court in Dublin, citing Mrs. Kelly to bring in the probate heretofore obtained by her, and to shew cause why that probate should not be revoked and declared void, the said pretended will pronounced void, and the deceased to be dead intestate. The service of the decree was not effected until the 3rd October following.

On the 4th December an appearance by proxy was given for Mrs. Kelly and the probate brought in. On the 28th January, 1852, at the petition of Mrs. D.'s proctor, the proctor for Mrs. K. was assigned to declare whether he would propound the will; and on the 6th February he declared he propounded the will and asserted an allegation. The proctor for Mrs. D. objected thereto, and prayed to be heard on his petition in objection to the asserted allegation. The act was delivered to Mrs. K.'s proctor, who brought it in on the 20th April, and declined to write thereto, and prayed the Court to reject the same.

In the act on petition it was alleged that the domicile of the deceased was in Ireland, the amount and character of his property both in Ireland and England were described, and, after a statement of the proceedings had in the Irish Courts in regard to the question of probate of the will, various circumstances were alleged, and letters and documents, not produced, were referred to, in support of [512] the Irish domicile; and it was submitted that, inasmuch as the deceased was by birth an Irishman and had resided in Ireland nearly the whole of his life, and had never abandoned his domicile of origin, the judgment of the Court of Delegates in Ireland must be held to be final and conclusive in respect to the will, and that it was not competent to the widow to propound in this Court the will pronounced to be null in Ireland, and it was prayed that the Judge would revoke the probate heretofore granted, &c.

Jenner and Bayford in opposition to the admission of the petition. The question raised is one of domicile. A proceeding by plea and proof would be more convenient in such a case. This is the first opportunity we have had of praying an allegation; for it was not known, till the petition was given in, what its contents would be. There may be instances in which similar cases have proceeded by petition, but when the opposite party objects, and prays an allegation, then that prayer should be allowed. The case of *Laneville v. Anderson* (9 Moo. P. C. 325) went further, for, though both parties assented to proceed by petition, the Judge himself interposed and directed an allegation. If the proceeding by petition be allowed, then certain documents therein referred to, but not produced, must be annexed.

Harding, (b) Q. A., and Twiss in support of the petition. The question as to the validity of the will has already been decided in Ireland. The jurisdiction [513] of the Irish Courts was not disputed; the judgment respecting the will is therefore *res adjudicata*, unless the domicile be questioned. The proceeding by petition is strictly in accordance with precedent; see *Craigie v. Lewin* (3 Curt. 439); *Hare v. Nasmyth* (2 Add. 25); *De Bonneval v. De Bonneval* (1 Curt. 859). The letters and documents referred to should be annexed to the affidavits, and not to the petition.

Cur. adv. vult.

May 10th.—*Judgment*—*Sir John Dodson*. In the act on petition it is alleged that

(b) See note (g), pp. 422-3.

the deceased was legally domiciled in Ireland. That point, it is admitted on both sides, should be in the first place set at rest. There are in the present instance two questions presented for my determination:—1st, whether this inquiry should be conducted by act on petition or by plea and proof; 2nd, if by act, whether the act requires to be reformed.

1st. The case of *Laneville v. Anderson*, which was cited, does not establish the proposition contended for. The will of the deceased in that case was proved in France, and in this Court an allegation was given in raising, amongst other matters, the question of domicile of the deceased. The late Judge, Sir Herbert Jenner Fust, was of opinion that the domicile was in the first place to be established, and, with that view, ordered the allegation to be reformed and to be confined to that point. The allegation, as reformed, was admitted, but, instead of replying thereto by allegation, an act on petition [514] was given in, which was very properly rejected; since it would be an anomaly to admit an act in answer to an allegation: the Court then ordered an allegation.

In the present instance the suit has been commenced by petition, and I apprehend that that is the proper, or, at least, not an unusual course. A proceeding by petition has at least these advantages—there is a saving of expense and likewise of delay. By adopting that course on the present occasion I think the question at issue—the domicile—may be more conveniently raised, and I am disposed to allow it.

2nd. I am clearly of opinion that the act must be reformed, for, though I permit the proceeding to be conducted by petition, I cannot allow the opposite party to be prejudiced by that course. It is clear on perusal of the act that reliance is placed on certain letters and documents, referred to, but not produced. Had the suit been by plea and proof those documents must have been annexed to the allegation: it would be unjust to withhold them on the present occasion. In permitting, therefore, this case to be proceeded with by petition, it is on the condition only that the documents referred to, or at least copies, be brought in and annexed to the act; otherwise the case must be conducted by plea and proof.

I direct the act to be reformed in the way I have pointed out.

[515] THE RECTOR AND CHURCHWARDENS OF THE PARISH OF ST. JOHN, WALBROOK, LONDON *against* THE PARISHIONERS THEREOF IN SPECIAL, AND ALL OTHER PERSONS IN GENERAL. Consistory Court of London, May 28th, 1852. —No Judge has power by the general law to grant a faculty to convert a part of a church-yard into a highway requiring to be widened for the public benefit, though consent be given by all persons interested.

[S. C. 16 Jur. 645. Approved, *Reg. v. Twiss*, 1869, L. R. 4 Q. B. 412. Referred to, *Keet v. Smith*, 1875, L. R. 4 Adm. & Ec. 404; *In re Plumstead Burial Ground*, [1895] P. 1295; *Vicar of St. Nicholas v. Langton*, [1899] P. 19; *In re Bideford Parish*, [1900] P. 314.]

Motion.

This was an application on the part of the rector and churchwardens of the parish of St. John, Walbrook, in the city of London, for a decree with intimation calling upon the parishioners of that parish in special, and all other persons in general, to shew cause why a faculty should not be issued for making certain alterations in the burial-ground of that parish.

The lord mayor, aldermen and commonalty of the city of London being engaged, but acting through a committee duly appointed, by virtue of certain acts of parliament, in making various public improvements in Cannon Street and the streets and places adjacent thereto, found it necessary in order to complete their plans to apply to the rector, churchwardens and parishioners of the parish of St. John, Walbrook, to consent upon certain terms that the wall of their burial-ground, on the east and south sides fronting Dowgate Hill and Cloak Lane, should be set back so as to give four feet additional [516] width to the public thoroughfare, and also that an old tomb adjoined to the east wall, belonging to a family supposed to be extinct, should be set back and re-constructed. The parishioners, in vestry assembled, gave authority to the rector and churchwardens to accept the terms proposed and to take the necessary steps for obtaining a faculty to carry into effect the alterations above mentioned.

It was also stated in the case that owing to the small number of interments the burial-ground, when altered, would be ample, and that, by reason of a row of trees

near to the south wall, it was believed that no interment had ever taken place in that part of the ground.

The facts as stated were supported by affidavits.

By "The City of London Sewers Act," to which the royal assent was given the 24th July, 1851, sect. 32, it is enacted—"that after any church-yard or burial-ground shall have ceased to be used for the interment of the dead, it shall be lawful for the commissioners, with the consent of the Bishop of London, to be signified by any instrument in writing under his hand and seal, to enter into such arrangements as may be agreed upon with the incumbent and churchwardens of the parish in which such church-yard or burial-ground may be situated for the appropriation thereof, or of any part thereof, to public improvements, or to enlarge and improve the public streets."

Harding, Q. A., on the above facts moved for a decree, and observed that the question turned on the construction of the words in the Sewers Act "ceased to be used," and that the consent of all persons concerned had been obtained. He referred to the case, as somewhat similar, of *Steeven and Hollah v. The Rector and Others of the Parish of St. Martin Orgars* (2 Add. 255), and argued that inasmuch as the application, though merely for the benefit of the parish, had been granted in that instance, the present application, being for a great public object, might with propriety be conceded.

Judgment—*Dr. Lushington*. I think, if my memory rightly serves me, the faculty, in the case referred to, was granted to take down a church in a dilapidated state without in any way perverting the consecrated ground on which the building stood; the ground was to remain, if I may use the expression, in its state of consecration. A similar faculty was, I remember, granted by Sir Christopher Robinson, when sitting in this chair, in regard to a church in Colchester.

I will assume that an equitable contract has been entered into in the present instance between the Corporation of London and the parish of St. John, Walbrook. The question, however, is, whether the Court has the power to grant this motion. If the case be within the section of the statute referred to, into the construction of which I will not enter, I have no jurisdiction; application must be made to the Bishop of London; on the other hand, if the case be not within that statute, the question will be whether I have authority by the general law to exercise the power asked for.

I well remember that an application was made to [518] Sir William Wynne, when Judge of the Arches Court, to grant a faculty for converting a part of the church-yard at Ewell in Surry into the public road requiring to be widened; and that learned Judge refused the motion, stating that nothing short of an act of parliament could enable him to accede to the prayer. (a) That dictum has been to my knowledge since acted upon, and I consider rightly, in several instances in the dioceses of London and Rochester; I must therefore refuse the present motion.

PARKES v. PARKES. Arches Court, May 29th, 1852.—A suit proceeded to a sentence in the Commissary Court of Surry, in which certain witnesses had been produced, sworn, and examined, in the diocese of London, without express consent given to time and place: on appeal, objection was taken to the depositions of such witnesses. Held, that the objection could not be sustained, especially by reason that the appellant had acquiesced by his acts in what had been done, and that, as the facts were within his knowledge in the Court below, and no objection taken, it was too late to object in the Court of Appeal.

[S. C. 16 Jur. 1093.]

On appeal.

This was originally a cause of divorce, by reason of adultery, instituted by Mary Ann Parkes against her husband Thomas William Parkes in the Commissary Court of Surry, in which Court sentence of divorce, as prayed, was on the 11th November, 1850, pronounced.

[519] From that sentence Mr. Parkes appealed to the Court of Arches, and on the very outset of the proceedings in that Court a preliminary objection was taken

(a) It is presumed that the reason why such an application cannot be granted is that a sentence of consecration is definitive.

on behalf of the appellant to a considerable portion of the evidence adduced on the part of Mrs. Parkes, which objection was not raised in the Court below.

It appeared by the minutes of the Court below that several of Mrs. Parkes' witnesses were produced and sworn before the Judge himself and certain of his surrogates, not in Surry within the local jurisdiction of the commissary, but in Doctors' Commons within the diocese of London. The same course too, it appeared, was adopted in regard to many of Mr. Parkes' witnesses. Both proctors were present at the production of the witnesses, and no objection was taken; but no express consent was given, or taken down in writing, to time and place.

The objections raised by Mr. Parkes were set forth in detail in the libel of appeal, but, by order of the late Judge, Sir Herbert Jenner Fust, were struck out; subsequently, the same matter was introduced again in the form of a special allegation, together with an affidavit assigning as the reason why the point was not raised in the Court below that he, Mr. Parkes, was not aware of the invalidity of the depositions until long after the sentence was signed. Sir Herbert Jenner Fust rejected the said allegation and affidavit, on the ground that all the objections would appear in the process, to which alone he could look for proof of any irregularity.

When the appeal was ready to be heard, on the 15th April, 1852, the objections were taken as a preliminary point, and the arguments thereon were [520] continued on the 24th of April and the 12th May following by Harding, Q. A., for the appellant, and by Phillimore, junr., for the respondent, after which the Court took time to deliberate.

The most important of the cases and authorities cited by counsel are reviewed in the judgment; and the heads of the argument in support of the objections to the evidence are there set forth. (a)

Judgment—Sir John Dodson. This was originally a suit brought in the Commissary Court of Surry by Mrs. Parkes against her husband for a divorce by reason of adultery alleged to have been committed by him. The learned Judge of that Court, after a long investigation, held that Mrs. Parkes had sufficiently proved the charge, and accordingly he pronounced in her favour.

From that judgment the case has been brought before this Court on appeal; and the counsel for the husband has, for the first time, taken a preliminary objection in this Court to the reception of the evidence of many of the witnesses, on the ground that those witnesses were produced and sworn in Doctors' Commons within the diocese of London, and, consequently, beyond the limits of the jurisdiction of the Commissary Court of Surry.

[521] With the view of establishing the invalidity of the evidence so taken, it was contended: 1st, that the local limit of jurisdiction is a known and well recognised principle of ecclesiastical as well as of common law; 2ndly, that the admissibility of evidence in any Court must depend upon the circumstance whether a witness who is examined is, or is not, indictable for perjury; 3rdly, that the objection, as stated, cannot be removed by waiver or consent, or be cured by any practice, however inveterate.

In support of the first proposition certain cases were referred to regarding the jurisdiction and power of temporal magistrates armed with local authority. Of the number was the case of *The King v. The Inhabitants of All Saints, Southampton* (7 Barn. & Cress. 785), which occurred in the year 1828. In that case, which was an appeal from an order of sessions, there was an examination of a soldier taken before two magistrates under the Mutiny Act, giving magistrates jurisdiction over soldiers quartered in places where magistrates have power to act; and the examination was held to be bad, as it did not appear that the soldier was quartered in the place where

(a) It is submitted that the question here involved depends rather on the principles of the civil law than of the common law of England. It may be observed that the civil law does not deal in technical points and nullities to the extent that the common law does or did. In order to constitute a nullity in a suit where the Court has jurisdiction over the subject-matter, and the proceedings are dependent on, or regulated by, the civil law, it must be shewn that an injustice has been done: see Gail, lib. 1, obs. 42, with all the references. It is to be understood, however, that this observation is not intended to apply to criminal suits.

they were justices. The soldier may have been quartered in the place, but the fact did not appear, and by reason thereof the order was quashed.

The case of *The Queen v. The Inhabitants of Shipston upon Stour* (6 Q. B. 119) was cited and commented upon. In that case, on an appeal against an order of removal, it appeared that an examination of a person had been taken and sworn before, and was signed by, two persons, whose names only, without any description of their office, were given. The [522] heading did not shew before whom the examination was taken. There was no reason to doubt that those persons were magistrates, but as their names alone appeared, without a description of their office, or authority, Lord Denman with the other Judges held that the order must be quashed.

The Queen v. The Inhabitants of Totness (11 Q. B. 80) was also cited, in which case it was held that all judicial acts by persons whose authority is limited, as to locality, must, on the face of them, purport to be done within the locality. The document in question did not on the face of it contain that requisite; it was therefore held defective.

In regard to these three cases to which I have referred, it is to be observed they arose under particular acts of parliament, consequently they stand, to some extent, separate and distinct from the case we are now considering. It must be admitted, however, that the law is laid down in those cases in very general terms; the result of which is that magistrates must not only be invested with authority, but that their authority or jurisdiction must appear on the face of their proceedings.

The case of *Rex v. Punshon* (3 Camp. 96) was cited, in which a distinction was taken by the Court between civil and criminal cases; but I do not think that case has any great application to the present. The case of *Rex v. Verelst* (ibid. 431), also cited, was a criminal case; and the question raised was whether Verelst had been duly sworn to his answers before Dr. Parsons acting as surrogate. Lord Ellenborough observed it is a general presumption of law that a [523] person acting in a public capacity is duly authorized to do so: but on the production of the registrar's book, wherein such appointments are recorded, it turned out that the entry led to the inference that the appointment had not taken place as the 123rd canon directs; whereon the appointment of Dr. Parsons was held to be a nullity, and the defendant was acquitted.

Now, upon the applicability to the Ecclesiastical Courts of this principle in regard to local jurisdiction, great reliance was placed upon the Statute of Citations, the 23 Hen. 8, c. 9, and upon some of the decisions based thereon. But that statute relates more particularly to the parties in a cause, and not to the examination of witnesses.

The first case referred to under that statute was *Pickaver's case* (Hob. 178), in which it was resolved by the Court that, if a bishoprick within the province of Canterbury be void, whereby the jurisdiction would devolve to the metropolitan, he must hold his Court within the inferior diocese for such cases, as were by law to be holden before the inferior ordinary.

The case of *Donegal v. Donegal* was also cited (3 Phill. 586). I shall dwell at some length on that case, not only by reason that the question was decided by Lord Stowell, but subsequently by the Vice-Chancellor. The marchioness, who was resident in Ireland, had been cited to appear in the Consistory Court of London. She appeared, and the case was proceeding, when Mr. Chichester intervened and objected to the jurisdiction of the Court, on the ground that her ladyship was not resident within the jurisdiction of the Court at the time she was cited. Lord Stowell, [524] in reference to the point raised, said: "In the course of the proceedings in this cause, an objection has been taken to the citation, not that it is ill conceived, but that it has not been executed properly: the objection is taken by the party called upon to see proceedings. The party cited in the cause might object to this, but it is not competent for the party only cited to see proceedings to do so; and if it had been, my opinion is, that the defect in the citation, if any, would have been cured by the appearance of the party. The stream of authorities flows in favour of this conclusion." So far then it is quite clear that though the Court had no right to cite and compel the lady to appear, if not resident within the jurisdiction, yet, as she had appeared, the objection was entirely cured, and she could not afterwards have resiled from it. His Lordship added, "The citation seems to me sufficient. I overrule the objection to the jurisdiction; but I decide nothing as to the liability to Mr. Chichester to be called

upon to see proceedings." "The stream of authorities," in respect to her ladyship, I am sure is as stated by Lord Stowell.

This case afterwards travelled into the Vice-Chancellor's Court, and I shall now recite what fell from his Honor on the point we are now considering. At 3 Phill. p. 604, he is reported to have said—"Now the first and most important question is, whether Lady Donegal would be now precluded, if she thought fit, from taking an objection to the question of jurisdiction. The question of jurisdiction is of two sorts—the want of jurisdiction as to the subject of the suit, which never can be acquired—and the [525] want of jurisdiction as to the locality of the parties in the suit." Certainly, here is a very wide distinction very properly taken. "It is material to see what steps are had in the inferior Court. If it appears on the record that the inferior Court had never any jurisdiction on the subject," i.e. over the subject-matter, "there is no proceeding in this Court, and no acquiescence of parties ever can maintain the judgment.

"But the want of jurisdiction may proceed, not from the nature of the subject, but because one of the parties is not locally within the jurisdiction of the special Court; and although the Court then may have full jurisdiction of the subject, it has not jurisdiction over the party in respect of the absence of that party from the local district. That is the nature of this objection: it being admitted here that on the subject itself the Court itself has full jurisdiction. And as to the question of the marriage between Lord and Lady Donegal, there is no objection, but the objection to the question being that, at the institution of the suit, Lady Donegal was not locally within the district, and therefore not properly before the Court.

"It appears to me that it hardly admits of a question that a Court of limited jurisdiction (I mean limited as an ordinary Court is, perhaps to an archdeaconry, or a bishopric, or an archbishopric), and it is hardly necessary to observe on the plainest principle of the common law that, on a mere assertion of interest, such a Court can never have jurisdiction beyond its own local limits." So far this makes strongly for the position asserted by the Queen's advocate.

[526] "I conceive that it is not the statute of the 23 Hen. 8 that created this objection: the objection is inherent in the nature of a limited jurisdiction." The Statute of Citations is an affirmation of the common law, which archbishops and bishops had in some instances exceeded; it was to restrain them within proper limits that the statute was passed.

"The 23 Hen. 8 seems to me to have had in view only to enforce the principle of the common law by imposing a penalty and forfeiture against those who should act against its principles. It seems by the recital of the statute itself that it had become necessary, in respect of the practice which had been adopted by the archbishop and others, and so the recital seems to import, in drawing within their superior jurisdiction persons who were not locally resident there.

"I take that statute to be merely affirmative of the general principle of the common law, and to give aid to that principle of the common law by the enforcement of the penalty and the forfeiture. The canon law considers it in the same way, and considers it as declaring the principle of the common law, and it declares, namely, that he who, in respect of an office which has a limit and local extent as to judicial jurisdiction, is necessarily by the principle of the common law limited in that jurisdiction, according to the extent and locality of his office." Though a Judge may have jurisdiction over the subject-matter, he cannot compel an individual against his will not resident within the jurisdiction to appear and contest a suit; but should he appear willingly, the defect is cured.

At page 608 the Vice-Chancellor proceeds thus:—[527] "I am bound to say that no authority which has been cited to me to day, at all, as I consider it, touches essentially this question—that Lady Donegal, or any other party, who, admitting the fact which gives jurisdiction to the Court, has a right to retire from an admission of that fact at any time before sentence.

"No authority appears to me to go that length. There are expressions in that case in Carthew (p. 33) which would be consistent with such a statement of facts; but when you come to weigh the weight of all the expressions there used, my opinion is on that case that the weight of authority is the other way, and that what the Court there means to decide is, not that a party may retire at any time before sentence, but that a party can never retire who has pleaded and submitted to the jurisdiction." . . .

"I state without exception, as a general principle, that, in Courts of Equity as well as Courts of Law, a party admitting a fact, which does give jurisdiction to a Court admitting it, and appearing and submitting to that jurisdiction, upon general principles and upon all analogies known to us, can never recede, or, as it is called in the Scotch law, resile from those facts and withdraw that admission." The Vice-Chancellor then proceeds to state his opinion in *Lady Donegal's case*—that she was properly before the Court though in Ireland at the time when the citation was issued. So stands the case of *Donegal v. Donegal*.

The case of *Butler v. Dolben*, decided by Sir George Lee, and referred to in the judgment of *Steward v. Bateman* (3 Curt. 206), was cited from that judg-[528]-ment. It involved a question under the Statute of Citations, but it has not, I think, so direct an application to the case before me as the one I have just entered into.

Now I think that the result of all the cases I have hitherto referred to, both from our own Courts and also *Pickaver's case*, is that they relate to parties in a suit, and have no direct bearing on the point I am called upon to decide. I do not mean to say they have not an indirect, and, possibly, a very important, bearing on the whole; still, they do not relate to witnesses produced in a cause, but to the parties thereof themselves.

It is certainly true that an ecclesiastical Judge has no direct power to compel the appearance of a witness resident out of his jurisdiction to undergo an examination; nevertheless he can accomplish this indirectly; he can do so by means of letters of request to the ordinary of the place in which the witness is resident, which ordinary gives his assistance sub mutua vicissitudinis obtentu; and the witness is thus compelled to appear and undergo his examination. But I apprehend this is accomplished, not on the sole authority of the local ordinary who merely compels an appearance, but also by reason of the authority of the Judge of the Court having jurisdiction over the cause, from whom the letters of request issued; for the local ordinary could not, of his own mere authority, have examined such witness in a cause over which he had no jurisdiction.

It is very true that the aid of letters of request was not invoked in the present instance; but the witnesses, whose evidence is objected to, voluntarily appeared and submitted themselves for examina-[529]-tion; moreover, the proctor on each side was present when the witnesses were produced and sworn. Now, the course that was taken in the present instance may perhaps be viewed in the light of an irregularity rather than of an absolute nullity. At all events, on a somewhat similar point, the matter seems to have been so considered by the learned Judge of the Consistory in *Woods v. Woods* (2 Curt. 516), as we shall soon see. I forbear, for the present, to say anything respecting the presence of the proctors on each side and the question of their consent to the acts done, as those points form a very important part of the case; I must, however, hereafter more particularly advert to them before I come to a conclusion.

(2) I now proceed to consider the second objection, which is certainly one of a very grave nature and was strongly pressed by the counsel for the appellant, namely, that the indictability of witnesses for perjury is the true test by which the admissibility of their evidence must be governed.

In support of that position various cases from the Common Law Courts were cited, but the case principally relied on is *Woods v. Woods*, decided by Dr. Lushington. It was a criminal suit for incest, and in the course of the proceedings three objections were taken. (1st) "That the requisition issued in the case was altogether a nullity, by reason of its being wrongly dated; that it ought to have been dated on the day on which it was decreed; but in fact it bore date subsequently, that is, when it was extracted." The learned Judge, however, overruled that objection. (2ndly) "That the commission under which [530] the evidence had been taken was granted without any legal authority, it being stated to have been granted by the official principal of the bishop, who would be the proper officer to direct such an instrument to issue, but that the requisition (under the authority of which the commission would have its validity) was directed to the bishop, or his vicar-general, commissary, surrogate, or other competent judge, without naming the official principal, who is a different officer from the vicar-general, although in this instance it may happen that the same person holds both offices." In point of fact it does happen very commonly that the offices of official principal and vicar-general, which are perfectly distinct offices, are united in one person. (3rdly) "That the seven last witnesses, under the commission, were described as having been examined 'on the aforesaid articles given in by F. Clarkson,'

when in point of fact there were no such articles, F. Clarkson being the proctor of the defendant, and the articles being those of Rothery, the proctor of the promoter."

Now the learned Judge, Dr. Lushington, having dealt with other matters not connected with the question before me, proceeds thus: "But it is incumbent upon me to consider the objections to receiving the evidence taken in Norfolk, which go to this: that it is taken in such a shape and form that an indictment for perjury could not lie against any of the witnesses who should depose falsely and corruptly. Now, nothing, in my judgment, can be more dangerous to the credit of these Courts than that it should be considered that they would decide questions affecting the rights and interests of parties upon evidence, the individuals giving which, if they [531] depose falsely and corruptly, might not be liable to an indictment for perjury." The learned Judge lays down the proposition very strongly. "Nothing," he adds, "indeed could be more fatal to the due administration of justice than that evidence should be received under such circumstances. The effect would be that these Courts would be attempting to administer justice in important cases, where the witnesses examined in the cause are under no apprehension that the punishment attached to the crime of perjury could be inflicted upon them, however falsely they might swear."

"The objections to this evidence may be classed under two heads: the questions are—1st, whether the oath was administered to the witnesses by a competent authority. 2ndly, whether the evidence has been so taken as to prevent the possibility of punishing any of the witnesses who should have perjured themselves. The first objections go to the whole of the evidence taken at Norwich;" namely, under the requisition and the commission; "the second to that of the last seven witnesses only," namely, those described as examined on the articles "given by F. Clarkson."

"With regard to the authority to administer the oath to the witnesses deposing under the requisition and the commission, the first objection is that there is a discrepancy between the date of the requisition and the date of the decree. I am of opinion that this cannot affect the validity of the proceedings; though the practice is not uniform, still what was done on this occasion—the requisition bearing date the day it issued, not the day it was decreed—is not at variance with the ordinary usage of these [532] Courts." Certainly I apprehend an irregularity was committed, still the Judge of the Consistory says it "is not at variance with the ordinary usage," shewing therefore practice is of some weight, though the practice would not cure that which is an absolute nullity. "The next objection is that there is a variation between the jurisdiction required to accept the requisition, and that accepting it at Norwich. Now, although, perhaps, the form of proceeding may have been, in some respects, singular, there does not appear to have been any essential defect; though it may be different from what might have been expected, yet I must look at the usage in the diocese of Norwich. I am not to suppose that there has been anything irregular in the present case, that is, different from what takes place in ordinary cases, and if there has not been any irregularity"—any departure from the common practice of that Court—"it is not for this Court, addressing requisitions to country jurisdictions, to find fault with their proceedings, unless the objections affect the substantial of justice."

Without citing more, it is enough to say Dr. Lushington overruled the first head of the objections, namely, the two first objections taken by counsel. It seems to me those objections have some, though not a direct, application to the question before me. He then proceeded to consider the last objection, in regard to the evidence of the seven witnesses taken on the articles erroneously described, and he rejected their evidence; but I need not here repeat the passage at length. He considers nothing could be more injurious to the ends of justice than to receive the evidence of witnesses, examined in [533] such a way that they could not be indicted for perjury.

I think there can be no doubt whatever that, as a general rule, the view taken by the learned Judge is perfectly correct. But I do not think it follows that the general rule is without exceptions; for, undoubtedly, there are, and must be, necessary exceptions. Take, for instance, the case of witnesses who being resident in foreign countries are examined abroad by commission from Courts in this country. A case of this nature frequently arises not only in the Ecclesiastical Courts but also in the Courts at Westminster; witnesses are examined by commission in foreign parts, and their evidence is here received, though it is impossible they could be indicted for perjury, inasmuch as the offence, if committed, would, in the case put, have been committed out of the kingdom. There are but few offences committed out of Her Majesty's

dominions of which we can take cognizance, and the power so to do rests on the authority of certain acts of parliament and special treaties.

Chief Justice Willes, in his very learned judgment in *Omichund v. Barker* (1 Smith's Leading Cases, 208*), cited in argument, expressly says that depositions of witnesses examined abroad by commission, though those witnesses are not liable to be indicted for perjury, must be admitted in our Courts, else there would be a manifest failure of justice. In the same judgment he likewise in substance tells us, it is not merely the fear of punishment by human laws that gives sanction to an oath, but principally the belief in a God, and that He will punish the crime of false swearing, [534] either in this world or in the next. There is, too, a passage in Phillipps on Evidence (pt. 1, c. 2) in these words: "But besides performing a ceremony of the importance just described, the law requires that the witness should acknowledge the efficacy of such a ceremony as an obligation to speak the truth. It is therefore necessary, in order that a witness's testimony should be received, that he should believe in the existence of a God, by whom truth is enjoined and falsehood punished. Without such a belief, one sanction, which the law regards as a material security for the truth of evidence, that of the fear of divine punishment invoked by the witness upon himself, is wanting. It is not sufficient that a witness believes himself bound to speak the truth from a regard to character, or to the common interests of society, or from a fear of the punishment which the law inflicts upon persons guilty of perjury. Such motives have indeed their influence, but they are not considered as affording a sufficient safeguard for the strict observance of truth. Our law, in common with the law of most civilized countries, requires the additional security afforded by the religious sanction implied by an oath." The fear of human punishment, then, is not the test; it is the religious obligation which is the essential feature.

Before I leave this part of the case I will observe that the probability is, if all the witnesses were equal in point of character and deposed with an equal appearance of truth, that more attention might be paid to witnesses liable to be indicted for perjury than to those who would not be liable; still I apprehend the depositions of both, already referred to, would [535] be receivable in any Court. Though, as a general rule, the liability to be indicted for perjury is necessary in order to render the testimony of witnesses receivable, yet, I think, it is clear that exceptions to that rule must, and do, constantly arise.

(3) I now proceed to consider the third objection taken, which resolves itself into this question, namely, whether, under the circumstances related in this case, the consent of both parties in the suit may not form another exception to the general rule above referred to.

In Ayliffe's Parergon (p. 322) we are informed that "a delegated jurisdiction may be prorogued by tacit consent of parties *de re ad rem*, and from time to time; but for a local prorogation thereof the express consent of parties is required: for a person, delegated to take cognizance of causes in one diocese, cannot take cognizance thereof out of such diocese without the express consent of parties." Here is, then, an authority for saying that proceedings may go on in another diocese with the express consent of the parties: on the force of the word express I shall hereafter observe.

Several cases were cited by counsel on the question of consent. In the first place, *Brown v. Lord Granville* (2 Dowl. P. C. 796) was mentioned, which was a case in which there had been an agreement between the attornies of the parties, in order to avoid the delay consequent on stating a special case, that the question should be raised on a demurrer, and the terms of the agreement were, "that such decision shall bind the parties." Pursuant to this agreement, the demurrer was argued, and the judgment of the [536] Court was against the defendant. The defendant then sued out a writ of error, and it was contended that nothing contained in the agreement deprived the defendant of his right, at common law, to take the judgment of a Court of Error; but Chief Justice Tindal held that the agreement between the parties, into which they entered for the sake of avoiding delay, had virtually precluded them from what would otherwise have been their right to bring a writ of error.

The case of *Mammatt v. Mathew* (2 Dowl. P. C. 797) was cited; it was a case in which a defendant waved an objection to an affidavit of debt by inducing the plaintiff to accept of certain persons as bail, by affecting to acquiesce in the decision of a single Judge as to the sufficiency of the affidavit. Although the defendant endeavoured

subsequently to get over his waver, the Court were unanimously of opinion that he, by acquiescing in the decision of the Judge, had waved his objection.

Hewlett v. Laycock (2 Carr. & P. 574), also cited, was an arbitration case. It appears the arbitrators excluded the parties and their attorneys from their meetings, and that they also examined witnesses at the witnesses' own houses. The attorneys protested against such a course, but did not give any notice that they should consider it a ground of objection to the award. Subsequently, when the arbitrators were ready to make their award, the defendants revoked their submission, finding that the award would have been against them. But Chief Justice Abbott ruled that, if a party means to object on the ground stated, it is his duty to give notice of his intention—in other [537] words, I presume, there must be an express dissent.

The last case at common law that I shall notice, though many others were mentioned at the bar, is *Furnival v. Stringer* (1 Bing. (N. C.) 68). It appears that was a case in which, under an act of parliament, the venue ought to have been laid in the county of Surry, but it was laid by mutual consent in London, and the Court held that the defendant, by reason of his consent, was afterwards precluded from objecting to the venue.

The passage in Ayliffe, which I have already cited, shews that “express consent” is sufficient in Ecclesiastical Courts to warrant the reception of evidence, though improperly or irregularly taken. But the question comes to this—Is the consent to be limited to express or oral consent only? It appears to me that consent may as certainly, and unequivocally, be given by acts, as by words—quite as conclusively by one, as by the other.

Let us see now what has been the course of proceeding in the present case. The proctor for Mr. Parkes attended on the production of the witnesses whose evidence in this Court is objected to, but took no objection whatever. Not only did he tacitly acquiesce in the production of those witnesses brought forward in behalf of Mrs. Parkes, but he took an active part in their examination—he cross-examined them, and did so at very great length. Having done this he allowed the cause, without objection, to proceed to a hearing in the Court below taking the chance of a sentence in his favour and speculating, as it were, upon it. In effect, he may be considered [538] to have said,—“If I get a sentence in my favour on the evidence so taken, well and good; if not, then I will try what I can do in the Court of Appeal, and with the view to get the sentence reversed, I will object to the evidence.” I know it was said that Mr. Parkes was not aware, before he came to this Court, that an objection would lie; on that point I shall have a remark to make. But I have not yet stated quite the whole case. It was not merely the proctor for Mrs. Parkes who took the course now complained of; the proctor for Mr. Parkes did the same thing; he produced Mr. Parkes's witnesses, who were sworn and examined exactly under the same circumstances. It is well understood that a proctor has somewhat more authority than an attorney at common law possesses; the proctor of a party is dominus litis, and it might be said it would be hard to bind the party on such a question, by the act of his proctor. Even here, however, the matter does not rest. I find on looking through the minutes of this cause, that Mr. Parkes himself actually produced a witness under the same precise circumstances. If ever then there was a case in which it could be said communis error facit jus, it is this identical case; both parties in the suit are in pari delicto, if delictum there be.

Such is the course which has been pursued; I conceive that the consent, such as described, will go very far indeed, on the authority of the passage cited from Ayliffe, to shew that Mr. Parkes is barred, not only by his proctor's conduct but by his own conduct, from the benefit of the objection now taken.

I must now say a word on a statement made at the bar that many precedents exist for the course [539] which has been adopted in this case and is now the subject of complaint. I have been furnished with the minutes of cases which have occurred in the Commissary Court of Surry between the year 1705 and the present time, and, without entering into particular cases, I find the result to stand thus:—there are 101 cases, in which the witnesses were produced and sworn in Southwark in the proper place for the sittings of the Court; there are no less than 270 cases, in which, without any special or express consent in writing, the witnesses were in the presence of both proctors produced and sworn, and afterwards examined in Doctors' Commons, as in the present instance; and, certainly, there are some cases in which

the express consent has been entered in the minutes for the production, &c., of the witnesses in Doctors' Commons, but the number of such instances is only twenty-nine. I find, too, that in the Court of the Dean and Chapter of St. Paul's there is a considerable number of cases in which witnesses were produced, &c., without express consent, not within the local limits of the jurisdiction of the Commissary of that Court, but here in Doctors' Commons within the diocese of London. Instances, too, of a like nature might be produced from other Courts. In the Commissary Court of Surry, however, we see what the prevailing usage has been, and prevailing usage, in the opinion of the learned Judge of the Consistory of London, is of some importance (see p. 531); the practice has been to produce witnesses, &c., as a matter of convenience in the diocese of London, for I cannot, though asked, [540] presume a composition between the Commissary of Surry and the Chancellor of the diocese of London.

I may mention it is not in the Ecclesiastical Courts only that evidence, irregularly taken, is received by consent; the same would seem to be the case in all Courts. In the Courts of Chancery the answers of a party, though not on oath, are sometimes given in and received as evidence by the acquiescence of the opposite party, when of course an indictment for perjury would not lie. Again, there was a recent case reported in the *Irish Jurist* (January, 1852); I allude to *Birch v. Somerville*. The case was this:—Birch brought an action for work and labour done against Sir William Somerville. In the course of the trial the Lord Lieutenant of Ireland, Lord Clarendon, was called as a witness, and the officer of the Court, instead of having administered the usual oath to him, merely admonished his lordship to speak the truth on his honour, as a peer of the realm, and his evidence was received at the time without objection. Subsequently, as the decision of the Court had been unfavourable to Mr. Birch, he endeavoured to get the verdict set aside on the ground that Lord Clarendon's evidence, which was important in the case, had been received improperly, by reason that he was admonished on his honour only, and not sworn. There was no express consent given to the course taken at the trial; there was merely acquiescence; notwithstanding, the Judges held that his lordship's evidence must stand, as the objection was made too late. This decision seems to me to be almost directly in point with the present case.

But there is another important matter, which I [541] cannot pass over, arising out of the time and circumstances under which this objection has been taken: Can this objection, not having been taken in the Court below, be raised in the Court of Appeal? The case of *Taylor v. Morley* (1 Curt. 481) was referred to, in which it is said that "an objection to the jurisdiction of the Court may certainly be taken at any time." This dictum, as I understand it, applies to the jurisdiction in respect of the subject-matter only; it would not apply to a party cited out of the limits of the jurisdiction, who gave an absolute appearance to the citation; such a one could not afterwards raise an objection. I apprehend also that, if an objection to evidence irregularly taken be not raised in that Court, in which the suit was originally pending, the objection cannot afterwards be taken in the Court of Appeal, for, as it seems to me, it would be unfair to reverse a decision on a point turning on the validity of evidence, when each party in the suit has acquiesced in that evidence and has taken the chance of a sentence in his favour. I am of opinion, therefore, that the present objection was not taken in due time.

It was said, however, that this objection was taken as soon as it was discovered; that I apprehend is not a sufficient answer. I conceive a party is bound to take an objection of this nature as soon as the facts on which the irregularity turns become known. It is not enough to say the irregularity itself has recently been discovered; *ignorantia juris non excusat*; the case of *Esdaille v. Davis* (6 Dowl. P. C. 465) is strong to the point.

In this case Mr. Parkes must have been cognizant [542] of the facts and proceedings on which the irregularity occurred, for he was himself an acting party thereto as far back as the 23rd May, 1850; he ought therefore to have taken the objection in the Court below at least, wherein the sentence was not delivered until the 11th November following. I am well aware that an attempt was made to bring forward the objection in this Court at the earliest stage of the appeal, but I know of no instance in which such an objection as the present has been allowed in the Court of Appeal. On looking through Sir Edward Simpson's notes (a) I find the following

(a) The volume of the Repertorium, so it has been called, was not mentioned.

entry—"A Judge of Appeal may admit an improper evidence, if it was read below"—an improper evidence being an improper witness; it is put down as a settled point. Now this has been the case here; the depositions of certain witnesses irregularly and improperly sworn were read in the Court below, and according to the entry above cited they may be read in this Court; I have no authority beyond this, but I conceive it is consistent with reason that it should be so.

Upon these two latter points especially, namely, the consent of the parties expressed by their acts over and over again and the lateness of the time, it is that I have come to the conclusion that I am bound to overrule the objection taken in this case to the reception of the evidence; therefore I do overrule this objection, and direct that the case may now be proceeded with on its merits.

[543] On the 1st July following the Judge of the Court of Arches affirmed the sentence given in the Commissary Court of Surry, on which Mr. Parkes prosecuted an appeal in the Supreme Court; but, before the case was ready to be heard, Mrs. Parkes died.

WHARTON AND OTHERS *against* ARMITAGE AND BOWER. Prerogative Court, May 17th, June 15th, 1852.—The sureties to an administration bond cannot be cited to bring in an inventory and account, or to shew cause why the bond should not be attended with, on the said bond being sued for.

Motion.

John Armitage died on the 5th August, 1850, intestate, a widower without a child or parent, leaving a brother, a nephew, and three nieces, together the only persons entitled in distribution to his personal estate of the value of about 300l.

On the 21st November, 1850, administration of the effects of the deceased was granted to his brother, and the usual bond was entered into by two sureties.

The administrator died on the 22nd September, 1851, insolvent, without having distributed the estate of the intestate; but during the life of the administrator application was made to him by the nephew, nieces, and their solicitor, for an account and a distribution, which he positively refused, stating he intended to keep the whole of the property, and after his death a similar application was made, without [544] effect, to the two sureties, resident in the province of York. There was not any legal personal representative of the administrator.

Deane, on the above facts verified by an affidavit, moved the Court, on the 17th May, 1852, to decree letters of request to issue to the Archbishop of York, to cite the two sureties to exhibit, on oath, an inventory and account of the goods of the said intestate.

Judgment—*Sir John Dodson*. Sureties are undoubtedly responsible to the extent of the covenants entered into by them in a bond, when the administrator does not do his duty, but it is no part of their bond to bring in an inventory and account. I am here asked to do more than I can; I must refuse this application.

On the 15th June the motion was renewed with the following prayer—to decree letters of request to cite the sureties to shew cause why the bond entered into by them should not be attended with and produced, as may be requisite, for the furtherance of justice, on the said bond being sued for, with the usual intimation.

The Court rejected the motion.

[545] WILLIAMS AND PRICE *against* WILLIAMS. Arches Court, July 1st, 1852.—An examination of witnesses taken in an Ecclesiastical Court *vivâ voce* is an irregularity, but not such an irregularity as to constitute the suit null and void.

[S. C. 16 Jur. 954.]

On appeal.

This was originally a business of proving in the Consistory Court of St. David's, at Carmarthen, the will, bearing date the 11th February, 1851, of Thomas Williams, who died on the 8th March, 1851, at the age of eighty-five. The suit was promoted in the Court below by the executor named in the will, against Rowland Williams and William Price, two of the nephews and next of kin of the testator.

The Judge of the Consistory Court decreed probate of the will and the costs of each party in the suit to be paid out of the estate of the deceased.

It appeared that the evidence in chief, as well as on cross-examination of each

party in the suit in the Court below had been taken *vivâ voce*, and on that account the appeal was instituted.

Addams and Haggard in support of the appeal. The whole proceeding at Carmarthen is a nullity; the evidence depends solely upon the Judge's notes. An irregularity may be surmounted; but here an essential matter arises constituting an absolute nullity, *Jones v. Yarnold* (2 Lee, 568). It is true Sir John Nicholl said, in *Ingram v. Wyatt* (1 Hagg. Ecc. 105), he might probably order a witness to appear and undergo a *vivâ voce* examination in open Court; but that Judge did not take that step. In the Courts of the Judicial [546] Committee of the Privy Council and of the Admiralty witnesses may be examined *vivâ voce*; but that power rests upon special legislative provision.

Bayford and Deane for the respondent. Irregularities may be cured by consent. If an irregularity has, in this instance, been committed, each party has concurred. Witnesses were examined *vivâ voce* in *Williams v. George* (3 Curt. 349); still, Sir Herbert Jenner Fust did not consider that circumstance to constitute a nullity.

Addams in reply. The entire proceedings below were a farce. The witnesses were examined in Welsh, and the Judge's notes are in English: moreover, the answer or defensive allegation was given in before the witnesses to the *conditit* were examined; so the witnesses on the *conditit* knew exactly what to say.

Sir John Dodson, immediately on the conclusion of the argument, intimated he should take time to deliberate; but, after a moment's consideration, he said that undoubtedly an irregularity had been committed; nevertheless, not such a one as to vitiate all the proceedings. He stated he would not uphold the objection taken, but would leave the appellants to appeal on the whole case.

Addams announced he would not argue the case on its merits; whereupon the Judge pronounced against the appeal, remitted the cause, but gave no order as to costs.^(b)

[547] COOMBS *against* HER MAJESTY'S PROCTOR. Prerogative Court, July 6th 1852.—The wife of a felon convict died intestate, leaving personal property acquired by her subsequently to her husband's conviction; held, that such property belonged to the Crown, and not to the next of kin of the intestate.

[S. C. 16 Jur. 820.]

Petition.

This was a question respecting the right to the personal estate of Mary Coombs, who died intestate without a child on the 6th September, 1850, leaving property consisting of about 200l. in a savings bank, the produce of her own industry.

Robert Coombs, the husband of the deceased, survived her, but at the date of her death he was a felon convict. Upon the 30th January, 1837, he was convicted of two distinct felonies, and was sentenced to seven years' transportation for each offence, namely, until the 30th January, 1851; consequently, at the time of the death, and after the death, of his wife, he was a felon convict. In the year 1848 he had a conditional pardon granted to him, not from the Crown, but from the Governor of the Colony of Van Diemen's Land, whereupon he went to Victoria.

The property of Mary Coombs was acquired by her subsequently to the conviction of her husband, and, on the supposition that he was not living at the date of this proceeding, her father, James Coombs, claimed the property in question, alleging that, under the above circumstances, Mary Coombs was to be considered as having died possessed of the said [548] money in her own right, as a feme sole in law, which proposition was denied on behalf of her Majesty.

The question was argued on the 5th June, 1852.

Deane, for the father of the deceased, referred to, or cited, *Bullock v. Dodds* (2 Barn. & Ald. 275), *Church's case* (16 Jurist, 517), *Roberts v. Walker* (1 Russ. & My. 752), *Ex parte Franks* (1 Moore & Scott, 11), *Weyland's case* (Co. Litt. 133 a), *Newsome v. Bowyer* (3 P. Wms. 37), *Hyde v. Price* (3 Ves. 443), *Lean v. Schutz* (2 W. Blk. 1195), *Hatchett v. Baddeley* (ibid. 1079), *Lewis v. Lee* (3 Barn. & Cr. 297).

Harding, Q. A., for the Crown, referred to, or cited, *Stephens' Comm.* bk. 6, c. 1,

(b) A special reason was assigned why this case was not carried to the Judicial Committee of the Privy Council.

Wms. on Exors. p. 1219 (4th edit.), *Foxley's case* (5 Rep. 110 a), *Bullock v. Dodds*, *Roberts v. Walker*, *Newsome v. Bowyer*.

Cur. adv. vult.

Judgment—*Sir John Dodson*. The parties before the Court in this suit are, first, the Queen's proctor asserting the right of her Majesty to the property of Mary Coombs, deceased; and, secondly, the father of the said Mrs. Coombs insisting on his right to the personal estate left by his daughter.

The claim is asserted on the part of the Crown not merely to the effects belonging to a felon at the date of his conviction, but also to any which may accrue to him afterwards during the period that he remains a felon convict, and, in consequence, it has [549] been argued that her Majesty has a right to the personal estate of Mrs. Coombs, to which her husband would have been solely entitled had he not been convicted as a felon.

On the other hand, it is contended on the part of the father of Mrs. Coombs that, whatever effect the conviction of the husband might have upon the property possessed by him at the date of his conviction, it can have no effect whatever on the property since gained by the wife, when she continued in this country trading as a feme sole, that she is to be regarded in the light of a widow, or as a wife divorced a vinculo matrimonii, and that her property would go to her next of kin, or, in this case, as Mrs. Coombs had no child, to her natural and lawful father.

In support of the right of the Crown certain cases were referred to, and of the number is *Bullock v. Dodds* (2 Barn. & Ald. 258). It appears by the marginal abstract there were two points raised, but the first I pass over, as it does not concern the present question; the second point determined is this, "By attainder all the personal property and rights of action in respect of property accruing to the party attainted, either before or after attainder, are vested in the Crown without office found; and therefore attainder may be well pleaded in bar to an action on a bill of exchange indorsed to the plaintiff after his attainder." At page 275 of the volume my Lord Chief Justice Abbott in delivering the judgment of the Court is reported to have said, "Upon consideration we are of opinion that the attainder of the plaintiff was properly pleadable in bar. An attainted person is [550] considered in law as one civiliter mortuus. He may acquire, but he cannot retain; he may acquire, not by reason of any capacity in himself, but because, if a gift be made to him, the donor cannot make his own act void, and reclaim his own gift; and as the donor cannot do this, and the attainted donee cannot enjoy, the thing given vests in the Crown by its prerogative, there being no other person in whom it can vest." This doctrine seems very clear and decisive on the point; the attainted person is civiliter mortuus, his property does not go to his next of kin; not only what he has at the date of his conviction, but any he may acquire afterwards, is acquired for the Crown, and will go to the Crown.

Church's case (16 Jurist, 517), decided by the Vice-Chancellor Parker in December, 1851, seems to me to lead very much to the same conclusion; the marginal note is—"A convict sentenced to death for felony, which sentence was commuted to transportation for life, received a conditional free pardon in the penal colony: held, that such pardon did not alter the effect of the attainder in vesting his property in the Crown." The case is stated thus—"T. Church, by his will dated in 1821, gave all his real and personal property to trustees, upon trust, to sell and to stand possessed of the proceeds, upon trust to invest the same, and, subject to certain annuities, to pay the dividends and income of such investment to his wife for life; and, subject thereto, the testator gave half of the trust fund to the children of his brother, W. Church, who should live to attain twenty-one years, as tenants in common. In 1840 the testator died. All his real and personal property was subsequently [551] converted, and their respective shares were paid to the children of W. Church, except to one who, having attained twenty-one, had been tried for felony in 1833 and sentenced to death, which sentence was commuted to transportation for life, a punishment he was then undergoing. A conditional free pardon, however, had been granted to him in the penal colony." It is to be observed that in the present case a conditional pardon in the colony had been granted to the husband of Mary Coombs. "The trustees paid this share into Court, under the Trustee Relief Act; and the present petition was presented by her Majesty's Attorney-General, praying that the costs thereof might be taxed and paid out of the fund in Court, and that the residue of such fund might be paid to such person, or persons, as her Majesty, by sign manual, should appoint to

receive the same." The decision of the Vice-Chancellor is thus stated: "Notwithstanding the conditional free pardon, his Honor, considering that the convict was still under attainder, made the order as prayed."

It appears to me that *Church's case* is on all fours with the case before me, and in conformity with *Bullock v. Dodds*. These cases make it clear that property circumstanced, as stated, does belong to the Crown and to no one else.

It is true that Church had been capitally convicted, yet that makes no difference. It is clear, on the authority of the cases I have referred to, that the property of a felon convict becomes the property of the Crown, and not only such as he had at the time of his conviction, but any other that may accrue to him during the period the conviction remains in force, until he receives an absolute pardon [552] from the Crown, or the punishment has been endured. It is not the punishment of death which makes the attainder, but the circumstance of being a convicted felon. The learned Sir Henry Spelman says that the term "felonia" necessarily implies forfeiture of estate; and this view is adopted by Blackstone (bk. 4, c. 7). Though other lexicographers give a different derivation to the word, they all come to the same conclusion, namely, that a conviction for felony, whether punished capitally or not, implies forfeiture of estate, goods, and chattels, without office found.

Various cases were cited on behalf of Mrs. Coombs with the view to shew that she was to be considered as a feme sole, as a widow, or as one divorced a vinculo matrimonii, and that by reason thereof her father would be entitled to the property in question. But the cases so cited do not at all go to the distribution of property on the death of a person circumstanced as Mrs. Coombs, who was the wife of a felon convict. They are of a different character; they go to questions of trading—whether, under certain circumstances, the woman could trade as a feme sole—whether she was liable to the bankrupt laws, and such like points. Certainly there are expressions from which it appears that the wife of a person who was exiled, who was banished, or who had abjured, the realm and the like, is to be considered in the light mentioned by counsel; but there is nothing to shew that, on the death of the woman so carrying on trade, the property belongs to her next of kin.

The case of *Thomas of Weyland* (1 Inst. 133 a), which was cited, is a case of one abjuring the realm, not of a [553] convict. The sole point in *Hatchett v. Baddeley* (2 W. Black. 1079) is whether a woman, who had eloped from her husband and run into debt, can be sued alone. The marginal note is "feme covert, eloping from her husband and running into debt cannot be sued alone:" in point of fact that decision might furnish some analogy for the case of the Crown. The case of *Lean v. Schutz* (ibid. 1195), so far as it was decided, is only this—feme covert, though having a separate maintenance, cannot be sued without joining her husband; but my attention was directed to what fell from the Chief Justice De Grey. "The general question," said his Lordship, "was intended by the parties to be decided; but it is not necessary to decide it upon this record; for the whole is totally vitious, as the husband is not party to the record. There is no instance in the books of an action's being sustained against the wife, the husband being living at home and under no civil disability. Even by the custom of London, though the wife and her effects are alone liable to execution, if she be a sole trader, yet the husband must be a co-defendant. And though a wife may acquire a separate character, by the civil death of her husband, as by exile, profession, or abjuration, yet by a voluntary separation she does not acquire such a character, which may be called a civil widowhood." From this it was contended that as by exile, profession, or abjuration a wife does, or did, obtain a separate character, so did Mrs. Coombs under the circumstances in which she was placed, and her next of kin is entitled to her property now she is dead. But there was nothing said by the Chief Justice respecting a felon convict; [554] that makes all the difference. A forfeiture in law of goods does not result from profession, exile, or abjuration; it is in felony alone that the goods are forfeited. When a man abjured the realm out of disgust, as it is said, or when a man abjured it instead of remaining to be punished, and made himself an exile, there was no forfeiture of goods; he departed from the kingdom, and in that case the wife might sue, or be sued, without her husband being joined with her. But all this does not seem to me to touch the question before me.

The case of *Newsome v. Bowyer* (3 P. Wms. 37) was also cited. It was one in which a person had voluntarily transported himself; he had been convicted, but

received an absolute pardon from the Crown, not, as in this case, from the governor of a colony, who is entitled, under an act of parliament, to grant, to a limited extent, a pardon. In the case cited the man had been convicted of felony, and had received a pardon, but he, as I have said, transported himself, and it was understood he would do so. His wife remained in this country, and some property devolved upon her after the pardon, namely, a share of an orphanage fund under the custom of London. It appears from the case that the Lord Chancellor King felt some difficulty in dealing with the matter; but eventually we learn, from a note to the report, the money was invested, and the wife was allowed the interest for her maintenance. The husband, who had transported himself, afterwards died, and the woman married again, when, upon application to the Court, the property was transferred to the second husband. But this case does not touch the [555] present; for the man, though he had been a felon convict, received an absolute pardon from the Crown; he was not transported as the consequence of his conviction of felony, but he transported himself and was voluntarily absent.

The case of *Roberts v. Walker* (1 Russ. & Mylne, 752) was also cited; the marginal note to which is—"personal property, not belonging to a felon, convicted of simple larceny and sentenced to transportation, at the time of his conviction, but accruing due to him afterwards, before his term of transportation has expired, is forfeited to the Crown." Now, the Master of the Rolls, Sir John Leach, in deciding the case, said: "In this case two questions are made; first, whether personal property, not belonging to a felon sentenced to transportation at the time of his conviction, but which accrued due to him afterwards, during the term of his transportation, is forfeited to the Crown." . . . "The first point appears to be settled by the case of *Bullock v. Dodds* (2 Barn. & Ald. 258); and a felon, until the term of his transportation has expired, is not restored to his civil rights." This case then strongly supports the view taken by the Queen's advocate, and confirms the case of *Bullock v. Dodds*, which appears to be settled law.

Other cases were cited in support of the claim of the father of Mrs. Coombs, and, particularly, the case of *Ex parte Franks* (1 Moore & Scott, 1). The only question there was, whether the wife of a convicted felon could carry on business as a feme sole, and be liable to the bankrupt laws; she was in the habit of frequently communicating with him confined on board [556] one of the hulks in this country. This question was sent from Chancery to the Court of Common Pleas, and the Judges of that Court certified—"We have heard this case argued by counsel, and considered the same, and are of opinion that, at the date and suing forth of the commission of bankruptcy against Kezia Franks, to wit, on the 25th day of July, 1827, the said Kezia Franks was a trader, and, as such, liable to become bankrupt within the true intent and meaning of the act of parliament passed in the sixth year of the reign of his late Majesty, King George the Fourth."

The cases then cited by counsel, so far as they have any bearing on the question before me, and especially those of *Bullock v. Dodds* and *Roberts v. Walker*, tend directly to establish the point that the property in question is the property of the Crown. I find, too, that Mr. Justice Williams, in his work on Executors (page 1219, 4th edit.), states his opinion in these words, "Where a man is convicted of felony, and sentenced to transportation, not only the personal property which belonged to him at the time of conviction, but also that which accrues due to him afterwards, during the term of transportation, such as a legacy bequeathed to him, or a share of a residue devolving on him during that period, is forfeited to the Crown."

The proposition, as stated by Mr. Justice Williams, is directly applicable to the case that has happened in the present instance; the doctrine seems to me to apply most directly. On the death of Mary Coombs her personal property devolved on her husband [557]; he acquired it, but he cannot retain it for his own use, as he is a felon convict; he has acquired it for the Crown.

Inasmuch as this is the doctrine to be collected from the cases, and the opinion expressed by Mr. Justice Williams, I can have no hesitation in deciding that the property in question belongs to the Crown, and not to the father of Mary Coombs.

As the Crown is a party in this proceeding, I say nothing at all respecting costs. It is to be understood that the only question I have determined is, who is entitled to the property. I do not determine who has the right to the administration; the presumption of law is that the husband, the convict, is still living.

A decree was subsequently taken out citing the convict, &c., and was duly served. On the 19th April, 1853, the Court decreed the administration to the Solicitor of Treasury.

[558] CAMPBELL AND OTHERS *against* THE PARISHIONERS AND INHABITANTS OF THE PARISH OF PADDINGTON IN SPECIAL, AND ALL OTHER PERSONS IN GENERAL. Consistory Court of London, July 8th, 1852.—No Judge has power, by the general law, to grant a faculty to sanction the use of consecrated ground for secular purposes; but, as a vestry room is employed for ecclesiastical as well as secular uses, a faculty, after some hesitation, was granted for the erection of a vestry room on consecrated ground.

[S. C. 16 Jur. 646. See cases cited in note to *St. John's, Walbrook v. Parishioners*, p. 515, ante. See also *London County Council v. Dundas*, [1904] P. 1; *Sutton v. Bowden*, [1913] 1 Ch. 518.]

This was a business of citing the parishioners and inhabitants of the parish of Paddington in special, and all other persons in general, having or pretending to have any right, title, or interest to shew cause why a faculty should not be granted to the incumbent and churchwardens of that parish for the purpose of erecting a new and suitable building or buildings for the holding of vestry "or" other parochial meetings on a piece of vacant ground in that parish.

In support of the application it was alleged, inter alia, in the act to lead the decree, that in consequence of the building then in use for holding meetings of vestry being found very inconvenient and without sufficient accommodation for the increasing business of the parish, the vestry appointed a committee to consider the matter, who reported that a portion of a certain plot of ground purchased by the parish in 1843 was the most eligible site that could be procured for new vestry premises, and that the ground afforded ample room for such premises without encroaching on the space necessary for a new church which it was in contemplation to build [559] thereon; that the report of the committee was adopted by the vestry with orders to the committee to carry the same into effect; that the space required for the new building to be erected, and for the yards and outbuildings, would be 116 feet long and 80 feet wide, and that a piece of vacant ground, being the ground proposed for the erection of the buildings, had been consecrated and was originally intended for an additional burial ground, but that no bodies had been interred therein, and it was not intended to be used as an additional burial-ground.

The above statement was verified by an affidavit of the vestry-clerk; a decree with intimation was issued and duly served; and the consent of the Bishop of London, as patron of the living, was given.

Middleton moved the Court for a faculty.

Judgment—Dr. Lushington. The Court is at all times reluctant to refuse an application which has received the assent of the parishioners and the patron of the living, who in this instance is the bishop of the diocese; but the Court is nevertheless bound to recollect the limits of its own power and authority.

When ground is once consecrated, no Judge has power to grant a faculty to sanction the use of such ground for secular purposes. The case of *St. George, Hanover Square*,^(a) illustrates this position. In that case the parish was cited to appear and shew [560] cause why a faculty should not be granted to erect a charity-school on part of the church-yard; the result was a prohibition. Though the present application is not precisely the same, still it is one involving some difficulty. I have, however, considered the question; it seems to me that there is some difference between sanctioning the erection of a charity-school and a vestry. A charity-school is purely secular; but a vestry-room is of rather a different character—a vestry-room is employed for ecclesiastical as well as secular uses.

The Court taking this view of the matter will not refuse its sanction to the application. The faculty may be issued; but those taking it must remember that they take it liable to all objections and proceedings which may be raised and had in another Court.

(a) *The Rector of St. George, Hanover Square v. Steuart*, Stra. 1126.

[561] IN THE GOODS OF JOHN OWEN, Deceased. Prerogative Court, Aug. 5th, 1852.—Administration of the goods of A., an intestate, were granted to B. by the Prerogative Court of Canterbury. B. died intestate, leaving part of A.'s goods unadministered, and administration of B.'s goods were granted to C. by the Consistory Court of St. David's. The Prerogative Court, on motion, granted administration of the unadministered effects of A. to C. as the administratrix of B.

Motion.

John Owen, late of Newport, in the county of Pembroke, died on the 29th November, 1843, intestate, leaving him surviving Jane Owen, widow, his relict, and Owen Owen, his only child, the only persons entitled in distribution to his personal estate of the value of £3500.

The widow renounced the letters of administration of the goods of the deceased, whereupon the same were, on the 30th May, 1845, granted by this Court to the said Owen Owen, who died, on the 11th February, 1849, intestate, leaving a part thereof unadministered, to wit, certain shares in the merchant ships "Agenoria," "Diligence," and "Eliza," all belonging to the port of Newport; also £1000 on mortgage of property in the county of Cardigan, and £1000 on mortgage in the town of Haverfordwest, and household furniture, &c., in the said town, of the value of about £70.

In May, 1849, letters of administration of the goods of Owen Owen were granted to Mary Ann Owen, his relict, by the Consistory Court at Carmarthen, such being the proper Court, as it was stated, by reason of the whole of his personal estate, [562] including his share of the said unadministered effects of John Owen, being situate within the jurisdiction of that Court.

The above statement was verified by the affidavit of Mary Ann Owen.

Addams moved the Court to decree letters of administration of all the goods of the said John Owen left unadministered to be granted to Mary Ann Owen, the administratrix of the goods of the said Owen Owen, on giving sufficient security. He referred to Williams on Executors, vol. 1, p. 191, 2nd edit.(a)

Sir John Dodson said I intended to grant the motion as prayed, though I did not, until it was read by counsel, recollect the passage referred to. The decision of Sir John Leach confirms my view; I grant the motion.

[563] CLARKE AND OTHERS *against* SCRIPPS. Prerogative Court, Aug. 10th, 1852.—A testator executed his will in 1843, which remained in his custody until his death, when it was found in a mutilated state—torn and cut; but the signatures of the testator and of the attesting witnesses remained at the end of the will. Held, in the absence of extrinsic evidence, from the peculiar manner in which the mutilations were effected, that there was no intention to revoke the whole will, but that the papers as altered were intended for a draft of a new will, and, in the event of his not making a new will, to operate as his will. The testator died suddenly.

[S. C. 16 Jur. 783. Applied, *In the Goods of Woodward*, 1871, L. R. 2 P. & D. 207. Explained, *Dancer v. Crabb*, 1873, L. R. 3 P. & D. 104. Applied, *In the Goods of White*, 1879, 3 L. R. Ir. 416; *Leonard v. Leonard*, [1902] P. 248.]

This was a business of proving the will, executed on the 16th May, 1843, of William Armiger Scripps, who died suddenly on the 26th August, 1851, at the age of eighty.

On the 28th August the will was found by the testator's son, Mr. Thomas Scripps, in a very mutilated state. It consisted of seven sheets of brief-paper, written on one side only of each sheet. The signature of the testator, with the attestation clause and signatures of the witnesses, remained at the end of the will; but the signature of the testator, which had been written at the foot of each of the first six sheets, was cut off. The word thousand had been cut out of the third sheet, and about two-thirds of that sheet were cut off and left loose, or pinned to the upper part of that sheet, but from the portion so cut off the three or four last lines had likewise been cut off from the bottom and destroyed. The margin of the sixth sheet was torn from the middle downwards, but not so as to destroy any one letter wholly. The lower half of the seventh sheet, immediately under the signatures of the attesting witnesses, had been cut or

(a) More will be found on the point involved, in the 4th edit. p. 261.

torn off. There were other alterations in the different sheets, but the above-mentioned were the principal.

It did not appear when, or by whom, the will was so mutilated. The will was in the custody of the deceased to the time of his death.

[564] The will so mutilated was propounded by the three executors named therein, and opposed by Mr. Thomas Scripps.

Harding, Q. A., and Twiss, for the executors. The presumption is against revocation. Unless a will be in plain terms revoked, the intention, as provided by the statute, to revoke must be proved; if the intention be doubtful the will must stand. The statute permits revocation of a part, as well as of the whole will, *In re Lambert* (1 Notes of Cases, 131 (anno 1841)). An intention to revoke a part is, *ex concessis*, an adherence to the remainder. Looking to the instrument in its present state it would be an absurdity to suppose the deceased intended to revoke the whole. The destruction of certain parts of the instrument has been carefully done. There is no "tearing" to satisfy the statute that the whole will is revoked. The signature of the testator as well as those of the attesting witnesses have been carefully preserved "at the foot or end" of the will.

Bayford and Phillimore, jun., for an intestacy. The present state of the papers establishes, *per se*, an intention to revoke the will entirely; the will is torn. The act done is sufficient under the statute to revoke. It matters not to what extent the act is carried; a rip is sufficient, *Bibb v. Thomas* (2 W. Black. 1043). In *Doe v. Harris* (6 Ad. & Ell. 209) the will was not injured in any respect; in this instance many important parts of the will are torn and utterly destroyed. The mere [565] cutting out the signature of the testator has been held sufficient, *Hobbs v. Knight* (1 Curt. 768). There is no reason why the principles established under the statute of frauds may not be applied to cases under the Wills Act. The extent of mutilation or destruction has never been defined: but enough is shewn on the face of the papers in the present case to justify the conclusion that the present will is revoked. The case of *Lambert*, cited on the other side, is materially distinguished from the present. In that case the mutilated paper was not unintelligible, in the present case it is.

Harding, Q. A., in reply. If the testator ever intended to revoke his entire will, it is clear in Lord Denman's language "he revoked his intention to revoke." The revocation was merely inchoate, and never concluded. The fact of leaving his signature at the end of the will is not reconcilable with revocation. All that he intended was to alter his will; the papers, as they remain, were intended for a draft of a new will, and not to be revoked till that was executed. The cases of *Bibb v. Thomas* and *Doe v. Harris* were under the statute of frauds; to that statute different considerations apply. Moreover, in those cases there was not the slightest doubt of the intention to revoke; here the intention is the very point in dispute. In *Hobbs v. Knight* the essence of the will—the signature at the end—was destroyed; here it has been preserved.

Cur. adv. vult.

[566] *Judgment*—Sir John Dodson. This case arises upon the will of the late William Armiger Scripps, which was duly executed on the 16th May, 1843; he died suddenly on the 26th August, 1851, at the age of about eighty years. He was a widower, and left surviving three sons and three daughters, and also a grandchild, the daughter of a son deceased, the only persons who would be entitled in distribution in case of intestacy. His real estate is of the value of about 600l., and his personal property of the value of about 9000l.

Shortly after the testator's death search was made for the will, and in his depositories it was found by his son, Mr. Thomas Scripps; but whether it was locked up with papers of moment and concern, or otherwise, the Court has just reason to complain that it is not informed. I may, however, I think, from the circumstances stated that the deceased was always desirous that the contents of the will should not be known in his life-time, and that it was found in a tin-box, presume that the will was locked up. When found, according to the affidavit of Mr. Thomas Scripps, it was in the mutilated state in which it now appears, cut and torn. By whom, and when, it was so mutilated I am not informed; but, from the circumstance of its having been in the custody and possession of the deceased, the ordinary presumption, that the act was done by himself, must prevail.

Out of the mutilated state of this instrument arises the question, not very easy

of solution, namely, whether the will is to be considered revoked in toto, or in part only.

[567] In discussing this matter counsel very properly called the attention of the Court to certain sections of the Wills Act, and particularly to the 20th section, which has a direct bearing upon the point at issue. The 20th section is to this effect—"that no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid," i.e. by marriage, "or by another will or codicil," duly executed, &c., "or by the burning, tearing, or otherwise destroying the same by the testator, or by some other person in his presence and by his direction, with the intention of revoking the same."

Upon this enactment it is obvious, first, that a part only of a will may be revoked in the manner described—in other words, that the whole will is not necessarily revoked by the destruction of a part; nevertheless I do not by any means intend to say that the destruction of a part may not, under certain circumstances, operate as a revocation of the entire will. Secondly, it is to be observed that "the burning, tearing, or otherwise destroying" the instrument must be done with the intention to revoke. It is not the mere manual operation of tearing the instrument, or the act of throwing it into a fire, or of destroying it by other means, which will satisfy the requisites of the law; the act must be accompanied with the intention of revoking; there must be the animus as well as the act; both must concur in order to constitute a legal revocation. It is the animus, also, which must govern the extent and measure of operation to be attributed to the act, and determine whether the act shall effect the revocation of the whole instrument, or only of some, and what, portion thereof.

[568] Now the intention of a testator to revoke wholly, or in part, may, I conceive, be proved—

1st. By evidence of the expressed declaration of a testator, especially if such declaration was contemporaneous with the act. If on doing the act, whether burning, tearing, or destroying the whole or a part, he should declare that he so did with the intention to revoke, there would be the act and intention; to whatever extent the act was carried, if he declared that it was his intention thereby to revoke the instrument, that declaration, I apprehend, coupled with the act, would be sufficient.

2ndly. The intention may, in the absence of any express declaration, be inferred from the nature and extent of the act done by a testator; i.e. it may be inferred from the state and condition to which the instrument has been reduced by the act. From the face of the paper itself it may be inferred either he did intend to destroy it altogether, or did not.

3rdly. The intention may, in some degree at least, be inferred from extrinsic circumstances. There may have been declarations, not direct as to the revocation, but such as would lead to the inference, whether he did intend to revoke the will, or did not.

I now proceed to notice some of the cases mentioned by counsel; the first in order of time is *Bibb v. Thomas* (2 W. Black. 1043), which occurred under the Statute of Frauds. Though the words of that statute differ somewhat from those of the present statute, I do not think that there is any circumstance in that respect to make a distinction between *Bibb v. Thomas* and the present case. The words in the Statute of Frauds [569] are, "burning, cancelling, tearing, or obliterating," whereas we now have "burning, tearing, or otherwise destroying." In the case of *Bibb v. Thomas* there were declarations spoken to; the testator, it appears, ordered his will to be brought to him, and, after looking at it, he gave it a "rip" with his hands, then rumbled it together, and threw it on the fire, but it fell off, and a female present picked it up somewhat singed, and put it into her pocket unseen. The testator, however, had some suspicion that she had preserved it; he said it should not be his will, and ordered her to destroy it; subsequently she stated she had destroyed it, though in fact it was not. He afterwards declared to another person his will was destroyed, and that the property would go to his sister. Upon the facts the jury held, with the concurrence of the Court, that there was a revocation in law. This decision, I apprehend, rested on the acts done by the testator, coupled with the declaration that he had no will.

Another case mentioned is that of *Doe v. Harris* (6 Ad. & Ell. 209), also under the Statute of Frauds. In that case the will, which was in a cover or envelope, was thrown by the testator on the fire; but a devisee under the will snatched it off, against the wish of the testator, and took it away; no part of the will was affected by the fire, but a corner of the envelope alone was burnt. The testator afterwards insisted

on its being thrown on the fire again, with the intent it should be burnt, and the devisee promised to burn it, but did not do so. It was held by the Court of Queen's Bench that the will, so far as it related to the freehold, was not revoked; because [570] there was no burning of the will itself, and no evidence whatever of what was said, proving an intention to revoke, could supply that deficiency; some visible act was wanting, the intention alone was insufficient; both must concur, as I before observed.

I forbear to pursue the cases further in which declarations are mixed up, inasmuch as in the case I have to determine we have no proof of any declaration accompanying the act of mutilation. No body was present, no body, as far as I am informed, knows how, or when, the will was mutilated; this case must therefore depend upon the state and condition of the instrument itself.

Under these circumstances the case of *Hobbs v. Knight* (1 Curt. 768), which was also cited, has a more immediate bearing; it was one of the very first of the kind that occurred after the Wills Act came into operation. That case depended altogether upon the state and condition to which the will was reduced by the act of the testator, unaccompanied by declaration at the time. There was an excision by the testator of his signature at the foot of the will; and the late Judge, Sir Herbert Jenner Fust, held that such excision operated as a revocation of the entire instrument. He considered that the signature at the foot or end of the will is of the essence of a will, and the destruction of it by cutting, he held, and I think rightly so, as equivalent to tearing; that cutting was a mode of destroying, and that the same effect resulted whether from tearing or cutting. I mention this particularly, as the will now before me is in part cut and in part torn. He also [571] intimated that a total obliteration of a testator's signature would have the same effect as if torn off or cut out, by reason, as I have already said, that a testator's signature at the foot of a will, under the statute, is essential to a will.

Lambert's case (1 Notes of Cases, 131 (anno 1841)) was also cited, and, in answer thereto, it was said the decision was given on motion—on an ex parte statement only—and consequently very little importance is to be attached to it. In regard to this observation I must remark that my late predecessor in disposing of motions, whether ex parte or otherwise, was at all times extremely cautious. If he entertained the least doubt, he always, with the view to have the point argued, rejected the motion, and directed the instrument to be propounded. I cannot therefore accede to the observation of counsel; I have no doubt that the learned Judge would have adopted his usual course, and would not have decided the point on motion, had he entertained the least doubt on the subject. *Lambert's case* is this: The testator died in 1841; in 1835 a solicitor received instructions to prepare a will for him, and, from those instructions, he made a draft, afterwards another draft, and in March, 1836, a fair copy of this draft, occupying nineteen sheets of paper, was left with the deceased for his approval. In August, 1836, he produced this draft will, already signed, to two clerks in his office, informed them it was his will, and requested them to attest it, which they did. In July, 1837, the deceased, having made several alterations, re-executed the will. The draft will was not returned to the solicitor, but the deceased spoke of his intention to return it to him, [572] stating that he had signed it by way of precaution, lest he should die before he might execute a regular will. After his death the draft will was found, in a box, executed, but certain parts of the first sheet were cut away, and the latter part of that sheet was affixed to the top of it by a wafer: there was no evidence when that was done. In the case before me we find part of the third sheet was cut off, and afterwards annexed; but whether so dealt with by the testator himself, and found in that state, there is some discrepancy in the evidence; but at all events the part originally cut off has been reannexed by a pin; consequently the two cases are in this respect much alike. In *Lambert's case* the counsel submitted that the spoliation took place before the 1st January, 1838; the Judge observed, the passages must have been cut out after July, 1837, but that it was immaterial whether the act was done prior to the 1st January, 1838, inasmuch as a will may, under the 20th section of the act, be revoked in part, as well as in the whole, "by burning, tearing, or otherwise destroying the same" . . . "with the intention of revoking the same." "There can be no doubt," said the learned Judge, "that the testator intended to revoke the part removed, and that it was his own act; the paper is therefore revoked pro tanto, and good for the other parts. I am of

opinion that probate should pass without the words in the first sheet removed by the testator himself." To that extent then Sir Herbert Jenner Fust held the will revoked; the portion cut off was to form no part of the probate, but the remainder was to stand, and accordingly of that he decreed probate.

I will apply *Lambert's case* to the present. In [573] that case, as we have seen, the testator duly executed a draft which, in point of fact, was his will. In the present case it is clear that the deceased duly executed the will itself, which had been regularly drawn by his solicitor; all his property is disposed of and executors are appointed; the first six sheets at the bottom thereof were signed by the testator and by the attesting witnesses, and at the end of the will, on the seventh sheet, there is the testator's signature, and an attestation clause with the signatures of the witnesses; there can be no doubt, then, that, in this case, the will, as originally executed, was in form and manner complete. The point, however, is to consider the present state of the will with the view to ascertain whether it is wholly, or in part only, revoked. There are various alterations on the face of the instrument. The first sheet is obliquely struck through with a pencil; but that circumstance has no effect as far as the question of revocation is concerned, and even before the statute it would have been equivocal only. All that can be said now is that it may have a very remote bearing upon the question of intention. In addition to the pencil mark which I have noticed, the signature of the testator, which stood at the bottom of this and the following five sheets, is cut off from every one of these sheets. His signature, however, together with the attestation clause and the signatures of the witnesses, remain at the end of the will on the seventh sheet; consequently, had the mutilations gone no further, there would have been no difficulty in saying that the will is not revoked, as the statute requires the signature at the foot or end only of the will. Unfortunately, however, there are other im-[574]-portant mutilations; for instance, about two-thirds of the third sheet have been cut off; and, even though the parts are preserved, evidently there is a word, denoting some sum of money, intentionally cut out; moreover, from the bottom of this sheet three or four lines have been cut off and are not forthcoming; the result of this is that what remains of the third sheet, when read in connexion with the fourth sheet, produces mere nonsense. The two parts of this third sheet, so far as it is preserved, were, when the will was laid before the Court, pinned together; and though there is some doubt whether this sheet was found immediately after the death of the testator, so pinned, I think the evidence preponderates for the affirmative. I pass over various cancellations and observations in the margins, which, being unexecuted, are of little importance, and now have to consider the state of the sixth sheet, respecting which much was said in argument. It was contended that the condition of this sheet clearly brings the case within the operation of the 20th section of the Wills Act; the margin of the lower half of this sheet is clearly torn away: if this tearing was done with the intention to revoke the will, that would be sufficient to effect the object. But I have no direct evidence respecting the intention; I can judge of the intention from the face of the instrument only. On looking to this sheet I must observe the tearing seems to have been done with great caution, so as not to destroy the will itself or any part thereof. There are some portions of the first letter of each word in the beginning of every line destroyed, but not a whole letter in any one line; so this part of the will can be read with the same facility as it could had [575] there been no tearing at all. From this circumstance, I think, it is to be presumed the deceased intended the will to remain in operation; otherwise, why did he tear this sheet so carefully as not wholly to destroy a single letter. I think, had he intended to revoke this will, he would have torn it in a very different manner. It was argued that on this margin, as well as on the lower part of the seventh sheet, which I shall presently notice, a codicil or codicils may have been written. What then? Even had a codicil or codicils been written and duly executed on the parts now removed, there would be an end of them, for in fact they are destroyed. The seventh sheet has likewise been mutilated; but, whether torn in half, or cut, I am not certain; whichever of the two, however, is of little importance, since I quite agree with Sir Herbert Jenner Fust that cutting and tearing are equivalent acts. Nevertheless, I must notice the present state of this sheet: the upper part, which remains, contains the conclusion of the will; the signature of the testator, the attestation clause with the signatures of the witnesses, and the remainder of this sheet has been removed, whether torn or cut off, I say, matters not, but removed with so great care as to shew

the testator designedly left his signature as well as the signatures of the witnesses. I think this is a strong circumstance to shew the testator did not intend to revoke totally the will. It was said he kept it, not as a will, but as a draft for a new will. That may be true in part; there is some evidence to shew that it was his intention to make a new will, as he had transferred certain property to trustees with the view to save legacy duty. He might have intended this instru-[576]-ment to be a draft for a new will; but he might likewise have intended it to remain an operative instrument until converted into a more formal instrument. In *Hobbs v. Knight*, to which I have already referred, Sir Herbert Jenner Fust considered the excision of the testator's signature destructive of the whole instrument. If that decision be sound, then I may say the preservation of the signature, considering the state of the seventh sheet of this will, is a very important circumstance, and tends, in my mind, to shew it was the intention of this deceased, should he die without completing his object of making a formal will, that this instrument should operate. Undoubtedly, he never meant to die intestate; there was no change of affection for those benefited under this will; he frequently spoke of having made a will, though the contents thereof he kept to himself.

Under all the above circumstances I cannot consider that the deceased, by dealing with the instrument in the manner he has, intended to revoke it altogether; I think he intended to revoke the will in part only. I therefore deem it my duty to pronounce this instrument to be his will as it now stands, except as to the alterations in pencil, the marginal notes and the words "and fifty" interlined in the third sheet, of which the attesting witnesses can give no account. Of course, costs must be paid on both sides out of the estate.

[577] IN THE GOODS OF CHARLOTTE ELIZABETH IVES BOSANQUET, Spinster, Deceased. Prerogative Court, Nov. 8th, 1852.—A testatrix held, under the circumstances detailed in the case, to have virtually acknowledged her signature. [Referred to, *Kevil v. Lynch*, 1873, Ir. R. 8 Eq. 248; *Wright v. Sanderson*, 1884, 9 P. D. 160.]

Motion.

Miss Bosanquet died on the 4th July, 1852, leaving a will bearing date the 15th November, 1850; she did not name any executor.

The will was thus signed:—

"CHARLOTTE ELIZABETH IVES BOSANQUET

"Signed in the presence of"

Beneath the above were the signatures of the attesting witnesses, Miss Sotheby, since deceased, and her servant Jane Roberts, who gave in her affidavit the following account of the transaction:—"That on one day, which she believes was on the 15th of the said month of November [1850], after having assisted the said Miss Sotheby from her bedroom down to the drawing-room, which was her custom to do, as she, the said Miss Sotheby, was very infirm, the said Miss Sotheby requested the deponent to stay in the room as she wanted her, she said, to put her name to Miss Bosanquet's will, which she had then before her. That the deponent, on referring to the said paper, saw that the names and words 'Charlotte Elizabeth Ives Bosanquet signed in the presence of' had been written on the said paper, in manner and form as they now appear. And she further saith that the said deceased, who was then present in the room, did not sign her name to the [578] said paper, or acknowledge her signature thereto, in the presence of the deponent or of the said Miss Sotheby, but that the said Miss Sotheby wrote her name to the said paper in the presence of the deceased and in the presence of the deponent, and thereupon she the deponent, according to the directions of the said Miss Sotheby, subscribed her name to the said paper in manner now appearing thereon in the presence of the deceased and in the presence of the said Miss Sotheby."

The affidavit gave no information respecting the handwriting on the paper, beyond what is above stated.

Jenner moved for administration with the will annexed.

Judgment—*Sir John Dodson*. I think, as the testatrix was assenting to the transaction, probate may pass. She did not, it is true, in words state the signature to be hers; still, I conceive there was a virtual acknowledgment thereof, she was in the room with the will lying open before her. The memorandum likewise at the bottom of the page, though it cannot be proved as a part of the will, since it is underneath

the signature of the testatrix, tends likewise to establish an acknowledgment on her part.(a)¹

[579] IN THE GOODS OF ELIZABETH WILMOT, Spinster, Deceased. Prerogative Court, Nov. 8th, 1852.—A testatrix appointed A. her executor, “but in case he shall happen at the time of my decease to be abroad, or from any other cause incapable of acting as such executor, then, and in such case, I appoint B. executor to act only during such time as A. shall be resident abroad, or otherwise incapable of acting.” A. died in the lifetime of the testatrix. Probate granted to B. as executor.

[S. C. 16 Jur. 1026.]

Motion.

Miss Wilmot died in September, 1852, leaving a will bearing date the 22nd May, 1844.

The testatrix, after bequeathing various legacies, appointed an executor in these words—

“I nominate, constitute and appoint my said nephew, Charles Foley Wilmot, executor of this my will, but, in case the said Charles Foley Wilmot shall happen at the time of my decease to be abroad, or from any other cause incapable of acting as such executor, then, and in such case, I appoint my said nephew Eardley Nicholas Wilmot executor to act only during such time as the said Charles Foley Wilmot shall be resident abroad, or otherwise incapable of acting, as aforesaid.”

Mr. Charles Foley Wilmot died in the lifetime of the testatrix, namely, on the 23rd March, 1852.

Pratt moved for probate to Mr. Eardley Wilmot, and submitted that under the terms of the will he was entitled thereto, as Mr. Charles Wilmot had become, by death, incapable of acting as executor. He referred to Swinburne on Wills, part 4, section 19.(a)²

[580] *Sir John Dodson* said—I have very little doubt on the matter; on the whole, I think, probate may pass to Mr. Eardley Wilmot. I decree probate to him as executor.

B——N *against* M——E, FALSELY CALLING HERSELF B——N. Consistory Court of London, Dec. 16th, 1852; Arches, Jan. 19th and 27th, 1853.—Lapse of time alone is not a bar to a suit of nullity of marriage, by reason of a natural and incurable malformation of the party, against whom the suit is instituted.

[S. C. in Privy Council, 1854, 1 Spinks, 248. See *M. v. D.*, 1885, 10 P. D. 75; *Scott v. Scott*, [1912] P. 281.]

Libel.

A citation, dated the 16th November, 1852, was taken out at the suit of Albemarle B., and personally served on Lucy Hurd Wyndham B., described therein as Lucy Hurd Wyndham M., spinster, falsely calling herself B. and pretending to be the wife of Albemarle B., calling on her to appear and answer him in a cause of nullity of marriage, by reason of the natural and incurable malformation of the parts of generation of her the said L. H. W. M., falsely calling herself B., rendering impossible the consummation of a marriage in fact thencefore had.

In the libel were pleaded, in substance, as follows:—

1st, 2nd, and 3rd articles. The fact of marriage on the 26th June, 1835, in India—the respective [581] ages of the parties at that time, Albemarle B. about twenty-three years of age, L. H. W. B. about nineteen—the certificate of the marriage—and that the marriage was never consummated, though they lived and cohabited as husband and wife.

(a)¹ The memorandum referred to was, according to the affidavit, written after the execution, and is in these words:—“I request that the very plainest and most inexpensive funeral may be made for me, but that I may be buried at Willesden, or, at least, that I may not be buried at Meesden.”

(a)² The passage referred to runs thus—“And finally, wheresoever it is likely that the testator would have substituted in the case not expressed, if he had remembered the same, as well as in the case expressed; there the substitute is to be admitted, as if the same case had been expressed.”

4th. That the parties so lived and cohabited together in India from the day of their marriage until June, 1840, when the said woman came to England for the benefit of her health; that the man, being in the Civil Service of the East India Company, continued in India and China in such service until March, 1844, when he having obtained leave of absence came to England, where he arrived on the 31st May, 1844; that on so arriving in England the said man and woman lived, cohabited, and slept together as before, at intervals, until the summer of 1845, when the said man finally separated himself from the said woman.

5th. That the said man during all the period aforesaid was and still is apt and fit, and was desirous of having carnal connexion with the said woman, and having a family by her; also, that the said woman during all such period was desirous of carnal connexion with the said man, but that she neither was nor is nor ever will be apt and fit for the same as hereinafter more particularly pleaded, and that for such reason only the aforesaid marriage in fact never has been and never can be consummated notwithstanding their mutual endeavours.

6th. That the parts of generation and sexual organs of the said woman were and are not in the state in which are the same parts and organs in women capable of sexual intercourse; that she hath not and never had any uterus, and that the vagina [582] is so unnaturally contracted as to be nearly impenetrable and is absolutely impervious; that such will appear to be the case to competent judges on inspection; and that by such natural malformation the said woman was and is thereby rendered incapable of sexual intercourse with any man, and that such the obstacle thereto is incurable and not to be remedied or removed by art.

7th. That the said man soon became aware that the parts of generation or sexual or seminal organs of the said woman were in such a state as to prevent the consummation of their marriage, but that he was not aware until he became so, as, and at the period, hereinafter pleaded, that such the obstacle to its consummation was incurable; that from the summer of 1845 until the month of November, 1847, when his leave of absence expired, he was compelled to, and did, travel about in England, Scotland, and Ireland by the state of his own health; that in November, 1847, he quitted England for the East Indies to resume his official duties, and continued in the discharge of such until the beginning of 1852, when he again obtained leave of absence and returned to England, where he arrived at the end of April following; and it was expressly alleged that it was only since such his return to this country that he became aware, from the information of medical practitioners whom the said woman had consulted from time to time, and to whose inspection she had submitted her person in respect to her aforesaid malformation and consequent impotency, that the same was absolutely incurable.

8th. That the said woman hath admitted and confessed that she was and is subject to a natural mal-[583]-formation by reason whereof the pretended marriage never had been nor ever can be consummated.

The admission of the libel was opposed in reference to the husband's delay in instituting the suit.

Haggard and Phillimore, jun., in opposition to the libel. The citation refers to a marriage which has existed for seventeen years. Though the cohabitation was not continued the whole period, it continued long enough to establish that, if any injury was done to the husband, he has acquiesced in it; the delay in instituting this suit is not sufficiently accounted for. Delay, when the impediment is not created by statute, must be a main ingredient in every suit. The cases of *Norton v. Seton* (3 Phill. 159), *Mortimer v. Mortimer* (2 Hagg. Con. 313), *Guest v. Shipley* (ibid. p. 323), *Harris v. Ball* (3 Phill. 155), *Briggs v. Morgan* (2 Hagg. Con. 329) were cited or referred to.

Addams and Twiss in support of the libel. The libel is drawn on the precedent of *D. v. A.* (1 Robt. 279). This suit is *causa impeditiva*, not *dirimens*; the libel, if proved, will establish that the marriage was void ab initio; consequently the Court will be merely ministerial. Lapse of time has nothing to do with the question; *Harris v. Ball*, said to be conclusive as to time, failed in respect of proof (3 Phill. 156, note (p)); *Guest v. Shipley* failed by reason of the husband's insincerity, so also *Briggs v. Morgan*; besides, in that case, the wife was fifty at the date of [584] her marriage; the other cases cited are beside the present question. Even if the delay had not been accounted for, it would not be a ground for the rejection of the libel.

Haggard in reply. The case of *D. v. A.* differs from the present; in that suit there was vigilance on the part of the husband.

Judgment—Dr. Lushington. This is a suit brought by the husband against his wife seeking to have a fact of marriage, had in the year 1835, pronounced null and void by reason of a natural and incurable malformation of her sexual organs, which existed at the date of their marriage.

Almost all Judges have expressed their extreme annoyance in having had to deal with suits of this nature, and of all no one had so strong an aversion as the late Sir John Nicholl; still, when such suits were rightly brought, they have considered themselves bound to give them due attention.

It is a mistake to assert that Ecclesiastical Courts annul marriages in cases like the present, for these marriages are in themselves ab initio void. There is no injury to complain of when the marriage is pronounced null and void; the injury had been previously inflicted by one or other of the parties, sometimes perhaps knowingly, sometimes in utter ignorance of his or her state at the date of the marriage.

The objection raised against the admission of this libel has been confined to a single point, namely, the length of time which has elapsed between the [585] marriage and the institution of this suit. The questions, however, which I must consider, are:—1st. Whether delay is itself an absolute bar, and, if not, 2nd, if a bar, when not accounted for, whether circumstances are not alleged in this case so as to prevent time operating as a bar.

I confess, when I at first read over the papers, I felt some difficulty respecting time forming a bar to a suit of this nature. I must recollect, however, that the Consistorial Courts, as well as the Court of Arches, are Courts of Law and not Courts of Equity, and that I nowhere find time prescribed, or rules laid down respecting lapse of time. No instance has been mentioned to me in which a Judge has said a particular number of years constitutes a bar, and I cannot discover that, when a suit like the present has terminated unfavourably to the promoter, there were not other circumstances besides the question of time co-operating. It is manifest that the case of *Harris v. Ball*, much relied on in argument, was not decided on the question of time; the exact ground on which the Court of Delegates dismissed that suit appears in a note to *Norton v. Seton* (see 3 Phill. 156, note (p)).

Having, then, no precise authority for my guide, I am placed in some difficulty; still, I think I should be placing myself in much greater difficulty and opening the door to uncertainty if I attempted to define what period would constitute a bar. Supposing I were to fix on seven years, why should not six and a-half equally prevail? On the other hand, were I to say that seven are not a bar, why should eight constitute one? I think it must be obvious [586] that to introduce, as it were, a statute of limitations where none exists, would be vain. It is not competent, however, for me to say that, looking at certain dicta of Lord Stowell and Sir John Nicholl, time may not form an element in some cases; nevertheless, I repeat there is no authority with which I am acquainted for saying that time alone will constitute a bar.

There is undoubtedly a wide distinction between a suit like the present and a suit for divorce by reason of adultery. In the latter, delay in instituting a suit after the ground of complaint has become known is an important ingredient; and were it not so regarded, great injustice might accrue to the defendant by rendering that party incapable of disproving the charge, or of establishing that which would be in law a just defence—whether a counter charge of adultery, or of acquiescence in the offence committed. On the other hand, in suits of a like nature with the present, no such injury can result; the proofs are of a totally different character; they must be by ocular inspection; in short, there is no similarity between the two.

Assuming, however, that mere delay unaccounted for would be an obstacle, I proceed in the second place to consider whether any and what circumstances are alleged in this libel to account for delay in instituting this suit.

It appears that the marriage took place in India, where the parties cohabited for five years, namely, until June, 1840, and that there is nothing whatever in their respective ages at the date of the marriage to make the observations of Lord Stowell, in [587] the case of *Briggs v. Morgan* (see 2 Hagg. Con. 330) here applicable. I never could hold five years to be a bar; a fortiori when the cohabitation has been in India, for there are not the same means in that country for making inquiry and of obtaining advice as exist in England. To proceed with the facts: It appears that the lady came

to this country in 1840—that she was joined by her husband in 1844—that they cohabited at intervals in the course of a twelvemonth—that in 1847 he went back to India leaving his wife in England, and lastly returned to this country in April, 1852. Taking this statement to be true I must observe it is to be lamented that the husband did not adopt some means, in the interval between 1844 and 1847, when he had full opportunity, to ascertain the true condition of his wife; he was aware at an early stage of their cohabitation that there was something wrong; nevertheless he did not satisfy himself of her alleged incurable condition until the present year. There is some blame for this delay; still I must recollect that when in India he was placed in difficulty; he had not the same facility for obtaining advice as he would have had in this country. After due consideration of the question raised on argument, and bearing in mind that I know of no authority for saying that delay alone in instituting such a suit would be a bar, though if a bar the lapse of time is partially accounted for, I have come to the conclusion that I should not be acting rightly were I to prevent the husband the opportunity of establishing his case. I therefore admit the libel.

From the above judgment the wife appealed to [588] the Court of Arches, in which Court the learned Judge having heard counsel on the 19th January, 1853, took time to deliberate.

Arches Court. On appeal. Jan. 27th, 1853.

Judgment—Sir John Dodson. This case is brought before me on an appeal from the Consistorial Court of London, and it is a suit of nullity of marriage on the alleged ground of the natural and incurable malformation of the parts of generation of the female.

The facts, as set forth in the libel, are in substance as follow :—The fact of marriage of the parties in the suit, the husband being twenty-three and the wife nineteen, took place in India in June, 1835, and a cohabitation there ensued for a period of five years. In June, 1840, the wife came to England under medical advice for the benefit of her health, but the husband remained in India discharging his duties in the Civil Service of the East India Company until the month of March, 1844, when he left on leave of absence. In May of the same year he rejoined his wife in England, and a cohabitation of three weeks' duration followed. Subsequently, at intervals, the cohabitation was renewed, and so continued until the summer of 1845, when the parties finally separated. Between the summer of 1845 and November, 1847, it is also stated that the husband travelled for the sake of health in various parts [589] of the United Kingdom; that at the latter date he set out for India, where he continued until early in the year 1852; that he then again obtained leave of absence and arrived in England in April following, when he, as he states, for the first time obtained professional information of the alleged incurable malformation of his wife.

Such is a general outline of the facts set forth in the libel, the admission of which was opposed in the Court below. The objection taken to its admission was solely on the ground of delay on the husband's part in instituting the suit, but the learned Judge of that Court overruled that objection; the question which I have to determine is whether his decision is well founded.

I may observe in the outset I do not discover on the face of the libel any reason to suspect fraud or insincerity. The sole question is whether after such an interval, as has occurred between the marriage and the separation, the husband is entitled to his prayer.

It was not pretended to be asserted at the bar that any statutable limitation to such a suit as the present exists. I was not referred to any authority, either from the general canon law or any text-writer, to make good the assertion that delay per se will operate as a bar; in fact it was admitted that the question is one *primæ impressionis*. However, certain cases were mentioned which were supposed to furnish some analogy; but to my mind I must confess they had little or no bearing, more especially those cited from the Admiralty Reports, inasmuch as the Judge of that Court has by his commission an equitable jurisdiction, which this Court does not [590] possess. Some decisions in this and the Consistorial Court were referred to, which it is necessary for me to examine.

The case of *Harris v. Ball*, not reported, is thus mentioned and observed upon by Sir John Nicholl in his judgment in *Norton v. Seton* (3 Phill. 147) at page 159, "The lapse of time may act as an absolute bar to the suit not brought by the party injured.

In *Ball v. Ball* it was so held by the Delegates." This passage was cited by counsel for the purpose of shewing that delay is an ingredient in such a case as the present ; but, I confess, I cannot understand the passage after looking at the facts of that case as stated ; there must be some mistake in the report. It appears, at pages 155-6, that, after a cohabitation of seven years, the suit was instituted by the wife—the party injured—that her libel was admitted by the Delegates and evidence taken thereon, that the ground of their decision against the wife was not by reason of delay in instituting the suit, but from the circumstance of her having "totally failed in proof of her libel." In fact, then, time—delay—was not the point, but defective proof. The case of *Harris v. Ball*, therefore, is not an authority for the present purpose.

The next case cited was *Guest v. Shipley* (2 Hagg. Con. 321). The parties were married in 1813, and this suit was instituted in 1820 on the part of the husband against his wife ; but, on a perusal of the judgment, it is evident the decision was not founded on delay. The principal feature of that case was that in a suit for adultery brought by Mrs. Guest two years after her marriage, Mr. Guest had himself confessed the [591] validity of the marriage. Lord Stowell dwelt on that admission, and took into account the conduct of the husband as established by his own letters. It appears that the wife was possessed of separate property, and that the husband's letters furnished proof of an attempt to extort money. Though in the course of the judgment his Lordship did say, "But the length of time which has elapsed is in itself almost a bar," he did not go the length of saying that delay per se would constitute a bar. It is clear to me that, in the conclusion arrived at in that case by the Court, the question of delay did not form a feature. The sentence was given in favour of Mrs. Guest on the grounds that her husband had, on a previous occasion, admitted the validity of the marriage, and shewed by his conduct that the suit of nullity was instituted with mercenary motives.

I will now proceed to examine the main circumstances of the case of *Briggs v. Morgan* (2 Hagg. Con. 328), which was also cited. In the original libel, given in sixteen months after the marriage, the ages of the parties were not stated, and that circumstance Lord Stowell considered in such a suit to be an important omission. Subsequently it turned out that, in the year 1818, when the marriage took place, the woman was a widow of fifty years of age and the man forty-two, and that she had been the wife of a former husband for eighteen years. His Lordship observed that "different considerations have been applied to persons of advanced age and to those of an earlier period of life with great reason and propriety. In the case of young persons the injury is greater ; in age more advanced the mode of inquiry is less conclusive" . . . "the woman was fifty years of age at the time of this marriage, rather beyond the crisis when the expectation of children can reasonably be entertained, and more particularly in the case of a woman who had been married many years before and had no children. The age of the man is not much a subject of observation, except that it is beyond the octavum lustrum, at which an experienced writer describes the passions to be in a state of greater composure ; at any rate, it is an age at which the disappointment on that account may be presumed less grievous, especially in the case of a marriage to a woman older than himself. This is not the only symptom of insincerity in the present complaint. There is the delay of sixteen months, which is not easily accounted for, in a case in which the proof of continual cohabitation is not required, for in case of actual malconformation no such proof is required. The party, according to his own description of the case, might have made his application at a much earlier period. The proofs of an effective cohabitation with the former husband are clear and strong, both by the affidavit of the laundress and of other persons ; and if the Court is not deceived in the inferences to be drawn from them, it cannot be, as it is alleged, a case of natural malconformation." The learned Judge, after having observed on other features of insincerity in the case, then said—"Under such circumstances the Court will not think itself justified in exposing a woman of this advanced age to the only proofs, certainly of an offensive nature, by which the alleged defect can be satisfactorily established." It is clear from the report of the above case that Lord Stowell did not consider the [593] delay in instituting the suit an obstacle ; he was at first disposed to admit the libel, but ultimately rejected it, principally on account of the advanced age of the woman and some features of insincerity manifested by the husband.

I do not consider it necessary to travel through the case of *Norton v. Seton* (3 Phill. 147). It is sufficient to say that it was a suit in which the husband, the party complaining, alleged his own impotency; though by the canon law that circumstance may not be an obstacle to the suit, provided the complaining party was at the date of the marriage ignorant of his defect, still if the marriage be contracted scienter, as Sir John Nicholl in *Norton v. Seton* considered to be the case, the party will not be permitted to take advantage of his own fraud.

In no one of the cases which I have examined do I find that the decision turned on the question of delay in instituting the suit, though, in two of these cases there had been a cohabitation for seven years. In the present suit there was certainly a continuous cohabitation for five years between 1835 and 1840, but it is to be observed that that occurred in a part of the world where, in all probability, satisfactory medical advice on such a case could not easily be had. The cohabitation was then interrupted till May, 1844, when it was renewed for a small period under the circumstances stated in the libel; the parties finally separated in 1845; the husband afterwards went back to India, and did not return to this country until early in the year 1852, when he, as he states, for the first time obtained information of the condition of his wife. If any fact set forth in [594] the libel be mis-stated, it may be counter-pleaded by the wife. In the present state of the law the truth of the facts may be easily ascertained, since, for anything that I know to the contrary, both husband and wife may be examined as witnesses in this case.

After a consideration of all the facts set forth, I am of opinion that, as no authority has been discovered for saying that lapse of time alone is a bar to such a suit, I cannot reject this libel. I will not, however, go the length of saying that in no case can delay operate as a bar; but I say that, as there is no obstacle arising from the respective ages of the parties and nothing in the conduct of the husband to lead me to question his sincerity, I should not be warranted, under all the circumstances stated in this case, in rejecting the libel.

On appeal to the Judicial Committee of the Privy Council the judgment of the Court of Arches was affirmed on the 13th April, 1853, without counsel for the respondent being heard. The Court consisted of the Lord Justice Knight Bruce, the Lord Justice Turner, Sir Edward Ryan, and Sir John Patteson.

[595] THE OFFICE OF THE JUDGE PROMOTED BY THE BISHOP OF HEREFORD against T———N.(a) Arches Court, Dec. 4th, 1852; Jan. 19th, 1853.—In a suit by letters of request, under the 3 & 4 Vict. c. 86, the “two years” (sect. 20), within which a suit or proceeding must be commenced against a clerk in holy orders for an offence against the laws ecclesiastical, date back from the day on which the decree or citation is issued from the Court of Appeal of the province, and not from the day on which the commissioners gave notice (sect. 4) to the clerk of their intention to meet to hold an inquiry into the offence charged.

On protest.

This was a cause of the promotion of the office of the Judge by letters of request under the hand and seal of the Lord Bishop of Hereford, and promoted by him against the Rev. E. T., vicar of the parish of K., &c., in the counties of Hereford and Radnor, diocese of Hereford and province of Canterbury, to answer to certain charges hereinafter mentioned.

The letters of request to the Judge of the Court of Arches bore date the 8th September, 1852, and were presented and accepted on the 20th of the same month. In consequence thereof, on the said 20th September, a decree was issued from the registry, which was served on the 1st October, and returned on the 2nd November in the same year.

The decree recites the letters of request to the effect that an application had been made (b) to the bishop by certain persons therein named, thirteen in number, one of whom is described as one of the churchwardens of the parish of K., complaining and charging that the Rev. E. T., vicar of K., in the diocese of Hereford, had within two years then last past “been guilty of conduct and demeanour un-[596]—becoming a

(a) As articles were not given in and proved, it is deemed just to suppress the name.

(b) No date specified.

clergyman, by having, within two years last past, to wit, between the month of March, 1850, and the month of June, 1851, harboured and kept, in the vicarage-house of K. aforesaid, one H. S. A. M. B., wife of J. M. B., being then, and long before having been, a notoriously lewd and unchaste woman, and also by having at divers times within the said period, in the said vicarage-house of K., and in divers other places within the diocese of Hereford, been guilty of the foul crime of adultery, and also of lewdness, incontinency, and indecencies with her; and by having within the period aforesaid improperly and contrary to the canons of the Church, in that case made and provided, admitted the said woman to the receiving of the holy communion;” and praying that the bishop would issue, or procure to be issued, a commission, in pursuance of the Church Discipline Act, for the purpose of making inquiry as to the grounds of the said charges. The decree also recites that the Bishop of Hereford, being at the time when he received the said application, patron of the vicarage of K., did, on the 13th December, 1851, pursuant to the statute, refer the application to the Lord Archbishop of Canterbury; that the archbishop did, on the 1st January, 1852, issue a due notice to the Rev. E. T. of his intention to issue a commission pursuant to the provisions of the statute, which notice, containing an intimation of the nature of the offence, together with the names and residences of the thirteen complainants, was personally served on the Rev. E. T. on the 3rd January, 1852; that the archbishop, on the 20th January, 1852, issued a commission, and that one of the commissioners did issue a notice of the time [597] when, and the place where, the commissioners would meet, which notice was duly served on the 13th March, 1852; that the commissioners did, pursuant to such notice, assemble at the place specified on the 13th April and four following days, as well as on Monday the 19th of the same month, and examine on oath witnesses in support of the charges, as on behalf of the Rev. E. T., who attended before the commissioners by his agent and solicitor; that, on the said 19th April, one of the commissioners did openly and publicly declare that they were unanimously of opinion that there was sufficient *prima facie* ground for instituting further proceedings against the Rev. E. T., and the depositions of the witnesses taken before them and their report were transmitted to the archbishop; that the bishop, since the 15th May, 1852, ceased to be the patron of the said vicarage of K., by reason thereof the archbishop on the 22nd of the same month transmitted to the bishop the said proceedings and report now remaining in the bishop's registry; and it was also recited that the bishop had thought fit to institute further proceedings, and to send the case, by letters of request, before the filing of the articles, to this Court. The request is formally made, and the decree, after these recitals, calls on the Rev. E. T. to appear in this Court and to answer to certain articles, “and more especially for having sometime, to wit, between the month of March, 1850, and the month of June, 1851, harboured and kept, in the vicarage house of K. aforesaid, the said H. S. A. M. B., a notoriously lewd and unchaste woman, he well knowing her to be such, and for having been guilty at various times during the period aforesaid of [598] lewdness, indecencies and improper familiarities with her, and for having on divers occasions, during the same period, committed the foul crime of adultery with her, and for having, notwithstanding, publicly administered to her the holy communion, and for having thereby brought great scandal on the Church.”

To this decree an appearance was given for the Rev. E. T., under protest, denying the jurisdiction of the Court.

In the act of protest it was simply stated that, by the 23rd sect. of the Church Discipline Act, it is especially provided that no criminal suit or proceeding against a clerk, for any offence against the laws ecclesiastical, shall be instituted in an Ecclesiastical Court otherwise than as in the said act is provided; and that, it plainly appears, on the face of the decree that the Bishop of Hereford had not sent the suit or proceeding to the Court of Arches to be heard and determined, by the letters of request, pursuant to the provisions of the statute.(a)

(a) The Judge observed at the opening of the argument that it would have been more convenient had it been stated in the act in what respects the letters of request are supposed to be defective. The Rev. E. T.'s counsel replied that when the protest is to facts not appearing in the decree, then those facts should be set forth; but to set out the objections when they appear on the face of the decree would be to set out the argument intended to be used.

Addams and Curteis in support of the protest. (1) The bishop ought not to have received the complaint from more than one person. The words of the statute—"of any party"—are clearly in the singular number, see 3 & 4 Vict. c. 86, s. 3. In criminal cases, not under this statute, a plurality of [599] promoters has been censured, see *Cory and Others v. Byron* (2 Curt. 403). Moreover, it is clear from the third section that the proceedings are to be at the instance, either of the complainant, or of the bishop himself; in this case both are lumped together. (2) Great delay has occurred—about fifteen months—in sending the letters of request. These points, though not per se sufficient to compel the Court to dismiss the person cited, must be taken into account. (3) The charges are preposterous; it cannot be proved that the woman was "notoriously lewd and unchaste." It was no offence to admit her to the sacrament; she might have been penitent; it is not averred she was not penitent. (4) As to place; it is not set forth in the decree that the adultery was committed within the diocese; the place must be specified, see *Homer v. Jones* (cited from Stephens' Law of the Clergy, p. 983). (5) The time is uncertain when the offences were committed; "sometime" only "between March, 1850, and June, 1851," is stated: the suit must "be commenced within two years after the commission of the offence," see 20th sect. The time counts from the issuing of the decree. The decree in this instance was issued on the 20th September, 1852; for any thing that appears, all the offences may have been committed before September, 1850; it is not averred that the offences were continued until June, 1851. (6) The want of specification in the decree cannot be remedied afterwards in the articles; they must both agree, *Brecks v. Woolfrey* (1 Curt. 880). The case is not sent to this [600] Court pursuant to the statute. The person cited must be dismissed.

Bayford and Twiss, *contra*. The thirteen persons were complainants and parties to the proceedings only; the bishop alone is in the strict sense of the word the promoter of this suit. (1) The act contemplates both a suit and a proceeding. (2) There is no just ground for complaining of delay. (3) It was argued that the case has not been properly sent. But the word case under the 13th sect. has a technical meaning; it does not apply to the preliminary inquiry; when a bishop proceeds in his own Court there is no case until the articles are filed; when he sends letters of request to the Arches there is no case until the decree is served. (4) The place where the offences were committed are sufficiently charged, namely, the vicarage house stated to be in the diocese; moreover "harbouring" implies the residence of the defendant. (5) As to time. We submit that if a case sent to this Court after previous proceedings is a continuance of the former proceedings, the two years must count from the notice prescribed in the 4th sect. To reckon the commencement of the two years from a later date would annul, in part, the proceedings before the commissioners. The letters of request are a part of the decree, the whole instrument must be construed together. There is no ground for the protest.

Cur. adv. vult.

Jan. 19th, 1853.—*Judgment*—*Sir John Dodson*. Undoubtedly the reverend gentleman, who has [601] appeared under protest to the jurisdiction of this Court, is perfectly correct in his position of law—that no clerk in holy orders can be proceeded against criminally, in an Ecclesiastical Court, for any offence against the laws ecclesiastical, except under the provisions of the Church Discipline Act. But the question which I have to determine is whether, in this instance, the tenor of that statute has, or has not, been complied with. Various objections, stated in the act in general terms, were taken by counsel, but, whether they have been established, it remains to be seen.

The first objection respects the number of persons upon whose complaint the bishop acted. The number consists of thirteen persons, one of whom is a churchwarden of the parish; and it was argued, in reference to the third section of the statute, that, instead of thirteen, there should have been one complainant only. The words relied upon are—"it shall be lawful for the bishop" . . . "on the application of any party complaining" . . . "to issue a commission;" but I cannot discover any words in the statute to prohibit a plurality of complainants; nor can I see that any detriment has resulted to the Rev. E. T. The bishop has, it is quite clear, under the same section of the act, authority to proceed on the information of a person complaining or of his own mere motion. I consider that the number of complainants is not fatal.

The second objection regards the delay, which, it is stated, took place in the early

part of the proceedings. The offences charged are laid as having been committed between the months of March, 1850, and June, 1851; and it was inferred, perhaps rightly, [602] that the complaint was made to the bishop not later than the month of June (for the precise date of the complaint does not appear), still, the bishop took no step until December, 1851. To this I observe that the delay may have arisen from the circumstance that the bishop was, in the first instance, the patron of the living, and could not therefore have issued a commission; but, howsoever this may be, it is clear the subsequent steps were taken with due despatch. The archbishop, to whom the matter was referred in December, 1851, issued on the 1st January, 1852, a notice, which was served on the reverend gentleman on the third of the same month, of his intention to issue a commission; and upon the twentieth of the same month the commission was actually issued. Upon the 13th March notice was given to the reverend gentleman of the time when, and the place where, the commissioners would meet; upon the 13th April and some subsequent days they did assemble and proceeded with the inquiry; and on the 19th April they reported unanimously that there was ground for further proceedings. On the 22nd May the commissioners' report was sent to the bishop's registry, for the archbishop had then nothing more to do with the matter, as the bishop had, on the fifteenth of that month, ceased to be patron of the living; and the bishop in September following issued his letters of request to this Court in order that further proceedings might be adopted. I forbear, however, to say more respecting the number of the complainants and the delay, as the learned counsel himself admitted he did not consider these objections to be fatal.

The third objection raised was that the bishop [603] had become the promoter of this suit. It was said that as this proceeding had been commenced at the instance of other persons, the bishop had no right to substitute himself as the promoter. But to this I answer the 13th section of the Act enables the bishop so to do, before the filing of the articles, if he shall think fit.

The fourth objection was that the decree, so it was said, does not specify the place, or places, where the adultery was committed. To ascertain whether this objection be well founded, I must look to the very words of the decree itself. On so doing I find the præsertim to be "and more especially for having, sometime, to wit, between the month of March, 1850, and the month of June, 1851, harboured and kept in the vicarage house of K. aforesaid the said H. S. A. M. B., a notoriously lewd and unchaste woman," . . . "and for having on divers occasions, during the said period, committed the foul crime of adultery with her." It was said that these offences might have been committed anywhere, and not necessarily even within the diocese of Hereford. But to this it was answered by the counsel for the promoter, and rightly so, that the latter part of the decree is to be taken conjointly with, and to be construed with, the former part thereof; the instrument is to be taken as a whole. When the parts are construed together, I think no reasonable doubt can exist. Suppose, however, I could not notice all the charges by reason that some of the acts are not specifically averred to have taken place within the diocese of Hereford; still I could not dismiss the clerk from answering some of the criminal charges, undoubtedly laid as committed in the vicarage house [604] which is stated to be within the diocese. This case is clearly distinguishable from *Breeks v. Woolfrey* (1 Curt. 880) which was cited; there no ecclesiastical offence in law was charged in the decree; here a part, at least, of the criminal offences are charged to have been committed in the vicarage house.

Hitherto, then, I do not consider that the objections raised would warrant me in dismissing the reverend gentleman, but one more objection remains to be considered, and that the most important one; namely, the question of time. The offences are charged to have been committed between the months of March, 1850, and June, 1851, but the decree was not issued until the 20th September, 1852; therefore the offences may all have been committed more than two years prior to the institution of this suit, since it is not stated that they were continued to June, 1851. Now, by the 20th section of the statute it is enacted—"that every suit or proceeding" . . . "shall be commenced within two years after the commission of the offence in respect of which the suit or proceeding shall be instituted"—here is a positive enactment, which is strengthened by the following negative words—"and not afterwards." By this section literally as it stands, it is clear the person cited cannot be proceeded against for the offences charged, as they are not, as I have observed, alleged to have

been committed within two years of the commencement of this suit. But it was said that this section is not to be taken alone; it is to be construed with reference to other parts of the statute, and thus the intention of the legislature is to be collected. I admit that rule of construction to hold [605] good, when any ambiguity exists in reference to the words relied on. But that rule has no application in the present instance. By the fourth section, which was especially referred to, it is enacted "that it shall be lawful for the said commissioners, or any three of them, to examine upon oath" . . . "all the witnesses" . . . "for the purpose of" . . . "ascertaining whether there be sufficient *prima facie* ground for instituting further proceedings." The term "further proceedings" is used in other parts of the statute; and it was said that the suit in this Court is not an original proceeding, but a continuation of the first proceeding, namely, of the commission of inquiry, which was instituted within the two years. I cannot adopt that view; though I allow that there is a want of distinctness, in some sections, in reference to the precise meaning of the words "proceeding," and "suit." The words of the 20th section already cited are plain; I cannot, then, attempt to explain away words that are distinct by words which are, to some extent, ambiguous. Even if a doubt could exist as to the meaning of the 20th section, it would be my duty, as this is a criminal proceeding, to give the individual cited the benefit of that doubt; but the truth is, I have no doubt respecting the meaning of the legislature. "The proceedings" or "the further proceedings," when sent to this Court, are to be "heard and determined according to the law and practice" of this Court; and we well know that a proceeding or suit is "commenced" by issuing a decree, which is the foundation of the suit or proceeding; and that must be done, in suits of a like nature with the present, within two years. Considering, then, that the offences [606] charged are not alleged to have been committed within two years of the issuing of the decree, I must sustain the protest, and dismiss the reverend gentleman; but, as the commissioners recommended this proceeding, I shall make no order as to the costs.

IN THE MATTER OF THE WILL AND CODICILS OF THE LATE EMPEROR NAPOLEON BONAPARTE, Deceased. Prerogative Court, Feb. 17th, 1853.—On motion made by Her Majesty's Government to the Prerogative Court to deliver up to a Secretary of State the original will and codicils of Napoleon Bonaparte for the purpose of being made over to the French Government, the Court decreed the papers to be delivered out, and a receipt taken for them from the Secretary of State, after notarial copies made, in order that they might be sent to the legal authorities in France to be recorded there in the proper place.

[S. C. 1 Spinks, 9; 17 Jur. 328.]

Motion.

This was an application to the Court to decree the original will and codicils of the late Emperor Napoleon to be delivered up to Her Majesty's Principal Secretary of State for Foreign Affairs, for the purpose of being made over to the French Government, upon a notarial copy thereof being left in the registry of this Court.

The Emperor died in the island of St. Helena on the 5th May, 1821, and left a will with seven codicils, which were proved in this Court on the 5th August, 1824, by Charles Tristan, Count de Montholon; power was reserved of making the like grant to the two other executors. The personal [607] estate of the deceased, within the province of Canterbury, was sworn not to exceed the sum of 600l.

The surviving executors executed proxies of consent to the will and codicils being delivered out.

The application was founded on the following affidavit, sworn the 7th February, 1853:—

"Appeared personally the Right Honourable John Russell, commonly called Lord John Russell, Her Majesty's Principal Secretary of State for Foreign Affairs, and made oath that an application has been made by the French Government to the Government of Her Majesty for the original will of the late Emperor Napoleon Bonaparte, which is now deposited in the registry of the Archbishop of Canterbury, to be delivered over to the French Government. And the appearer further made oath that Her Majesty's Government consider it advisable, on grounds of public policy, that such application should be complied with, and that the will should be delivered out of the registry aforesaid to Her Majesty's Principal Secretary of State

for Foreign Affairs, in order that the same may be by him forthwith delivered over to the French Government accordingly."

Harding, Q. A., in support of the motion. Similar applications have been granted, for instance—

On the 19th May, 1791, the will and codicils of Mary Renton, widow, deceased, were decreed to be delivered out for the purpose of being deposited and left in the proper office for registering wills in the city of Edinburgh.

On the 23rd November, 1792, the will and codicil [608] of Duncan Forbes, deceased, were decreed to be delivered out for the purpose of being again deposited in the proper office for registering wills in the island of Grenada, where the said original will and codicil were formerly proved and deposited.

Again, on the 4th July, 1839, the codicil dated "Rome, 12th March, 1839," to the will of Sir Herbert Taylor, deceased, was decreed to be delivered out for the purpose of being recorded, or filed, in the proper Court, or with the legal authorities in France.

The Court, then, has the power to grant the present application; the question is simply one of discretion. Sufficient is set forth in the affidavit of the Secretary of State to justify the Court in making the decree prayed; no one's interest can be injured thereby; the surviving executors are consenting.

Judgment—Sir John Dodson. This is an application, at the instance of the Lords of the Treasury, to this Court to decree the will and several codicils of the late Napoleon Bonaparte to be delivered out of the registry to Her Majesty's Principal Secretary of State for Foreign Affairs, for the purpose of being given up to the French Government.

The ground of the application is stated to be public policy, which the Queen's advocate seemed to think was of itself almost sufficient to induce the Court to grant the prayer. I cannot, however, hold to that view; it is necessary to shew that the step proposed to be taken is conformable to law. Undoubtedly this Court, as all other Courts, is desirous [609] to carry into effect the views of Her Majesty's Government; nevertheless, it must not venture to go beyond the limits of legal authority. In a country governed by settled laws, it is necessary for Courts to be guided by those laws, and not by the will and desire of a Government. For instance, during war it was by no means unusual for the Crown to order a Prize Court to release a vessel seized as prize of war, and such order was obeyed, unless there had been a final decree condemning the ship and cargo to the captor. Till such sentence had passed the vessel was the property of the Crown; consequently the Crown had the power to order a release; but after a sentence of condemnation no such power existed, for then the property vested in the captor.

In the present instance it was pointed out to me that, independently of the wishes of Her Majesty's Government, there is legal authority to justify me in complying with the application. Three cases have been produced from the records of this Court. The first in order of time occurred in 1791, and respected the will of Mary Renton, which had been proved in this Court, and was, by its order, transmitted to Edinburgh, to be deposited in the proper office for the registry of wills; but the ground of that order was stated to be that, without the original will, a title to certain property could not be perfected; that will, then, was delivered out of this registry for a legal purpose. The next instance adduced occurred in 1792; the will of Duncan Forbes was delivered out for the purpose of its being placed in proper custody in the island of Grenada, where it had been originally proved; after the death of the testator the will was sent to be proved in this [610] Court, and, by its order, was afterwards returned; *Forbes' case*, then, is not very similar to the present. The third case mentioned, which occurred in 1839, appears to furnish a more direct bearing. The case was this: Sir Herbert Taylor made a codicil at Rome to his will; the papers were proved here, and that codicil was afterwards delivered out for the purpose of being sent to France, there to be placed in proper custody.

On consideration, I think I may be justified in following *Sir Herbert Taylor's case*, and granting the present application; but I cannot do so exactly in accordance with the precise form of the prayer, as I have not, I conceive, the power. I shall order the papers asked for to be delivered out, not for the purpose of their being sent to the French Government, but for the purpose of placing them in the custody of the legal authorities in France, to be recorded in the proper place; and I have no doubt

that Lord John Russell will take care that this condition is complied with. I will direct the registrar, after notarial copies have been made, to attend on his lordship, and deliver the original papers to him, for which he must give a receipt. I think I am justified in going thus far, as, in some respects, this case is stronger than Sir Herbert Taylor's. Sir Herbert was, beyond doubt, a domiciled Englishman, but Napoleon Bonaparte, though a prisoner at St. Helena, did not, I conceive, from that circumstance lose his French domicile; moreover, his property in this country was very small. Under all the circumstances of the case, I decree the original papers to be delivered out, in order that they may be sent, as in *Taylor's case*, to the legal authorities in France.

[611] The Queen's advocate intimated he could not pledge himself, inasmuch as he had no authority to accept the grant in any other form than that moved by him, that the exact terms specified by the Court would be observed by the Secretary of State.

The Court stated that it must adhere to its decree, and could not presume that it would be disregarded.

IN THE GOODS OF ADMIRAL AUSTEN, Deceased. Prerogative Court, Feb. 17th, 1853.

—A codicil signed, but not attested, on board a Queen's ship in a river, by the commander-in-chief actually engaged in a naval operation, held to be within the 11th sect. of the Wills Act, and to incorporate a prior codicil signed by him, but not attested whilst living ashore.

[S. C. 17 Jur. 284.]

Motion.

Admiral Austen died on the 7th October, 1852, leaving a will and five codicils. Of the will and the three first codicils there was no question. The fourth and fifth codicils were written on the same sheet of paper as the third, and are as follows:—

(The fourth.)

"Hong Kong, 24th Nov. 1851.

"In a settlement of my accounts, made this day, I find my son, Charles Jno. Austen, a Commander R. N., stands indebted to me, or to my estate in case of my death before he repays the same, the sum of five hundred pounds.

"CHARLES JNO. AUSTEN."

(The fifth.)

"H.M.S. 'Ratler,' in Rangoon River,

"the 1st day of April, 1852.

"In the event of my death before the said debt of five hundred pounds is discharged by my afore-[612]-said son, I desire my executors not to demand it, or any part that may remain unliquidated; this is in consideration of his increasing family, and the death of his dear brother Henry.

"CHARLES JNO. AUSTEN."

These two codicils were not attested, and the question was whether, by reason of the following circumstances, they were entitled to probate under sect. 11 of the Wills Act:—

The secretary of the admiral deposed that the admiral, "at the date of the said codicils, was in actual service, as Commander-in-Chief of Her Majesty's Naval Forces on the East India and China station, having hoisted his flag on board H. M.'s S. 'Hastings' in such capacity in the month of September, 1850, at Penang. That from the time he so hoisted his flag he was almost always afloat, until the month of October, 1851, when H. M.'s said ship 'Hastings' arrived at Hong Kong in China, and remained there until early in the month of January, when the said admiral proceeded to Burmah; that during the greater part of such period the said admiral lived on shore at Hong Kong, but had no command on shore, and no official duties to discharge there, and he maintained a constant daily communication with his ship, which was lying during the whole time in the harbour ready for sea. Deponent further saith, that on the 1st April, 1852, the date of the second of the said codicils [in question], the said admiral was on board H. M.'s S. 'Ratler' in Rangoon River, directing the naval part of the operations then going on against the town of Rangoon, in the territory of Burmah. And the [613] deponent lastly saith that the said deceased from such period was continuously engaged in H. M.'s naval service in other hostile operations against Burmah, until the day of his death."

Deane moved for probate of the fourth and fifth codicils in conjunction with the other papers, and submitted that the defect in the fourth codicil was cured by being

incorporated with the fifth, which latter codicil came within the spirit of the 11th section of the Wills Act.

Judgment—Sir John Dodson. I do think that the fifth codicil comes within the spirit of the 11th section of the Wills Act. Though the admiral was not actually at sea when he wrote that codicil, he was in a river on a naval expedition. The fifth codicil is, I think, entitled to probate. I will speak to the registrar respecting the fourth codicil.

Eventually probate was granted of both codicils; they were considered as forming one codicil.

[614] U———N, FALSELY CALLED F———s *against* F———S. Consistory Court of London. Feb. 19th, 1853.—In a suit of nullity of marriage by reason of impotency, though the party complained of has not undergone an inspection, the rule, in respect of three years' cohabitation, is not absolutely binding; it may, under circumstances, be dispensed with.

[S. C. *nom. A. v. B.*, 1 Spinks, 12.]

This was a suit of nullity of marriage promoted by the woman against the man by reason of his "impotency."

The fact of marriage took place on the 21st July, 1849, at which time the woman was twenty-three and the man twenty-five years of age. They cohabited together as husband and wife, at various places in England, from the date of their marriage until "towards the end" of May, 1852, when the man alone quitting his residence in the diocese of London went to Paris, but, before leaving, directed his wife not to follow him.

The citation was dated the 25th November, 1852, and served personally on the man on the 29th of the same month at Paris. No appearance was given for him, and the cause was carried on throughout in *pœnam*.

In the 11th art. of the libel it was pleaded that the woman "was apt and fit for coition and was desirous for the conjugal embraces" of the man "and willing to be carnally known in order to become a mother by him, and gave herself up to him without any reserve for that purpose" . . . that the man, save as hereinafter excepted, "was of sound bodily [615] health, but that, notwithstanding the premises, he has not at any time been able to consummate his aforesaid pretended marriage, and she," the woman, "never hath been carnally known by him, nor is he able carnally to know her;" and it was alleged that the inability of the man "to consummate the said pretended marriage arises from the defective state of his parts of generation and his natural impotency, imbecility and impediment, which render him incapable of carnally knowing any woman whomsoever."

12th art. That the sexual organs of the man would appear, on due examination, by competent medical judges, to be in a defective state by Nature. That the said defect existed prior to the marriage and is irremediable.

13th art. That the virginity of the woman would appear on due inspection.

14th art. That the health of the woman was very considerably impaired by her cohabitation with the man, &c.

15th and 16th arts. Various letters, written between June and November, 1852, and addressed to the woman, were pleaded in which the man indirectly admitted his impotency.(a)

A decree for answers to the libel, and a monition [616] to submit to inspection were served personally on the man at Paris, but they were disregarded by him. A notice also that the cause would be heard on the day fixed was sent by post, and the receipt thereof was acknowledged by him in a letter.

The libel, save as to the condition of the man, was fully proved. Dr. Locock and Dr. Ferguson, who were appointed by the Court inspectors of the woman, made the following report:—"We find the usual proofs that no sexual intercourse has ever been

(a) The following is a copy of a letter dated 20th November, 1852.

"My dear,—I will not and cannot return to England to undergo the misery of a medical inspection under the direction of a Court, but I think it is only due to you to state (which in effect I ought to have done before), that during the three years of our marriage I have been in a physical condition which ought to have prevented me from contracting marriage at all, and which I assure you, I never should have done, had I been aware before marriage of the incapacity which I afterwards discovered.—I am, &c. &c.

properly effected ; and, secondly, that there exists no impediment to perfect sexual intercourse on the part of the said woman."

Phillimore, jun., for the woman, submitted that her libel was proved. He observed that it was the act of the husband which prevented a cohabitation for an entire space of three years, he ordered her not to follow him to Paris, her absence was therefore by compulsion ; that under the circumstances of this case, an inspection of the husband's person was not necessary, *Sparrow v. Harrison* (3 Curt. 16).

Judgment—*Dr. Lushington*. I have carefully considered the proceedings had in this case, and have attentively read the evidence. In so distressing a case as the present, the Court will always feel anxious to afford the relief asked for, provided it can do so in conformity with acknowledged principles of law.

The marriage of the parties in this suit, it appears, took place on the 21st July, 1849, and the [617] separation occurred "towards the end" of May, 1852 ; the cohabitation therefore was two months short of three years.

The report of the inspectors appointed by the Court establishes the virginity of the woman, and the depositions of the witnesses examined on the libel support her case. The letters, too, of the husband strongly corroborate the case of the complainant. It is true they contain not an express admission of his state, but on that account I am inclined to attach to them more value. The letters are clearly genuine : it is against all probability that such letters could have been framed for the purpose of collusion. I am persuaded there is no attempt in this suit to deceive the Court, nor intention, on the one side or the other, to keep anything of importance from it.

There is nevertheless one difficulty in this case, which I cannot pass over without notice. The cohabitation of the parties falls short by two months of the term usually required by law. What, then, am I to do ? I have a choice, it is true, either to refuse or to grant the wife's prayer. If I decline to pronounce this marriage null and void, am I, as in the case of *Welde v. Welde*,^(a) to give a sentence in favour of the husband, and to decree a monition against the wife to return to cohabitation ? I think not ; I would hesitate some time before taking that step. There are many reasons why in the present instance I should not adopt that precedent. In the first place, Mr. Welde was examined by a surgeon, who swore he believed him to be capable of performing his marital duties ; in the second place, Mr. Welde swore to his belief that he had consummated [618] his marriage. In the present case the proceedings are in *pœnam* ; the husband is abroad, consequently it would be impossible for me to enforce on him an order to receive his wife back, and to cohabit with her. In the next place, there has not been an examination of his person. Again, there has been a confession in effect, though not in words, of his unfitness for the marriage state. Lastly, the melancholy state of the wife's health is distinctly established. This case, then, is in its circumstances utterly discordant with *Welde v. Welde*.

I am of opinion that a triennial cohabitation is not an absolutely binding rule. It is a convenient and fitting rule, and one not to be departed from on slight ground ; still, circumstances may arise, as in the present case, to justify the Court in dispensing with it. I am not aware that there is any magic in three years ; I conceive that the object of the rule is to provide that sufficient time may be afforded for ascertaining, beyond a doubt, the true condition of the party complained of.^(a)² If the Court can be satisfied by circumstances that the complaint of the promoter of the suit is well founded, it never ought to be driven *sine gravissima causa*, after such a cohabitation as is proved in this case, to order a return.

One further observation I will add, though I express it with hesitation, and rather as a point to be inquired into, whether if, after a marriage, the husband, before the space of three years be complete, should go abroad, for instance, to the East Indies, [619] the "triennial cohabitation" would in law be held to be broken off?^(a)³

(a)¹ Before Dr. Bettesworth, in 1731 ; see 2 Lee, 580.

(a)² By comparing Code 5, 17, 10, with Nov. 22, 6, from which the canon law on the point is derived, the observation of the learned Judge will be seen to be well founded.

(a)³ In a suit for nullity by reason of impotency it would seem that, according to the letter of the law, a cohabitation for three years complete is required, if any doubt exist as to the case. Of that opinion Dr. Bettesworth appears to have been, when he stated in his judgment, "if the parties are necessarily absent, the man is to be restored

Be that however as it may, the rule of three years' cohabitation is not considered universally binding in Scotland.(b)

Under all the circumstances of this case, I have no hesitation as to the course I ought to pursue; I must grant the prayer of the wife.

The Court signed the sentence of nullity.

[620] IN THE GOODS OF SARAH TOPPING, Widow, Deceased. Prerogative Court, March 16th, 1853.—On motion made for a decree calling upon the executor of a will, of which probate had been granted in 1835, to prove the same per testes, otherwise to shew cause why the probate should not be revoked, &c., the Court granted the motion on security being given for costs in 100*l.*, and observed, there is no limitation, as to time, in requiring a will to be proved in solemn form. Motion.

Sarah Topping died, a widow, in June, 1834, aged ninety years. On the 15th October, 1835, probate of a paper alleged to be the will of the deceased was obtained by S. F., a son-in-law of the deceased, the sole executor and universal legatee named therein.

The said will purports to bear date on the 20th June, 1821, at which time the deceased, aged about seventy-seven years, was deaf and nearly blind, and in a state of very weakened capacity. She had at such time three daughters and six grandchildren, the children of two deceased sons, with all of whom she was, at all times, upon terms of the greatest harmony and affection.

The above statement was verified on oath by M. L., now the only surviving child of the deceased, who further swore it was not until a considerable time after her said mother's decease that she became aware of the existence of the said will, that her said mother died in a workhouse almost destitute, and that the only property to which she was entitled was a reversionary share in certain property, under the will of A. S. deceased, subject to [621] the life interest of a person only recently dead. M. L. likewise swore she had ascertained that the three persons whose names appear subscribed as witnesses to the will are all still living, and are persons most respectable, and that they are prepared to prove circumstances, which will shew that the will is absolutely invalid, and was improperly made.

These circumstances were also detailed in the affidavit of M. L.

Under the facts set forth the Court was moved to permit a decree to be issued against the said S. F., at the promotion of the said surviving daughter, calling upon him to prove the said will in solemn form of law, otherwise to shew cause why the said probate should not be revoked, and the said will be pronounced null and void, and the deceased be pronounced to have died intestate.

Curteis, in support of the motion, argued that, as the presumption of payment of a bond, after twenty years, might be repelled, by evidence of impossibility, Gresley on Evidence, 2nd edit. p. 474, note (f), so likewise might it be shewn, after the same lapse of time, that a will could not have been duly executed.

Judgment—Sir John Dodson. There have been instances in which wills have been called in, and the executors compelled to prove them in solemn form, after a great length of time. I know of no way in which executors can protect themselves from that inconvenience, except by examining the attesting witnesses before taking probate. [622] Notwithstanding what is stated in some of the books to the contrary, it was the opinion of that learned Judge, the late Sir William Wynne, that there is no limitation, as to time, in calling in question a will.(a) I concur in that opinion; and

as to that time during which he has been absent;” see 2 Lee, 586. But, in a case like the present, where a husband, the party complained of, neglecting to answer to the libel and to submit to inspection, has withdrawn from the country, it is submitted that his conduct leads to the presumption that his impotency consists of malformation which would be apparent on inspection, rendering, therefore, the triennial cohabitation unnecessary.

(b) In former times the period of three years' cohabitation was required by the law of Scotland; but, in the modern law of that country, there is no precise period fixed, during which the parties must cohabit, before decree will be pronounced. See Fraser's Law of Scotland, vol. i. 59.

(a) The dictum of Sir William Wynne will be found in the case of *Hoffman v. Norris* (Prerog. 1805), reported in 2 Phill. 230, note (b).

I shall allow the decree prayed for to be issued, on security for costs, to the amount of 100l., being given.

IN THE GOODS OF THE REV. GEORGE HUNT, Clerk, Deceased. Prerogative Court, April 19th, 1853.—A testator by his will bequeathed articles of plate “specified in schedules A & B to be annexed to this document” [his will]. Two such schedules, marked A and B, were found after his death, which, it was sworn, were not written when the will was executed, but were in existence prior to the execution of a subsequent codicil, in which no mention was made of the schedules. Probate was granted of A and B.

[S. C. 17 Jur. 720. Followed, *In the Goods of Stewart*, 1863, 3 Sw. & Tr. 194. Not followed, *In the Goods of Mathias*, 1863, 3 Sw. & Tr. 100. Referred to, *In the Goods of Lady Truro*, 1866, L. R. 1 P. & D. 201. Considered, *In the Goods of Smart*, [1902] P. 242.]

Motion.

The Rev. George Hunt died, on the 7th March, 1853, leaving a will bearing date the 1st December, 1849, and a codicil thereto dated the 1st November, 1851.

In the body of the will is the following paragraph:—“I give and bequeath to my dear son, George Ward Hunt, all the plate specified in schedule A to be annexed to this document. I give to my wife for her life, and to my unmarried daughters, as long as they are in possession of the Buckhurst property, all the plate contained in schedule B to be annexed to this document, and [623] afterwards I bequeath the whole of it to my son, George Ward Hunt.”

After the death of the testator two schedules A and B written on one sheet of paper, containing an inventory of plate, were found without date and unexecuted. There was no reference in the codicil to the schedules.

One of the attesting witnesses to the will and codicil deposed that neither at the execution of the said will, nor subsequently at the execution of the codicil thereto, were any schedules produced or shewn to the witnesses, nor did she observe any such to be attached to either the said will or codicil.

The widow of the deceased stated she wrote the will at his dictation, and was present at the execution thereof; she further made oath that she wrote the schedules A and B “from the directions of the testator, about the time of the making of such aforesaid will, but she believes a day or two after the execution thereof, but prior to the execution of the said codicil (the plate, as she well recollects, having been brought into the room by the butler for the purpose of making such schedules), but she well remembers that no schedules were produced to the witnesses, or attached to the said will at the execution thereof. And she further made oath that two days after the death of the said testator, to wit on the 9th March, 1853, she, deponent, made a careful search in the room occupied by the testator as a study, and that she found locked up in a drawer (the key of which was in the possession of testator to the time of his death, and was, after that event, taken possession of by this deponent), and wrapped up in a piece of brown paper, not sealed [624] up, the will and codicil now hereunto annexed, no other papers whatsoever being in the said wrapper, and that, upon a further search amongst the deceased’s papers, she found in a tin box, in the aforesaid study, the schedules hereunto annexed marked A and B, and she lastly made oath that no other testamentary paper or schedule was found, save those hereunto annexed, although she has made a careful search for the same.”

Deane moved for probate of the will and codicil, together with the schedules A and B, as forming part of the will, and submitted that A and B, being explanatory of the will, may be held to be incorporated; they were written prior to the codicil.

Judgment—Sir John Dodson. The question is whether unexecuted papers, not having been written when a will was executed, but being in existence prior to a codicil duly executed, in which there is no reference to such unexecuted papers, can be held to be incorporated, and form a part of such will. I know of no precise decision in point; still, I think, probate may pass with the schedules as prayed.

[625] N——R, FALSELY CALLED M——E, *against* M——E. Consistory Court of Rochester, Jan. 12th, April 21st, 1853.—In a suit of nullity of marriage by reason of the husband’s impotency the medical inspectors reported that his impotency was not apparent, but that he was impotent quoad his wife, with

whom he had cohabited for two and a half years. The Court pronounced for the nullity, and held that the general rule requiring three years' cohabitation is not absolutely binding, when there has been an actual cohabitation sufficiently long to overcome, were the man potent, any temporary impediment to consummation.

[Referred to, *Scott v. Scott*, [1912] P. 281.]

This was a case of nullity of marriage by reason of impotency promoted by the wife against the husband. The parties in the cause were married on the 10th February, 1848, and cohabited together until the 10th August, 1850, when they finally separated.^(a) At the date of the marriage the man was of about forty-five, and the woman of about thirty years of age.

The citation was issued on the 1st January, 1851.

In the libel admitted on behalf of the woman it was pleaded that she was, during the cohabitation, in good health, well made, and formed in all her parts, and in every respect apt for marriage; also, that, during such cohabitation, the man was of good, sound and perfect bodily health, save that, on account of some natural incurable impotency, he did not, and was not able to, consummate the said marriage, and is naturally incapable of knowing any woman carnally; also, that the health of the woman, still a virgin, was much impaired by distress of mind.

Responsive to the libel an allegation on behalf of [626] the man was given in, wherein his potency and fitness were pleaded, and the non-consummation of the marriage was attributed to the defect of the woman, stated to have arisen from a malformation of the hip-joint occasioned by disease therein in her youth.

The admission of the allegation was in March, 1852, objected to in toto; but the Judge held that it was open to the man to contravene the case set up in the libel and to shew that the marriage could not be consummated by reason of a defect in the woman. After certain alterations were made, in conformity with the direction of the Court, the allegation was admitted.

Dr. Loecek and Mr. Lawrence were appointed by the Court inspectors of the persons of each party in the cause.

They reported in reference to the woman "that she is a virgin, and that there is no impediment on her part to prevent the consummation of her marriage with" . . . "We report further that in consequence of the said . . . having stated to us that he had been prevented from consummating his marriage with the said . . . by an imperfection in her left hip, which did not allow of proper access to her parts of generation, we carefully examined the left hip-joint of the said" . . . "and found that there is not the slightest foundation for such statement, that the motions of the left hip-joint, if less perfect than those of the right, are so in a degree hardly perceptible; and, consequently, that the said . . . can separate the thighs fully for the purpose of sexual intercourse."

They reported in respect of the man "that there is no physical defect in his parts of generation, from [627] which we should be authorized to pronounce him incapable of knowing any woman carnally; that the testicles are of the full natural size, and apparently distended by their proper secretion" . . . "that from his failure to accomplish sexual intercourse, during a long period of cohabitation, we believe the said man to be impotent as regards the said woman, and that such impotency cannot be removed by art or skill."

Amongst the witnesses examined on the libel were Dr. Robert Lee and Mr. Lavies, a surgeon, whom the lady had consulted previously to the institution of this suit. Their evidence, as far as the lady was concerned, was in unison with the report of the inspectors. Mr. Lavies, who had attended the lady from her infancy, likewise deposed to her impaired state of health occasioned by distress of mind.

Two of the witnesses on the allegation were Sir Benjamin Brodie and Mr. Cæsar Hawkins, whom the gentleman had previously consulted respecting his condition. Sir Benjamin Brodie on his examination in chief stated—"I examined his genital organs; they appeared to be quite perfect and to all appearance were perfectly developed; he appeared to me to be potent and capable of having sexual connexion with a woman. I observed no defect in his genital organs, and I observed nothing which

(a) It appears by the pleadings and evidence that, in the interval between the date of the marriage and the final separation, the man and the woman slept together for a space of one year and nine months.

would lead me to suspect the existence, or the probability of the existence, of any defect in them. I had no reason whatever to suspect the said gentleman of impotence on examining him as I have now deposed. In my examination of him, of which I have [628] now deposed, I observed nothing which would lead me to suspect that he was otherwise than potent."

Sir Benjamin on his cross-examination deposed—"From my experience as a surgeon, whether arising from cases within my knowledge or otherwise, I am not prepared to state that no man is, or can be, impotent, whose parts of generation are to external appearance perfect." . . . "Assuming that the gentleman, the producent, had cohabited with the ministrant, as his wife, for two years and a half, and had slept in the same bed with her for a period of one year and nine months in succession from the time of their marriage, but that their marriage had never in fact been consummated, and that the producent had never been able to have sexual intercourse with the ministrant, and further assuming the ministrant, his de facto wife, to be properly made and formed as to her parts of generation, and apt and fit for man, and that no impediment exists, or existed, to her being carnally known by man, I would not be prepared, from my experience as a surgeon, to state unhesitatingly from any knowledge I may have acquired of the producent's state, either from inspection or otherwise, that the producent was nevertheless potent or capable of having sexual intercourse with woman. If the marriage of the producent and ministrant be, as both parties admit it to be, unconsummated after a cohabitation of the nature pre-interrogate, and if such non-consummation be clearly not, in any way, attributable to the ministrant, it must be that it is owing to the producent's inability to consummate the marriage, although there may be nothing absolutely indicative of that inability outwardly, or in the external appearance of [629] his organs of generation. The fault may be in the woman from malformation or resistance; but if it is not in the woman, it must, in the case of non-consummation, be in the man, who may be nervous, or have some internal defect, even if there is no defect outwardly. A man may be impotent without any external sign or token of impotency; but that cannot be so in the case of a woman. A woman must be capable of being carnally known, unless there is some visible or palpable incapacity, or unless she resists the act of intercourse."

The evidence of Mr. Cæsar Hawkins was in substance the same as Sir Benjamin Brodie's.

Addams and Bayford argued from the evidence in the cause that the lady was entitled to a sentence of nullity.

Harding, Q. A., and Jenner for the husband. A triennial cohabitation is required by law: in this case the cohabitation has subsisted for two years and a half only. The case divested of the evidence of the wife (a) is one *primæ impressionis*; the wife has no physical defect, and the husband is quite as other men, though she is a virgin. No authority has been cited for the sentence prayed. It was argued that, as there has not been a consummation, incapacity on the part of the husband must be inferred; but consummation is not necessary for the validity of a marriage. The case is no more than incapacity quoad hanc. Impotency must be general [630] and incurable; general impotency cannot be inferred from the simple fact of non-consummation. Either the defect must be proved, or inferred from the absence, or refusal, of the man to undergo inspection. *Sparrow v. Harrison* (3 Curt. 16 and 4 Moore, P. C. 100) went further than any case before it; but the present, if the nullity be pronounced for, will go beyond that case.

By the Court. If a man keep out of the way he may debar justice at any time; that is not to be permitted; such was the ground of the sentence in *Sparrow v. Harrison*.

Argument resumed. The only case in the books, and that was collusive, in which a sentence of nullity quoad hanc has been pronounced, is that of *The Countess of Essex* (2 St. Tr. 786 (Cobbett's edit.)).

Addams and Bayford in reply. The ground of the impediment to the consummation set up by the husband is entirely disproved. The report of the inspectors goes

(a) The de facto wife was examined in support of her libel. Her counsel at first referred to her evidence; but, on the Queen's advocate's intimation that he objected to her evidence being received, her counsel waved it. The question of the admissibility of her evidence was not argued.

far beyond impotency quoad hanc. The general rule requiring a triennial cohabitation has been broken through in other cases.

Cur. adv. vult.

April 21st.—*Judgment*—*Dr. Lushington*. This was a suit instituted in January, 1851, and brought by Mary Anne N., alleging herself to be falsely called M., against Mr. M., to whom, it is [631] admitted and proved, she was married on 10th February, 1848. She prays the Court to pronounce such marriage null and void by reason of Mr. M.'s alleged impotency.

On the 10th August, 1850, the parties in this suit separated; the cohabitation lasted two years and six months.

At the date of the marriage Mr. M. was about forty-five years of age, and rector of . Miss N. was about thirty.

The 3rd and 11th articles of the libel plead the fitness of Miss N. for all the purposes of marriage, and that she is still a virgin: the 9th article pleads that no consummation of the marriage ensued: and the 10th article pleads Mr. M.'s impotency and incapability of carnally knowing any woman.

Before I consider whether any, or what, legal consequence results from the cohabitation, either as regards the period it continued or the circumstances attendant upon it, I will direct my attention to the two main issues in the cause, namely, whether any incapacity for connubial intercourse existed in Miss N.; secondly, the alleged impotency of Mr. M., and the evidence produced to prove it.

In regard to the first issue: the affirmative of Miss N.'s own capacity and fitness, pleaded necessarily by her, are contradicted in plea by Mr. M. as well as by his answers. He imputes to her either natural or supervenient incapacity for sexual intercourse.

The report of Dr. Locock and Mr. Lawrence states that Miss N. is a virgin—that there is no impediment on her part to a consummation, and they assert that opinion in very strong terms, after having [632] examined the lady with reference to the defect imputed. Mr. Lavies, a medical gentleman, who has for a long time attended Miss N., deposes in accordance with the report in every respect: he was one of the medical men called in when Miss N. experienced that attack of disease in the hip to which the consequence of incapacity has been attributed by Mr. M. There is no opposing evidence worth consideration. I conclude therefore that Miss N. is a virgin and capable of consummation.

With respect to the second issue—the alleged impotency of Mr. M.

I must now weigh the evidence with due consideration of the two facts I hold to be proved—indeed both beyond all reasonable doubt—1st, the fitness of Miss N. for connubial intercourse; 2nd, that no consummation has taken place, and that such circumstance has not arisen from any defect on the part of Miss N.

The primary evidence on this part of the case is also the report of Dr. Locock and Mr. Lawrence; and the first conclusion which I draw from it is that there is no defect, whence impotency could be inferred, visible on inspection in the person of Mr. M. For the purpose of supporting their opinion they mention certain statements made to them by Miss N., which I pass over.

Before I consider the most important, and, as I conceive, the most difficult part of their report, I will observe that the evidence of Sir Benjamin Brodie and Mr. Hawkins, witnesses examined on behalf of Mr. M., confirm the first part of the report, namely, that there is no visible cause for impotency to be discovered by inspection of the person [633] of Mr. M.; on the contrary, they state that, to all appearance, he is capable of effecting consummation.

Since there is, then, apparent capacity, or rather no apparent incapacity, in Mr. M., I now proceed to consider the concluding and most difficult part, as far as law is concerned, of their report.

The paragraph is in these words:—"That from his failure to accomplish sexual intercourse during a long period of cohabitation, we believe the said" M. "to be impotent as regards the said" N., "and that such impotency cannot be removed by art or skill."

Some discussion took place at the bar as to the meaning of this paragraph—it was questioned whether these gentlemen, the inspectors, intended to say that Mr. M. is incompetent with reference to all women, or only so as to Miss N. I must say that I never entertained the least doubt of the meaning intended to be conveyed by the

inspectors; but I will state that, *ex majori cautela*, I caused a communication to be made, through the registrar, to Dr. Locock for an explanation; and that explanation was made known to the proctors for each party, in order that they, or either of them, might, if it was deemed fit, make any further representation to the Court.

The explanation given accords with what I conceive to be the plain meaning of the words—that the inspectors said, and intended to say only, that Mr. M. is impotent *quoad hanc*, as regards Miss N. only.

Let me now consider the effect of this restricted meaning—whether the report could have been, or ought, in order to influence the judgment of the [634] Court, to have been, comprised in terms which would have included the whole female sex.

If inspectors, upon examination, discover apparent impotency, namely, natural defects or injuries, the result of which their medical skill enables them to estimate, they may of course certify to impotency as to all women; but when there is neither defect nor injury apparent, what means have they of judging of impotency at all? I apprehend that the primary ground of their judgment must be non-consummation after a cohabitation for a considerable period of time. No further or other assistance can they have, save that they may have been accustomed to advise in similar cases, and so have gained a species of experience, not of fact, but of inference from facts.

In what respect, then, do the *media concludendi*, or rather the means of forming a judgment, possessed by these medical gentlemen, in regard to this latter paragraph, differ from the means possessed by the Court, or any other person, accustomed to form an opinion upon such matters? In no other respect, I apprehend, than the opportunity of frequently, or more frequently, having to consider circumstances of this description. The main ground of conclusion is non-consummation after long cohabitation—a ground common to us all, and recognised in this case also by the evidence, on the cross-examination, of Sir Benjamin Brodie and Mr. Cæsar Hawkins.

But I will ask, how comes it that such non-consummation is evidence of impotency at all? Surely, by reason that, according to the ordinary course of nature, consummation does take place where persons, both competent, cohabit together. When, [635] therefore, after such cohabitation, a wife is proved to be a virgin capable of consummation, the absence of consummation must necessarily be attributed to the apparent, or non-discoverable, impotence of her husband. It cannot, as Sir Benjamin Brodie states, arise on the part of the wife.

All that I have hitherto said is consistent with the known rule of law on this subject, which rule is founded on the same principle of reason and no other; namely, that, after a triennial cohabitation and the wife proved to be a perfect woman and a virgin, the non-consummation is by law attributed to the impotence of the husband.

But the report of the medical gentlemen in this case narrows the averment of impotence to *quoad hanc*. Does the rule of law do more, or rather can it by possibility do more? The rule of law and the report necessarily go on the same grounds, and no other—the non-consummation after opportunity.

Who by possibility can say that such a man is necessarily impotent as to all women? It may be so, or it may not. There can be no evidence to establish the affirmative, as the evidence of such cohabitations is necessarily impossible. The utmost that can be said is, that there might be something of a guess made, by reason of the one failure; that the probability is that a man, impotent *quoad hanc*, would be impotent as to all: this however would be inference, not proof. Who can tell the physical cause of that one failure, when the man is apparently without defect?

I abstain from descending into further useless speculation upon this subject. I think that the report does go the whole length to which the in-[636]-spectors were justified in going. If I should be threatened with the danger of the man marrying again and having children, my answer is that the rule of law, to which I have adverted, does not, and cannot, provide against such danger.

I will add, however, one observation before I leave this part of the case—an observation which must be apparent to all—that impotency *quoad hanc* is just as prejudicial to the individual female as universal impotence.

Having weighed, I hope carefully, all these premises, I have come to the conclusion that they will justify me in pronouncing this marriage null and void, unless I am prohibited from so doing by some counteracting rule.

The ordinary rule, applicable to such a case as this, is that there must have been a triennial cohabitation. After a triennial cohabitation without consummation the law

presumes impotency, though no defect be apparent; whether impotency quoad hanc, or universally, the law says nothing, and can say nothing. In the present case the parties lived together for two years and six months only (see note at p. 625); within the strict letter of the rule mentioned this case then certainly does not come.

But upon what principles, I will inquire, is this rule founded? I think there can be but one; namely, that there should be a cohabitation of so long an endurance that, if the man were potent and in good health, no temporary impediment could have prevented consummation, according to all reasoning and experience of which the subject admits. By temporary impediment, in such a case, I mean [637] nervous feeling on the part of the man, or resistance from fear on the part of the woman; either cause preventing consummation, indeed so recognised by the evidence in this cause; yet both causes incapable of proof, save by the testimony of the parties themselves.

If such impediments exist, no man can judge of the duration of them. There is no sound reason why they should terminate at the expiration of any particular period. The rule is founded on probability alone. The man may be incapable up to the moment when the three years expire, but capable after. The law, however, cannot deal with possibilities.

But what does the duration of three years mean? Not the lapse of time alone, that cannot be; but continued facility for consummation. Within certain bounds this facility must differ in all cases. Seldom, if ever, in cases of this description did the parties sleep together constantly in the same bed for three years together; nor has such a strictness ever been required in any case, at least to my knowledge.

The reason of the rule, therefore, is facility for consummation for an adequate period of time, presumed to be sufficient to overcome temporary impediments. Time alone, even extending to three or more years, would not be sufficient, unless there was adequate facility for consummation; neither would facility for consummation be sufficient, unless of duration to overcome temporary impediments.

If my judgment deceives me not, I have stated the true principles on which the rule depends.

Let me now consider what, with reference to the circumstances of this case, are the decrees which the [638] Court might pronounce. First, I might dismiss Mr. M. on the ground that Miss N.'s case is not proved according to the strict letter of the rule of law. Secondly, I might, in accordance with the course taken by the Judge of the Court of Arches (Dr. Bettesworth) in *Welde v. Welde* (2 Lee, 585-587) (anno 1731) direct Miss N. to return to cohabitation for a longer period. Thirdly, I might, if the case in my opinion justified that course, pronounce that the marriage was null and void. These are the three possible courses which it is open to the Court to adopt.

As regards the first, I think, looking at the evidence in this case, and even at the precedent of *Welde v. Welde*, I could not adopt it, unless I were of opinion that the law imperatively compelled me; in other words, that the law not only indispensably requires a triennial cohabitation in order to a sentence in favor of the wife, but that, without it, the husband would be entitled to be dismissed.

The second course is unquestionably open to me; indeed it is one which I must pursue should I be of opinion that the rule of triennial cohabitation is absolutely binding.

It must be admitted that cohabitation for three years is the general rule in cases when impotency is not apparent. In *Lewis v. Lewis* (ibid. 579), before Sir John Cooke, in the Arches in 1702, cited in *Welde v. Welde*, the rule was inferred and acted upon. In *Welde v. Welde* the parties had been married about three years, but during a great part of that time had lived apart; further cohabitation was en-[639]-forced, that is, the spirit of the rule was acted on, and not the letter. In *Greenstreet v. Cumyns* (2 Phill. 10) it was alleged that the husband's impotency would be apparent on inspection; this the medical report disproved, but held him impotent on his own admissions. Lord Stowell pronounced that marriage null and void, though it was only of two years' duration. On looking at the evidence in that case the judgment of course could not have proceeded on the ground of apparent impotency, for that was negatived, but of latent impotency. That learned Judge, being satisfied of the fact, considered he was not bound by the rule of triennial cohabitation.

In Scotland at the present day, though in former times a term of three years was required, there is no fixed period for the cohabitation (see note (b), at p. 619).

Those Courts, according to circumstances, require only that there shall be an actual cohabitation of sufficient duration to test the impotency.

In *Sparrow v. Harrison* the actual cohabitation was not so long as in the present case; nevertheless the Judicial Committee pronounced for the nullity (4 Moore, P. C. 103). In respect, however, to that case I may observe the husband had, in the first instance, agreed to submit to inspection (see 3 Curt. 2), and afterwards refused; the marriage, moreover, had taken place seven years before the separation; but it is not the length of time that a marriage has subsisted, it is the actual cohabitation to which the Court must look.

Admitting as I do the general rule to be a triennial cohabitation, may there not be occasions on which the Court would be justified in departing [640] from the letter of the rule? I think there may be, provided the actual cohabitation has been sufficiently long, together with the evidence, to satisfy the Court that the power of the husband to consummate has been fully tried. I may also observe that the health of the wife may render a further trial dangerous to life: again, it may be impossible to force actual cohabitation, for the parties may be so alienated as to render the attempt wholly futile.

To apply this reasoning to the present case. With the evidence of frigidity quoad hanc I am fully satisfied; moreover, non-consummation is admitted; it is alleged by the husband to arise from the defect of the wife, and that allegation is wholly disproved.

Mr. Lavies, a medical gentleman, who has known Miss N. from childhood, deposes that a continued cohabitation with Mr. M. would be highly injurious to her health, and that her health has already been impaired by distress of mind and excitement from her position.

Since August, 1850, it appears the parties have in fact been separated; I do not inquire who was to blame, it is the fact only to which I advert.

I am of opinion, after a due consideration of the case, that I am not under the necessity of compelling this lady to return for the purpose of completing the triennial cohabitation. I think that so to do would not only be a useless, but might be a very mischievous, application of a technical rule, which I think, in its spirit, does not apply to this case. I think I have no right to expose this lady to the humiliation and probable injury to her health which might be the effect of a further trial. I therefore pronounce for the nullity with costs.

[641] IN THE GOODS OF RICHARD DINMORE, Deceased. Prerogative Court, May 6th and 14th, 1853.—A testator produced to three witnesses his holograph will, contained in one page, with his signature in the testimonium clause, in these words—"in witness whereof I Richard Dinmore have set my hand and seal," &c. The testator acknowledged the paper "to be his last will," but his signature "was not more particularly referred to." There was no seal. Probate granted under 15 Vict. c. 24, but an inventory and sureties required, as three minors were interested.

[S. C. 1 Spinks, 2.]

Motion.

Richard Dinmore died on the 9th April, 1853, leaving a will, entirely in his own handwriting, bearing date the 1st September, 1842.

The will was contained in one page of half a sheet of foolscap paper, and the writing was continuous. The testator, after disposing of his property of the value of about 800l., appointing an executor, and revoking all former wills, concluded thus,—“and do declare this to be my last will and testament, in witness whereof I Rich^d Dinmore have set my hand and seal this first day of September, one thousand eight hundred and forty-two.”

This was followed by the signatures of three attesting witnesses. The only signature by the testator was that in the testimonium clause; there was no seal.

One of the attesting witnesses deposed that he and his fellow witnesses attended the testator by his request to witness his will at a certain place, when he, the testator, “then and there produced the said paper writing, ready written, and acknowledged the same to be his last will and testament, and to be all of his own handwriting” . . . “and he further [642] made oath that, at the time the said deceased so produced the said will, the same was completed as it now appears, and contained the names ‘Rich^d Dinmore’ as part of the ending thereof, but that such names were not written

in his this deponent's presence, and were not, in any manner, more particularly referred to by the said deceased, at the time he so acknowledged the said will."

☐ Spinks moved for probate to the executor, and submitted, 1st, that the signature of the testator in the testimonium clause was valid under the Wills Act Amendment Act (15 Vict. c. 24); 2ndly, that the testator sufficiently acknowledged that signature, *Keigwin v. Keigwin* (3 Curt. 607), *In re Anne Ashmore* (ibid. 756).

☒ *Judgment*—*Sir John Dodson*. In the absence of the next of kin of the deceased, or without their consent, I will not dispose of this motion. It is very true that a signature by a testator in the testimonium clause is now sufficient; but the words in that clause in the present instance are somewhat singular. The deceased has evidently not done all which he states he intended; he has rather pinned himself down to do something more.

☐ On the 14th May the motion was renewed, and proxies of consent from all the next of kin, capable of consenting, were produced.

The Judge observed that he would grant the motion, but, as there were three minor children, he should require an inventory and sureties.

[643] IN THE GOODS OF WILLIAM BAULY, Deceased. Prerogative Court, June 22nd, 1853.—A testator intending, as suggested, to appoint Philip B., "a farmer," with whom he was intimate, an executor, by mistake caused him to be named Edmund in his will. Philip had a brother named Edmund, who had no acquaintance with the testator, and was not a farmer. On proxy of consent from Edmund probate was decreed to Philip B.

Motion.

William Baully died on the 18th August, 1852, having duly executed a will and a codicil thereto, respectively bearing date the 25th June, 1852, and the 19th July, 1852.

By the will the testator's wife, Henry Calver and Philip (originally written Edmund) "Baker, of Woolpit, aforesaid, farmer," were appointed executors, and by the codicil a fourth person was added.

The Christian name of Mr. Baker as "Edmund" occurs also in the codicil.

A solicitor, having prepared a draft of the will from instructions given by the deceased, attended the deceased to complete it, and, when about to insert the names of the executors in the blanks left for the same, he inquired of the deceased the Christian name of Mr. Baker, whom the deceased stated to be "a farmer living at Woolpit," but referred him to his, the deceased's, wife for such name; whereupon she stated it to be Edmund, which name was inserted in the draft as well as in the will.

Philip Baker, who was a farmer at Woolpit, and had been for some years on terms of great intimacy with the deceased, had a brother named Edmund [644] living at Woolpit, but Edmund was neither a farmer, nor had he any acquaintance with the deceased.

The testator informed his mother-in-law, who resided with him, that Baker, the farmer, had, at his request, consented to be an executor.

After the testator's death his mother-in-law sent for Philip Baker, who, on reading the will and seeing the name of Edmund, instead of Philip, struck out with a pen Edmund, and over it wrote his own name, feeling assured he was the person intended for an executor; but, on its occurring to him that he had done wrong, he partially erased his name of Philip.

In support of the above statement affidavits were made by the solicitor, the mother-in-law of the testator, and Philip Baker.

Baker had a legacy under the will of 5l. as an executor.

Deane, on the 6th May, moved for probate of the will (with the codicil) to pass as it originally stood, with the name of "Edmund" restored, and without the name of Philip, to be granted to the said Henry Calver and Philip Baker as two of the executors. He referred to *Camoy's v. Blundell*, acted upon in *Thomson v. Hempenstall* (1 Robt. 788).

Judgment—*Sir John Dodson*. I cannot discover in the affidavits produced sufficient to warrant me in supposing a mistake was committed in the insertion of the name of Edmund, instead of Philip. I have not the consent of Ed-[645]-mund, and I do not think that I can substitute the one for the other.

Deane. Will the Court allow the motion to pass on the consent of Edmund?

Sir John Dodson. No. I must have a little more information.

On the 22nd June the motion was renewed, and a proxy of consent from Edmund was produced, on which the Court granted the motion.

ROBERTS against ROBERTS. Arches Court, Aug. 4th, 1853.—When reference is made in one article of the pleadings to a preceding article and the subject-matter is the same, a respondent in his answers may repeat an explanation, or refer to his answer given to the preceding article for the explanation.

Answers.

This was a cause of divorce by reason of alleged adultery brought by the Rev. Edmund Roberts against his wife, Elizabeth Ann Roberts. The cause was instituted by letters of request from the Commissary of Canterbury.

A libel and a responsive allegation were given in and admitted, and the answers to the allegation were also given in, but their admission was in part op-[646]-posed, on the ground that if the fourteenth, twentieth and twenty-third answers were read, it would be necessary to read also the thirteenth, nineteenth and twenty-second answers, by reason of the reference made to the next preceding answer.

In order to make the precise nature of the objection clear, the thirteenth and fourteenth articles of the allegation are here set forth with the answers thereto.

"13th. That it was well known to the said Rev. Edmund Roberts, previous to his going to Ireland in the said month of August, that the said Elizabeth Ann Roberts would, in the event of her not obtaining in London servants, and particularly a laundrymaid, go to Bath for that purpose, and it was arranged, between them, that the said Rev. Edmund Roberts should, whilst in Ireland, write to the said Elizabeth Ann Roberts at Bath, directing his letters to No. 11 Rivers Street, Bath, being a house, belonging to the mother of the said Elizabeth Ann Roberts, occupied by Mrs. Selina Cottle, and from whom he, the said Rev. Edmund Roberts, received the rent of the said house for the said Elizabeth Ann Roberts' mother; and that he the said Rev. Edmund Roberts accordingly, in the month of August, whilst in Ireland, wrote and sent two letters to the said Elizabeth Ann Roberts directed to her, as agreed, at No. 11 Rivers Street, the address to each of such letters being in his, the said Rev. Edmund Roberts', writing. That the said two letters not having come to the hands of the said Elizabeth Ann Roberts by reason of the said Mrs. Cottle having erroneously understood the said Elizabeth Ann Roberts (on her calling on her to request that she [647] would forward any letters addressed to her at Mrs. Cottle's residence) that she was in lodgings at No. 10 Milsom Street, and being unable to discover where the said Elizabeth Ann Roberts was staying at Bath, she, the said Selina Cottle, about the end of the month of August, forwarded the said two letters by post in an envelope directed to the said Elizabeth Ann Roberts at Paul's Cray, with a request of an acknowledgment of their receipt, and he, the said Rev. Edmund Roberts, in, and by, a letter, dated the 12th October following, written and sent by him to the said Selina Cottle, acknowledged the receipt of the said two letters and of a quarter's rent for the aforesaid house; that the said two letters are now, if not destroyed, in the possession, or within the power, or knowledge, of the said Rev. Edmund Roberts."

"14th. That in part supply of proof of the premises in the next preceding article pleaded, and to all other intents and purposes in the law whatsoever, the party proponent exhibits, hereto annexes, and prays to be here read, and inserted, and taken as part and parcel hereof, a certain paper writing marked AA, and alleges and propounds the same to be the original letter sent by the said Rev. Edmund Roberts to the said Selina Cottle, on or about the 12th October last, acknowledging the receipt of a quarter's rent and of the said two letters, as in the next preceding article pleaded. That the whole body, series, and contents of the said paper writing, and the subscription thereto, were and are of the proper handwriting and subscription of the said Rev. Edmund Roberts, and are so well known to be," &c.

[648] Mr. Roberts, after admitting the facts as pleaded in the former part of the 13th article, answered thus:—"Respondent admits that the said letters were never delivered to the said Elizabeth Ann Roberts, but disbelieves, and therefore denies, that such non-delivery arose from the cause assigned, to wit, Mrs. Cottle having erroneously understood the said Elizabeth Ann Roberts that she was in lodgings at No. 10 Milsom Street, but he says that it arose, as he has been informed and believes,

from the circumstance of the said Elizabeth Ann Roberts having studiously kept her place of residence concealed from the said Mrs. Cottle." Mr. Roberts then admitted the remainder of the facts as pleaded.

14th. "To the fourteenth position, or article, of the said allegation and the exhibit marked AA therein pleaded, respondent, referring to his answer to the next preceding article, says he admits the same to be true."

The objections taken to the answers to the 20th and 23rd articles were of precisely the same character.

Haggard and Robinson in support of the objections.

Jenner and Twiss, contra.

Judgment—Sir John Dodson. It has not been contended that the answers are insufficient, but it was said that, in some instances, they are not limited to the articles. It was observed that if the answer, for instance, to the 14th article were read, it would be necessary to read also the

[This volume was not completed.]

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Those Courts, according to circumstances, require only that there shall be an actual cohabitation of sufficient duration to test the impotency.

In *Sparrow v. Harrison* the actual cohabitation was not so long as in the present case; nevertheless the Judicial Committee pronounced for the nullity (4 Moore, P. C. 103). In respect, however, to that case I may observe the husband had, in the first instance, agreed to submit to inspection (see 3 Curt. 2), and afterwards refused; the marriage, moreover, had taken place seven years before the separation; but it is not the length of time that a marriage has subsisted, it is the actual cohabitation to which the Court must look.

Admitting as I do the general rule to be a triennial cohabitation, may there not be occasions on which the Court would be justified in departing [640] from the letter of the rule? I think there may be, provided the actual cohabitation has been sufficiently long, together with the evidence, to satisfy the Court that the power of the husband to consummate has been fully tried. I may also observe that the health of the wife may render a further trial dangerous to life: again, it may be impossible to force actual cohabitation, for the parties may be so alienated as to render the attempt wholly futile.

To apply this reasoning to the present case. With the evidence of frigidity quoad hanc I am fully satisfied; moreover, non-consummation is admitted; it is alleged by the husband to arise from the defect of the wife, and that allegation is wholly disproved.

Mr. Lavies, a medical gentleman, who has known Miss N. from childhood, deposes that a continued cohabitation with Mr. M. would be highly injurious to her health, and that her health has already been impaired by distress of mind and excitement from her position.

Since August, 1850, it appears the parties have in fact been separated; I do not inquire who was to blame, it is the fact only to which I advert.

I am of opinion, after a due consideration of the case, that I am not under the necessity of compelling this lady to return for the purpose of completing the triennial cohabitation. I think that so to do would not only be a useless, but might be a very mischievous, application of a technical rule, which I think, in its spirit, does not apply to this case. I think I have no right to expose this lady to the humiliation and probable injury to her health which might be the effect of a further trial. I therefore pronounce for the nullity with costs.

[641] IN THE GOODS OF RICHARD DINMORE, Deceased. Prerogative Court, May 6th and 14th, 1853.—A testator produced to three witnesses his holograph will, contained in one page, with his signature in the testimonium clause, in these words—"in witness whereof I Richard Dinmore have set my hand and seal," &c. The testator acknowledged the paper "to be his last will," but his signature "was not more particularly referred to." There was no seal. Probate granted under 15 Vict. c. 24, but an inventory and sureties required, as three minors were interested.

[S. C. 1 Spinks, 2.]

Motion.

Richard Dinmore died on the 9th April, 1853, leaving a will, entirely in his own handwriting, bearing date the 1st September, 1842.

The will was contained in one page of half a sheet of foolscap paper, and the writing was continuous. The testator, after disposing of his property of the value of about 800l., appointing an executor, and revoking all former wills, concluded thus,—“and do declare this to be my last will and testament, in witness whereof I Rich^d Dinmore have set my hand and seal this first day of September, one thousand eight hundred and forty-two.”

This was followed by the signatures of three attesting witnesses. The only signature by the testator was that in the testimonium clause; there was no seal.

One of the attesting witnesses deposed that he and his fellow witnesses attended the testator by his request to witness his will at a certain place, when he, the testator, “then and there produced the said paper writing, ready written, and acknowledged the same to be his last will and testament, and to be all of his own handwriting” . . . “and he further [642] made oath that, at the time the said deceased so produced the said will, the same was completed as it now appears, and contained the names ‘Rich^d Dinmore’ as part of the ending thereof, but that such names were not written

in his this deponent's presence, and were not, in any manner, more particularly referred to by the said deceased, at the time he so acknowledged the said will."

¶ Spinks moved for probate to the executor, and submitted, 1st, that the signature of the testator in the testimonium clause was valid under the Wills Act Amendment Act (15 Vict. c. 24); 2ndly, that the testator sufficiently acknowledged that signature, *Keigwin v. Keigwin* (3 Curt. 607), *In re Anne Ashmore* (ibid. 756).

¶ Judgment—*Sir John Dodson*. In the absence of the next of kin of the deceased, or without their consent, I will not dispose of this motion. It is very true that a signature by a testator in the testimonium clause is now sufficient; but the words in that clause in the present instance are somewhat singular. The deceased has evidently not done all which he states he intended; he has rather pinned himself down to do something more.

¶ On the 14th May the motion was renewed, and proxies of consent from all the next of kin, capable of consenting, were produced.

The Judge observed that he would grant the motion, but, as there were three minor children, he should require an inventory and sureties.

[643] IN THE GOODS OF WILLIAM BAULY, Deceased. Prerogative Court, June 22nd, 1853.—A testator intending, as suggested, to appoint Philip B., "a farmer," with whom he was intimate, an executor, by mistake caused him to be named Edmund in his will. Philip had a brother named Edmund, who had no acquaintance with the testator, and was not a farmer. On proxy of consent from Edmund probate was decreed to Philip B.

Motion.

William Bauly died on the 18th August, 1852, having duly executed a will and a codicil thereto, respectively bearing date the 25th June, 1852, and the 19th July, 1852.

By the will the testator's wife, Henry Calver and Philip (originally written Edmund) "Baker, of Woolpit, aforesaid, farmer," were appointed executors, and by the codicil a fourth person was added.

The Christian name of Mr. Baker as "Edmund" occurs also in the codicil.

A solicitor, having prepared a draft of the will from instructions given by the deceased, attended the deceased to complete it, and, when about to insert the names of the executors in the blanks left for the same, he inquired of the deceased the Christian name of Mr. Baker, whom the deceased stated to be "a farmer living at Woolpit," but referred him to his, the deceased's, wife for such name; whereupon she stated it to be Edmund, which name was inserted in the draft as well as in the will.

Philip Baker, who was a farmer at Woolpit, and had been for some years on terms of great intimacy with the deceased, had a brother named Edmund [644] living at Woolpit, but Edmund was neither a farmer, nor had he any acquaintance with the deceased.

The testator informed his mother-in-law, who resided with him, that Baker, the farmer, had, at his request, consented to be an executor.

After the testator's death his mother-in-law sent for Philip Baker, who, on reading the will and seeing the name of Edmund, instead of Philip, struck out with a pen Edmund, and over it wrote his own name, feeling assured he was the person intended for an executor; but, on its occurring to him that he had done wrong, he partially erased his name of Philip.

In support of the above statement affidavits were made by the solicitor, the mother-in-law of the testator, and Philip Baker.

Baker had a legacy under the will of 5l. as an executor.

Deane, on the 6th May, moved for probate of the will (with the codicil) to pass as it originally stood, with the name of "Edmund" restored, and without the name of Philip, to be granted to the said Henry Calver and Philip Baker as two of the executors. He referred to *Camoys v. Blundell*, acted upon in *Thomson v. Hempenstall* (1 Robt. 788).

Judgment—*Sir John Dodson*. I cannot discover in the affidavits produced sufficient to warrant me in supposing a mistake was committed in the insertion of the name of Edmund, instead of Philip. I have not the consent of Ed-[645]-mund, and I do not think that I can substitute the one for the other.

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